Attorney Solicitation: The Scope of State Regulation After *primus* and *Ohralik*

David A. Rabin
*University of Michigan Law School*

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ATTORNEY SOLICITATION: THE SCOPE OF STATE REGULATION AFTER PRIMUS AND OHRALIK

Within the past few years, there has been a growing concern—both within and without the legal profession—over increasing the layman’s access to legal services. Two of the principal means of increasing this access, advertising and solicitation, have long been prohibited by the organized bar, although a few minor exceptions have been allowed. In 1977, the question of the constitutionality of prohibitions against legal advertising was presented to the United States Supreme Court in Bates v. State Bar of Arizona. The Court ruled in a landmark decision that certain types of advertising could not be prohibited, but expressly reserved the question of the constitutionality of prohibitions against in-person solicitation. Eleven months after Bates, the Court decided two attorney solicitation cases, In re Primus and Ohralik v. Ohio State Bar Association. Those who had expected groundbreaking rulings of the degree of Bates were no doubt disappointed, for Primus and Ohralik appear to have produced little change in the laws governing attorney solicitation. Indeed, it may be said that those decisions have introduced an added degree of confusion in the area of solicitation.

The purpose of this article is to analyze the opinions in Primus and Ohralik, to delineate the scope of permissible state regulation in the wake of those two decisions, and to recommend specific changes in existing state solicitation rules. Part I examines the general nature of attorney solicitation law—by whom it is made and how it is enforced. Part II describes the statutory and constitutional aspects of solicitation law prior to Primus and Ohralik. Part III discusses the Court’s holdings in Primus and Ohralik, and the changes in current statutory schemes required by the two decisions. Part IV considers whether the commercial/noncommercial distinction drawn by the court in Primus and Ohralik furnishes a useful or desirable basis for state regulation of attorney solicitation.

1 There is often only a very fine line between advertisement and solicitation. Generally speaking, “advertising” refers to “activities which seek to inform, notify or persuade the public, but without the use of a person-person encounter,” while “solicitation” refers to “similar activities involving personal contact.” Note, Advertising, Solicitation, and the Profession’s Duty to Make Legal Counsel Available, 81 Yale L.J. 1181, 1181 n.4 (1972). So-called “ambulance chasing” is a type of solicitation that involves the employment of laymen to procure personal injury cases for an attorney. These laymen are sometimes called “runners” or “cappers” and provide this service for a fee. The term is sometimes used to describe the practices of attorneys who employ such laymen, or to the personal solicitation of accident cases by the attorney himself.


3 Id. at 366.


tion. Finally, Part V provides a brief treatment of the arguments for and against liberalized attorney solicitation rules, and contains specific proposals for liberalization of current state solicitation rules. The article concludes that the commercial/noncommercial distinction should not be used as a basis for state solicitation laws, that all attorneys should have the same freedom to solicit, and that both attorneys and laymen would benefit from carefully drawn liberal rules designed to prevent the legitimate dangers of attorney solicitation.

I. THE NATURE OF ATTORNEY SOLICITATION LAWS

A. By Whom It Is Made

Attorney solicitation falls within the category of attorneys' "professional conduct" or "professional ethics" and, as such, is subject to regulation by the judiciary. The responsibility of the courts to regulate the admission of attorneys to the bar and to define and regulate the practice of law is based on the inherent power of the courts to regulate the conduct of attorneys as officers of the court.\(^6\) Generally, the highest court of a particular jurisdiction prescribes the rules relating to conduct of attorneys in that jurisdiction.\(^7\) In jurisdictions with a mandatory or "integrated" bar,\(^8\) the rules may be prescribed by the governing body of the bar, subject to approval by the highest court of the state. Rules relating to attorney conduct are thus part of the "rules of court" in each state.\(^9\)

B. How It Is Enforced

The disciplinary process is administered either by a disciplinary agency as an adjunct to the court, or by grievance committees of bar associations as representatives of the court. The rules and procedures under which the disciplinary system is administered are

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\(^6\) See American Bar Ass'n Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement Section II (The Inherent Power of the Court to Supervise the Disciplinary Process) (1970), and cases discussed therein.

\(^7\) In the state of New York, for example, each of the four Judicial Departments issues rules regulating attorney conduct; at present, all four Departments have approved the same set of rules. In the District of Columbia, the rules are prescribed by the D.C. Court of Appeals.


\(^9\) In this article, the term "state regulation" is used to refer to regulation by that body which is responsible for promulgation of rules of attorney conduct, be it the highest court, the state bar, or the legislature acting in aid of the courts.
prescribed by the body that is responsible for promulgation of the rules of attorney conduct.

Disciplinary investigations usually begin with a complaint by an aggrieved client, another attorney, or a bar association. In addition, a court, on its own initiative, may institute disciplinary proceedings when it appears that the attorney is unworthy to continue as an officer of the court. The complaint is usually investigated by a lawyer who is a member of a disciplinary committee, a professional investigator, or a staff lawyer. Upon completion of the investigation, the investigator reports to an inquiry panel of the disciplinary agency or bar association.

The inquiry panel reviews the report to determine if formal action should be brought. The complaint may be dismissed, an informal reprimand given, or formal charges filed. If charges are filed, the matter is set for trial or hearing. The body before which disciplinary proceedings are heard varies from state to state; they may be conducted before a referee, a court commissioner, or, in two or three states, before a jury.\(^\text{10}\)

After the trial or hearing, a recommendation is made to the disciplinary board or to the state's highest court. Either body may suggest dismissal of the complaint or discipline. If the recommendation is to the disciplinary board, that board makes a final recommendation to the state's highest court which has ultimate authority. Discipline may consist of a private or public reprimand, suspension, or disbarment.\(^\text{11}\)

II. THE STATE OF ATTORNEY SOLICITATION LAWS PRIOR TO Primus AND Ohralik

A. The State Rules

State rules of attorney conduct are usually patterned after the provisions of the American Bar Association Code of Professional Responsibility (ABA Code), which functions as a model code of ethics for the legal profession. The current ABA Code, adopted in August, 1977, deals specifically with attorney solicitation in Disci-


\(^{11}\) For a more in-depth discussion of the topics examined in the subsection, see generally Bradner, *supra* note 10. For a discussion of a discipline in advertisement and solicitation cases, see generally Note, *Advertising, Solicitation and Legal Ethics*, 7 *VAND. L. REV.* 677, 690-94 (1954).
plinary Rules 2-103 (Recommendation of Professional Employment)\textsuperscript{12} and 2-104 (Suggestion of Need of Legal Services).\textsuperscript{13} Gen-

\textsuperscript{12} DR 2-103 \textit{Recommendation of Professional Employment}, reads as follows:

(A) A lawyer shall not, except as authorized in DR 2-101(B) [the advertising provision], 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.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

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

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

(2) He may cooperate with the legal service activities of any of the offices DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored or approved by a bar association.

(2) A military assistant office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is operated for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organi-
erally, attorney solicitation is prohibited except for the specific instances described in those rules. Some states have adopted the ABA Code verbatim, while others have adopted provisions with minor deviations. In addition to providing disciplinary proceedings, some states impose criminal liability for certain forms of attorney solicitation, although such liability is imposed by statute rather than by court rules. The exact provisions of the various state solicitation rules are not important here; it need only be noted that as of the time of the decisions in Primus and Ohralik, no juris-

zation provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations. Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing in terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure. (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.


13 DR 2-104 Suggestion of Need of Legal Services, reads as follows:

(A) 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 2-100(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.


15 See, e.g., Cal. Bus. & Prof. Code §§ 6150-6154 (West 1974 & Supp. 3B 1977). Section 6153 makes certain types of attorney solicitation punishable by imprisonment not exceeding 6 months or by a fine not exceeding $2,500, or both.
B. Constitutional Aspects of Attorney Solicitation Law: The Right of Groups to Solicit

In a series of cases beginning in 1963, the United States Supreme Court has held that certain types of attorney solicitation are protected by the first amendment. Specifically, solicitation by groups is permissible if the claim solicited is related to the activity which forms the basis for group membership.

In *NAACP v. Button*, for example, the petitioner organization had brought suit to enjoin enforcement of a Virginia state law which prohibited attorney solicitation. In the lower courts, certain activities of the NAACP had been held to be illegal under state statutes. These activities included the maintenance of a legal staff of fifteen attorneys, all of whom were NAACP members, and who were paid a per diem fee (not to exceed $60, plus out-of-pocket expenses) to conduct civil rights litigation. The case arose out of the efforts of the NAACP to recruit plaintiffs for school desegregation cases. The Court held that such solicitation was protected by the first and fourteenth amendments, stating that, for the NAACP, "litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression." In addition to this concern over freedom of expression, the Court stressed its concern over freedom of association, observing that the first and fourteenth amendments protect certain forms of orderly group activity and that the Constitution protects the right "to engage in association for the advancement of belief and ideals." The Court further held that the state's interest in regulating professional conduct was insufficiently compelling to justify prohibition of solicitation in that case. The absence of any...
motive of pecuniary gain on the part of the NAACP lawyers, and the nature of the litigation being solicited, clearly influenced the Court's decision.\textsuperscript{22}

In 1964, the Court further expanded the right of groups to solicit in \textit{Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar}.\textsuperscript{23} In that case, the Virginia State Bar had brought suit to enjoin the union from referring members' tort claims to a group of private attorneys, an activity characterized by the Bar as unlawful solicitation.\textsuperscript{24} The Virginia court granted an injunction against the union, but the United States Supreme Court reversed, holding that such activities were "an inseparable part of this constitutionally guaranteed right [of the workers] to assist and advise each other."\textsuperscript{25} Thus the right of groups to solicit was not held to be limited to "political expression" cases. As in \textit{Button}, the Court stressed the associational rights of the union members; it also noted that a state could not infringe on a person's right to be fairly represented in congressionally-authorized suits by invoking the power to regulate professional conduct.\textsuperscript{26}

An attempt to limit the holding in \textit{Button} to litigation involving political expression again failed in \textit{United Mine Workers v. Illinois State Bar Association}.\textsuperscript{27} In that case, the bar association had succeeded in enjoining the UMW from employing a licensed attorney on a salary basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Commission. The lower court had limited \textit{Button} to cases involving political expression, and limited \textit{Brotherhood of Railroad Trainmen} to the recommendation of attorneys not hired by a group on a salary basis. The United States Supreme Court vacated the injunctions, finding that the freedoms of speech, assembly, and petition gave the union the right to engage in the activities in question.\textsuperscript{28} In so holding, the Court explicitly rejected the argument that the freedom of groups to solicit should be limited to polit-

\textsuperscript{22} The Court seemed to think that the state statutes were specifically aimed at hampering NAACP activities and recognized them as part of Virginia's resistance to integration. \textit{Id.} at 433-37.
\textsuperscript{23} 377 U.S. 1 (1964).
\textsuperscript{24} Specifically, the union had established a sixteen-lawyer Department of Legal Counsel to aid the families of union members who had been killed or injured in railroad accidents in obtaining whatever benefits to which they were entitled. The Department recommended to union members and their families the names of lawyers whom the union believed were honest and competent. This plan resulted in the channelling of practically all claims, on a private fee basis, to attorneys who had been chosen by the union. \textit{Id.}
\textsuperscript{25} 377 U.S. at 6.
\textsuperscript{26} \textit{Id.} at 7.
\textsuperscript{27} 389 U.S. 217 (1967).
\textsuperscript{28} \textit{Id.} at 221-22.
ical expression cases. Similarly, the Court found no meaningful distinction between the financial arrangement in *Brotherhood of Railroad Trainmen* and that in *United Mine Workers*, and laid strong emphasis on the UMW's associational rights.

Finally, in *United Transportation Union v. State Bar of Michigan*, a state bar association had sued to enjoin defendant union from paying investigators to keep track of work-related accidents, visit injured members, and urge the members to retain named private attorneys who were selected by the union and who had agreed to charge a contingent fee of not more than 25% of recovery. The stated purpose of the plan was to assist injured workers and their families in obtaining competent counsel and to protect them from excessive fees in suits under the Federal Employer's Liability Act. In vacating the injunction, the Court held that collective action to obtain access to the courts is a constitutionally-guaranteed fundamental right. Significantly, the lawyers involved in the UTU's plan were private practitioners and received more than a nominal fee; moreover, the union investigators were paid by the union to engage in a typical form of "ambulance chasing." Those factors notwithstanding, the union's practice was upheld on the strength of the Court's prior decisions in *Button*, *Brotherhood of Railroad Trainmen*, and *United Mine Workers*.

The cases discussed above establish two important propositions. First, groups are free to solicit political expression cases in certain types of circumstances, even if the solicited person is not a group member. Second, groups may solicit group members or beneficiaries in ordinary commercial litigation if the claim solicited is related to the activity which forms the basis for group membership. The exceptions in DR 2-103(D) are based on the constitutional decisions described here.

### III. The Commercial/NonCommercial Distinction: The Court's Restrictive Approach to Attorney Solicitation

*Primus* and *Ohralik* were particularly poor cases for adjudicating the scope of permissible state regulation of attorney solicitation because, as Justice Marshall said, "[t]hey could hardly have arisen

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29 "'[The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes with small ones, are guarded. . . . '"

30 *Id.* at 223 (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)).

31 *Id.* at 576 (1971).

in more disparate factual settings." These cases are polar opposites and it is probable that most solicitation cases will fall somewhere on the broad continuum between them. Nevertheless, the cases must be examined for their impact on the current regulatory scheme.

A. Primus and Ohralik

On October 9, 1974, the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina filed a formal complaint with the Board, charging Edna Primus, an attorney practicing in Columbia, South Carolina, with having engaged in unlawful solicitation by sending a letter to a welfare mother seeking to have the ACLU represent her in a suit alleging involuntary sterilization. The Board found that Primus was guilty of soliciting a client on behalf of the ACLU, in violation of Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the South Carolina Supreme Court. As a result, it administered a pri-

33 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 469 (Marshall, J., concurring in part and concurring in the judgment).

34 During the period in question, Primus was associated with a law firm and was an officer of and cooperating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU). Although she received no compensation for her ACLU work, she was paid a retainer as a legal consultant for the South Carolina Council on Human Relations (Council), a non-profit organization.

During the summer of 1973, the Council was asked by Gary Allen, a local businessman and officer of a local organization serving indigents, to send one of its representatives to brief three welfare mothers on their legal rights after they had been sterilized, allegedly as a condition of their being able to continue receiving Medicaid payments. At the Council's request, Primus conducted a meeting in Allen's office and advised the women of their legal rights and suggested the possibility of a lawsuit. A month later, in August, 1973, the ACLU informed Primus that it was willing to provide representation for the women. After Allen told her that one of the women, Mary Etta Williams, wished to file suit against the doctor who had performed the sterilizations, Primus wrote Williams, stating:

The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on. . . .

About the lawsuit, if you are still interested, let me know and I'll let you know when we will come down to talk to you about it.

In re Primus, 436 U.S. at 416 n.6.

Shortly after receiving the letter, Williams visited her doctor to inquire about one of her children and there encountered the doctor's lawyer. At the lawyer's request she signed a release of the doctor's liability. After giving the doctor and his lawyer a copy of Primus' letter, she called Primus and told her she had decided not to sue. That was the end of all communication between the two women. Other attorneys, including two of Primus' associates who were also ACLU cooperating attorneys, did represent other sterilized mothers in a suit against the doctor filed on April 15, 1974.

35 The code of legal ethics adopted by the South Carolina Supreme Court is the original 1969 version of the ABA Code. South Carolina adopted that version in 1973 and it was in force in South Carolina at the time of Primus even though the ABA Code was subsequently modified. South Carolina's DR 2-103(D) reads:

A lawyer shall not knowingly assist a person or organization that recommends, fur-
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civate reprimand.

The South Carolina Supreme Court agreed that Primus had violated the rules, but increased the discipline to a public reprimand. The Court, adopting the Board's findings in full, held that Primus had violated DR 2-103(D)(5)(a) because "one of, if not the primary purpose of the ACLU, was the rendition of legal services."° It also found that she had violated DR 2-103(D)(5)(c) because "[i]t is, also, the policy of the ACLU to ask for attorneys' fees in their lawsuits, and their fees go into their central fund and are used, among other things, to pay costs and salaries and expenses of staff attorneys."° Finally, it held that she had violated DR 2-104(A)(5) because she had asked Williams in the letter to join in a class action suit against the doctor.°

South Carolina's DR 2-104 reads in pertinent part: "(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: . . . . The remainder is essentially the same as the corresponding rule in the current ABA Code. These provisions were adopted as part of Rule 32 of the Supreme Court of South Carolina, 22 S.C. Code, Rules of the Supreme Court of South Carolina, rule 32 (1977)(incorporating by reference the 1969 version of the AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY). For the text of the current versions of DR 2-103(D) and DR 2-104, as promulgated by the American Bar Association, see notes 12-13 supra.

36 In re Smith, 268 S.C. 259, 267, 233 S.E.2d 301, 305 (1977) (per curiam).
37 Id. at 267, 233 S.E.2d at 305.
38 Id. at 266, 233 S.E.2d at 304.
On appeal, the United States Supreme Court reversed,\(^{39}\) holding that Primus could not constitutionally be disciplined for those activities. In an opinion by Justice Powell, the Court reiterated its holdings in its prior attorney solicitation cases\(^{40}\) and dismissed as meaningless the slight distinction between \textit{Button} and \textit{Primus}. In response to the argument that the ACLU, unlike the NAACP in \textit{Button}, is an organization primarily devoted to the rendition of legal services, the Court stated that "for the ACLU, as for the NAACP, 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'association'."\(^{41}\)

The Court also found unpersuasive the argument that the ACLU, unlike the NAACP, benefited from the litigation solicited. Allegedly, the ACLU would have benefitted financially from bringing suit because it commonly requested an award of counsel fees, but the Court found that such a request did not remove the solicitation from the category of protected solicitation. It reached this conclusion not only because of the fact that counsel fees are not drawn from plaintiff’s recovery and often do not compare with the usual fees obtainable in private litigation, but more importantly, because the ACLU is motivated by "its widely recognized goal of vindicating civil liberties" rather than by "considerations of pecuniary gain."\(^{42}\) The Court reiterated its holding in \textit{Button}, stating that where political expression or association is at issue, governments must regulate more precisely than they do in the area of commercial affairs.\(^{43}\) The Court suggested that where an attorney has engaged in "in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences" a showing of potential danger is sufficient for discipline;\(^{44}\) but in cases such as \textit{Primus}, the attorney may not be disciplined unless the solicitation is \textit{in fact} "misleading, overbearing, or involves other features of deception or improper influence."\(^{45}\) The Court found that no such misconduct had actually occurred in \textit{Primus}. Furthermore, because the solicitation was effected through a letter, it "involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion."\(^{46}\)


\(^{40}\) See Part II B supra.


\(^{42}\) \textit{In re Primus}, 436 U.S. at 429-30. See also note 72 infra.

\(^{43}\) Id. at 434.

\(^{44}\) Id.

\(^{45}\) Id. at 438. See note 79 infra.

\(^{46}\) Id. at 435 (footnote omitted). Justice Rehnquist dissented, stating that he disagreed with the distinction the Court drew in solicitation cases: "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." Id. at 443 (Rehnquist, J., dissenting). He would have affirmed the decision of the state court, believing that South Carolina had acted within constitutional limits. Id. at 446.
The companion case to *Primus, Ohralik v. Ohio State Bar Association*, presented a far different situation to the Court. In *Ohralik*, two accident victims were repeatedly contacted by Ohralik, who urged them to hire him as their attorney. Both filed complaints against Ohralik with the Grievance Committee of the Geauga County, Ohio, Bar Association charging unlawful solicitation. The Association filed a formal complaint with the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. After a hearing, the Board found that Ohralik had violated Disciplinary Rules 2-103(A) and 2-104(A) of the Ohio Code of Professional Responsibility and recommended a public reprimand. The Ohio Supreme Court adopted the Board's findings but increased the discipline to indefinite suspension from the practice of law.

On appeal, the United States Supreme Court, per Justice Powell, affirmed that decision. In-person solicitation by attorneys, it held, is different from mere advertising because, unlike advertising, in-person solicitation "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."

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48 Ohralik, an attorney practicing in Montville and Cleveland, Ohio, learned in February, 1974, about an automobile accident that had occurred earlier that month. The driver, Carol McClintock, and one of her passengers, Wanda Lou Holbert, were both injured. Ohralik called McClintock's parents who told him that their daughter was in the hospital; upon visiting her parents at their home, Ohralik was informed that McClintock's car had been hit by an uninsured motorist.

Upon visiting McClintock in the hospital, Ohralik found her lying in traction. He told her he would represent her and asked her to sign an agreement; she declined, stating that she wished to discuss the matter with her parents. He also attempted to see Holbert but learned that she had just been released from the hospital.

Ohralik paid another call on McClintock's parents, bringing along a tape recorder which he concealed under his coat. Upon examining their insurance policy he told them that both women could collect damages under the policy's uninsured motorist clause. The McClintocks told Ohralik that their daughter had phoned to say that he could represent her and they also told him that Holbert "swore up and down that she would not [sue for her injuries]." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 450.

Ohralik visited Holbert, without having been invited, and again concealed the tape recorder with which he recorded most of the conversation with her. He informed her that he was representing McClintock and after Holbert stated that "she really did not understand what was going on," 436 U.S. at 451, Ohralik also offered to represent her, to which she assented.

Holbert's mother attempted to repudiate her daughter's oral agreement, but Ohralik insisted it was binding. A month later, Holbert confirmed in writing her desire not to sue; she told him that the insurance company would not pay her unless he notified the company that he was not her lawyer. McClintock also eventually discharged him as her lawyer. Another lawyer eventually represented McClintock in concluding a settlement with the insurance company, but she paid Ohralik one-third of her recovery in settlement of his lawsuit against her for breach of contract. Ohralik also filed suit against Holbert but it was dismissed with prejudice after he was disciplined for improper solicitation by the Ohio Supreme Court. 436 U.S. at 449-52.

49 These rules are essentially the same as those in the current ABA Code. *See* notes 12-13 supra.
50 *Ohio State Bar Ass'n v. Ohralik*, 48 Ohio St. 2d 217, 220, 357 N.E.2d 1097, 1099 (1976).
51 Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. at 457.
that his solicitation of the two women was indistinguishable, for constitutional purposes, from the advertisement in *Bates v. State Bar of Arizona.* The Court also stated that commercial speech is afforded only limited protection, corresponding to its "subordinate" position in the first amendment's hierarchy of values. In drawing this distinction between commercial and noncommercial speech, the Court argued that the states have a compelling interest "in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,'" and that the states may therefore discipline a lawyer for soliciting employment under circumstances likely to result in harmful consequences. The Court found that Ohralik had indeed breached this standard by approaching two young accident victims at a time when they were incapable of making considered judgments or of safeguarding their self-interests. The Court also found fault with his use of a concealed tape recorder and with his deceptive statements to the women, although it did not rest its decision on these latter two grounds.

Whatever the wisdom of using these particular cases for enunciating the permissible scope of state regulation, one must still determine their effect on current state solicitation rules. The discussion below will consider the minimum changes required to bring state rules into line with the Court's rulings in *Primus* and *Ohralik.*

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52 433 U.S. 350 (1977). In *Bates,* the Court held that certain forms of attorney advertising are protected by the first amendment.

53 Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 462.

54 Id. at 464.

55 Id. at 467.

56 Id.

57 "He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer." Id.

58 "Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial." Id. at 468.

Justice Rehnquist concurred for reasons stated in his dissent in *Primus.* Justice Marshall, in an opinion covering both cases, concurred in part and concurred in the judgments. He stated that his purpose in writing a separate opinion was "to highlight what I believe these cases do and do not decide, and to express my concern that disciplinary rules not be utilized to obstruct the distribution of legal services to all those in need of them." Id. at 468-69. (Marshall, J., concurring in part and concurring in the judgment).

59 The question of desirability of making only the required changes is deferred to Part V infra.

The term "commercial solicitation" will be used hereinafter to refer to solicitation in cases such as *Ohralik,* while the term "noncommercial solicitation" will be used to refer to solicitation in cases such as *Primus.* These terms relate more to the motivation behind solicitation than to the subject matter of the solicited suit, because even solicitation of personal injury claims is protected, in certain circumstances, under the rule in *Primus.*
B. Effect of Primus on the Regulation of Non-Commercial Solicitation

In order to determine the effect of Primus on noncommercial solicitation, three questions must be answered: who may solicit under the rule in Primus, what kind of solicitation is protected by that rule, and what changes to state rules are necessary in light of that decision.

1. Who may solicit under the rule in Primus—It should be noted that in the Court's four previous solicitation cases no attorneys had actually been disciplined. Prior to Primus and Ohralik, there was some question as to who might solicit under the protection of the Constitution—whether all group members could do so, or only non-lawyer group members. When the ABA drafted its solicitation provisions, it gave these prior cases a narrow construction, allowing attorneys to be recommended, employed, or paid by a group, or to "cooperate" with one, but nowhere explicitly allowing group-affiliated attorneys to directly solicit.

In Primus, the Court found fault with this formulation, stating that the state rules "sweep broadly," and prohibit a group-affiliated attorney from ever giving unsolicited advice to a layperson that he or she take advantage of the group's legal services. The Court also stated that such a formulation has a potential chilling effect on cooperative activity to provide legal services and that it might permit "discretionary enforcement against unpopular causes."

The Court stopped short, however, of declaring the rules unconstitutional on their face. It held that "findings compatible with the First Amendment" could not have been made by the lower courts in Primus and thus avoided having to rule on the facial validity of the provisions. Implicit in the Court's holding, however, is that

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60 For a discussion of those cases, see Part II B supra.
61 In the three union cases, the attorneys did not themselves solicit; rather, non-lawyer group members referred cases to the attorneys. The role of the attorneys in Button is a subject of disagreement. In discussing this aspect of Button in his Primus dissent, Justice Rehnquist stated that the NAACP attorneys had played only a limited role in the group's solicitation efforts, In re Primus, 436 U.S. at 444 (Rehnquist, J., dissenting), and that "[w]hile Button appears to permit . . . solicitation for political purposes by lay members of the organization . . . it nowhere explicitly permits such activity on the part of lawyers." Id. at 445. The majority in Primus disagreed with this interpretation, stating that the attorneys in Button were involved in the group's actual solicitation efforts and that the holding in Button protected the NAACP's legal staff as well as its lay members. In re Primus, 436 U.S. at 425 n.16.
62 See DR 2-103(D), supra note 12.
63 In re Primus, 436 U.S. at 433.
64 Id.
65 Id. at 434.
group-affiliated attorneys may themselves solicit. 66

2. When solicitation is protected by the rule in Primus—It is clear that some solicitation involving "political expression and association" comes within the protection of Primus. 67 Unfortunately, the Court formulated no explicit test in either Primus or Ohralik for determining what types of solicitation are protected. The only language that is helpful appears in a footnote in Primus, where the Court stated that the line between protected and unprotected solicitation is based "in part on the motive of the speaker and the character of the expressive activity." 68 With respect to "motive," it is almost certain that the solicitation will not be protected under Primus if the motive behind solicitation is the prospect of pecuniary gain. 69 One of the issues in Primus was whether the fact that the ACLU receives court-awarded attorneys' fees removes its solicitation from the protection which would otherwise be granted. The Court stated that solicitation by the ACLU was protected, notwithstanding such awards, because the organization is motivated by "its widely recognized goal of vindicating civil liberties" rather than by "considerations of pecuniary gain." 70 In Ohralik, on the other hand, "the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests." 71 Thus, payment of compensation to the attorney will not remove solicitation from the protection of Primus so long as such compensation is not the attorney's motive for taking the case. 72

The second aspect of the Court's apparent test — "character of

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66 Justice Rehnquist believed that while lay members of groups might properly solicit, lawyers should not be allowed to do so. He feared that lawyers may have persuasive powers not possessed by laymen, thus increasing the possibility of harm to the client and society. In re Primus, 436 U.S. at 445 (Rehnquist, J., dissenting).

67 What exactly is meant by the term "political expression" is open to question; discussion of that problem will be deferred to Part IV B infra.

68 In re Primus, 436 U.S. at 438 n.32.

69 The reason for stating that this is "almost certain" will be explained in Part IV C. 2., infra, where the motive test will be examined in more depth.

70 In re Primus, 436 U.S. at 429-30.

71 Id. at 438 n.32.

72 Thus, the appropriate question is not whether there was a fee involved or if any fee involved was more than nominal; the appropriate question is whether the attorney's motivation was pecuniary. In Primus, the Court stated, "[i]n a case of this kind there are differences between counsel fees awarded by a court and traditional fee-paying arrangements which militate against a presumption that ACLU sponsorship of litigation is motivated by considerations of pecuniary gain . . . ." Id. at 429-30 (emphasis added). Thus, the fact that the fees involved were small was not conclusive on the question of motivation; it merely "militated against a presumption" of pecuniary motivation in the context of that case. In other types of cases, a court-awarded fee might very well be the attorney's motive for solicitation; not all attorneys are fortunate enough to be able to command substantial fees. One may, therefore, offer two caveats for attorneys. First, the fact that a fee is small will not foreclose inquiry on the question of motivation. Second, attorneys should be aware that the larger the fee, the more difficult it will be to prove that their motivation was not pecuniary.
the expressive activity" — is more difficult to clarify. In *Primus*, the Court consistently speaks in terms of two factors, "political expression" and "association." It is unclear, however, whether both of these factors must be present or if only one is sufficient to protect the soliciting attorney.\(^{73}\) The Court’s previous solicitation decisions provide some guidance on this issue. In *Button*,\(^{74}\) both political expression and association were involved, and the solicitation was held to be protected. In the three cases involving unions,\(^{75}\) only one of these factors — association — was present, but the solicitation was nevertheless held protected. All three cases involved personal injury suits which could not fairly be characterized as "political." By contrast, in *Ohralik*, neither political expression nor association was involved and the solicitation was held unprotected. It thus appears that at least one of these factors must be present for the solicitation to be protected.

The only type of case not yet considered by the Court is one in which an attorney who is not group-affiliated solicits a political expression case. As the union cases demonstrate,\(^{76}\) the exercise of associational freedom, standing alone, will satisfy the "character of the expressive activity" aspect of the test; whether the exercise of political expression, standing alone, will do so, remains a matter of speculation.

*Primus* is capable of both a broad and narrow reading. At its broadest, it would protect solicitation if the attorney’s motive is proper, the solicitation involves associational rights, and the attorney engages in no "misconduct" during the act of solicitation.\(^{77}\) The important limitation upon solicitation under this broad interpretation is that the attorney engage in no "misconduct." In cases such as *Primus*, an attorney may be disciplined for solicitation which in fact involves certain types of "misconduct."\(^{78}\) By comparison, in *Ohralik*, the attorney was not disciplined for any actual misconduct, but for soliciting in improper circumstances.\(^{79}\)

\(^{73}\) The Court refers at several points to "political expression or association," see, e.g., *In re Primus*, 436 U.S. at 434 (emphasis added), while at other points it refers to "political expression and association." *Id.* at 437-38 (emphasis added). Moreover, the Court stated in *Ohralik* that "a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing . . . ." *Ohralik* v. Ohio State Bar Ass'n, 436 U.S. at 462-63 n.20 (emphasis added).


\(^{75}\) *Id.*

\(^{76}\) *Id.*

\(^{77}\) *Ohralik* v. Ohio State Bar Ass'n, 436 U.S. at 462-63 n.20. This broad interpretation is supported by the Court’s statement in *Ohralik* that, "we hold today in *Primus* that a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing that the state constitutionally may proscribe." *Id.*

\(^{78}\) *In re Primus*, 436 U.S. at 434. See note 80 and accompanying text *infra*.

\(^{79}\) *Ohralik* v. Ohio State Bar Ass'n, 436 U.S. at 467-68.
The problem, then, under this broader interpretation is to determine what is meant by "misconduct." 80

Primus can also be interpreted narrowly. As the majority in Primus suggested, different results might have obtained if Primus had received any benefit from the solicitation; 81 if her income had depended in any way on the outcome of the litigation; 82 if the lawyers conducting the litigation would have received a share of any court-awarded attorneys' fees; 83 if Williams had "communicated unambiguously a decision against litigation" prior to the time Primus sent her the letter; 84 if the solicitation had been conducted in person; 85 if the legal services had not been offered free of charge; 86 or, finally, if "an innocent or merely negligent misstatement were made by a lawyer on behalf of an organization engaged in furthering associational or political interests." 87 If the Court were to hold that the presence of one or more of these factors would make solicitation unprotected, then Primus would be narrowed considerably. 88

3. Changes to State Laws Required By Primus — Primus requires no dramatic changes to state solicitation rules governing noncommercial solicitation. 89 One change that should be made is that group-affiliated attorneys, as well as lay members of such

80 In coming to the conclusion that Primus could not be disciplined, the Court stated that "[t]he record does not support appellee's contention that undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case." In re Primus, 436 U.S. at 434-35. See text accompanying note 45 supra. It later stated: "[n]or does the record permit a finding of a serious likelihood of a conflict of interest or injurious lay interference with the attorney-client relationship." Id. at 436. It is, therefore, reasonable to infer that these would be culpable forms of misconduct. In addition, the Court mentions other forms of misconduct that may be grounds for discipline: that which is "misleading, overbearing or involves other features of improper influence," id. at 438; fraud, intimidation, and other forms of "vexatious conduct," Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 462; stirring up frivolous or vexatious litigation, Primus, 436 U.S. at 435; and assertion of fraudulent claims, debasing the legal profession, overcharging, and underrepresentation. Ohralik, 436 U.S. at 461.

81 See In re Primus, 436 U.S. at 429-30 n. 21.
82 Id. at 436 n.30.
83 Id. at 430 n.24.
84 Id. at 435 n.28.
85 Id. at 435.
86 Id. at 437.
87 Id. at 438 n.33.
88 As Justice Rehnquist points out in his dissenting opinion in Primus, "the Court carefully reserves judgment on factual circumstances in any way distinguishable from those presented here." Id. at 442-43 n.1 (Rehnquist, J., dissenting).
89 The Court in Primus did not declare South Carolina's solicitation provisions to be unconstitutional; rather, it held that those provisions could not constitutionally be applied to Primus under the facts of her case. Id. at 439. Primus could have been decided on the basis of Button had it not been for two slightly distinguishing characteristics. See notes 41-42 and accompanying text supra. Furthermore, two of the Disciplinary Rules under which Primus had been sanctioned by the state, DR 2-103(D)(5)(a) and (c), were to apply, according to the statute, only if they were not prohibited by the "controlling constitutional interpretation at the time." See note 35 supra. In other words, the controlling constitutional interpretation, as expounded in Primus and Ohralik, is to be incorporated into the statute by reference.
groups, should be allowed to solicit. Thus, DR 2-103(D) of the 1969 version of the ABA Code should be amended to read as follows:

a lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates except as follows. He may cooperate in a dignified manner with, or recommend the use of his or other lawyers' services on behalf of any of the following.

Several changes must also be made in the current ABA Code. First, DR 2-103(A) should be amended to read: "A lawyer shall not, except as authorized in DR 2-101(B) and DR 2-103(D), recommend employment. . . ." Second, DR 2-103(C)(2) should be amended to read: "He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may recommend the use of his or other lawyers' services on behalf of such offices or organizations. . . ."

Finally, DR 2-103(D) should be amended as follows: "A lawyer . . . may be recommended, employed, or paid by, or may cooperate with, or may recommend the use of his or other lawyers' services on behalf of, one of the following . . . ."

States that have adopted the 1969 version of the ABA Code need not worry about having to delete DR 2-103(D)(5)(a), proscribing solicitation where the primary purposes of the organization include the delivery of legal services, since the rule is now prohibited by the controlling constitutional interpretation, at least when the rule is read literally. States having this version should, however, in the interest of clarity, amend DR 2-103(D)(5)(a) by adding to the end of the provision the clause, "unless such legal services are a form of political expression or association." It is reasonable to assume that not every attorney will be familiar with the controlling constitutional interpretation in Primus. States using the current version of the ABA Code need make no changes, since that version has no provision corresponding to the 1969 version of DR 2-103(D)(5)(a).

90 See Part III B 1 supra.
91 See note 35 supra.
92 See note 12 supra.
93 Id.
94 Id.
95 See note 35 supra for the text of DR 2-103(D)(5)(a) of the 1969 American Bar Association Code of Professional Responsibility.
96 See note 41 and accompanying text supra.
97 See note 12 supra.
Similarly, states having the 1969 version of the ABA Code may retain DR 2-103(D)(5)(c), proscribing solicitation where an organization derives a financial benefit from the rendition of legal services. The Court found no fault with this rule in *Primus*, holding instead that awards of counsel fees to the ACLU do not constitute "financial benefit." The current version of the ABA Code contains language similar to DR 2-103(D)(5)(c) of the 1969 code in DR 2-103(D)(4)(a). States having the current version need not change their provisions so long as the courts do not construe "profit" as including compensation that is merely ancillary to some non-pecuniary purpose.

The only other significant change to the existing state laws demanded by *Primus* concerns DR 2-104(A)(5), which allows an attorney to accept, but not seek, employment in a class action suit from joined parties. In finding that this rule was unconstitutionally applied to Primus, the Court implied that an attorney may solicit class action suits under circumstances such as those in *Primus*. Thus, states should amend this rule by adding at the end of the provision the clause, "unless the class action involves political expression or association."

Finally, the effect upon state solicitation rules of the standard of care enunciated by the Court must be considered. The Court suggested that in *Primus*-type cases, the state may punish solicitation only if it in fact involves certain types of misconduct. The ABA Code makes no reference to any such standard of care. The solicitation cases decided prior to *Primus* and *Ohralik* enunciated no such standard, since those cases considered whether certain types of solicitation were permissible, not whether any actual solicitation had been properly conducted.

The states arguably are not required to incorporate the *Primus* standard of care into their solicitation provisions so long as they take it into consideration when applying those provisions to "protected" solicitation cases. In the interest of clarity, however, the states should include this standard in the appropriate provision. Otherwise, an attorney unaware of *Primus* who solicits protected cases might believe that he has an entirely free hand in soliciting such cases. States having the 1969 version of the ABA Code should add the following new provision as DR 2-103(D)(5)(e): "Any lawyer

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98 See note 35 *supra*.
99 See note 42 and accompanying text *supra*.
100 See note 12 *supra*. The relevant portion of DR 2-103(D)(4)(a) states: "such organization . . . is so organized and operated that no profit is derived by it from the rendition of legal services. . . ."
101 The provisions are the same in both versions of the American Bar Association Code of Professional Responsibility. See notes 13 and 35 *supra*. 
cooperating with the legal service activities of any organization which engages in such activities as a form of political expression or association may not engage in [misconduct] in recommending the services of such organization or his services on behalf of such organization.'" States should also enumerate those forms of misconduct which are prohibited. 102 For states having the current version of the ABA Code, such a provision might be added as DR 2-103(D)(4)(h).

Thus, *Primus* requires little change in state law with regard to noncommercial solicitation. The effect of *Ohralik* on commercial solicitation, however, is somewhat greater.

### C. Effect of Ohralik on the Regulation of Commercial Solicitation

The types of cases contemplated by *Ohralik* are those where, for one reason or another, the solicitation does not meet all the criteria for protection under *Primus*. Attorneys who fall within *Ohralik* may be disciplined, the Court stated, for soliciting in ""circumstances likely to result in the adverse consequences the State seek to avert."" 103 The principal question is whether commercial solicitation, without more, is punishable *per se*. 104 To say that commercial solicitation may be prohibited *per se* is to say that such speech is completely unprotected by the first amendment. Disciplinary Rules 2-103 and 2-104 of the ABA Code prohibit all commercial solicitation *per se* except in certain enumerated circumstances. 105 Language in *Ohralik*, however, suggests that commercial solicitation may not be punished unless the attorney solicits in the prohibited types of circumstances or engages in misconduct in fact. 106 An examination of commercial speech cases

102 See note 80 supra.
103 *Ohralik* v. Ohio State Bar Ass’n, 436 U.S. at 464.
104 The phrase “circumstances likely to result” will be discussed in detail in Part IV C infra.
105 See notes 12-13 supra.
106 In response to *Ohralik*’s claim that the Court had to decide whether a state may discipline him for solicitation *per se*, the Court said, “we agree that the appropriate focus is on appellant’s conduct.” *Ohralik* v. Ohio State Bar Ass’n, 436 U.S. at 463. The Court then enunciated what it called a “prophylactic” rule, allowing states to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in misconduct. *Id.* at 464. It seems very unlikely that the Court would have focussed so much attention on *Ohralik*’s conduct if commercial solicitation were punishable *per se*; more likely, the Court would have held that, the act of solicitation having been proved, *Ohralik* could be disciplined. Furthermore, earlier in the opinion, the Court noted that, “[w]hile entitled to some constitutional protection, appellants conduct is subject to regulation in furtherance of important state interests.” *Id.* at 459 (emphasis added). The logical conclusion is that the Court would hold unconstitutional an attempt by a state to discipline an attorney for solicitation *per se*.

Because DR 2-103(A) prohibits commercial solicitation *per se*, a reasonable question at
leads to the conclusion that such solicitation is not punishable per se.

In *Bigelow v. Virginia*, 107 the Court reversed a conviction for violation of a Virginia anti-abortion statute. The defendant had advertised an offer to make low-cost arrangements for legal abortions in New York. The Court upheld this advertisement, not only because abortions were legal in New York, but because it found the state's justification invalid. Virginia had claimed that the advertisement, being commercial in nature, could be banned entirely. The Court responded that commercial aspects of speech do not deprive that speech of all first amendment protection. 108

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 109 the appellants had contended that the advertisement of prescription drug prices was outside the protection of the first amendment because it was "commercial speech." The Court responded by reiterating its holding in *Bigelow* and interpreting that decision as having abolished the notion of unprotected commercial speech. 110 Although the Court in *Virginia Pharmacy* admitted that commercial speech may be regulated to some extent, 111 it concluded that such speech is not subject to complete suppression by the state. 112

*Bigelow* and *Virginia Pharmacy* involved advertising which may be potentially less dangerous than solicitation. The fact remains, however, that both advertising and solicitation are forms of commercial speech, and although they may be subject to different degrees of regulation, the opinion in *Virginia Pharmacy* prohibits the state from complete suppression of commercial speech. 113

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108 Id. at 818.
109 425 U.S. 748 (1976). For a further discussion of these and other cases relating to the "commercial speech doctrine," see Part IV A infra.
111 Id. at 770.
112 Id. at 771-72 n.24.
113 The conclusion that commercial solicitation is not punishable per se finds support in Justice Marshall's opinion in *Ohralik*, in which he said, "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 in part and concurring in the judg-
Since these cases indicate that in-person commercial solicitation by individual attorneys is not punishable *per se*, DR 2-103(A) should be amended to read:

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 *unless such a recommendation is made in circumstances not likely to result in [misconduct] and involves no [misconduct] in fact.*

In addition, a new DR 2-104(A)(6) should be added to the current code, stating: "A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action may accept employment resulting from that advice if such advice was not given in circumstances likely to result in [misconduct] and involved no [misconduct] in fact." In this manner, both the seeking of employment and the acceptance of employment after giving unsolicited advice will be possible in circumstances where misconduct is not likely to occur.

### IV. THE VIABILITY OF THE COMMERCIAL/ NONCOMMERCIAL DISTINCTION AS A BASIS FOR STATE REGULATION OF SOLICITATION

Thus far, the article has considered only the minimum changes that the states must make to their solicitation rules in the wake of *Primus* and *Ohralik*. The minimum changes proposed in Part III are based on the commercial/noncommercial distinction drawn by the Court. Whether these changes are desirable is another matter. This Part examines the Court's rationale in drawing distinctions between types of solicitation, and questions the desirability of basing state attorney solicitation laws on those distinctions.

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114 See note 12 supra.

115 These proposed changes are not required by *Ohralik*. The Court did not rule that DR 2-103(A) is unconstitutional; by framing the issue in *Ohralik* as it did, it avoided the question of the facial validity of that provision. See note 94 supra. Thus, so long as the states do not actually use this provision to discipline an attorney for commercial solicitation *per se*, its current text will not be open to attack. The proposed changes are recommended solely for the sake of clarity.
A. The "Commercial Speech Doctrine"

Determining the protection to be accorded speech by drawing distinctions based on the commercial nature of that speech is nothing new for the United States Supreme Court. Thirty-six years before Primus and Ohralik, the Court in Valentine v. Chrestensen reversed a lower court order enjoining a local police commissioner from interfering with petitioner's distribution of advertising leaflets, in violation of a sanitary code provision forbidding the distribution of advertising matter in the streets. The holding in Chrestensen has been interpreted as creating a "primary purpose" test: "[w]hen the primary purpose of the speech is 'commercial,' it falls within a category of speech that is not within the protection of the First Amendment."

In a long line of cases, the Court further developed the commercial speech doctrine. Beginning in 1973, however, the Court began to retreat from the doctrine. In Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights, the Court affirmed a cease and desist order against a newspaper for running certain types of advertisements, but seemed to rely more on the fact that the advertisements promoted an illegal activity (discrimination in hiring) than on the mere fact of the advertisements' commercial nature. Two years later, in Bigelow v. Virginia, the Court reversed petitioner's conviction under a Virginia anti-abortion statute, stating that "a State cannot foreclose the exercise of con-

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116 316 U.S. 52 (1942).
117 The Court stated in Chrestensen that it has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating information and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thorough-fares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Id. at 54.
118 J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 769 (1978). This test arose from the fact that the leaflet involved in Chrestensen contained two messages: on one side it contained an advertisement for a commercial exhibition of a former Navy submarine and on the other side a message protesting the city's denial of wharfage facilities for the exhibition. "As to the political protest message . . . the Court said it was 'enough' that the message had admittedly been designed 'with the intent, and for the purpose, of evading the prohibition of the ordinance.'" Id. (quoting Valentine v. Chrestensen, 316 U.S. at 55).
121 Specifically, the newspaper was held to have violated an ordinance prohibiting sex-designated help-wanted advertisements under certain circumstances.
stitutional rights by mere labels." 123 The Court’s 1976 decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council 124 involved the constitutionality of a statute prohibiting the advertising of prescription drugs. The Court held that such advertising was protected by the first and fourteenth amendments, noting that the commercial speech doctrine announced in Chrestensen had been greatly weakened by subsequent decisions. 125

Unfortunately, the widely held belief that the category of commercial speech was dead was not borne out by the opinions in Primus and Ohralik. The Court in Ohralik stated that it had not abandoned the “commonsense” distinction between commercial and noncommercial speech. 126 Indeed, the Ohralik Court further explained that it had noted probable jurisdiction in the case in order to consider not only an aspect of the states’ authority to regulate attorney conduct, but also the scope of protection of a “form of commercial speech.” 127 Thus, for the Court, Ohralik was significant not only for its effect on the regulation of professional conduct, but also for its effect on the commercial speech doctrine. The decision undoubtedly disappoints those who had thought that the category of commercial speech would soon be discarded. After a line of cases in which the Court refused to use the doctrine in a restrictive manner, the Court has suddenly revived it in order to justify restrictions on speech. The merits of the commercial speech doctrine are beyond the scope and purpose of this article. The discussion which follows will examine the merit of the Court’s use of the doctrine in the context of attorney solicitation.

B. “‘Political Expression and Association’ as Distinguishing Characteristics

In drawing a line between types of attorney solicitation cases, the Court in Primus used the factors of “political expression” and “association” to distinguish the solicitation in Primus from other

123 Id. at 826 (quoting NAACP v. Button, 371 U.S. at 429).
125 Id. at 758-60. See also notes 107-112 and accompanying text supra. Three commentators writing prior to Primus and Ohralik agreed that “[u]nder the most recent case law this category of speech [commercial speech] may well have been abandoned. . . .” J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 118, at 767. In discussing the effect of Bigelow on attorney advertising and solicitation, Professor Monroe H. Freedman, an authority on legal ethics, concluded that the decision “severely restricted, if it did not overrule Valentine v. Chrestensen” and that “the present provisions of the Code of Professional Responsibility, forbidding advertising and solicitation by lawyers, are constitutionally invalid.” Freedman, Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility, 4 HOFSTRA L. REV. 183, 192-93 (1976).
126 436 U.S. at 455-56 (quoting Virginia Pharmacy, 425 U.S. at 771 n.24).
127 436 U.S. at 454.
The term "association" is not nearly as problematic as the term "political expression." In neither *Primus* nor *Ohralik* did the Court give a satisfactory definition of "political expression." In *Primus*, the Court referred to the ACLU's goal of vindicating "civil liberties" through litigation. The Court also referred to the "freedom to engage in association for the advancement of beliefs and ideas." If "political expression" is to be defined in terms of "beliefs and ideas," determining the scope of the "political expression" protection might prove impossible. The Court's recent experience in the area of defamation law amply demonstrates the pitfalls of using vague terms to distinguish between protected and unprotected speech. The same difficulties can be foreseen in using the "political expression" test enunciated in *Primus* to distinguish between valid and invalid types of solicitation.

**C. Standards of Care**

The distinctions which the Court has drawn among types of solicitation cases have a particular purpose — to impose differing standards of care on attorneys who solicit. In cases such as *Primus*, the states may punish only solicitation which involves misconduct in fact. In cases such as *Ohralik*, the states may punish

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128 *In re Primus*, 436 U.S. at 434.

129 *Id.* at 430. In the oral argument in *Primus*, Justice Rehnquist asked Primus' counsel what was encompassed by the term "civil liberties." Counsel replied that it referred to "suits arising under the Bill of Rights or statutes amplifying those rights." Baker, *Do Lawyers Have a First Amendment Right to Solicit?*, 64 A.B.A.J. 364, 369 (1978). Thus, if "political expression" were equated with "civil liberties," one could possibly rely on the above definition.

130 *In re Primus*, 436 U.S. at 438 n.32 (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

131 Thus in his dissenting opinion in *Primus*, Justice Rehnquist expressed his belief that no state "will be able to determine with confidence the area in which it may regulate prophylactically and the area in which it may regulate only upon a specific showing of harm." 436 U.S. at 443 (Rehnquist, J., dissenting).

132 In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the Court stated that "the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern. . . ." *Id.* at 44. Thus, the "public issue" test was born. Justice Marshall dissented in *Rosenbloom*, stating, among other reasons, that in using such a test,

[the Court is required to weigh the nuances of each particular circumstance on its scale of values regarding the relative importance of society’s interest in protecting individuals from defamation against the importance of a free press. . . .] Whatever precision the ad hoc method supplies is achieved at a substantial cost in predictability and certainty.

*Id.* at 81 (Marshall, J., dissenting).

Only three years later, the Court in *Gertz v. Welch*, 418 U.S. 323 (1974), abandoned the "public interest" test, stating, *inter alia*, that the test "would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not." *Id.* at 346.
an attorney for soliciting under circumstances likely to result in such misconduct. At issue is the validity of such different standards, and the appropriateness of the commercial/noncommercial distinction as a basis for them. The Court seemed to rely on two premises in justifying the application of a lower standard of care in cases such as *Primus*: first, political expression and association deserve greater protection than commercial speech; second, non-pecuniary motivations of attorney solicitation minimize the chance that the potential client will be harmed. Both of these premises are examined below.

1. Political expression and association — Whether the solicitation of political expression cases warrants a lesser standard of care than ordinary commercial cases is subject to debate. Even assuming this society's strong interest in seeing civil liberties vindicated, it does not follow that there is a qualitatively smaller interest in seeing other types of legal rights vindicated. Indeed, the Court seems to have forgotten the spirit of its decision in *United Mine Workers*. There, the Court rejected the argument that the freedom of groups to solicit should be limited to political expression cases. Moreover, in *United Transportation Union*, the Court extended to groups the same freedom to solicit ordinary commercial cases as to solicit political expression cases. It thus makes little sense for the Court to impose a different standard of care in the context of "political expression" cases. To say that we should allow attorneys equal freedom to solicit commercial cases does not imply a lesser interest in political expression; rather it connotes a deeper concern over nonpolitical injuries.

Whether solicitation involving associational freedom warrants a lesser standard of care is also subject to debate. The freedom of association may preclude the states from prohibiting people from joining together to achieve a lawful common goal, but that does not necessarily mean that the states should require one to join a group in order to pursue that goal. In giving group-affiliated attorneys greater freedom to solicit than non-affiliated attorneys, the Court is stating, in effect, that improper activity suddenly becomes proper the moment the attorney becomes affiliated. If the fact of group-affiliation provided some assurance that a potential for harm would be minimized, then there might be a basis for a distinction founded on such affiliation. A group-affiliated attorney who solicits an in-

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134 *In re Primus*, 436 U.S. at 434; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 458-59.
135 *In re Primus*, 436 U.S. at 429-31; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 461 n.19.
137 See note 29 supra.
jured person, however, is as likely to cause harm to that person as a non-affiliated attorney. It may be true that groups select only those attorneys whom they feel are trustworthy. Under both the ABA Code\textsuperscript{139} and dictum in Primus,\textsuperscript{140} however, groups are forbidden from interfering with the attorney-client relationship. Thus, a group lawyer is perfectly free to handle a case any way he wants. Of course, groups may exert a certain tempering influence on their attorneys because they can sanction improper solicitation by those attorneys. That influence, however, may also be exerted by the state’s attorney disciplinary agency. If disciplinary agencies are ineffective, the best solution is to reform them, rather than to delegate the responsibility of regulation to lay groups to whom such regulation may be of only subsidiary importance. There seems, therefore, little reason to require a lesser standard of care in the solicitation of political expression and “associational” cases than in other types of cases.

2. Non-pecuniary motive — The other justification for requiring a lesser standard of care in cases such as Primus, the attorney’s motive, is also difficult to support. The Court’s assumption is that there is less danger to potential clients where the motive behind solicitation is not pecuniary; conversely, where there is a pecuniary motive, a lawyer’s judgment is presumably clouded by greed.\textsuperscript{141} Greed, however, is not the only passion which blinds a person’s eyes. In his dissent in Primus, Justice Rehnquist expressed his belief that there is a substantial danger that even civil liberties lawyers will allow their judgment to be distorted in their efforts to right the world’s wrongs.\textsuperscript{142} Justice Rehnquist’s remarks suggest that it is wrong to assume that a client is in less danger when his case involves political expression than when his case involves personal injury. Perhaps the clearest example demonstrating the fallacy of the “motive” distinction is that of the protection given un-

\textsuperscript{139} See DR 2-103(C)(2)(b), supra note 12.
\textsuperscript{140} “[A] State may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation.” In re Primus, 436 U.S. at 439. But see Ohralik v. Ohio State Bar Ass’n, 436 U.S. at 471 (Marshall, J., concurring in part and concurring in the judgment).
\textsuperscript{141} Ohralik v. Ohio State Bar Ass’n, 436 U.S. at 461 n.19.
\textsuperscript{142} His exact statement was

I cannot share the Court’s confidence that the danger of such consequences is minimized simply because a lawyer proceeds from political conviction rather than for pecuniary gain. 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.

ions to solicit the personal injury cases of their members. Attorneys cooperating with unions may solicit ordinary commercial litigation from union members, despite the fact that those attorneys receive real financial benefit. Such solicitation has been upheld as an exercise of associational freedom.\textsuperscript{143} Yet, it is difficult to believe that such attorneys are completely oblivious to the prospect of pecuniary gain.\textsuperscript{144}

Another problem with this motive test is that it is a subjective one.\textsuperscript{145} As Justice Rehnquist said in \textit{Primus}, under a motive test solicitation would be "subject to manipulation by clever practitioners . . . . [W]e may be sure that the next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of 'political association' . . . ."\textsuperscript{146} The majority in \textit{Primus} admitted that a line based on motive and content of speech "will not always be easy to draw"\textsuperscript{147} but dismissed the problem, saying, "that is no reason for avoiding the undertaking."\textsuperscript{148} As Justice Rehnquist said, and as this article agrees, such difficulty "is a valid reason for avoiding the undertaking where a more objective standard is readily available."\textsuperscript{149}

The principal fault with the Court's focus on the attorney's motive is that it obscures the most important aspect of solicitation, namely, providing the consumer with reliable information. Regardless of the attorney's reasons for soliciting, the consumer is given valuable information about his or her legal rights and the availability of legal services. Indeed, in both the previous solicitation cases and the \textit{Bates} advertising case, the Court's main concern seemed to be the assurance of a free flow of information about legal rights

\textsuperscript{143} See notes 30-31 and accompanying text \textit{supra}.
\textsuperscript{144} Had Ohralik been a cooperating attorney with a union and had the two women been union members injured in work-related activity, his solicitation arguably would have been protected. Unfortunately, as the Court said, Ohralik "was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests." \textit{In re Primus}, 436 U.S. at 438 n.32. It strains belief, however, to say that attorneys cooperating with unions are motivated not by their commercial interests but rather by the prospect of associational activity for the advancement of beliefs and ideas. It might be argued that the Court has weighed this commercial motivation of union attorneys, and has decided that the freedom of association won. It this were true, however, freedom of association would also justify protecting solicitation by civil rights groups; yet, as shown, the Court has required that such groups not be motivated by the prospect of pecuniary gain. It follows that both types of groups should be required to demonstrate non-pecuniary motivation, since it is inconceivable that the Court intended to place greater restrictions on civil rights groups than on unions.
\textsuperscript{145} See notes 69-72 and accompanying text \textit{supra}.
\textsuperscript{146} \textit{In re Primus}, 436 U.S. at 442 (Rehnquist, J., dissenting).
\textsuperscript{147} \textit{In re Primus}, 436 U.S. at 438 n.32.
\textsuperscript{148} \textit{Id}.
\textsuperscript{149} \textit{Id}. at 443 (Rehnquist, J., dissenting).
and services, rather than the benefits accruing to attorneys. In *Ohralik*, the Court paid lip service to the former of these interests but minimized the potential for benefit to the consumer, stating that solicitation may be one-sided and thus harmful, and that under the states rules, attorneys are not precluded from giving advice about legal rights — they merely cannot accept employment as a result of that advice.

These rationales are unpersuasive. With regard to the latter rationale, many attorneys will simply not feel it worth their time to give free legal advice. Attorneys may have a duty to assist laymen, but they still have to make a living. The first rationale, on the other hand, assumes that it is better to protect against a potential for harm in some instances of solicitation than to assure the provision of valuable information in most, if not all, such instances.

Thus, the Court's approach in *Ohralik* appears to be a reversal of that taken previously. Benefit to the attorney and benefit to the consumer go hand-in-hand and cannot be severed quite as neatly as attempted by the Court. A more objective approach would be to focus on the character of the conduct involved rather than motive.

3. Desirability of the standards of care imposed — Perhaps more important than the issue of different standards of care based on the commercial/noncommercial distinction is the question whether the particular standards themselves are desirable.

Essentially, the Court is concerned with three classes of attorney behavior. The first class covers misconduct that is inherently injurious, such as invasion of privacy, while the second includes misconduct that carries a probability of resulting injury, such as misrepresentation. These two classes are related in that they are concerned with the way the attorney conducts himself during the act of solicitation. In contrast, the third class relates to the cir-

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150 In referring to those four solicitation cases in *Bates*, the Court said, "[u]nderlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them." *Bates v. State Bar*, 433 U.S. 350, 376 n.32 (1977).


152 In his separate opinion in *Ohralik*, Justice Marshall decried the Court's neglect of this informational aspect of solicitation, stating that such an interest is substantial whether or not it occurs in a commercial context, and that it deserves as much protection as the interests protected in *Bates*. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 474 (Marshall, J., concurring in part and concurring in the judgment).

153 *Id.*

154 Lying to someone, by itself, does not injure a person; a lie causes injury only if one relies upon it to his detriment. In the case of misconduct such as deception, then, the Court is saying that the probability is so high that such misconduct will cause actual injury that it is properly proscribed. In fact, the Court recognized this distinction between solicitation which is inherently injurious and that which is not. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 466 n.27.
cumstances in which the act of solicitation is carried out. An attorney falling within *Primus* need only refrain from engaging in the misconduct contained in the first two classes. An attorney falling within *Ohralik*, however, must also refrain from solicitation in “circumstances likely to result in misconduct.”

Unfortunately, it is not clear what circumstances are encompassed by this rule. The Court described such circumstances as those “inherently conducive” to misconduct. Arguably, improper circumstances include soliciting a person while he or she is hospitalized or shortly thereafter. Other circumstances analogous to this would be funerals, the scenes of accidents, or any other situation which can be expected to be particularly traumatic for those involved. Unfortunately, the phrase “circumstances likely to result in misconduct” could be interpreted as covering virtually all solicitation. For example, an unscrupulous attorney might be willing to deceive a potential client who has little education, and courts might apply this standard to any attorney who solicits a person with little education. This interpretation is not as extreme as it seems, particularly in light of the Court’s statement in *Ohralik* that “the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.” With such a pronouncement to guide them, lower courts could interpret the *Ohralik* standard to cover almost any type of situation.

Assuming *arguendo* that the *Ohralik* standard is capable of definition, inquiry needs to be focussed on the deterrent value of that standard, since the purpose of solicitation rules is to prevent injury to the public. The Court in *Ohralik* justified its rule on two grounds. First, the Court said that under adverse circumstances, “it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.” This presumption, however, is not unreasonable only if one believes that the majority of lawyers are unscrupulous. The anti-misconduct rule of *Primus* is sensible because certain types of misconduct are inherently injurious while others carry a very high

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155 In the remainder of this article, the term “anti-misconduct rule” will be used to refer to the *Primus* rule, while the term “prophylactic rule” will be used to refer to the *Ohralik* rule.

156 *Ohralik* v. Ohio State Bar Ass’n, 436 U.S. at 464.

157 In *Ohralik*, the attorney was disciplined for soliciting McClintock while she was lying in traction in her hospital room and for soliciting Holbert when, as he knew, she had just been released from the hospital. In such circumstances, as the Court said, “they were especially incapable of making informed judgments or of assessing and protecting their own interests.” 436 U.S. at 467.

158 *Ohralik* v. Ohio State Bar Ass’n, 436 U.S. at 465 (footnote omitted).

159 *Id.* at 466 (footnote omitted).
probability of resulting in injury. By comparison, the probability that solicitation in improper circumstances will result in misconduct is much lower.

The second justification offered for the Ohralik standard is that since in-person solicitation often takes place with no third parties present, it would be difficult or impossible to obtain reliable proof of what had occurred, especially if the consumer were distressed at the time of solicitation.\(^{160}\) Thus, the Court reasoned, it would be more difficult to prevent misconduct by soliciting attorneys if the states were required to prove actual misconduct in addition to solicitation in improper circumstances.\(^{161}\) In effect, the Court is making the law easier to break so that those who break it can be caught more easily. Unfortunately, the Court neglected to consider how the solicitation itself is to be proven. If a complainant cannot prove that the attorney had, for example, intimidated or deceived him, it is at least as probable that the complainant will be unable to prove that solicitation had even occurred. It would still be the word of the attorney against the word of the complainant, the very situation the Court sought to avoid in enunciating a prophylactic rule. Even assuming that solicitation can be proven, an enforcement rationale is valid only if unscrupulous attorneys so outnumber scrupulous ones that it is worthwhile to deter the "good" solicitation in the course of deterring the "bad."

Thus, the justifications given by the Court for a prophylactic rule in Ohralik-type cases are unpersuasive. A prophylactic standard can be justified only if it is more effective in preventing improper solicitation than an anti-misconduct standard. Admittedly, in many settings such as hospital rooms, funerals, and the like, it would be easy to prove that solicitation had occurred in improper circumstances because these circumstances are presumptively improper. In situations where location need only be shown, then, a prophylactic rule is perhaps justified; the ease with which "improper circumstances" is shown in such cases would deter solicitation.\(^{162}\) In other situations, however, it would not be as easy to prove that "improper circumstances" existed. An example is where the location is proper but the solicited person is in no condition to discuss matters of such import.\(^{163}\) In such situations, moreover, an attorney might never know in advance whether a po-

\(^{160}\) Id.
\(^{161}\) Id.
\(^{162}\) Of course, both scrupulous and unscrupulous attorneys alike would be deterred but this result is justified on the ground that solicitation in such circumstances would also amount to an invasion of privacy, which constitutes actual, as opposed to probable, injury.
\(^{163}\) An example is a person who is emotionally upset or under the influence of alcohol or a drug which affects perception and reason.
potential client was capable "of making informed judgments or of assessing and protecting [his or her] own interests."\textsuperscript{164}

Of course, an attorney who is unscrupulous enough to engage in misconduct and who is willing to take the chance that misconduct could not be proven, would probably also be willing to take the chance that a complainant could not prove that the solicited person was in no condition to discuss legal matters. At the same time, a scrupulous attorney who takes disciplinary rules seriously might be deterred from ever soliciting. Such an attorney will have realized that he might not know, prior to the act of solicitation, whether the potential client was capable of rational judgment. If he solicits a potential client who had previously taken a handful of tranquilizers, he will be guilty of a breach of the \textit{Ohralik} rule, even though he was unaware of the person's condition, or even if he stops soliciting upon becoming aware of it. Under the Court's scheme, then, the "good" attorneys would be deterred and most "bad" attorneys would not, precisely the opposite effect which solicitation rules seek to attain.

Thus, the standards of care enunciated by the Court are not only based on distinctions of dubious value, but would probably work in a counterproductive manner. The next Part of this article will examine a potentially more useful scheme of regulation.

V. BEYOND \textit{Primus} AND \textit{Ohralik}: LIBERALIZATION OF STATE SOLICITATION LAWS

In the preceding Part, this article attempted to demonstrate that the commercial/noncommercial distinction drawn by the Court does not furnish a desirable basis for state regulation of attorney solicitation. This does not mean that a higher standard of care should be imposed on attorneys in \textit{Primus}-type circumstances. This article contends that all types of solicitation deserve protection, and that attorney solicitation rules should be liberalized because the present scheme is discriminatory and restricts the public's access to legal services. This Part will examine the reasons supporting these conclusions.

\textbf{A. Arguments Favoring Liberalization}

1. Discrimination between attorneys — A review of the current ABA solicitation rules demonstrates how the rules discriminate against certain classes of attorneys. Under the present scheme,

\textsuperscript{164} \textit{Ohralik} v. Ohio State Bar Ass'n, 436 U.S. at 467.
lawyers cooperating with groups may solicit cases whether the subject matter is commercial or noncommercial. By contrast, the lawyer who is not group-affiliated must wait for clients to knock on the door. Under DR 2-104 of the ABA Code, lawyers not affiliated with groups may accept solicited cases under certain circumstances; for example, attorneys are allowed to solicit close friends and relatives.\textsuperscript{165} However, the exception permitting the solicitation of former clients "if the advice is germane to the former employment"\textsuperscript{166} operates in a discriminatory manner. If an attorney has had clients who have continuous, as opposed to occasional, dealings with the law, that attorney may solicit.\textsuperscript{167} Furthermore, Ethical Consideration (EC) 2-4 of the Code expressly allows attorneys to solicit "regular" clients in addition to former ones.\textsuperscript{168} Yet a great proportion of lawyers deal with clients who have only specific legal problems, for example, a real estate transaction, divorce, or personal injury. Once such matters are ended, there is little or no possibility that matters "germane to the former employment" will ever arise. Nor is it likely that such clients will become "regular" clients. The result is that many individual practitioners and small legal partnerships may never be able to solicit under the exceptions provided by DR 2-104. This situation is perhaps most onerous to young attorneys who wish to start their own practice.\textsuperscript{169}

Thus, the current scheme produces a situation where those attorneys who have the greatest need of finding business are not allowed to solicit (other than close friends and relatives), while those who have the least need of finding business are allowed to solicit. One of the principal arguments in favor of liberalizing attorney solicitation is that the current scheme gives established lawyers a decided competitive advantage over others.\textsuperscript{170} The most frequent re-

\textsuperscript{165} See DR 2-104(A)(1), supra note 13.
\textsuperscript{166} Id.
\textsuperscript{167} For example, a lawyer who has represented a business with regard to its tax matters may solicit employment whenever the tax laws change.
\textsuperscript{168} See AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY EC 2-4 (1977). See also id. Canon 2, n.82 and DR 2-104(A)(1), supra note 13.
\textsuperscript{169} As Justice Marshall said in \textit{Ohralik}, "[t]he Disciplinary Rules against solicitation fall most heavily on those attorneys engaged in a single practitioner or small-partnership form of practice — attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms." \textit{Ohralik v. Ohio State Bar Ass'n}, 436 U.S. at 475 (Marshall, J., concurring in part and concurring in the judgment)(footnote omitted).
\textsuperscript{170} As Professor Freedman has said, "what is clear is that the principal purpose of the antisoliciation rules is to limit competition among lawyers." M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 114 (1975). He later remarked that lawyers often take tax deductions for membership fees in country clubs on the ground that such fees are business expenses — in other words, a means of solicitation. Id. at 116-17. Prof. Freedman's assertions are supported by \textit{In re Cohn}, 10 Ill. 2d 186, 196, 139 N.E.2d 301, 306 (1957)(Bristow, J., concurring on consideration of petition for rehearing):
response to this argument is that if the Court is to allow solicitation in some circumstances, the "evil" should be contained as much as is constitutionally permissible. This response is weak in two respects. First, it assumes that increased solicitation is an evil, which is by no means obvious. More importantly, however, the argument ignores the fact that restrictive solicitation rules allow one group in the legal community to maintain a great advantage over others. Given a choice between maintaining the current discriminatory scheme, which is intolerable to some, and allowing attorneys to solicit in any and all circumstances, which is intolerable to others, the most equitable solution is to achieve equality of opportunity, and to try to contain the real evils of solicitation as much as possible.

2. Discrimination against consumers — The present scheme also discriminates against consumers of legal services. To the same extent that attorneys who are not group-affiliated have less leeway to solicit, clients who are not group-affiliated have less access to information regarding their legal rights. As one commentator noted, laypersons who are so powerless that they cannot organize their own litigation programs are in even greater need of the free flow of legal information than those who have such power.171 Similarly, one federal court has said, "it would make no sense for an individual's right of access to legal action to cease to exist, or not to come into existence at all, at the moment he ceases to belong to a group."172 Liberalizing attorney solicitation rules would thus increase the public's access to legal services.173 The underutilization of legal services by certain groups is well-known;174 increased solicitation would do much to alleviate this problem.

Opponents of more liberal solicitation laws have argued that anti-solicitation rules do not prevent lawyers from informing those people that they have a claim. While this is true, it is also unrealis-

Nor is it amiss to note that opulent lawyers and large law firms who do not employ "runners" to attract business do spend large sums of money for memberships in country clubs, entertainment in fashionable surroundings and other similar amenities of social intercourse. That the primary purpose of these expenditures is the attraction of law business and not hospitality is attested by the fact that such lawyers regularly claim and the Internal Revenue Department regularly allows deductions for these expenditures as "business" and not "personal" expenses.

173 As Justice Marshall noted, "[m]any persons with legal problems fail to seek relief through the legal system because they are unaware that they have a legal problem and, even if they 'perceive a need', many do not obtain counsel ... because of an inability to locate a competent attorney." 436 U.S. at 473 (Marshall, J., concurring in part and concurring in the judgments) (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 371 (1977)).
tic. Without a profit incentive many lawyers simply will not feel it is worth their while to give advice. Moreover, an attorney who advises someone of his rights does himself a disservice because he is forbidden by the ABA Code from accepting employment as a result of that advice.\textsuperscript{175} It is somewhat unrealistic to expect attorneys to voluntarily negate their prospects for employment. Given the profit incentive, however, attorneys would be much more likely to give laypersons valuable information about their legal rights.\textsuperscript{176}

Canon Two of the ABA Code states, "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."\textsuperscript{177} If this Canon is to have more than token value, attorneys should have a duty, or at the very least, have the right, to "stir up litigation" when they are advising people of their rights and enabling them to redress grievances through the judicial system.\textsuperscript{178} To summarize, liberalization of solicitation laws would both equalize competition and engender a freer flow of information to consumers.

**B. Arguments Against Liberalization**

The traditional arguments\textsuperscript{179} against attorney solicitation fall into three classes. First is the argument that solicitation harms the dignity of the legal profession and that it would result in undue commercialization of the profession. This argument is based on an elitist view of the profession and arguably is not constitutionally supportable.\textsuperscript{180} Second is the argument that solicitation would result in the "stirring up" of litigation, would induce the bringing of

\textsuperscript{175} See DR 2-104, supra note 13.


\textsuperscript{177} American Bar Association Code of Professional Responsibility Canon 2 (1977).

\textsuperscript{178} M. Freedman, supra note 170, at 188.

\textsuperscript{179} See generally Note, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674 (1958); Note, Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available, 81 Yale L.J. 1181 (1972); Comment, Controlling Lawyers by Bar Associations and Courts, 5 Harv. C.R.-C.L. L. Rev. 301 (1970); Comment, Advertising, Solicitation, and Prepaid Legal Services, 40 Tenn. L. Rev. 439 (1973). In addition, the numerous amicus briefs filed in Primus and Ohralik contain extended discussions of these issues.

\textsuperscript{180} Responding to this argument in the context of attorney advertising, the Court has said, "[s]ince the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled." Bates v. State Bar of Arizona, 433 U.S. 350, 371-72 (1977). Because the ban on solicitation also originated as a rule of etiquette rather than as a rule of ethics, see H. Drinker, Legal Ethics 210-11 (1953), the same reasoning would seem to apply to the historical reason for the restraint on solicitation. In his separate opinion in Ohralik, Justice Marshall said, "[a]s Bates made clear, 'disdain' is an inadequate basis on which to restrict the flow of information otherwise protected by the First Amendment." Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 475 n.6 (Marshall, J., concurring in part and concurring in the judgment).
fraudulent claims, and would result in incompetent representation of clients. But these considerations do not, in themselves, support the independent ban on solicitation.\textsuperscript{181} The last argument expresses the legitimate fear that solicitation might result in overreaching, overcharging, misrepresentation, and invasion of privacy. These dangers do not, however, justify the broad prohibition against solicitation contained in current state solicitation rules.\textsuperscript{182} Less restrictive alternatives are available to the states to insure that attorneys who engage in misconduct may be disciplined, while so-called "benign" solicitation is not thereby prevented.\textsuperscript{183}

Another frequently-voiced objection to liberalized solicitation rules is that there would be a sudden onslaught of unethical solicitation. This objection is based on the questionable assumption that the current restrictive scheme is successful in preventing such solicitation. The relevant question, however, is not how many attorneys, in absolute terms, would solicit improperly, but how much of an increase in improper solicitation would result. As one attorney who commented on the liberal California proposals discussed below stated, "[t]hose inclined to solicit in an obnoxious manner are already doing so."\textsuperscript{184}

The only way to assess the impact of liberalized rules is to compare the number of reported complaints about solicitation in a jurisdiction that has changed from a restrictive to a liberal scheme. As yet, the only jurisdiction which has done so is the District of Columbia. The new rules, however, have only been in effect for about eight months as of this writing, and thus, any data that might

\textsuperscript{181} With regard to the "stirring up litigation" argument, the proper solution arguably is to increase the number of courts or decrease the available causes of action, not to decrease access to legal services. With regard to fraud, harassment, and incompetence, such misconduct is already proscribed by the ABA Code. \textit{See American Bar Association Code of Professional Responsibility DR 2-109 (Acceptance of Employment), DR 6-101 (Failing to Act Competently), and DR 6-102 (Limiting Liability to Client) (1977).}

\textsuperscript{182} Interestingly, the author of one of the law review articles cited by the Court in \textit{Ohralik} came to the conclusion that "there is little support for the contention that solicitation harms clients." \textit{See Note, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674, 684 (1958).}

\textsuperscript{183} Justice Marshall defined "benign" solicitation as that which is conducted 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 a matter that is not frivolous.

\textsuperscript{184} \textit{State Bar of California, Final Report and Recommendation of the Special Committee on Lawyer Advertising and Solicitation} app. C (Nov. 6, 1978).
be derived from the District's experience could not be considered conclusive evidence of the effect of liberal rules. It is interesting to note, however, that seven months after the new rules became effective, the president of the D.C. Bar Association told the American Bar Association Committee on Advertising that "there had been few complaints about abuse of the new rules."185

A final objection to liberalized solicitation laws is that many attorneys would solicit who do not presently do so, and abuses which would not have occurred before will take place when attorneys "play it too close to the line." These potential costs, however, are outweighed by the potential benefits — both to attorneys and to society as a whole — that would flow from increased solicitation.

C. Recent Proposals and "Safeguard" Provisions

Within the past few years, there have been several proposals for liberalized solicitation laws.186 The common thread running through these proposals is that they would, as a general rule, permit attorneys to solicit, but would prohibit certain types of misconduct, such as deception, undue influence, intimidation, overreaching, promoting harassing litigation, and other types of "vexatious conduct." These rules would create no distinctions based on subject-matter of the solicited suit, motivation of the soliciting attorney, or presence of group-affiliation.

These proposals, in effect, create only anti-misconduct rules — the prohibitions mentioned above are directed at the attorney's conduct during the act of solicitation. In order to give further assurance that these rules will not be breached, and to protect against other dangers not directly involved in the act of solicitation, such as overcharging, the states may wish to add one or more of these "safeguard" provisions. In considering these safeguards, one must remember that they would apply to Primus- and Ohralik-type cases alike. Hence the safeguards must not unconstitutionally restrict the freedom to solicit granted in Primus.

One of the main criticisms of liberalized solicitation is that it prevents a free choice of lawyers because soliciting attorneys tend to be aggressive and the potential client may be inexperienced in hir-
Similarly, it is asserted that solicitation may be offensive to clients because of the possible invasion of privacy. Similarly, it is asserted that solicitation may be offensive to clients because of the possible invasion of privacy. There are several ways, however, in which the states may prevent these abuses. First, they can specifically prohibit the undesirable conduct, such as overreaching. Second, they can specifically prohibit solicitation where it would constitute an invasion of privacy, preferably by listing certain settings where solicitation is improper, such as hospitals, funerals, or scenes of accidents. Third, the states could require the soliciting attorney to provide the potential client with a list of other local attorneys who handle the same type of legal claim involved. This list could also give approximations of the fees charged by these attorneys which would help prevent another alleged abuse of solicitation, namely, overcharging. Finally, the states could require attorneys who have been retained as a result of solicitation to give their client a "cooling-off" period, such as 72 hours, during which the client could rescind the agreement without incurring any liability. Such a provision would be similar to those designed to protect consumers from door-to-door salesmen.

The second safeguard, prohibiting solicitation in certain settings, is designed to protect against invasion of privacy; as such, it would be constitutional under *Primus*. The third safeguard, requiring the attorney to give the potential client a list of other local attorneys, might be perceived as an unconstitutional restriction on the freedom of groups to solicit. This safeguard, however, would only nominally burden such solicitation and is designed to help protect laypersons from attorneys who overreach. As the Court said in *Primus*, "[n]othing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the as-

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188 Id.
189 Two of the most far reaching proposals are the DISTRICT OF COLUMBIA CODE OF PROFESSIONAL RESPONSIBILITY, adopted as Rule X of the Rules Governing the Bar of the District of Columbia [hereinafter cited as DISTRICT OF COLUMBIA CODE], and the PROPOSED RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, reprinted in STATE BAR OF CALIFORNIA REPORTS 4-6 (August, 1978) [hereinafter cited as PROPOSED CALIFORNIA RULES]. See DISTRICT OF COLUMBIA CODE DR 2-103(B)(2) and DR 104 (A)(2), and PROPOSED CALIFORNIA RULE 2-101(B)(2).
190 The practice of listing fees might seem to conflict with the Court's decision in *Goldfarb* v. Virginia State Bar, 421 U.S. 773 (1975). In *Goldfarb*, the Court struck down, on antitrust grounds, a minimum fee schedule promulgated and enforced by a state bar association. *Goldfarb* involved a "fixed, rigid price floor," 421 U.S. at 781, which attorneys were compelled to obey. The proposal here would not raise the same problems unless, of course, the attorneys on the list conspired to fix prices. Merely listing the fees charged by attorneys is not substantially different from price advertising, which the Court upheld in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
191 See, e.g., UNIFORM CONSUMER CREDIT CODE, Section 3.502.
192 Invasion of privacy is a form of misconduct prohibited by *Primus*. See note 80 supra.
sociational freedom of non-profit organizations." The fourth safeguard, requiring a cooling-off period, is a modification of common law contract rules and would be constitutional under *Primus*, since it affects neither the attorney's behavior nor the circumstances of solicitation.

Some attorneys might be unwilling to inform their clients of their right to a list of other attorneys and to rescind. Thus, the states might wish to enact a fifth safeguard, in the form of a statute of frauds provision. Such a provision could consist of two parts. First, attorneys would be required to have all their retainer agreements reduced to writing, containing whatever terms the state deems essential. Since many attorneys already make this their practice, it would not be an onerous burden. Second, every retainer agreement would be required to contain the following clauses in conspicuous type:

**IF YOUR ATTORNEY WAS THE ONE WHO STARTED CONTACT BETWEEN THE TWO OF YOU, YOU HAVE THE FOLLOWING RIGHTS:**

1. Before you sign this agreement, you have the right to receive, from your attorney, a list containing the names of other attorneys in your area who handle claims like yours and estimates of the fees they charge. If your attorney refuses to give you this list, or if he or she gives it to you and you decide you do not want to retain him or her, you do not have to sign this agreement.

2. You have the right to cancel this agreement within 72 hours after you sign it without being under obligation to your attorney.

By requiring that all retainer agreements be in writing and contain these clauses, states may insure that attorneys inform potential clients of their rights if they wish to make the agreement enforceable. Furthermore, it is unlikely that the Court would hold such a statute of frauds provision unconstitutional when applied to attorneys falling within *Primus*. First, these requirements are well-defined and would work no substantial hardship on attorneys. Second, and more importantly, this safeguard is designed to ensure that the potential client makes an informed choice — an interest arguably worthy of protection even for *pro bono* civil rights plaintiffs.  

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193 *In re Primus*, 436 U.S. at 439.

194 Just because a client is not charged a fee does not mean that client has nothing to lose. For example, arguably a person who brings a civil rights suit for the purpose of resolving a constitutional issue is opening himself to a greater danger of defamation than that to which he would ordinarily be exposed. In addition, the client will be subjected to the unpleasantness of litigation (of which many are unaware) and may lose his cause of action under principles of *res judicata*. 
Finally, the states might wish to enact a safeguard which would prevent lawyers from taking advantage of consumers who are incapable of making rational judgments. Such a provision sounds perilously close to the prophylactic rule of *Oralik* which this article has previously criticized. The three main faults with the *Oralik* rule were (1) it could be interpreted to cover virtually any situation, thus deterring even "benign" solicitation; (2) it appeared to impose strict liability on the attorney; and (3) it was applicable only to certain classes of attorneys and certain classes of solicitation. The following provision, which is based on DR 2-103(A)(3) of the new District of Columbia Code, would avoid those defects: "A lawyer shall not solicit a potential client who is apparently in a physical or mental condition which would make it unlikely that he or she could exercise reasonable, considered judgment as to the selection of a lawyer." First, as used in both this proposed scheme and the D.C. Code, the provision would apply to all attorneys and all solicitation. Second, the provision narrowly defines the situations in which it would apply, which are those where a potential client needs the most protection. The rule would not, however, prevent an attorney from soliciting a consumer who happened not to be on the same educational level. Third, and most importantly, by using the word "apparently", the rule would eliminate strict liability and impose a fault requirement. Thus, an attorney soliciting a consumer covered by this provision could not be disciplined unless the lawyer solicited while knowing (a subjective standard) or having a good reason to know (an objective standard) that the client was not in the proper condition. An attorney who came to this realization during the act of solicitation could not be disciplined if the attorney stopped soliciting upon reaching that realization.

It is likely that this last safeguard would be constitutional under *Primus*. First, it narrowly defines the situation in which it applies, thereby preventing, or at least minimizing, any potential "chilling" effects. Second, states have a compelling interest in preventing even civil rights and union lawyers from persuading a person to sue when that person is unable to exercise rational judgment. In fact, solicitation in such circumstances could well be construed as undue influence, a form of misconduct already prohibited by *Primus*.

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195 See Part IV C *supra*.
196 See District of Columbia Code DR 2-103(A)(3), note 189 *supra*.
197 Because people are often in greatest need of an attorney during traumatic periods, states might wish to create an exception to this rule which would permit only solicitation by mail when the potential client is covered by this rule.
198 See note 80 and accompanying text *supra*. 
D. Recent Statutory Revision

There recently has been some statutory revision paralleling these proposed rules. On July 12, 1978, the District of Columbia Court of Appeals repealed its previous rules regarding attorney advertising and solicitation and enacted liberalized provisions.\(^{199}\) California has also been considering a range of possible changes. First, on August 24, 1978, the Board of Governors of the State Bar of California tentatively approved liberalized provisions of its solicitation rules.\(^{200}\) These proposals were submitted to the attorneys of California for their approval and, following an overwhelming negative response, the Board retracted them.\(^{201}\) Later, on November 6, 1978, the California Board submitted another solicitation proposal that would have prohibited all oral solicitation but would have permitted solicitation by mail, including solicitation addressed to a particular client seeking employment for a specific matter.\(^{202}\) This rule would also have permitted attorneys to solicit former or present clients and to respond to inquiries from potential clients.\(^{203}\) Upon further consideration, however, the Board decided on November 17, 1978, to amend that proposal to prohibit all solicitation "specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain."\(^{204}\) Thus, under the rule finally adopted by the Board for submission to the California Supreme Court, the only permissible commercial solicitation, other than that directed to past or present clients or in response to inquiries, is a "communication" sent by mail seeking employment generally, but not in relation to a particular case. In effect, this would be no more than a written advertisement; at best, it would straddle the line separating advertising from solicitation.

The November 6, 1978 proposal would have allowed solicitation by mail. The Board apparently felt that even this extremely limited form of solicitation was too dangerous. By creating a distinction in the types of letters that may be mailed, the Board disregarded the advice of their own Special Committee on Lawyer Advertising and


\(^{200}\) Proposed California Rules, reprinted in State Bar of California Reports 4-6 (August, 1978).

\(^{201}\) Over 700 comments were received, running about eleven to one against the proposals.

\(^{202}\) Id. Rule 2-101(B) (November 6, 1978 proposal) at 29-30.

\(^{203}\) Id. at 31.

\(^{204}\) Rule 2-101(B), Resolution Adopted by the Board of Governors of the State Bar of California (Nov. 17, 1978).
Solicitation that such a scheme would "create a burdensome enforcement problem in distinguishing in each particular case, a prohibited writing from a permitted writing." 205

As finally adopted, the California rule incorporates by reference the current constitutional interpretation with regard to attorney solicitation. 206 This reference at least insulates the rule from an adverse constitutional ruling. It would probably be unconstitutional, however, to discipline an attorney for commercial solicitation with regard to a particular case if that solicitation were conducted in faultless circumstances and involved no misconduct in fact. 207

Despite California's rejection of the liberal proposal of August 24, 1978, this proposal, along with the new District of Columbia Code, furnishes insight into the potential for liberalized solicitation provisions. Both the District of Columbia and proposed California rules 208 abolish all the distinctions created by the United States Supreme Court among types of attorneys and types of solicitation. Both sets of rules allow in-person solicitation for pecuniary gain but prohibit various forms of misconduct. 209 The two schemes also carefully describe what is meant by "misrepresentation." 210

The two sets of rules also contain several "safeguard" provisions. Both schemes, for example, would prohibit solicitation where the potential client was incapable of rational judgment, 211

205 See Final Report, supra note 201, at 6.

The following hypotheticals should demonstrate the problems that might result from the rule as finally proposed. Suppose that an attorney is aware that a certain person has just been in an accident giving rise to a personal injury claim. The attorney sends this person a letter stating that he handles personal injury claims, but makes no reference to the accident. Or suppose the attorney sends the same letter to the same person, but he does not know that the person has been in an accident; in other words, the mailing is a complete coincidence. If a complainant could somehow convince a Disciplinary Board that the attorney knew the person had been in an accident, the attorney would be subject to discipline. Finally, suppose an attorney sends someone a letter stating in general terms that he handles divorce cases. Since a substantial number of married couples contemplate divorce at one time or another, such a letter might well be construed as a prohibited writing. An attorney might be subjected to discipline because he was not acquainted with the intimate details of the life of every person to whom he mails a letter. Because of these problems, the rule as adopted by the Board might deter many attorneys from sending any letters at all.

206 Rule 2-101(B), Resolution Adopted by the Board of Governors of the State Bar of California (Nov. 17, 1978).

207 See Part III C supra.

208 In the remainder of this article, the term "proposed California rule" will be used to refer to the liberal proposal of August 24, 1978.

209 See District of Columbia Code DR 2-103(B)(2) and DR 2-104(A)(2), supra note 199; Proposed California Rule 2-101(B)(2), supra note 200.

210 See District of Columbia Code DR 2-101(B), supra note 199; Proposed California Rule 2-101(A), supra note 200; Suggested Standards for Attorney Communications, Proposed California Rules, supra note 200, at 5.

211 See note 196 and accompanying text supra for a discussion of the District of Columbia rule. The parallel proposed rule in California is Proposed California Rule 2-101(B)(1), supra note 200. Because the proposed California rule appears to make the attorney strictly liable, it is not recommended that the states adopt it; the D.C. formulation is preferable.
and would prohibit attorneys from compensating or rewarding anyone for recommending or securing employment for them.\textsuperscript{212}

With regard to the protection of privacy, the proposed California rules contain provisions having no counterpart in the District of Columbia rules. The former would prohibit solicitation when the consumer has informed the attorney that the consumer "does not want to receive communications" from the attorney,\textsuperscript{213} when the consumer is already represented by counsel and the attorney knows that or has failed to inquire about it,\textsuperscript{214} or where the potential client "has a reasonable expectation of privacy."\textsuperscript{215} This article does not recommend that these latter two rules be adopted by states wishing to liberalize solicitation. Although no one would condone an attempt by an attorney to persuade someone to break a retainer agreement with another attorney, if a person merely has an on-going relationship with an attorney, there seems to be little reason to prohibit another attorney from making that person a better offer. In other words, the California rule would have a definite anticompetitive effect. Moreover, the "reasonable expectation of privacy" rule could be construed as covering virtually all solicitation and would thus defeat the purpose of liberal solicitation rules.

The schemes outlined in the preceding sections contain many exceptions to the general rule of freedom to solicit. While these proposals would certainly liberalize current law, they would not work a revolutionary change on it. The principal effect of most of these proposed revisions would be to eliminate the various distinctions among forms of solicitation which are now drawn by state solicitation rules; this approach would not only increase and equalize competitive opportunities among lawyers but also among consumers. These proposals would by no means give attorneys the unfettered license to engage in "ambulance-chasing," for example. Although in-person solicitation for pecuniary gain would be permissible for all attorneys, the outlined restrictions would help curb possible abuses. Those practices which most offend attorneys' sense of dignity would continue to be prohibited. While these proposals do not purport to curb all abuses, it is unrealistic to expect any scheme of regulation to accomplish that goal. Current state solicitation rules, with their stringent and broad prohibitions, have not curbed all abuses. As long as there are unscrupulous attorneys, there will be unscrupulous solicitations. The best that can be ex-

\textsuperscript{212} See District of Columbia Code DR 2-103(C), supra note 199; Proposed California Rules 2-101(c), 2-101(B), and 3-102(B), supra note 200.

\textsuperscript{213} See Proposed California Rule 2-101(B)(3), supra note 200.

\textsuperscript{214} See Proposed California Rule 2-101(B)(4), supra note 200.

\textsuperscript{215} See Proposed California Rule 2-101(B)(5), supra note 200.
pected — and the goal of these proposals — is to weed out as much "bad" solicitation, while simultaneously permitting as much "good" solicitation as possible. With regard to the real evils of solicitation, the proposed revisions are as stringent, if not more so, than current state rules. The difference is that the proposed schemes would not seek to prevent all solicitation in order to discourage misconduct. The current laws use a bludgeon; the proposed schemes would use a rapier.

VIII. CONCLUSION

The recent decisions in Primus and Ohralik compel little, if any, change in the current state attorney solicitation rules. The current scheme of regulation, however, is based on a commercial/non-commercial speech distinction which is difficult to support in the context of attorney solicitation. The types of solicitation subsumed under each category are not so different that they should be subjected to differing degrees of protection.

At the very least, the publicity generated by the decisions in Primus and Ohralik may cause many states, as it did California, to reconsider their present stand on attorney solicitation. The states are urged not to follow the scheme of minimum protection created by the Court in Primus and Ohralik, but rather to undertake a complete overhaul of their present solicitation rules. Through careful drafting, the states should reasonably be able to balance the needs of society against the legitimate dangers of increased attorney solicitation. Although such attempts might result in rules more complex than the present ones, "[c]areful draftsmanship is a slight burden to bear, especially where freedom of speech and honorable, life-long careers are at stake." 216

No one really knows what will happen if liberalized provisions are enacted. Attorney solicitation is not a scientific phenomenon which can be predicted with certainty. It is just as reasonable to believe that increased solicitation will result in great benefits as it is to believe that it will result in great abuses. Whether abuses are prevented depends as much, or more, on how the rules are enforced as on how they read. The states should remember that if they enact liberalized solicitation laws, they are not bound by that decision for all eternity. The potential costs of an experiment with liberal solicitation rules would well be worth the potential benefits of such rules.

— David A. Rabin