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Attorney and Client - Regulation of Professional Conduct - Behavior of Attorney Who Solicits Client for Pecuniary Gain Is Not Sanctioned by the First Amendment When Adverse Consequences Are Likely

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ATTORNEY AND CLIENT—REGULATION OF PROFESSIONAL CONDUCT—BEHAVIOR OF ATTORNEY WHO SOLICITS CLIENT FOR PECUNIARY GAIN IS NOT SANCTIONED BY THE FIRST AMENDMENT WHEN ADVERSE CONSEQUENCES ARE LIKELY

Appellant, an attorney, was disciplined by the Ohio Supreme Court for recommending his own legal services to two young women eleven days after they were injured in an automobile accident.[1] Appellant solicited one of the women while she was in the hospital, and the other the day she was released from the hospital.[2] Appellant and one of the women were at most casual acquaintances.[3] Appellant initiated the meetings with both women, and both retained him.[4] Later both women discharged appellant as their attorney.[5] Appellant insisted he had a binding agreement and brought suit against one of the women for services rendered.[6] Both women filed grievances with the Ohio State Bar Association which charged appellant with violating the anti-solicitation ban under the

1. Ohralik v. Ohio State Bar Ass'n., ____U.S.____, ____ 98 S. Ct. 1912, 1924 (1978).

2. *Id.* at ____, ____, 98 S. Ct. at 1915-16. Appellant visited one of the women in the hospital where he found her lying in traction. After a brief conversation, appellant told her he would represent her and asked that she sign a contingent fee agreement. The woman refused to sign until she talked to her parents. Appellant then sought out the other accident victim. *Id.* at ____, 98 S. Ct. at 1915. Upon learning that she had been discharged from the hospital earlier in the day, appellant then visited the accident scene, took photographs, picked up a tape recorder, which he concealed under his raincoat, and proceeded to the home of the accident victim's parents. *Id.* at ____, 98 S. Ct. at 1915-16. Once there, he examined their automobile insurance policy and explained that the driver of the other vehicle was an uninsured motorist, but that their policy would provide up to $12,500 for each girl under an uninsured motorist clause. *Id.* at ____, 98 S. Ct. at 1916. The accident victim then phoned her parents and told the appellant to "go ahead" with her representation. *Id.*

3. *Id.* at ____, 98 S. Ct. at 1915.

4. *Id.* at ____, 98 S. Ct. at 1915. Eventually one of the women did sign the contingent fee agreement; the other acquiesced with an "O.K." *Id.* at ____, 98 S. Ct. at 1916.

These two young women were driver and passenger in a car involved in an accident. *Id.* at ____, 98 S. Ct. at 1915. None of the charges against Ohralik by the Ohio disciplinary authorities, however, arose out of the possibly conflicting representation of the two women. Ohio State Bar Ass'n. v. Ohralik, 48 Ohio St.2d 217, 357 N.E.2d 1097 (1976). *See, e.g.*, Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 135 A.2d 252 (1957) *cert. denied,* 355 U.S. 966 (1958) (conflicts of interest between driver and passengers were such that the same attorney could not fairly represent both parties' interests—decided under old Canon 6, which did not go as far in prohibiting representation of conflicting interests as does its descendent, Canon 5 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY as specified particularly at EC5-15 in the Ethical Considerations and Disciplinary Rules promulgated in aid of the canon). *See generally* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC5-14, EC5-15, DR5-105 (A), (B).

5. *Id.* at ____, 98 S. Ct. 1916. The mother of one of the accident victims attempted to repudiate her daughter's oral agreement, but appellant insisted that the daughter had entered into a binding contract. *Id.*

6. *Id.* at ____, 98 S. Ct. 1916-17.

Code of Professional Responsibility.[7] Although the bar association's grievance committee recommended a public reprimand, the Ohio Supreme Court increased the discipline to indefinite suspension.[8] The United States Supreme Court *held* that the Bar may discipline a lawyer for in-person solicitation for financial gain, when the circumstances of the solicitation are likely to produce adverse consequences.[9] *Ohralik v. Ohio State Bar Association,* ____ U.S. ____, 98 S. Ct. 1912 (1978).

Proscriptions against attorney solicitation, advertising and self-laudation first surfaced in the United States in 1908[10] when the American Bar Association (ABA) adopted Canon 27.[11] Both direct and indirect advertising, such as newspaper comments and publicity photos, were thought to "lower the tone" of the legal profession and were "reprehensible."[12] Since 1908 all states that have codified the lawyer disciplinary rules have also adopted the attitude and essence of the ABA's restrictions on lawyer advertising.[13]

The anti-advertising, anti-solicitation, anti-publicity provisions of 1908, however, have been subject to attack by those who wish to replace the negativism with a more positive goal of

7. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), DR 2-104(A). DR 2-103(A) provides as follows: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." 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: . . . [exceptions not applicable here]" These DRs also appear in the ABA CODE OF PROFESSIONAL RESPONSIBILITY.

8. Ohio State Bar Ass'n. v. Ohralik, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976). Appellant's defense was that his conduct was entitled to first and fourteenth amendment protections. The disciplinary board found, however, that appellant had violated the anti-solicitation ban and rejected the appellant's claim to first and fourteenth amendment protections. The Supreme Court noted probable jurisdiction to consider the scope of first amendment protection afforded to this form of commercial speech as well as to consider the state's authority to regulate and discipline licensed bar members. 433 U.S. 350 (1977).

9. ____ U.S. at ____, 98 S. Ct. at 1915.

10. Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available,* 81 YALE L.J. 1181, 1182 (1972). Prior to 1908 no general prohibition of lawyer advertising or solicitation existed in the United States. *Id.* at 1182.

11. Shadur, *Publicity, Advertising, and Solicitation,* in PROFESSIONAL RESPONSIBILITY—A GUIDE FOR ATTORNEYS 45 (D. Ream. ed. 1978). Cannon 27 declared it to be "unprofessional to solicit professional employment by circulars, advertisements, through touters or by professional communications or interviews not warranted by personal relations." The original 32 Cannons of Professional Ethics were adopted by the ABA in 1908. The new Code of Professional Responsibility was adopted in 1969 and contains nine Canons which are followed by Ethical Considerations and Disciplinary Rules. ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Preface* at i (1977).

12. Shadur, *supra,* note 11.

13. *Id* Justifications for banning lawyer publicity and solicitation have, in general, focused on the following harms: first, that advertising will stir up ideal litigation and fraudulent claims; second, that potential clients will be harmed by over-reaching attorneys through overcharging or underrepresenting; and, third, that advertising and solicitation detracts from the dignity of the legal profession. *Id.* at 46-47. A fourth justification for banning lawyer solicitation, corruption of public officials, is based on the presumption that the soliciting lawyer will pay doctors or hospital personnel and policemen for information concerning prospective clients. Note, *A Critical Analysis of Rules Against Solicitation by Lawyers,* 25 U. CHI. L. REV. 674, 680 (1958). *See also Note supra* note 10.

maximizing the availability of legal counsel to the public.[14] This specific trend is apparent in related situations concerning advertising of professional services.[15] Recent commercial speech decisions demonstrate a broadening of first amendment protection of speech formerly considered excluded from protection.[16] Most recently *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*[17] stated that truthful commercial speech is afforded limited protection.[18] The Supreme Court noted that the free flow of information is vital to the free enterprise system.[19] While recognizing that commercial advertisements may be of interest and importance to the public,[20] however, the Court hedged the protection to be afforded commercial speech with several qualifications.[21]

Virginia Pharmacy Board left open the question of whether a lawyer may advertise.[22] Consequently in *Bates v. State Bar of Arizona,*[23] the Supreme Court was called upon to determine the constitutional validity of an Arizona Supreme Court rule which prohibited lawyers from advertising the availability and price of legal services. The Court concluded that the justifications[24] ad-

14. Shadur, *supra* note 11, at 48. The Ethical Considerations and Disciplinary Rules concerned with advertising, solicitation and publicity were placed under Canon 2 which states as follows: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1977). *See* Ohralik v. Ohio State Bar Ass'n. ___ U.S. ___, ___ 98 S. Ct. 1925, 1926 (1978) (Marshall, J., separate opinion, concurring in part and concurring in the judgments). *See also* Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services,* 48 N.Y.U.L. REV. 595 (1973).

15. *See* Virginia State Bd. V. Virginia Citizens Consumer Council, 425 U. S. 748 (1976); Bigelow v. Virginia, 421 U. S. 809 (1975).

16. Virginia State Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). "[T]he free flow of commercial information is indispensible." *Id.* at 765. The Supreme Court agreed that the channels of communication should be opened rather than closed. Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). *See also* Bigelow v. Virginia, 421 U.S. 809 (1975) (first amendment protections extended to newspaper advertisement of abortion services).

17. 425 U.S. 748 (1976).

18. *Id.* at 748. "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this one is in the negative." *Id.* at 773. The Court further noted that commercial speech, like other forms of speech, may be subject to regulation based on time, place and manner restrictions. Nor has untruthful speech been granted protection. "The [f]irst [a]mendment . . . does not prohibit the State from insuring that the stream of commercial information flow clearly as well as freely." *Id.* at 770-72.

19. *Id.* at 765.

20. *Id.* at 764-65. The Court noted that a "commercial" advertisment may be of general interest to the public. Intelligent decisions on the aggregate are informed decisions. As such the free flow of information is imperative. *Id.*

21. See supra note 18.

22. 425 U.S. at 773. Physicians and lawyers "do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.* (emphasis original).

23. 433 U.S. 350 (1977). The controversy was generated by a legal clinic's newspaper block advertisement listing prices for routine legal matters. *Id.* at 354. The advertisement, placed by the appellants, stated that they offered legal services at very reasonable prices and listed their fees for uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name. *Id.* at 385.

24. *Id.* at 368-79. The justifications included the following: the adverse effect on professionalism, the inherently misleading nature of attorney advertising, the adverse effect on the

vanced for a complete ban on lawyer advertising by the state were insufficient to deny first amendment protection to truthful commercial advertising in newspapers.[25]

While solicitation pertains to a lawyer's face-to-face contact with a layman for the purpose of gaining a client, advertising refers to a lawyer's arms-length attempts to communicate to the general public information about his practice.[26] The Supreme Court acknowledged that in-person solicitation may prove problematic in differentiating between deceptive and non-deceptive advertising.[27] It stated that solicitation might pose such dangers as overreaching and misrepresentation.[28] *Bates* maintained that the first amendment allows the legal profession to advertise; leaving open the question of attorney solicitation.[29] Therefore, the power that the states have to place a broad proscription against attorney in-person solicitation for precuniary gain remained intact.[30]

In *Ohralik* the Supreme Court acknowledged that lawyer in-person solicitation for pecuniary gain is inconsistent with the profession's ideal of the attorney client relationship.[31] Solicitation motivated by monetary gain poses significant harms of overreaching, and undue influence to the prospective client.[32] Solicitation may cause the potential client to make an immediate response,[33] whereas advertising allows the recipient to reflect on the message and make a reasoned response.[34] Further, there is little or no opportunity to oversee or regulate the in-person solicitation,

administration of justice, the undesirable economic effects of advertising, the adverse effect of advertising on the quality of service, and the difficulties of enforcement. *Id.*

25. *Id.* at 383. *See also* Friedman v. Rogers, ___ U.S. ___, 98 S. Ct. 887 (1979).

26. Note, *supra* note 10, 81 YALE L. J. at 1181 n.4.

27. 433 U.S. at 366. The Court explicitly stated it was not resolving the problems associated with attorney in-person solicitation of clients. *Id.*

28. *Id.* at 366. The Court also suggested that attorney solicitation of a client in a hospital room or accident site breeds undue influence. *Id.*

29. *Id.* at 350.

30. *See* In re Ades, 6 F. Supp. 467 (D. Md. 1934); Remington v. State Bar of Cal., 218 Cal. 446, 23 P.2d 510 (1933); In re Cohn, 10 Ill. 2d 186, 139 N.E.2d 301 (1957); People v. Berezhiak, 292 Ill. 305, 125 N.E. 36 (1923).

Personal solicitation sometimes called ambulance chasing has an interesting history. Ambulance chasing in the United States had its beginnings back in 1907 when an enterprising lad of 18, Abraham Gatner, persuaded a law firm to hire him to secure potential clients. Although no ambulances were actually chased, names of accident victims were acquired through devious means; Gatner took to hanging around police headquarters paying reporters for accident tips and eventually promised hundreds of policemen a three dollar tip for every accident lead. As Gatner's ambitions grew so did the competition; yet "Gatner remained one step ahead." At the newly formed New York Police Academy, he told policemen in training of their opportunities "to flesh out their pay" by keeping Gatner's phone number with them at all times. His business prospered until 1928 when he was found guilty of defrauding a lawyer associate and sentenced to a brief jail term. ("No doubt the fact that he had been a willing witness for the investigation mitigated his sentence considerably."!) M. BLOOM, THE TROUBLE WITH LAWYERS 126-30 (1968).

31. ___ U.S. at ___, 98 S. Ct. at 1917.

32. *Id.* at ___, 98 S. Ct. at 1920-22.

33. *Id.*

34. *Id.*

whereas media advertising more easily provides for reflective activity by the client as well as regulated action by the state.[35]

The *Ohralik* Court further noted that commercial speech is afforded limited first amendment protection.[36] There exists a common sense distinction between speech involving a commercial transaction, which is traditionally subject to government regulation,[37] and other forms of speech.[38] Although solicitation involves speech, the state is not powerless to regulate a potentially harmful commercial activity whenever speech is a component of that activity.[39] Commercial speech, then, is not considered to be beyond the state's regulatory powers.[40] Since financial gain was an element of the solicitation in *Ohralik,* the level of judicial scrutiny used by the Court was less demanding than if the speech were without the commercial element.[41]

The speech activity did not actually have to impinge upon a right of the client in order to be subject to state regulation.[42] The Court concluded that the state may take preventive measures in order to regulate solicitation for monetary gain.[43] The *Ohralik* Court pointed out that there need not be any subsequent finding of fraud, deception, coercion or duress before the speech activity is subject to state regulation.[44] In addition, a subsequent actual finding of harm to the client need not be demonstrated.[45]

North Dakota lawyers are presently subject to this same attorney solicitation proscription for monetary gain.[46] Although there have been no cases concerning attorney in-person solicitation for financial gain in North Dakota it follows, from North Dakota's adoption of the Code of Professional Responsibility,[47] and in light of *Ohralik* that North Dakota's prohibition of in-person attorney solicitation for precuniary gain does not violate the first amend-

35. *Id.* at ____, 98 S. Ct. at 1924.

36. *Id.* at ____, 98 S. Ct. at 1918. The Court reiterated the *Bates* holding that truthful advertising by lawyers is protected against blanket prohibition. *Id.* at 1915.

37. Hinchey, *The First Amendment and the Delivery of Legal Services,* 63 A.B.A.J. 945 (1977). Only the exchange of ideas was thought to fall within the protection of the first amendment. *Id.*

38. ____ U.S. at____, 98 S. Ct. at 1918.

39. *Id.* at ____, 98 S. Ct. at 1919.

40. *Id.* Nor was commercial speech beyond the state's regulatory powers in *Virginia State Bd.* or *Bates. Id.*

41. *Id.*

42. *Id.* at ____, 98 S. Ct. at 1923. "The rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs." *Id.*

43. *Id.*

44. *Id.* "The rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse conequences the State seeks to avert." *Id.*

45. *Id.*

46. N.D. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) and DR 2-104(A) are identical to the OHIO CODE OF PROFESSIONAL RESPONSIBILITY. *See supra* note 7.

47. Matter of Howe, 257 N.W.2d 420, 422 (N.D. 1977). Canon 2 is presently being revised.

ment rights of lawyers practicing in this state.[48] It is equally clear, however, that North Dakota's blanket proscription against attorney solicitation in all of its diverse forms may not withstand first amendment challenge.[49]

The broadly stated, flatly proscriptive anti-advertising and anti-solicitation provisions of an earlier era have been relegated to the dated textbooks. At the present time, however, the ban prohibiting in-person attorney solicitation for pecuniary gain remains intact.

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Telephone interview with Joel Gilbertson, Executive Director, State Bar Ass'n. of North Dakota (Jan. 26, 1979).

48. *See Supra* note 46. The Supreme Court of North Dakota has not taken any official position on attorney advertising or solicitation. Whether North Dakota attorneys should be permitted to advertise on radio or television has been subject to considerable debate as well. The State Bar recommended that media advertising be allowed. *See The Gavel* at 1 (N.D. State Bar Ass'n. June 1978); *The Gavel* at 1 (N.D. State Bar Ass'n. Dec. 1977); *The Gavel* at 1 (N.D. State Bar Ass'n. Oct. 1977); *The Gavel* at 1 (N.D. State Bar Ass'n. Sept. 1977). The North Dakota Supreme Court, however, has not acted on the proposal. Telephone interview with Marshall Bergerud, Chairman of the North Dakota Ethics Committee, State Bar Ass'n. of North Dakota (Jan. 30, 1979).

49. In re Primus, ____U.S.____, 98 S. Ct. 1893 (1978). The Court concluded that in areas of ____, 98S. Ct. at 1908. *See also* NAACP v. Button, 371 U.S. 415 (1963). Is should be noted, however, that pursuant to the action of the membership of the State Bar Association, taken at its July, 1978 annual meeting, the Ethics Committee has revised the pertinent provisions of the Code of Professional Responsibility for presentation to the Board of Governors as of this writing.