North Dakota Law Review

Volume 55 | Number 2 Article 7

1979

Attorney and Client - Regulation of Professional Conduct - Disciplinary Action Was Improper against an Attorney Who Solicited a Client for a Non-Profit Organization Which Utilized Litigation as a Vehicle for Political Association and Expression

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ATTORNEY AND CLIENT—REGULATION OF PROFESSIONAL CONDUCT—DISCIPLINARY ACTION WAS IMPROPER AGAINST AN ATTORNEY WHO SOLICITED A CLIENT FOR A NON-PROFIT ORGANIZATION WHICH UTILIZED LITIGATION AS A VEHICLE FOR POLITICAL ASSOCIATION AND EXPRESSION.

The Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (Board) charged petitioner[1] with engaging in solicitation in violation of the Code of Professional Responsibility.[2] The charge related to a letter sent by petitioner to a prospective client on behalf of the American Civil Liberties Union (ACLU).[3] The Board approved a panel report recommending that petitioner be found guilty of soliciting a client on behalf of the ACLU in violation of the disciplinary rules of the Supreme Court of South Carolina[4] and a private reprimand

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1. In re Primus, ____ U. S. ____, 98 S. Ct. 1893 (1978). Edna Smith Primus was a lawyer practicing in Columbia, South Carolina. She was an officer and cooperating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU). *Id.* at ____, 98 S. Ct. at 1893.

2. *Id.* at ____, 98 S. Ct. at 1897.

3. *Id.* Prior to sending the letter to Marry Etta Williams, Primus attended a meeting of women who had been sterilized or threatened with sterilization as a condition of continuing medical assistance under Medicaid. At the meeting Primus advised the women in attendance of their legal rights and the possibility of a lawsuit. *Id.* at ____, 98 S. Ct. at 1896. The letter stated:

> You will probable (sic) remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. 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.
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> . . . . .
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> About the lawsuit, if you are interested, let me know, and I will let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.

Id. at ____, 98 S. Ct. at 1896-97 n. 6.

4. S. C. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (D) (5) provides 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. However, he may cooperate in a dignified manner with the legal services activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
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> . . . . .
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> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
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> (a) The primary purposes of such organization do not include the rendition of legal services.
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> . . . . .
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> (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

was issued.[5] The Supreme Court of South Carolina entered an order that adopted verbatim the findings and conclusions of the panel report and increased the sanction to a public reprimand.[6] On appeal to the United States Supreme Court, petitioner asserted the state had not advanced a subordinating state interest to avoid unnecessary interference by the disciplinary rules with her first amendment freedoms.[7] The Court *held* that South Carolina's application of the disciplinary rules to the solicitation by letter, on behalf of the ACLU, violated the first and the fourteenth amendments of the United States Constitution.[8] *In re Primus*, ____U.S.____, 98 S. Ct. 1893 (1978).

In *Primus*, the Court examined the competing values of the state's power to regulate professions within its borders[9] and the first amendment freedom of association.[10] State regulation of the legal profession is regarded as within the valid exercise of the state's power.[11] The need to regulate solicitation developed from the common law doctrines of barratry, maintenance, and champerty.[12] State regulation of the legal profession has not been without

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S. C. CODE OF PROFFESSIONAL RESPONSIBILITY DR 2-104 (A) provides as follows:

> 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:
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> . . . . .
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> (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.

5. ____ U. S. at ____, 98 S. Ct. at 1898-99.

6. In re Smith, 268 S.C. 259, 233 S.E.2d 301 (1977).

7. ____U.S. at ____, 98 S. Ct. at 1899.

8. *Id.* at ____, 98 S. Ct. at 1909. The Court only considered the constitutionality of DR 2-103 (D) (5), because the lower court determined that DR 2-103 (D) (5) proscribed in a narrower fashion the same conduct as DR 2-104 (A) (5). A determination that DR 2-103 (D) (5) was unconstitutional would mean DR 2-104 (A) (5) was unconstitutional. *Id.* at ____, 98 S. Ct. at 1902 n.18.

9. *See* Bates v. State Bar of Arizona, 433 U. S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748 (1976); Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975); Williamson v. Lee Optical Co., 348 U. S. 483 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U. S. 608 (1935).

10. ____ U. S. at ____, 98 S. Ct. at 1899. "[T]here is no longer any doubt that the [f]irst and [f]ourteenth [a]mendments protect certain forms of orderly group activity." NAACP v. Button, 371 U. S. 415, 430 (1963). *See, e. g.,* Shelton v. Tucker, 364 U. S. 479 (1960); NAACP v. Alabama ex rel. Patterson, 357 U. S. 449 (1958); DeJonge v. Oregon, 299 U. S. 353 (1937).

11. *See* Bates v. State Bar of Arizona, 433 U. S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971); Sperry v. Florida ex rel. Florida Bar, 373 U. S. 379 (1963); Lathrop v. Donohue, 367 U. S. 820 (1961); Cohen v. Hurley, 366 U. S. 117 (1961).

12. NAACP v. Button, 371 U. S. 415, 438 (1963). "Barratry is the offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." Churchwell v. State, 195 Ga. 22, ____, 22 S.E.2d 824, 826 (1942). "Maintenance is defined as 'an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party, with money or otherwise to prosecute or defend.' " Schnabel v. Taft Broadcasting Co., Inc., 525 S. W. 2d 819, 823 (Ct. App. Mo. 1975). "Champerty, a species of maintenance, consists of an agreement under which a person who has no interest in the suit of another undertakes to maintain or support it at his own expense in exchange for part of the litigated matter in the event of a successful conclusion of the cause." *Id.*

The policy of these common law doctrines was to prevent disinterested third parties from using law suits to oppress poor people or to vex political opponents. *See generally* Zimroth, *Group Legal Services and the Constitution,* 76 YALE L. J. 966, 969-71 (1967).

constitutional limitations. The United States Supreme Court has held that the state's power to regulate the legal profession is subject to procedural due process guaranteed by the fourteenth amendment[13] and has incorporated in the due process clause the freedoms guaranteed by the first amendment.[14]

In situations where a conflict exists between state regulations and first amendment freedoms of association, the state must show a subordinating interest which is compelling and the means employed to achieve that interest must be closely drawn to avoid unnecessary abridgement of associational freedoms.[15] The leading case concerned with these competing interests of solicitation and freedom of association was *NAACP v. Button.*[16] In *Button,* the Court took a three-step approach to determine whether the activities of the National Association for the Advancement of Colored People (NAACP) were protected by the first amendment.[17]

First, the *Button* Court looked at whether solicitation of a client was outside the protected freedoms of the first amendment.[18] The Court stated that within the framework of the NAACP objectives, "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."[19]

13. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U. S. 252 (1957).

14. *See* Shelton v. Tucker, 364 U. S. 479 (1960) (freedom of association); Cantwell v. Connecticut, 310 U. S. 296 (1940) (freedom of religion); De Jonge v. Oregon, 299 U. S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U. S. 697 (1931) (freedom of press); Fiske v. Kansas, 274 U. S. 380 (1927) (freedom of speech).

15. NAACP v. Button, 371 U. S. 415 (1963). "Even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." Buckley v. Valeo, 424 U. S. 1, 25 (1976).

16. 371 U. S. 415 (1963).

17. *Id.* at 429-44. The National Association for the Advancement of Colored People (NAACP), through the Virginia Conference of the NAACP (Conference) maintained a legal staff of fifteen attorneys, all of whom were Negroes and members of the NAACP. Each legal staff member agreed to abide by the policies of the NAACP, which limited the kinds of lawsuits handled to those with a question of possible racial discrimination. Once the legal staff decided a litigant, whether a member or non-member of the NAACP, was entitled to NAACP assistance, the Conference defrayed all litigation expenses in the case and usually, although not always, paid each assisting lawyer a per diem fee of not more than sixty dollars. None of the staff received a salary from the NAACP, nor could he accept any compensation from the litigant or any other source for the work in the NAACP assisted case.

NAACP legal staff members became involved in public school desegregation cases through their attendance at meetings of parents and children, often prompted by bulletins from the Conference urging desegregation and encouraging the bringing of lawsuits, at which meetings the staff members would speak on the steps necessary to achieve desegregation. Blank authorization forms brought by the staff member, authorizing NAACP attorneys to represent the signers in legal proceedings to desegregate schools, were made available to those in attendance. By the act of signing, the plaintiffs in the particular actions made their own decisions to enter the litigation. *Id.* at 420-22.

18. *Id.* at 429-31.

19. *Id.* at 429. The basic objectives and purposes of the NAACP are to eliminate racial barriers

Second, the Court considered the impact the enforcement of the solicitation statute would have upon first amendment freedoms.[20] In the area of free expression, standards of permissible statutory vagueness are strict and the government may regulate in the area only with narrow specificity.[21] The *Button* Court concluded that the Virginia Supreme Court of Appeals' construction of the solicitation statute, as applied to the NAACP activities, violated the first and fourteenth amendments by unduly inhibiting protected freedoms of expression and association.[22]

Third, the *Button* Court considered whether the record showed that there was a subordinating interest in the regulation of the legal profession that would justify limiting the first amendment rights of the NAACP.[23] Virginia attempted to equate the common law crimes of barratry, maintenance, and champerty with the activities of the NAACP, but malicious intent was required for the common law crimes and it was not present in the record.[24] Additionally, the record failed to show a pecuniary gain for the NAACP, a conflict of interest between the clients and the NAACP, or a private gain through the use of the legal process.[25] Accordingly, the Court concluded that "the state. . . . failed to advance any substantial regulatory interest, in the form of substantial evils flowing from the petitioner's activities, which can justify the broad prohibitions which it has imposed."[26] Therefore, the United States Supreme Court found that, based on the record, the NAACP activities were modes of expression and association which Virginia may not prohibit as improper solicitation.[27]

Three subsequent opinions of the United States Supreme Court have extended *Button* to prevent states from proscribing solicitation of legal counsel by labor unions for their members.[28] In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,*[29]

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which deprive Negroes of equal rights within the United States. The NAACP devotes funds to litigation on behalf of these purposes. *Id.* at 419-20.

20. *Id.* at 431-38.

21. *Id.* at 432-33. A statute may be invalid if it restricts guaranteed first amendment freedoms, even though the record shows the petitioner has not engaged in the privileged conduct. The threat of the statute's sanction deters protected first amendment freedoms as much as the actual sanction. *Id.* *See, e. g.*, Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970).

22. 371 U. S. at 437.

23. *Id.* at 438-42.

24. *Id.* at 438-40.

25. *Id.* at 441-43.

26. *Id.* at 444.

27. *Id.* at 428-29. The dissent argued that the evidence in the record did show that the evils sought to be prevented by the state were present. *Id.* at 452 (Harlan, Clark, Stewart, J., dissenting).

28. United Transp. Union v. State Bar of Mich., 401 U. S. 576 (1971); United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U. S. 217 (1967); Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U. S. 1 (1964).

29. 377 U. S. 1 (1964).

the majority stated that the rights of free speech, petition and assembly guaranteed by the first amendment gave railroad workers the right to consult with each other and select a spokesman who could be counted on to provide counseling.[30] In *United Mine Workers of America, District 12 v. Illinois State Bar Association,*[31] the Court said that the rights of free speech, petition and assembly gave the United Mine Workers Union the right to maintain an attorney on a salaried basis to assist the members of the Union in asserting their legal rights.[32] The Court found no legal significance in the fact that the United Mine Workers Union attorney was actually a salaried employee of the Union, while under the plan approved in the prior case against the Brotherhood of Railroad Trainmen, the attorney was a beneficiary of the Union's referral recommendations.[33] In *United Transportation Union v. State Bar of Michigan,*[34] the Court concluded that the common thread which ran through the prior decisions was that collective activity to obtain access to the courts was within the scope of protection of the first amendment.[35]

In *Primus,* the presence or absence of this common thread was the first question the United States Supreme Court was required to address in determining whether petitioner's conduct was protected by the first amendment.[36] The Supreme Court rejected the conclusion of the lower court and stated that the record did not support any distinction between the ACLU and the NAACP.[37]

30. *Id.* at 5-6. Under the Brotherhood plan, the United States was divided into sixteen regions and the Brotherhood selected a lawyer in each region with a reputation for honesty and skill in representing members in railroad personal injury suits. Whenever a member was injured or killed, the secretary of the local lodge would reccommend that the lawyer from that region be consulted. *Id.* at 4. The dissent distinguished this case from *Button* on the ground that *Button* involved "political expression" whereas this case involved a procedure for settlement of damage claims. *Id.* at 10 (Clark, Harlan, J., dissenting).

31. 389 U. S. 217 (1967). Under the United Mine Workers' plan, the Union retained one attorney on a salaried basis. Injured Union members were advised to fill out a form entitled "Report to Attorney on Accidents" and to turn the form into the Union's legal department. When the attorney receives a report, he presumes the worker wants to file an application for a claim adjustment. The claim is prepared by the attorney, usually without discussing the claim with the worker, and is presented to opposing counsel for negotiations and an attempt to reach a settlement. If no settlement is reached, the Industrial Commission schedules a hearing. This is usually the first time the attorney and client come into personal contact with each other. *Id.* at 219-21.

32. *Id.* at 221-22.

33. *Id.* The dissent argued that the Union's plan would unfortunately permit mass processing of client's claims and is not conducive to a good attorney-client relationship. *Id.* at 231-32 (Harlan, J., dissenting).

34. 401 U. S. 576 (1971). The Union advised members having claims under the Federal Employees Liability Act to consult designated attorneys. Prior to March, 1959, the Union had informed injured members that the designated attorneys would not charge in excess of 25% of any recovery. Union representatives were reimbursed for transporting the prospective clients to the legal counsel offices. *Id.* at 578.

35. *Id.* at 585.

36. ____ U. S. at ____, 98 S. Ct. at 1902 (1978).

37. *Id.* at ____, 98 S. Ct. at 1902-05. The South Carolina Supreme Court stated that the primary purpose of the ACLU was to render legal services, a fact which in its view differentiated that organization from the NAACP in that the legal services offered by the latter were only secondary to,

Both the ACLU and the NAACP use litigation as a form of political expression and association to advance their purposes.[38] The Court did not consider that the ACLU request for counsel fees took the case outside of *Button*, because the NAACP often makes similar requests.[39] The Court concluded that Primus did fit within the level of protection of *Button* requiring South Carolina to present a compelling state interest in the regulation of this type of solicitation and a means of regulation drawn with narrow specificity.[40]

The disciplinary rules at issue covered some concededly constitutionally protected activity.[41] Notwithstanding the broad sanctions imposed by South Carolina, the Court would have allowed petitioner to be disciplined if the evidence of her activities had involved the kind of conduct which South Carolina was trying to prevent.[42] The Court did not find any of the substantive evils present on the record.[43] In addition, a state may regulate in a broad prophylatic manner, speech that simply proposes a commercial transaction;[44] however, in the area of political

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or a vehicle for the furtherance of, its political aims. In re Smith, 268 S. C. 259, ____, 233 S. E. 2d 301, 305-06 (1977).

38. ____ U. S. at ____, 98 S. Ct. at 1902-03.

39. *Id.* at ____, 98 S. Ct. at 1903.

40. *Id.* at ____, 98 S. Ct. at 1905.

41. *Id.* Even though the state conceded that the conduct of Ms. Primus in the informal meeting, *see supra* note 2, was constitutionally protected, it is not clear that such a meeting is protected by the literal terms of the rule. "Moreover, the disciplinary rules in question permit punishment for mere solicitation unaccompanied by proof of any of the substantive evils that appellee maintains were present in this case." ____ U. S. at ____, 98 S. Ct. at 1905.

In Ohralik v. Ohio State Bar Ass'n, ____ U. S. ____, 98 S. Ct. 1912 (1978), a companion case to *Primus*, the Court concluded that the state bar could constitutionally discipline a lawyer for in-person solicitation for pecuniary gain. In *Ohralik*, the state regulated in a broad prophylactic manner, and applied its broad regulations in a disciplinary proceeding against the attorney without proof that any of the substantive evils were present in the case, because commercial speech and not the first amendment freedoms of association and expression was the constitutionally protected event under consideration. *Id.* at ____, 98 S. Ct. at 1920.

42. *Id.* at ____, 98 S. Ct. at 1906. The state claimed that the regulatory program was aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference and other evils generally attributed to lawyer solicitation of prospective clients. *Id.* at ____, 98 S. Ct. at 1905.

43. *Id.* at ____, 98 S. Ct. at 1906. The Court examined the evidence and found that solicitation by letter, as contrasted with in-person solicitation, did not involve an invasion of privacy or an opportunity for overreaching. The letter provided additional information for the prospective client to make an informed decision. The record was void of any likelihood of conflict of interest or lay interference with the attorney-client relationship. As in *Button* there was no showing that the litigant was solicited for a malicious purpose, or for a private gain seeking no public interest. Consequently the common law offenses of barratry, maintenance and champerty would not be present. *Id.* at ____, 98 S. Ct. at 1906-07. *See supra* note 24 and text referenced thereto.

44. *Id.* at ____, 98 S. Ct. at 1906. When solicitation involves a commercial transaction the test used is prophylactic regulation in furtherance of the state's interest in protecting the public. When political expression or association is at issue a member of the Bar may not be disciplined unless the evidence shows the conduct was of the type against which the broad prohibition was directed. *Id. See* Ohralik v. Ohio State Bar Ass'n, ____ U. S. ____, 98 S. Ct. 1912 (1978); Bates v. State Bar of Arizona, 433 U. S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748 (1976). *See Also* Friedman v. Rogers, ____ U. S. ____, 99 S. Ct. 887 (1979).

expression and association the state must regulate with significantly greater precision.[45]

The dissent in *Primus*[46] disagreed with the differing levels of scrutiny used in *Primus* and the companion case, *Ohralik*. In the dissent's view, the state would not have to show that the harmful consequences were actually present; instead, the state would have permitted to review the objective conduct of an attorney, and discipline would be constitutional whenever the state's belief that such conduct could result in the substantive evils the state permissibly sought to prevent was a reasonable one.[47]

The North Dakota disciplinary rule corresponding to the rule construed in *Primus* has not been interpreted in any North Dakota court decisions.[48] However, following the guidelines set forth by *Primus* and *Ohralik*, the pivotal point in any North Dakota case will be whether, in the individual case, the solicitation can be termed "association" through a non-profit organization or "commercial speech" for private gain.[49]

Due to the differing levels of scrutiny, there will be a dispute as

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45. ___ U. S. at ___, 98 S. Ct. at 1908. "Accordingly, nothing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of non profit organizations, or their members, having characteristics like those of the NAACP or the ACLU." *Id.* at ___, 98 S. Ct. at 1908-09.

46. ___ U. S. at ___, 98 S. Ct. at 1909 (Rehnquist, J., dissenting). The majority stated that the motive of the attorney would be relevant. Consequently, the court would inquire whether the attorney was trying to advance an idea through association and expression or seeking a pecuniary gain. The dissent argued that the more objective standard of the attorney's conduct should be used, because the attorney's motive is too speculative. *Id.* at ___, 98 S. Ct. at 1910-12 (Rehnquist, J., dissenting).

47. *Id.* at ___, 98 S. Ct. at 1911-12 (Rehnquist, J., dissenting).

48. N. D. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (D) (4) provides as follows:

> A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101 (B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating 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 judgement in behalf of his client:
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> . . . . .
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> (4) Any bona fide organization that reccommends, furnishes or pays for legal services to its members or beneficiaries provided that the following conditions are satisfied:
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> (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 organized 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.
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> (b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyers 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.

49. ___ U. S. at ___, 98 S. Ct. at 1910. A determination of the category into which the solicitation fits will trigger a different level of scrutiny. *Id.*

to whether the solicitation is commercial speech or political association. The effect of the *Primus* decision may lead the classic "ambulance chaser" to try to conform his conduct to some associational goal that would require the potential disciplinary proceeding against him based on that solicitation to be judged under the more rigorous standards of scrutiny applied by the Supreme Court to South Carolina's discipline of Edna Smith Primus.[50]

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50. *Id.* at ____, 98 S. Ct. at 1910 (Rehnquist, J., dissenting). Justice Rehnquist elaborated upon this in his dissent, where he stated, "[T]he next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantel of 'political association' to assure that insurance companies do not take unfair advantage of policy holders." *Id.*