

# Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation\*

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A woman arrives at a metropolitan courthouse holding a small boy by the hand. She speaks almost no English at all. She is intimidated by the imposing surroundings, and she is frightened and confused. All that she knows is that she is required to be some place in that building because her son has been arrested or her landlord is attempting to evict her family. People brush by her, concerned with their own problems. Then a man appears, smiles at her, and asks her in her own language whether he can help her. Through him, she meets and retains the man's employer, a lawyer who guides her to the proper place and who represents her interests.<sup>1</sup>

Rather than receiving a citation as "Attorney of the Year," this attorney was "convicted of the misdemeanor of soliciting business on behalf of an attorney, subjected to disciplinary proceedings, and censured by the court."<sup>2</sup> This parable demonstrates not only the compelling need for legal assistance when navigating the complex, and often unfamiliar, legal process, but also one reason why this assistance is practically unavailable for many people. Initiating contact with potential clients is a significant barrier to providing legal services for low-income populations who are often under-informed about their legal rights, and may not be aware that legal services are available to them or even that they have legitimate legal claims.<sup>3</sup> In light of these concerns, this Note argues that in-person solici-

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\* David Boschetto co-authored an earlier version of this Note. We are greatly indebted to him for his contributions.

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<sup>1</sup> MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 118 (1975).

<sup>2</sup> *Id.*

<sup>3</sup> See Mark Hansen, *A Shunned Justice System*, A.B.A. J., April 1994, at 18 (noting that only half of low-income families eligible for free legal assistance were aware of eligibility).

tation by Legal Services Corporation ("LSC") programs, as well as by fee-seeking attorneys who represent primarily low-income clients, should be permissible.

Even though the LSC was established with a broad mandate to assist low-income populations, its activities are limited by statutory and funding restrictions.<sup>4</sup> These restrictions have undermined the ability of low-income individuals to seek justice.<sup>5</sup> In 1996, for example, Congress substantially restricted LSC-funded programs from, *inter alia*, engaging in several activities.<sup>6</sup> In addition, Congress cut the LSC's funding by one-third, a reduction of \$278 million<sup>7</sup> that was not substantially recouped from non-federal funding sources.<sup>8</sup> The barriers to justice are also felt by moderate-income individuals, who do not qualify for free legal services. These individuals are caught between the fear of paying high fees for "unresponsive representation"<sup>9</sup> and the fear of representation compromised by the resource constraints of those attorneys they can afford to hire.<sup>10</sup>

While in-person solicitation can increase access to legal services for low-income people, this practice is generally proscribed by the legal profession's disciplinary rules.<sup>11</sup> To test this proposition, either states must amend the profession's governing rules for public policy reasons, or the Supreme Court must amend them on constitutional grounds. In Part I, this Note reviews traditional First Amendment jurisprudence governing attorney advertising and client solicitation and argues that under recent

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<sup>4</sup> See generally Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 107-08 (1998).

<sup>5</sup> As Michael Cardozo, president of the New York City Bar Association, has noted: "In New York City [the reduction in LSC funding] means that at a time of increased need for legal services for the poor, immigrants, and . . . abused women and children, fewer than 200 legal services lawyers are available in the entire City to provide needed legal assistance." *City Bar Association Responds to Crisis in Civil Legal Assistance*, METROPOLITAN CORP. COUNS., Dec. 1996, at 20. Nationally, "of up to 50 million eligible clients for funded legal assistance, only some 1.5 million received services during 1993 at the 328 legal services programs." James Podgers, *Chasing the Ideal*, A.B.A. J., Aug. 1994, at 56, 57 (quoting Alexander D. Forger, President of the LSC).

<sup>6</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 501-504, 110 Stat. 1321, 1350-56 (1996) (including political action, abortion litigation, prison or illegal alien assistance, or class action litigation).

<sup>7</sup> See David E. Rovella, *Will Court Win Spur GOP Backlash?*, NAT'L L.J., Jan. 13, 1997, at A1.

<sup>8</sup> See John McKay, *That Elusive Butterfly*, LEGAL TIMES, July 13, 1998, at 20.

<sup>9</sup> Podgers, *supra* note 5, at 58.

<sup>10</sup> In 1992, while approximately 50% of moderate-income families had new or ongoing legal needs, only 39% of those families sought legal or judicial assistance. See *id.*; see also Hansen, *supra* note 3, at 18-19.

<sup>11</sup> For example, "[a] lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) (amended 1991). State regulations that actually govern attorney conduct generally mirror or are substantially similar to Model Rule 7.3. See, e.g., ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1998).

precedent, in-person solicitation by non-profit and profit-seeking attorneys is protected First Amendment activity. Part II contends that restrictions on in-person solicitation do not significantly advance public policy goals, and, even if they could advance these goals, that there are less speech-restrictive methods of doing so. Part III explains that a congressional attempt to condition LSC funding on abstention from in-person solicitation would be unconstitutional.

## I. The First Amendment and Client Solicitation

### A. Introduction: *The Perceived Need for Regulation of Attorney Solicitation*

Many states have responded to troubling images of "ambulance chasers" by placing limits on attorney solicitation of clients, despite recognition of the need for legal representation.<sup>12</sup> The facts of *Ohralik v. Ohio State Bar Ass'n*<sup>13</sup> exemplify the concerns behind these limitations. After learning of a traumatic automobile accident, attorney Ohralik approached the eighteen-year-old women who had been seriously injured, Carol McClintock and Wanda Lou Holbert, to discuss filing suit.<sup>14</sup> While McClintock was still in traction and Holbert still in pain, Ohralik "foisted" his services upon them, despite their obvious resistance.<sup>15</sup> When Holbert protested that she "really did not understand what was going on,"<sup>16</sup> Ohralik pressured her to consent to representation.

Although prohibitions on solicitation originally emerged in this country as rules of etiquette, fear of behavior like Ohralik's has motivated many states to use codes of professional ethics to limit lawyers' ability to solicit clients.<sup>17</sup> Despite the arguably compelling interests advanced by these restrictions, lawyers and potential clients also have compelling interests that are infringed upon by these restrictions, namely, their First Amendment free-speech rights and their interest in obtaining justice. In 1978, the Supreme Court decided that the states' traditional decision to strike the balance between these competing interests in favor of limiting attorney solicitation was constitutional.<sup>18</sup>

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<sup>12</sup> States regulate attorney conduct through disciplinary codes, which are typically formulated by the state's bar association or highest court. *See supra* note 11.

<sup>13</sup> 436 U.S. 447 (1978).

<sup>14</sup> *See id.* at 450.

<sup>15</sup> *See id.* at 469 (Marshall, J., concurring).

<sup>16</sup> *Id.* at 451.

<sup>17</sup> *See id.* at 460. "The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation [sic], and misrepresentation." *Id.* at 461.

<sup>18</sup> *See Ohralik*, 436 U.S. at 466-67.

## B. *The First Amendment and Commercial Speech*

### 1. *Commercial Speech in General*

At the outset, it is necessary to distinguish between attorney communication to clients that merits First Amendment protection and that which does not. If a lawyer's solicitation of a client does "no more than propose a commercial transaction,"<sup>19</sup> it falls under the "commercial speech" rubric and receives limited First Amendment protection under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>20</sup> In *Virginia Pharmacy*, the Court held that statutory bans on pharmacist advertising could not be justified by the state's interest in maintaining the "professionalism" of its pharmacies.<sup>21</sup> Writing for the Court, Justice Blackmun explained that the state's argument was undermined by the "high professional standards . . . guaranteed by the close regulation"<sup>22</sup> of pharmacists. The majority revealed that its concern encompassed not only pharmacists' right to speak, but also consumers' right to acquire information: "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."<sup>23</sup> The Court also noted the disparate impact that the restriction would have on the poor, the infirm, and the elderly—those populations that spend disproportionate percentages of their income on prescription drugs, but are "the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent."<sup>24</sup>

The Court rejected the state's argument that the advertising ban would protect quality, holding that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban . . . affects [professional standards] only through the reactions it is assumed people will have to the free flow of drug price information."<sup>25</sup> In deciding that the First Amendment prohibited such paternalistic protection, the Court held that Virginia could sat-

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<sup>19</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

<sup>20</sup> 425 U.S. 748, 762–70 (1976) (abandoning the rule established in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), that purely commercial advertising was entitled to no First Amendment protection and could be regulated in the same manner as any other business activity).

<sup>21</sup> See *Virginia Pharmacy*, 425 U.S. at 770. A pharmacist licensed in Virginia was "guilty of unprofessional conduct if he 'publishe[d], advertise[d] or promote[d], directly or indirectly . . . any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.'" *Id.* at 749–50 (quoting the VA. CODE ANN. § 54-524.35 (Michie 1974)).

<sup>22</sup> *Id.* at 768.

<sup>23</sup> *Id.* at 763.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 769.

isfy its interest in maintaining pharmacists' professionalism by imposing disciplinary measures on pharmacists who endanger their customers.<sup>26</sup>

The First Amendment protection extended to advertising in *Virginia Pharmacy*, however, was not limitless. The Court clearly stated that advertising could be regulated in several constitutionally permissible ways.<sup>27</sup> Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court clarified the extent of this permissible restriction, declaring commercial speech subject to an intermediate level of First Amendment protection.<sup>28</sup> Under the *Central Hudson* test, non-misleading commercial communication can only be regulated if the government has a substantial interest that is directly advanced by the regulation in question, and if the regulation is not "more extensive than is necessary to serve that interest."<sup>29</sup>

## 2. Attorney Advertising and Client Solicitation as Commercial Speech

In *Bates v. State Bar*,<sup>30</sup> the Supreme Court held that truthful, non-misleading advertising by lawyers constitutes commercial speech, subject to general protection by the First Amendment.<sup>31</sup> In *Bates*, the Arizona state bar had suspended former legal aid attorneys for violating its prohibition of attorney advertising in newspapers and other media.<sup>32</sup> The state bar argued that advertising had an adverse effect on professionalism, the administration of justice, and the economy; was inherently misleading; and presented enforcement difficulties.<sup>33</sup> The Court rejected these justifications, holding that truthful attorney advertising "may not be subjected to blanket suppression."<sup>34</sup>

The Court's reasoning in *Bates* may be instructive when considering in-person solicitation. Responding first to the bar's argument that price advertising adversely affected professionalism, the Court noted that the "postulated connection between advertising and the erosion of true pro-

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<sup>26</sup> See *id.* at 768-69.

<sup>27</sup> See *id.* at 771. The Court's opinion did not foreclose regulation of: (1) time, place, and manner; (2) false or misleading speech; (3) proposed illegal transactions; or (4) electronic broadcast advertisements. See *id.* at 771-73. The Court also suggested that regulation of advertising by professions providing varied services, such as physicians and lawyers, could require the consideration of different factors. See *id.* at 773 n.25.

<sup>28</sup> 447 U.S. 557, 562-66 (1980).

<sup>29</sup> *Id.* at 566.

<sup>30</sup> 433 U.S. 350 (1977).

<sup>31</sup> See *id.* at 383-84.

<sup>32</sup> See *id.* at 353-56. The suspended attorneys had placed a newspaper ad stating that their private clinic offered "legal services at very reasonable fees," and listing their fees for routine uncontested claims. *Id.* at 354-55.

<sup>33</sup> See *id.* at 368-79.

<sup>34</sup> *Id.* at 383.

fessionalism [is] severely strained."<sup>35</sup> The Court observed that clients, even those of modest means, expect their attorneys to charge fees, and that *failure* to advertise might engender public distrust of attorneys.<sup>36</sup> In support of its protection of advertising, the Court cited studies in which individuals in need of legal assistance revealed they did not retain counsel because they feared the attendant fees or were unable to "locate a competent attorney."<sup>37</sup> The Court reasoned that attorney advertising was not misleading if the promised, and appropriate, services were provided at the stated price.<sup>38</sup> The Court suggested that most attorneys would continue to "abide by their solemn oaths" even if advertising were permitted, and that the few who did not would be restrained by the bar, as in other cases of misconduct.<sup>39</sup> By distinguishing between the act of advertising and subsequent conduct, the Court can be understood to imply that the problem rested not with advertising, or even with in-person solicitation itself, but with misconduct that occurs after an attorney approaches a potential client.<sup>40</sup> Therefore, prohibiting all attorney advertising was not an acceptable remedy for broader attorney misconduct.

The state bar then argued that the inability to standardize attorney conduct and service quality precluded informed comparisons by consumers and justified prohibiting advertising. The Court, however, found this argument unpersuasive.<sup>41</sup> Even if accepted, this argument only illustrates the need for in-person solicitation, which allows potential clients to inquire specifically about the cost and quality of service available. Furthermore, the Court felt that the prohibition kept the public ignorant and underestimated the public's ability to analyze the limited information provided in the advertisements.<sup>42</sup>

The *Bates* Court concluded that advertising promoted, rather than undermined, broader social goals. First, informative advertising could enable the "not-quite-poor and the unknowledgeable" to access legal services, rather than suffering wrongs in silence.<sup>43</sup> Second, the Court argued that advertising could "reduce, not advance, the cost of legal serv-

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<sup>35</sup> *Id.* at 368.

<sup>36</sup> *See id.* at 368-71. In fact, the American Bar Association ("ABA") advises attorneys to clearly and "as soon as [is] feasible" advise clients about the fee charged, *Id.* at 369 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1976)).

<sup>37</sup> *Id.* at 370 (internal citations omitted).

<sup>38</sup> *See id.* at 372-73.

<sup>39</sup> *Id.* at 379.

<sup>40</sup> *See id.* at 375 ("[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture . . .").

<sup>41</sup> *See id.* at 373.

<sup>42</sup> *See id.* at 373-74.

<sup>43</sup> *Id.* at 377. The Court noted in dicta that a rule allowing restrained advertising would fulfill "the bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available,'" an obligation articulated in the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY's mandate. *Bates*, 433 U.S. at 377.

ices.”<sup>44</sup> Third, the Court noted that by lowering entry barriers to the legal services market, advertising could enable new providers to enter the market.<sup>45</sup> Finally, the Court reasoned, advertising would not reduce the quality of service provided, because attorneys seeking to cut corners would do so regardless of the rules on advertising.<sup>46</sup> Indeed, advertising might actually improve the quality of service. In conclusion, *Bates* suggested a number of permissible limitations on advertising not foreclosed by its holding.<sup>47</sup> Notably, the Court did not rule on the constitutionality of restrictions on in-person solicitation.<sup>48</sup>

Decisions following *Bates* have expanded First Amendment protection of attorney advertising. In *In re R.M.J.*,<sup>49</sup> the Supreme Court invalidated the discipline of an attorney whose advertisements listed specialties not included in the list prescribed by statute and who mailed announcements of his practice.<sup>50</sup> Similarly, in *Peel v. Attorney Registration*,<sup>51</sup> the Court overturned a disciplinary action against a lawyer who had advertised his National Board of Trial Advocacy certification.<sup>52</sup> Because the Court concluded that the statement was not misleading, it held the statement protected by the First Amendment.<sup>53</sup> Finally, in *Zauderer v. Office of Disciplinary Counsel*,<sup>54</sup> the Court extended First Amendment protection to advertisement of an attorney’s availability to handle particular claims.<sup>55</sup> Once again, the advertisement’s veracity was the touchstone of the Court’s analysis.<sup>56</sup>

In-person solicitation, in contrast, has received less protection. In *Ohralik*, the Court endorsed broad state discretion in restricting in-person solicitation,<sup>57</sup> finding the state’s interest in preventing the predicted harm

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<sup>44</sup> *Id.* The Court did not specifically calculate the impact of attorney advertising on client fees.

<sup>45</sup> *See id.* at 378 (theorizing that without advertising, the sole means of obtaining clients would be through word-of-mouth recommendations).

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 383–84. As with other commercial speech, the state could restrain false, deceptive, or misleading advertising, as well as advertisements that vouched for the quality of services to be provided. *See id.* at 383.

<sup>48</sup> *See id.* at 384.

<sup>49</sup> 455 U.S. 191 (1982).

<sup>50</sup> *See id.* at 205–07 (holding that attorneys could be sanctioned only if their statements were demonstrably false or misleading, and only when narrower restrictions could not advance the asserted state interests).

<sup>51</sup> 496 U.S. 91 (1990).

<sup>52</sup> *See id.*

<sup>53</sup> *See id.* at 106, 110.

<sup>54</sup> 471 U.S. 626 (1985).

<sup>55</sup> *See id.* at 655–56 (involving personal injury actions arising from usage of the Dalkon Shield intrauterine device).

<sup>56</sup> *See id.* at 639–41.

<sup>57</sup> *See Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 466–68 (1978). *See supra* text accompanying notes 14–16 for a detailed description of attorney Ohralik’s behavior.

sufficiently compelling to obviate the need for "explicit proof or findings of harm or injury."<sup>58</sup>

*Ohralik* emphasized the distinction between advertisements, which were accorded broad First Amendment protection under the *Bates* line of cases, and: "[u]nlike a public advertisement, which simply provides information . . . in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."<sup>59</sup> In addition to evidencing a desire to protect the public from the potential harms of solicitation, the Court noted the state's "special responsibility for maintaining standards among members of the licensed professions."<sup>60</sup> Although the Court rejected the argument that advertising would erode lawyer professionalism in *Bates*,<sup>61</sup> it was willing to accept that argument as applied to in-person solicitation in *Ohralik*.<sup>62</sup> Ultimately, the Court deemed the "particularly strong" state interests in protecting the public and maintaining lawyer professionalism to be sufficient to outweigh *Ohralik*'s right to free expression.<sup>63</sup> While the *Ohralik* opinion predated the "intermediate scrutiny" standard articulated in *Central Hudson*,<sup>64</sup> it has been cited with approval since *Central Hudson*.<sup>65</sup> Moreover, the *Central Hudson* approach is generally consistent with the analytical framework employed in *Ohralik* to examine solicitation restriction.

Although *Ohralik* endorsed a complete ban on in-person solicitation, subsequent cases have recognized some protected forms of client solicitation. In *Shapero v. Kentucky Bar Ass'n*,<sup>66</sup> Justice Brennan, writing for the Court, concluded that under the First and Fourteenth Amendments, states could not categorically prohibit attorneys from soliciting for-profit business by sending truthful letters to potential clients "known to need" particular legal services.<sup>67</sup> Justice Brennan asserted that the right to advertise via targeted direct mail solicitation was a natural extension of the right to advertise to the general population, which had been previously recognized in *Zauderer*.<sup>68</sup> Although acknowledging that targeted direct mail solicitation presented the opportunity for isolated abuses or error,<sup>69</sup> the Court reasoned that the state could regulate such abuse "through far

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<sup>58</sup> *Ohralik*, 436 U.S. at 468.

<sup>59</sup> *Id.* at 457 (citations omitted).

<sup>60</sup> *Id.* at 460 (citations omitted).

<sup>61</sup> See *Bates v. State Bar*, 433 U.S. 350, 368-69 (1977).

<sup>62</sup> See *Ohralik*, 436 U.S. at 460-61.

<sup>63</sup> See *id.* at 460.

<sup>64</sup> See *supra* text accompanying notes 28-29.

<sup>65</sup> See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

<sup>66</sup> 486 U.S. 466 (1988).

<sup>67</sup> See *id.* at 473-74.

<sup>68</sup> See *id.* at 473, 475-76.

<sup>69</sup> See *id.* at 476. Despite the state's claim that *Shapero*'s letter "'fairly shouts at the recipient . . . that he should employ *Shapero*,'" the Justices concluded that the letter was not overreaching. *Id.* at 478 (quoting Respondent's Brief at 19).



less restrictive and more precise means.”<sup>70</sup> Even in the absence of such precautions, the Court noted, recipients of targeted mailings had the opportunity for deliberate consideration before taking action.<sup>71</sup> Finally, the Court explained, targeted direct mail solicitation was no more invasive than the activities protected by *Zauderer*.<sup>72</sup>

In contrast to *Shapero*, in *Florida Bar v. Went For It, Inc.*,<sup>73</sup> the Supreme Court upheld Florida’s thirty-day blackout period for targeted direct mail solicitation of accident victims and their families.<sup>74</sup> The Florida Supreme Court had enacted the regulation in response to a detailed two-year bar study identifying the effects of lawyer advertising on public opinion.<sup>75</sup> Analyzing Florida’s rule under the *Central Hudson* test,<sup>76</sup> the Court determined that: (1) Florida had a substantial interest in protecting the reputation of its bar,<sup>77</sup> (2) the thirty-day blackout advanced this interest in a direct and material way,<sup>78</sup> and (3) the temporary nature of the regulation rendered it narrowly tailored to achieve its stated objectives.<sup>79</sup>

In upholding Florida’s ban, the Court distinguished *Shapero* on factual grounds. The *Shapero* record lacked any findings comparable to Florida’s two-year study.<sup>80</sup> In *Shapero*, the state had focused on undue influence and overreaching,<sup>81</sup> concerns that were not raised in *Florida Bar*.<sup>82</sup> Finally, while *Shapero* Court the direct effect of solicitation on the victims and their families, the Court in *Florida Bar* focused on the “demonstrable detrimental effects” of solicitation on the public’s opinion of attorneys.<sup>83</sup>

### C. “Political” Solicitation

In contrast to its commercial in-person solicitation jurisprudence, the Court has extended broad First Amendment protection to solicitation

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<sup>70</sup> *Id.* at 476.

<sup>71</sup> *See id.* at 475–76.

<sup>72</sup> *See id.* at 476. The Court argued that an invasion of privacy “occurs when the lawyer discovers the recipient’s legal affairs [without his or her knowledge], not when he confronts the recipient with the discovery.” *Id.* at 476.

<sup>73</sup> 515 U.S. 618 (1995).

<sup>74</sup> The plaintiff, owner of a lawyer referral service, filed an action for injunctive and declaratory relief in district court, claiming that the blackout period violated the First and Fourteenth Amendments. *See id.* at 621.

<sup>75</sup> *See id.* at 620. The bar found Florida residents regarded letter-writing to victims in the immediate wake of an emergency as “deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.” *Id.* at 625.

<sup>76</sup> *See id.* at 623–24.

<sup>77</sup> *See id.* at 625.

<sup>78</sup> *See id.* at 625–28.

<sup>79</sup> *See id.* at 633.

<sup>80</sup> *See id.* at 629.

<sup>81</sup> *See Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 474–76 (1988).

<sup>82</sup> *See Florida Bar*, 515 U.S. at 624 n.1.

<sup>83</sup> *Id.* at 631.

with a political character. The earliest of the cases addressing "political" solicitation, *NAACP v. Button*,<sup>84</sup> overturned a Virginia statute prohibiting in-person solicitation by or on behalf of organizations with no direct interest in the proposed litigation.<sup>85</sup> In extending First Amendment protection to the NAACP's activity,<sup>86</sup> the Court described the solicitation of clients for civil rights cases as a "form of political expression,"<sup>87</sup> emphasizing that "[r]esort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."<sup>88</sup> Regulating solicitation by the NAACP would not advance the policy of reining in "those who urge recourse to the courts for private gain."<sup>89</sup> In fact, the Court held that the state failed to advance any legitimate public interest that would justify proscribing the NAACP's political client solicitation.<sup>90</sup>

The Court reaffirmed its elevation of "political" solicitation in *In re Primus*,<sup>91</sup> decided on the same day as *Ohralik. Primus*, like *Button*, involved solicitation on behalf of a non-profit organization, the American Civil Liberties Union ("ACLU").<sup>92</sup> The Supreme Court of South Carolina had upheld the disciplinary sanction of an ACLU attorney for improper solicitation,<sup>93</sup> distinguishing *Button* by arguing that the ACLU, unlike the NAACP, "has as one of its primary purposes the rendition of legal services."<sup>94</sup> The South Carolina court also noted that the ACLU stood to benefit financially from its requests for court-ordered lawyers' fees.<sup>95</sup> The U.S. Supreme Court rejected both grounds of distinction,<sup>96</sup> noting that the ACLU's litigation was politically motivated<sup>97</sup> and that the discretionary and uncertain nature of court-awarded attorney's fees "militat[ed] against a presumption that ACLU sponsorship of litigation is motivated by considerations of pecuniary gain . . . ."<sup>98</sup> As in *Button*, the Court did not find sufficient public policy justifications for the proscription to outweigh the ACLU's First Amendment rights.<sup>99</sup>

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<sup>84</sup> 371 U.S. 415 (1963).

<sup>85</sup> See *id.* at 423.

<sup>86</sup> See *id.* at 428-29.

<sup>87</sup> *Id.* at 429.

<sup>88</sup> *Id.* at 443.

<sup>89</sup> *Id.* at 440.

<sup>90</sup> See *id.* at 444.

<sup>91</sup> 436 U.S. 412 (1978).

<sup>92</sup> See *id.* at 415-16.

<sup>93</sup> See *id.* at 421.

<sup>94</sup> *Id.* at 427 (quoting *in re Smith*, 233 S.E.2d 301, 306 (S.C. 1977)).

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 427-30.

<sup>97</sup> See *id.* at 428.

<sup>98</sup> *Id.* at 429-30.

<sup>99</sup> See *id.* at 434-36. It should be noted, however, that the solicitation at issue in *Primus* was a letter and not in-person solicitation. It is unclear whether the Court viewed this fact as significant.

The ACLU's non-profit status significantly influenced the *Primus* Court's discussion of the relevant policy issues. Although "the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences," such rules could not "be applied to appellant's activity on behalf of the ACLU."<sup>100</sup> Moreover:

[C]onsiderations of undue commercialization of the legal profession are of marginal force where, as here, a nonprofit organization offers its services free of charge to individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to tap alternative sources of such aid.<sup>101</sup>

In conjunction with language in *Ohralik* limiting its holding to profit-motivated solicitation,<sup>102</sup> this argument in *Primus* suggests that non-political solicitation by non-profit organizations providing free services to low-income clients enjoys First Amendment protection.

#### D. A New Context-Specific Approach?

Recent Supreme Court and federal circuit court decisions reveal the emergence of a context-specific analysis of the level of First Amendment protection appropriate for different forms of attorney solicitation. For instance, in *Florida Bar*,<sup>103</sup> the Supreme Court upheld direct mail solicitation restrictions in the context of personal injury cases only after the state had demonstrated the adverse impact of such mailings on the reputation of the bar.<sup>104</sup> The Fourth Circuit's decision in *Ficker v. Curran*<sup>105</sup> reflects a similar context-specific analysis of attorney solicitation. In *Ficker*, the court invalidated a Maryland statute mandating thirty-day waiting periods for direct mail solicitation of criminal and traffic defendants on First Amendment grounds.<sup>106</sup> In outlining a context-specific analysis that

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<sup>100</sup> *Id.* at 434.

<sup>101</sup> *Id.* at 437.

<sup>102</sup> See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) ("Today we . . . hold that the State . . . constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers. . . .").

<sup>103</sup> 515 U.S. 618 (1995). The Court reiterated that political expression through solicitation remained protected: "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment." *Id.* at 634 (citations omitted).

<sup>104</sup> Although the public may now view profit-seeking solicitation as odious or reprehensible, it is doubtful that such negative views extend to non-profit organizations. Therefore, non-profit solicitation would seem to create far fewer problems for the reputation of the bar than for-profit solicitation.

<sup>105</sup> 119 F.3d 1150 (4th Cir. 1997).

<sup>106</sup> See *id.* at 1151.

was responsive to the nature and circumstances of the individual case, the court noted that "a criminal defendant's privacy concerns differ considerably from those of a potential civil plaintiff."<sup>107</sup> The court suggested that the procedural setting,<sup>108</sup> nature of the communication,<sup>109</sup> and, most importantly, existence of a profit motive for the communication,<sup>110</sup> should be considered when reviewing restrictions on solicitation. In light of these factors, the court concluded that "[w]here the in-person solicitation is by a non-profit organization . . . the danger of undue influence is minimized and outweighed by the value of the information and the right to free speech."<sup>111</sup> This differentiation suggests that solicitation by non-profit organizations generally will enjoy First Amendment protection.<sup>112</sup> Additionally, it suggests that courts may protect profit-seeking solicitation if insufficient justification for restrictions is offered.

*E. Beyond Primus: The First Amendment and In-Person Solicitation after Liquormart*

Under *Button*<sup>113</sup> and *Primus*,<sup>114</sup> solicitation by non-profit groups such as the LSC appears to be protected. It remains uncertain, however, whether solicitation by for-profit lawyers seeking to represent low-income clients is protected, though the *Ohralik* line of cases suggests that it is not.<sup>115</sup> In 1996, the 44 *Liquormart, Inc. v. Rhode Island*<sup>116</sup> ruling threw the entire field of commercial speech jurisprudence into doubt. This ruling demands a reconsideration of *Ohralik*, and possibly requires the Court to invalidate any across-the-board prohibition of commercial solicitation.

Prior to *Liquormart*, the Court's commercial speech doctrine was, as one leading commentator observed, "poised on a makeshift—and un-

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<sup>107</sup> *Id.* at 1156.

<sup>108</sup> *See id.* at 1155 (noting that "[w]hile accident victims typically have three years in which to file a claim, criminal defendants are subject to a much more accelerated calendar").

<sup>109</sup> *See id.* at 1153 ("[T]argeted letters do not carry the same potential for undue influence as in-person solicitation . . .").

<sup>110</sup> *See id.* at 1152.

<sup>111</sup> *Id.*

<sup>112</sup> If the *Ficker* reasoning is ultimately adopted by the Supreme Court, it will serve as a strong indication that *Florida Bar* did not represent a significant reversal in the trend toward increasing First Amendment protection of lawyer advertising and solicitation. Even if *Florida Bar* is a paradigm-shifting case, it is unlikely that the core holding of *Primus* will be disturbed. Simply put, *Primus* establishes two distinct branches of lawyer-solicitation First Amendment law, a political (or arguably non-profit) one and a commercial one.

<sup>113</sup> *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>114</sup> *In re Primus*, 436 U.S. 412 (1978).

<sup>115</sup> *See supra* Part I.B.2.

<sup>116</sup> 517 U.S. 484 (1996).

steady—foundation for the future.”<sup>117</sup> The *Liquormart* plurality ruling clarified two key questions left unanswered by *Central Hudson*:<sup>118</sup> (1) how significantly does a speech restriction need to advance the asserted governmental interest in order to pass constitutional muster; and (2) how narrowly tailored to that purpose does the restriction need to be. The plurality’s response to these questions in *Liquormart* is crucial in considering the restriction of solicitation by attorneys.

### 1. *Liquormart and the Requirement of Material Advancement*

*Liquormart* involved a Rhode Island law imposing a complete ban on the advertisement of liquor prices in order to further the government interest in reducing alcohol consumption.<sup>119</sup> The Rhode Island District Court invalidated the law, holding that it did not advance this interest.<sup>120</sup> The First Circuit reversed, finding “inherent merit” in Rhode Island’s theory.<sup>121</sup>

On appeal to the Supreme Court, the Justices unanimously held that the law was unconstitutional, but divided on the rationale.<sup>122</sup> Writing for a plurality, Justice Stevens advanced a strict view of the required nexus between the state interest and any restriction on commercial speech.<sup>123</sup> Stevens relied on *Central Hudson* for the proposition that a “commercial speech regulation ‘may not be sustained if it provides only ineffective or remote support for the government’s purpose.’”<sup>124</sup> He then added that “the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so ‘to a material degree.’”<sup>125</sup> In invalidating the Rhode Island law for lack of evidence that an advertising ban would actually discourage alcohol consumption, the Stevens opinion indicated that the “material degree”<sup>126</sup> standard was a high one.<sup>127</sup>

It is doubtful that the restrictions upheld in *Ohralik* would survive the *Liquormart* standard. The *Ohralik* Court held that the disciplining of an attorney for solicitation “under circumstances likely to pose dangers that the State has a right to prevent,” was constitutionally permissible.<sup>128</sup>

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<sup>117</sup> LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12–15 (2d ed. 1988).

<sup>118</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980); see *supra* text accompanying notes 28–29.

<sup>119</sup> See *Liquormart*, 517 U.S. at 489–90.

<sup>120</sup> See 44 *Liquormart, Inc. v. Racine*, 829 F. Supp. 543 (D.R.I. 1993).

<sup>121</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7 (1st Cir. 1994).

<sup>122</sup> See *Liquormart*, 517 U.S. at 488–89.

<sup>123</sup> See *id.* at 505.

<sup>124</sup> *Id.* (citation omitted).

<sup>125</sup> *Id.* (citation omitted).

<sup>126</sup> *Id.*

<sup>127</sup> See *id.* at 507.

<sup>128</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978). The Court concluded that “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.” *Id.* at 466.

Under *Liquormart*, a bare assertion of future harms would be insufficient to justify a speech restriction. Instead, the state must offer factual evidence that solicitation actually caused the asserted harms and that an across-the-board prohibition on in-person solicitation could prevent such harms. Furthermore, the *Ohralik* Court's claim that the imposition of a professional standard served the state interest of maintaining standards<sup>129</sup> was circular, and should not survive *Liquormart*.

The *Florida Bar* decision,<sup>130</sup> handed down before *Liquormart*, required a heightened showing—in comparison with *Ohralik*—that the restrictions in question advanced the asserted government interests.<sup>131</sup> In *Florida Bar*, the Court upheld a thirty-day blackout period before attorneys could contact accident victims only after receiving specific factual findings that the restriction would serve the asserted state interests.<sup>132</sup> The Fourth Circuit's *Ficker v. Curran*<sup>133</sup> opinion, however, suggests that even this evidence could be insufficient in the wake of *Liquormart*. In *Ficker*, fact-findings similar to those offered by the state in *Florida Bar* were insufficient to justify a thirty-day ban on direct mailings to criminal and traffic defendants.<sup>134</sup> This outcome suggests that in order to sustain restrictions on attorney solicitation in the wake of *Liquormart*, states must make a convincing, fact-based showing that each restriction will significantly advance an asserted state interest. The mere presumption of *Ohralik* will no longer suffice.<sup>135</sup>

## 2. *Liquormart and the Less Restrictive Alternative*

Solicitation regulations shown to materially advance asserted state interests must still satisfy the requirement clarified in *Liquormart* that the extent of the restriction be no greater than necessary to effectuate the state's asserted purpose.<sup>136</sup> Prior to *Liquormart*, the scope of speech restrictions needed only to be reasonably proportional to the state interest.<sup>137</sup> However, both the plurality and the principal concurrence in *Liq-*

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<sup>129</sup> See *id.* at 460.

<sup>130</sup> See *supra* text accompanying notes 73–83.

<sup>131</sup> See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), cited with approval in *Liquormart*, 517 U.S. at 502.

<sup>132</sup> See *supra* text accompanying notes 73–83.

<sup>133</sup> 119 F.3d 1150 (4th Cir. 1997).

<sup>134</sup> See *supra* text accompanying notes 105–112.

<sup>135</sup> In the companion field of solicitation by certified public accountants, the Court invalidated a Florida law banning in-person solicitation because the state failed to provide statistical or anecdotal evidence demonstrating that the ban advanced the state interests of protecting clients from fraud and invasion of privacy. Justice Kennedy, who dissented in *Florida Bar* on the ground of inadequate showing, here commanded a majority of the Court. See *Edenfield v. Fane*, 507 U.S. 761 (1993).

<sup>136</sup> See *Liquormart*, 517 U.S. at 507.

<sup>137</sup> See *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (requiring “a fit that is not necessarily perfect, but reasonable . . . one whose scope is in proportion to the interest served”) (internal quotation marks omitted).

*uormart* moved toward a standard resembling the least restrictive alternative.<sup>138</sup> Although the plurality opinion did not demand a perfect means-ends fit, it did suggest that a restriction would not survive judicial scrutiny if the same goals could be accomplished by a less speech-restrictive alternative.<sup>139</sup> The Stevens opinion also broke from *Fox* by restricting legislative discretion.<sup>140</sup> If the *Liquormart* standard survives in subsequent cases, it will likely yield results substantially similar to those produced under a least restrictive alternative standard.

Across-the-board prohibitions on in-person solicitation, like the one upheld in *Ohralik*, should fail the *Liquormart* means-ends requirement. In *Ohralik*, the Court opined that in-person solicitation would be particularly difficult to regulate because it "is not visible or otherwise open to public scrutiny."<sup>141</sup> The Court's contention that there were no means, short of an outright ban, by which to regulate in-person solicitation, surely overstates the issue.<sup>142</sup> Numerous effective and less restrictive alternatives are available to states, including requirements that lawyers notify the state of solicitations, record initial meetings, cease the solicitation upon the client's request, and use retainer agreements with lengthy revocation periods.<sup>143</sup> These requirements would protect solicited clients from fraud or undue coercion, thereby addressing the principal concerns behind the Court's *Ohralik* ruling.<sup>144</sup> In light of these "less restrictive and more precise alternatives,"<sup>145</sup> an across-the-board ban that might qualify as a reasonable fit under *Fox* would not withstand *Liquormart*'s heightened scrutiny. Justice Marshall recognized this possibility in his *Ohralik* concurring opinion:

[W]here honest, unpressured "commercial" solicitation is involved—a situation not presented in [*Ohralik* or *Primus*—I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicita-

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<sup>138</sup> In *Fox*, Justice Scalia explicitly rejected the least restrictive alternative test as unduly burdensome. *See id.* at 477.

<sup>139</sup> *See Liquormart*, 517 U.S. at 507. Writing for the plurality, Justice Stevens stated that "[t]he State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance." *Id.*

<sup>140</sup> *See id.* at 510 ("[A] state legislature does not have . . . broad discretion to suppress truthful, non-misleading information for paternalistic purposes . . .").

<sup>141</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466 (1978).

<sup>142</sup> For a detailed discussion of a less speech-restrictive alternative, see *infra* Part II.D.

<sup>143</sup> *See* Louise Hill, *Solicitation By Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 411 (1990).

<sup>144</sup> *See Ohralik*, 436 U.S. at 462.

<sup>145</sup> Hill, *supra* note 143, at 412.

tion rule and against which the First Amendment ordinarily protects.<sup>146</sup>

What was open to doubt for Marshall is now beyond dispute. Less restrictive means of regulation render across-the-board prohibitions on in-person solicitation unnecessary to protect potential clients and unconstitutional under the First Amendment norms articulated in *Liquormart*.

### 3. *Protecting Lawyers' Image?*

Even if alternative means exist to protect the public, supporters of a ban on in-person solicitation might argue that such a ban would further the cause of justice by protecting the image and reputation of the bar, citing support for this theory in *Ohralik*<sup>147</sup> and *Florida Bar*.<sup>148</sup> In *Zauderer v. Office of Disciplinary Counsel*,<sup>149</sup> however, the Court expressed doubt "that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment right."<sup>150</sup> To the extent that *Florida Bar* stands for the proposition that solicitation can be prohibited to protect lawyers' reputations, it is incompatible with precedents like *Zauderer*, and with the more recent *Liquormart* decision's heightened scrutiny of restrictions on commercial speech.

Moreover, the basic assertion that a ban on solicitation can substantially protect attorneys' image is logically flawed. A regulation can only be marginally successful, since "[t]he representation of unpopular clients, the adversarial nature of court proceedings, and the high fees accompanying legal representation," and not simply solicitation, "contribute to the general public's poor opinion of the legal profession."<sup>151</sup> Even if the state's interest in protecting attorneys' reputation justified restrictions on attorneys' First Amendment rights, it is doubtful that any regulation could satisfy *Liquormart's* requirement that it materially advance the asserted state interest.

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<sup>146</sup> *Ohralik*, 436 U.S. at 476 (Marshall, J., concurring).

<sup>147</sup> See *id.* at 461 (describing "debasement of the legal profession" as one of the substantive harms of solicitation).

<sup>148</sup> See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625-26 (1995).

<sup>149</sup> 471 U.S. 626 (1985).

<sup>150</sup> *Id.* at 648; see also *Florida Bar*, 515 U.S. at 639-40 (Kennedy, J., dissenting) (arguing that "to the extent the bar seeks to protect lawyers' reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more . . . than manipulating the public's opinion by suppressing speech that informs us how the legal system works"). Kennedy concluded by describing the thirty-day ban on direct mail solicitation as "censorship pure and simple." *Id.* at 640.

<sup>151</sup> Todd Mitchell, Note, *Privacy and Popularity: The Supreme Court Attempts to Polish the Public Image of the Legal Profession in Florida Bar v. Went For It, Inc.*, 74 N.C. L. REV. 1681, 1714 (1996).



#### 4. *Limiting the Scope of Ohralik*

If flat prohibitions on in-person solicitation survive the heightened First Amendment scrutiny developed in *Liquormart*, some profit-seeking solicitation of low-income clients might still be permissible. It is notable that the two cases since *Bates* that have upheld limits on solicitation, *Ohralik* and *Florida Bar*, both involved solicitation of accident victims for personal injury lawsuits.<sup>152</sup> Although fears of fraud and overreaching may be particularly compelling in such cases, the same is not true for matters like eviction proceedings, government benefits hearings, and family court adjudications.

This sort of issue-specific approach to in-person solicitation was adopted by the Fourth Circuit in *Ficker*.<sup>153</sup> This analysis can be logically extended from the targeted mailings at issue in *Florida Bar* and *Ficker* to in-person solicitation. Indeed, *Ficker* characterized *Ohralik* as limited to the proposition that states may prohibit "in-person solicitation of accident victims."<sup>154</sup> Whether or not the Supreme Court would endorse this restricted reading of *Ohralik* remains to be seen. With these First Amendment arguments in mind, we turn to a public policy analysis of in-person solicitation.

## II. Economic Support for In-Person Solicitation

The claim that lawyers have a First Amendment right to solicit clients does not address the normative question of whether they should exercise that right. Even though *Bates* invalidated comprehensive bans on lawyer advertising and recognized attorney price advertising as protected speech,<sup>155</sup> the organized bar has been reluctant to formulate advertising standards or encourage widespread attorney advertising.<sup>156</sup> State bar associations have been reluctant to approve in-person solicitation and live telephone contact by attorneys.<sup>157</sup>

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<sup>152</sup> See *Florida Bar*, 515 U.S. at 621; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978).

<sup>153</sup> *Ficker v. Curran*, 119 F.3d 1150, 1155–56 (4th Cir. 1997) (distinguishing the interests of accident victims from those of criminal defendants).

<sup>154</sup> *Id.* at 1152 (emphasis added).

<sup>155</sup> See *Bates v. State Bar*, 433 U.S. 350, 383 (1977).

<sup>156</sup> See Whitney Thier, *In a Dignified Manner: The Bar, the Court, and Lawyer Advertising*, 66 TUL. L. REV. 527, 540 n.56 (1991) (noting that by continuing after *Bates* to bring disciplinary charges against attorneys who advertised, state bar associations indicated their attempt to read *Bates* narrowly).

<sup>157</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 cmt. (1983) (amended 1991) (commenting that advertising, mailed written communications, and auto-dialed recordings enable prospective clients to be informed about the need for legal services and the qualifications of available lawyers and law firms, without subjecting them to possibly coercive in-person or telephone solicitation).

In contrast, many commentators, perhaps inspired by Marshall's observation in *Ohralik* that "prohibitions on solicitation interfere with the free flow of information . . . and . . . operate in a discriminatory manner,"<sup>158</sup> have used economic theory to prove that both the legal profession and clients would be better served by allowing unrestricted, or at least minimally restricted, attorney advertising.<sup>159</sup> The results of empirical studies examining advertising in general can be analogized to the specific context of in-person solicitation. For instance, written advertisements, telephone solicitation, and in-person solicitation all impart considerable information regarding the attorney's services, specialties, and fees. In-person or telephone solicitation may be even more helpful to potential clients, because it offers them the opportunity to ask questions and to learn about the relationship between the attorney's services and the client's particular needs. In light of these added opportunities for information gathering, the strongest argument against in-person solicitation is the exaggerated fear of its potential coerciveness. However, the potential client has the ultimate control over each form of advertisement or solicitation—he or she can turn away at any time.

#### A. Solicitation and Information Gathering

In general, people seeking to purchase legal services rely on three types of information: personal knowledge, reputation, and advertising.<sup>160</sup> Because most people have limited personal knowledge of legal services, high-income consumers tend to rely upon reputational information, which is usually available at low cost, and marked by some reliability. Low-income individuals, however, often have only limited access to reputational information and the resources necessary for verifying it.<sup>161</sup> Unlike high-income consumers, who often have personal contact with lawyers or with people who frequently purchase legal services, low- and middle-income consumers do not usually have access to these sources of information.<sup>162</sup> As a result of restrictions on advertising and the lack of access to "word of mouth" information, low-income consumers often do not know where to turn when they need legal advice, or how to fill the infor-

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<sup>158</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 474 (1978) (Marshall, J., concurring).

<sup>159</sup> See, e.g., Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1084 (1983) (concluding that advertising yields improved information about legal services without sacrificing quality); John R. Schroeter et al., *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49 (1987) (providing empirical evidence of lower prices in professional service markets where advertising is permitted).

<sup>160</sup> See Hazard et al., *supra* note 159, at 1094–99.

<sup>161</sup> See *infra* notes 177–183 and accompanying text.

<sup>162</sup> See *Bates v. State Bar*, 433 U.S. 350, 374 n.30 (1977) (noting that "[i]nformation as to the qualifications of lawyers is not available to many . . . [a]nd, if available, it may be inaccurate or biased").

mation gap. Professional standards that prohibit solicitation outside of "family or prior professional relationship"<sup>163</sup> benefit established attorneys and those catering to higher-income clients, while hurting small firms serving lower-income clients.<sup>164</sup> Furthermore, while restrictions assist the wealthy to obtain information about legal services, they leave low-income individuals without such assistance.

Expanding lawyers' ability to advertise would enable more prospective clients to learn about the available legal options and their potential legal claims.<sup>165</sup> Additionally, advertising often spurs consumers to investigate the advertiser's reputation and other people's experience with the proffered service.<sup>166</sup> As a result, advertising would allow attorneys to provide higher quality legal service to more people at a lower price.<sup>167</sup> In-person solicitation, which offers an additional source of information, can only add to the benefits achieved through advertising. Still, the benefits of advertising must be weighed against its burdens. In traditional television or print advertising these burdens include significant set-up costs, the relative brevity of the message, and the risk that consumers will not respond to the message or will pay little attention to it because of its impersonal, biased source.<sup>168</sup> Yet in-person solicitation, with proper safeguards, may ameliorate some of these concerns, as prospective clients are able to ask questions and interact with lawyers on a personal level. Such distinctions make personal communication more influential than impersonal communication, especially when the communication concerns products or services, such as legal representation, that are expensive, risky, or infrequently purchased.<sup>169</sup>

By focusing on the concerns of attorneys rather than on those of potential consumers, the legal profession analyzes the desirability of adver-

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<sup>163</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) (amended 1991).

<sup>164</sup> See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 436, 475-76 (1978) (Marshall, J., concurring) (noting that the non-solicitation rules had a discriminatory impact on the suppliers as well as the consumers of legal services:

Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society . . . so the 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)

(internal citations omitted).

<sup>165</sup> See Thier, *supra* note 156, at 542.

<sup>166</sup> See Hazard et al., *supra* note 159, at 1099.

<sup>167</sup> See Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 776-78 (1988) (noting that advertising increases the demand for legal services, reduces consumers' "search costs," allows attorneys to create sufficient volume to offer routine services at a lower cost, increases competition, and potentially reduces consumer confusion about legal services).

<sup>168</sup> See Hazard et al., *supra* note 159, at 1097-99.

<sup>169</sup> See ELIHU KATZ & PAUL F. LAZARSFELD, *PERSONAL INFLUENCE: THE PART PLAYED BY PEOPLE IN THE FLOW OF MASS COMMUNICATIONS* 46-65 (1955).

tising through the wrong lens.<sup>170</sup> Under the "paternalistic guise of protecting the consumer from false and misleading information,"<sup>171</sup> attorneys have restricted the information available to the public. Many bar associations and attorney referral services do not publish the attorney information desired by consumers, including years of practice in a particular field or complaints filed against attorneys.<sup>172</sup> Consumer response research indicates that members of the public desire increased, and more informative, advertising.<sup>173</sup> Consumers consider the following factors when selecting an attorney: integrity of the lawyer, quality of the service, area of lawyer specialty, past experience of the lawyer, and cost of service.<sup>174</sup> The ABA Commission on Advertising discovered that consumers consistently found lawyer advertising to be "appropriate, favorable, or useful."<sup>175</sup> Law firms that included a photograph or offered consumer information in their advertisements reported a higher level of satisfaction.<sup>176</sup> In-person solicitation creates another opportunity to give people the information they want.

The relative infrequency of legal problems, high cost of legal services, and mystique surrounding the legal profession make it difficult for low-income litigants to acquire sufficient information to make informed choices about legal services.<sup>177</sup> As a result, low-income individuals often consult attorneys for only the most pressing problems.<sup>178</sup> Unfortunately, their opponents do so far more frequently. A study evaluating perceived power imbalances in landlord-tenant disputes found that "while 81.8% of

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<sup>170</sup> See Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283 (1992).

<sup>171</sup> *Id.* at 285; see also Thier, *supra* note 156, at 549 ("It seems ironic, and perhaps patronizing, that the public is not consulted about whether lawyers should be permitted to advertise. The public, after all, is the recipient of legal services").

<sup>172</sup> See Morton, *supra* note 170, at 301, 304.

<sup>173</sup> See *id.* at 287-89 (summarizing the research).

<sup>174</sup> See Robert E. Smith & Tiffany S. Meyer, *Attorney Advertising: A Consumer Perspective*, 44 J. MARKETING 56, 56-64 (1980).

<sup>175</sup> See Wayne Moore & Monica Kolasa, *AARP's Legal Services Network: Expanding Legal Services to the Middle Class*, 32 WAKE FOREST L. REV. 503, 518 (1997) (quoting COMMISSION ON ADVERT., AMERICAN BAR ASS'N, *YELLOW PAGES LAWYER ADVERTISING: AN ANALYSIS OF EFFECTIVE ELEMENTS* at vii-xi (1992) [hereinafter COMMISSION ON ADVERT.]).

<sup>176</sup> See COMMISSION ON ADVERT., *supra* note 175, at x; see also Hansen, *supra* note 3, at 18 (noting that low- and middle-income people who obtained legal service reported more outcome satisfaction than those who did not).

<sup>177</sup> See generally BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 152-57 (1977) (reporting the results of a study by the American Bar Foundation of the relationship between the incidence of problems requiring legal services and the frequency of service utilization); Podgers, *supra* note 5, at 56-58.

<sup>178</sup> See CURRAN, *supra* note 177, at 261. Other work has demonstrated that low-income people with legal problems were less likely to seek legal services than people with similar legal problems and higher incomes. See, e.g., Russell G. Pearce et al., *Project, An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 132-36 (1980).

landlords were either represented by counsel or were experienced repeat players, only 8.1% of tenants had attorneys and none were repeat players."<sup>179</sup> Moreover, pro se tenants "frequently forfeited their formal legal protections by failing to assert them."<sup>180</sup>

Given the latent demand for and strong need of representation, as well as the overburdened caseloads of most legal services centers,<sup>181</sup> professional standards should allow for-profit legal groups to solicit clients. It is difficult to justify a system in which lawyers who *could* serve low- and middle-income clients are rendered powerless, while attorneys catering to upper-class clients are able to solicit freely through manipulation of the "prior professional relationship" loophole.<sup>182</sup> Many analysts argue that, so long as there is adequate protection against false, fraudulent, or misleading advertising, the public's access to much-needed legal resources would be increased by *all* forms of advertising, including in-person solicitation.<sup>183</sup>

### B. The Benefits of Advertising for Consumers

Opponents of lawyer advertising and solicitation argue that even truthful advertising enables unethical and incompetent lawyers to recruit clients, and also encourages clients to accept advertising claims without careful evaluation.<sup>184</sup> Supporters respond that, to the contrary, advertising would lower prices and expand the market for legal service to low- and middle-income individuals with few ill effects.<sup>185</sup> In-person solicitation might further enhance these positive effects.

Commentators have categorized legal services as either "individualized" or "standardizable," depending on the degree of risk and complexity involved in performing the service.<sup>186</sup> Commentators have rarely evaluated lawyer advertising in relation to other market phenomena, and, consequently, have mistakenly assumed that advertising will have a similar effect on all forms of legal services.<sup>187</sup> Increased advertising primarily benefits firms that provide standardizable services. Purchasers of indi-

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<sup>179</sup> Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 71.

<sup>180</sup> *Id.*

<sup>181</sup> See *supra* notes 4–10 and accompanying text; especially Podgers, *supra* note 5, at 56–57.

<sup>182</sup> See *supra* text accompanying notes 163–164.

<sup>183</sup> See Morton, *supra* note 170. But see Hazard et al., *supra* note 159, at 1108 (arguing that no additional protections are needed since "[m]arket forces control quality when consumers refuse to make repeat purchases from a producer and give that producer a bad reputation by informing other consumers about the low quality of its goods and services").

<sup>184</sup> See, e.g., *Bates v. State Bar*, 433 U.S. 350, 373–74 (1977).

<sup>185</sup> See Hazard et al., *supra* note 159, at 1088–89.

<sup>186</sup> See *id.* at 1090.

<sup>187</sup> See Hazard et al., *supra* note 159, at 1089.

vidualized services, aware of the greater risks at stake, tend to evaluate information carefully and find that advertising provides little useful information.<sup>188</sup> On the other hand, firms providing standardizable services must appeal to a broader range of clients, including those who often have limited resources, in order to generate a sufficient volume of business.<sup>189</sup> Firms providing standardizable services can use advertising to increase their recognition in the community, generate more business, and lower prices. Through this process, more low-income individuals who do not qualify for free legal services could gain access to representation.

The increased demand resulting from lower prices creates an incentive for firms to provide a greater volume of services, thereby enhancing access to representation and encouraging higher quality services. The more actively involved clients are in the litigation process, and in the selection of an attorney, the more likely they are to achieve positive results.<sup>190</sup>

Economic theory suggests that advertising and solicitation would stimulate competition among attorneys, resulting in price reductions that would allow consumers who previously could not afford to (or chose not to) purchase legal services to enter the market.<sup>191</sup> The increased volume of clients, in turn, would enable firms to thrive despite the price reductions. Two empirical studies provide considerable support for this scenario. McChesney and Muris discovered that advertising lower prices and available services not only enabled legal clinics to increase their sales volume relative to traditional non-advertising firms, but also resulted in higher customer satisfaction, as reflected in the ability of clinics to obtain better child-support payment structures than traditional firms.<sup>192</sup> A Federal Trade Commission ("FTC") study found that "attorneys who advertise a specific service tend to provide a lower price than attorneys who do not advertise that service,"<sup>193</sup> suggesting that "the dominant effect of advertising is to enhance price competition by lowering consumer search costs."<sup>194</sup> Viewed together, these studies demonstrate that permitting attorney advertising "does in fact increase consumer welfare."<sup>195</sup>

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<sup>188</sup> See *id.* at 1105.

<sup>189</sup> See *id.* at 1102, 1104.

<sup>190</sup> See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 30, 43-46 (1974).

<sup>191</sup> See Calvani et al., *supra* note 167, at 761.

<sup>192</sup> See Fred S. McChesney & Timothy J. Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503-06 (1979).

<sup>193</sup> Calvani et al., *supra* note 167, at 783 (quoting CLEVELAND REG'L OFFICE & BUREAU OF ECON., FEDERAL TRADE COMM'N, *IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING* 126-27 (1984) [hereinafter CLEVELAND REPORT]).

<sup>194</sup> *Id.* (quoting CLEVELAND REPORT, *supra* note 193, at 79).

<sup>195</sup> *Id.* at 781. Calvani et al. also cited a study conducted in Florida three years after *Bates* finding no evidence linking legal firms that advertised with malpractice claims. See *id.* at 782.

### C. The Regulation of In-Person Solicitation

Despite this optimistic market analysis, many fear that allowing unrestrained in-person solicitation would sanction fraud, unethical conduct, and uninformed consent. Although it ultimately reserved judgment on the question, the *Bates* Court recognized a strong state interest in protecting the public from the dangers that can accompany attorney solicitation.<sup>196</sup> Such an argument presumes that consumers cannot resist persuasive, beguiling attorneys, that attorneys will not police themselves, and that market pressures may not compensate for potential abuse.<sup>197</sup>

Fear of coercion is strongest when the negotiating parties belong to a group (or groups) traditionally viewed as disempowered, such as women, minorities, and the poor. In-person solicitation involves a direct interaction between an attorney and a person who may not have had similar educational and professional opportunities. In courtroom hallway solicitations, the imbalance may be even greater—the attorney is likely in her element while the solicited person may already feel intimidated by a confusing judicial process. Various commentators have suggested that negotiation<sup>198</sup> within a private arena that lacks formal protections or public exposure may encourage people to act on their prejudices, placing the “weaker” party at a considerable disadvantage.<sup>199</sup> In contrast, higher-status negotiators typically possess the advantage, because they “have authority, command automatic deference, and exert subtle and covert control over lower status people.”<sup>200</sup>

Research comparing formal adjudications to informal negotiations undermines these assumptions. For example, researchers discovered that ethnic minorities and women experience either little difference or positive benefits in informal settings like divorce mediation and small claims settlements, and noted participants’ satisfaction with outcome and belief in the fairness of the process.<sup>201</sup> Divorce research offers particularly compelling insights into how “weaker” parties fare when directly confronting higher-status individuals in informal settings. Women tend to feel satisfied with the outcomes of settlement negotiations despite the fact that

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<sup>196</sup> *Bates v. State Bar*, 433 U.S. 350, 366 (1977).

<sup>197</sup> *Cf. id.* at 374–75 (rejecting *Florida Bar’s* inherent assumption that the “public is not sophisticated enough to realize the limitations of advertising”). The *Bates* Court also rejected the argument that advertising would encourage fraudulent claims. *See id.* at 375 n.31.

<sup>198</sup> In-person solicitations may be analogous to opening negotiations.

<sup>199</sup> See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387–88.

<sup>200</sup> Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 458 (1992).

<sup>201</sup> See Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, MEDIATION Q., Summer 1989, at 3, 12–14.

they often must negotiate with former husbands who may have had substantially greater power within the marriage.<sup>202</sup>

Unlike divorce mediation, in-person solicitation involves strangers with only presumed status imbalances. Because in-person solicitation is brief, terminable at any time, and potentially rewarding for both parties, it may be even less susceptible to prejudice and coercion.<sup>203</sup> As Justice Kennedy explained in *Florida Bar*, targeted mail solicitation, an analogous process, is "largely self-policing . . . [p]otential clients will not hire lawyers who offend them."<sup>204</sup>

Because in-person solicitation is not as coercive as is generally assumed, there is no justification for banning useful methods of transmitting information "vital to the recipients' right to petition the courts for redress of grievances."<sup>205</sup> This is especially true when opposing parties, "either by themselves, or by their attorneys . . . are free to contact the unrepresented persons to gather evidence or offer settlement."<sup>206</sup> It is even more difficult to justify such a ban when the solicited parties are the "very people who most need legal advice."<sup>207</sup>

Given today's unmet need for legal services, especially among low-income populations,<sup>208</sup> the risks involved with in-person solicitation do not outweigh the opportunity to help people to enforce their legal rights. The dangers of solicitation may differ in degree and kind depending upon the environment in which the solicitation occurs and the type of claim involved.<sup>209</sup> Unlike in a hospital room, where consumers may face a substantial risk of privacy invasion, consumers waiting for their court appearance or agency hearing have already chosen a forum for airing their private grievances. While it is arguably reasonable for the state to ban in-person solicitation in hospital rooms or at accident sites, where people may be too traumatized or heavily medicated to resist, the autonomy and ability of participants in forums such as small claims courts<sup>210</sup> casts doubt on any across-the-board ban.

In-person solicitations are more difficult to regulate than targeted mail solicitations—there is often little physical evidence of what actually

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<sup>202</sup> See Emery & Jackson, *supra* note 201, at 12–14.

<sup>203</sup> See Delgado et al., *supra* note 199, at 1391.

<sup>204</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 642 (1995) (Kennedy, J., dissenting).

<sup>205</sup> *Id.* at 636 (Kennedy, J., dissenting).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 643 (Kennedy, J., dissenting).

<sup>208</sup> See *supra* text accompanying notes 4–10.

<sup>209</sup> For example, in *Ohralik*, the Court observed that in-person solicitation of the sort performed by the defendant attorney "may exert pressure [on an accident victim] and often demands an immediate response," providing the victim with little "opportunity for comparison or reflection." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978). The *Bates* Court also worried about the possibility of undue influence if in-person solicitation occurred in a hospital room or at an accident site. See *Bates v. State Bar*, 433 U.S. 350, 366 (1977).

<sup>210</sup> See *supra* text accompanying notes 201–204.



occurred between the parties—and a legitimate concern has been voiced that it is harder to turn away a person than a targeted letter. Nevertheless, Supreme Court precedent disfavors flat bans if less restrictive means can address state concerns while permitting some speech.<sup>211</sup> In the context of in-person solicitation, even solicitation by for-profit attorneys, such alternatives are indeed available.

#### *D. Less Speech Restrictive Alternatives*

There are several alternatives to complete prohibitions on in-person solicitation. For example, attorneys “could be required to notify a state or state bar entity of the purported contact, to record and retain initial meetings with prospective clients on tape, and keep a record of any subsequent meetings.”<sup>212</sup> In addition, a soliciting attorney could be required to distribute information sheets (in the client’s primary language) to prospective clients, clearly stating the attorney’s name, area of expertise, years of practice, fee arrangements (e.g., contingency or sliding scale), office hours, and a list of local referral services able to verify this information.<sup>213</sup> Such a proposal would also inform prospective clients of an extended right to rescind any retainer.<sup>214</sup> Unlike a typical client, who can discharge her attorney whenever she wishes but must compensate for the reasonable value of services rendered, the solicited client could be given a designated period in which she could rescind without paying compensation or liability.<sup>215</sup> This measure would further alleviate the coercive pressure of face-to-face encounters and give the client time to reconsider the offer without fear of financial penalty. Finally, current ethical rules require the attorney to cease her sales pitch as soon as the consumer indicates that she does not wish to be solicited or receive services.<sup>216</sup>

As another matter, existing attorney referral sources<sup>217</sup> do not provide information that consumers desire when making informed decisions. Local bar associations and consumer interest groups could develop a service listing lawyers’ experience,<sup>218</sup> fields of specialty,<sup>219</sup> typical fee

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<sup>211</sup> See *supra* Part I.

<sup>212</sup> Hill, *supra* note 143, at 411.

<sup>213</sup> See Smith & Meyer, *supra* note 174, at 56, 60. See also Morton, *supra* note 170, at 288–89.

<sup>214</sup> See Hill, *supra* note 143, at 411.

<sup>215</sup> See *id.*

<sup>216</sup> See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.3(b) (1983) (amended 1991).

<sup>217</sup> As of 1992, there were 329 bar association-sponsored non-profit lawyer referral services in the United States. See Morton, *supra* note 170, at 301. These referral services, however, typically only give a caller the name of an attorney who claims to practice in the caller’s problem area, and certify that a lawyer has malpractice insurance and is a member of the bar in good standing. See *id.*

<sup>218</sup> See Smith & Meyer, *supra* note 174, at 60.

<sup>219</sup> See Morton, *supra* note 170, at 329.

arrangements, years of practice,<sup>220</sup> and any misconduct complaints.<sup>221</sup> Bar associations could also establish hotline numbers<sup>222</sup> providing information and referrals, following the Better Business Bureau model. The creation of services disclosing disciplinary actions against attorneys would increase public trust in attorneys, and the threat of disclosure by such services might also encourage attorneys to act more ethically.<sup>223</sup> Judgments about whether a solicitation was fraudulent, unduly coercive, or misleading could be based on a consumer-oriented standard, rather than the current "reasonable attorney" standard.<sup>224</sup> In order to give teeth to these proposals, attorneys convicted of fraudulent, coercive, or misleading solicitation could be made subject to serious penalties, such as punitive damages, as well as public exposure.<sup>225</sup>

Proposals to require state bar associations to provide greater disclosure, especially of disciplinary records, are a tough sell.<sup>226</sup> State bar associations may fear the loss of self-regulation. Bar associations should be encouraged to balance this loss of autonomy with the benefits that truthful, non-coercive solicitation would offer to the bar (increased volume of business), and especially to the public (provision of valuable and much-needed information to under-served groups without sacrificing the quality of service).

Whatever shape restrictions ultimately take, a categorical ban on in-person solicitation is clearly not necessary to safeguard the public from the professional advocate. Such a ban, then, is not only bad public policy, but is also forbidden under the Supreme Court's *Liquormart* analysis.

### III. Epilogue: Can Congress Condition LSC Funding on Non-Solicitation?

One final obstacle to the use of in-person solicitation would be a decision by Congress to condition continued receipt of LSC funding on refraining from in-person solicitation. While fears of such congressional action may once have seemed chimerical, they are all too real in light of the significant restrictions Congress imposed on LSC funds in 1996.<sup>227</sup> Analogous restrictions on in-person solicitation, however, would argua-

<sup>220</sup> See Smith & Meyer, *supra* note 174, at 60.

<sup>221</sup> See Morton, *supra* note 170, at 329.

<sup>222</sup> See *id.* at 329-30.

<sup>223</sup> See *id.* at 292-93.

<sup>224</sup> See *id.* at 328.

<sup>225</sup> See *id.* at 328-29 (advocating publication of malpractice verdicts or settlements and maintenance of records for easy consumer access).

<sup>226</sup> Hill notes that the "current ethical rules may in fact be viewed as an expression of the need to protect various interest groups." Hill, *supra* note 143.

<sup>227</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 501-504 110 Stat. 1321, 1350-56, (1996) [hereinafter OCRAA]; see *supra* text accompanying notes 4-8.

bly be unconstitutional.<sup>228</sup> The doctrine of unconstitutional conditions raises an interesting problem when applied to the LSC and other activities involving government-funded speech, namely, the tension between the First Amendment protection of free speech and Congress' Spending Clause power to fund whichever activities it chooses. As two leading commentators explain, the Court has addressed this tension by distinguishing "'penalties' on speech from . . . mere 'nonsubsidies.'"<sup>229</sup> The Court made this distinction in *Federal Communications Commission v. League of Women Voters*,<sup>230</sup> which invalidated a law prohibiting "editorializing" by public broadcasting stations receiving congressional funding.<sup>231</sup> Writing for the majority, Justice Brennan emphasized that the restriction could not be seen as a mere failure to subsidize speech, because the ban extended to the use of funds from non-governmental origins.<sup>232</sup> Applied to the LSC, this reasoning dictates that a restriction on the use of private funds for solicitation would clearly be unconstitutional.<sup>233</sup>

Congress may, however, limit the use of its own funds as long as it does not restrict the use of separate, private funds for speech purposes. Brennan noted that "[i]f Congress were to adopt a revised version of [the statute] that permitted . . . stations to establish 'affiliate' organizations which could then use the stations' facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid . . . ."<sup>234</sup> This approach was explicitly adopted in *Rust v. Sullivan*,<sup>235</sup> in which the Court upheld as a legitimate form of non-subsidy a regulation prohibiting family planning centers from using government funds to discuss or counsel women on abortion. Chief Justice Rehnquist, writing for the Court, argued that "[g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."<sup>236</sup>

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<sup>228</sup> For a developed argument that the OCRAA restrictions were themselves unconstitutional, see Roth, *supra* note 4.

<sup>229</sup> GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1318 (13th ed. 1997) ("[u]nder this distinction, government may not use the leverage of a subsidy to induce recipients to refrain from speech they would otherwise engage in with their own resources, but it may refrain from paying for speech with which it disagrees").

<sup>230</sup> 468 U.S. 364 (1984).

<sup>231</sup> *See id.* at 402.

<sup>232</sup> *See id.* at 400. As Brennan explained, a "station that receives only one percent of its overall income from [government] grants is barred absolutely from all editorializing. Therefore . . . such a station is not able to segregate its activities according to the source of its funding." *Id.*

<sup>233</sup> *See* Roth, *supra* note 4, at 128 n.139. Both lower courts that considered the restrictions on the use of private funding in the OCRAA struck them down as unconstitutional. *See id.*

<sup>234</sup> *League of Women Voters*, 468 U.S. at 400.

<sup>235</sup> 500 U.S. 173 (1991).

<sup>236</sup> *Id.* at 193.

At first, this language seems dispositive regarding Congress' authority to limit its LSC funding to selected activities, while prohibiting its use in solicitation; however, other language in *Rust* demonstrates that Congress does not have absolute ability to regulate speech it funds. The Court noted that "the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' . . . or have been 'expressly dedicated to speech activity.'"<sup>237</sup> Government may not restrict speech in public fora merely because it provides the funds that maintain those fora.

If these *Rust* exceptions are to apply, the LSC, or the provision of legal assistance generally, must be deemed a public forum. A powerful argument that the LSC is such a public forum was advanced by Jessica Roth, who explained that the LSC "has been dedicated since its inception to core First Amendment activity, namely the provision of legal advice and services. Congress created the LSC a decade after the Supreme Court held in [*NAACP*] v. *Button* that efforts to secure and act upon legal advice fall within constitutionally-protected freedoms."<sup>238</sup>

If legal representation encompasses the First Amendment dimension the Court attributed to it in *Button*, and arguably in *Primus*, the governmental provision of legal services must be a kind of public forum for the purposes of First Amendment analysis.<sup>239</sup>

Once a state has created a limited public forum, it may still limit the content of speech aired in that forum. But "[o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum' . . . ."<sup>240</sup> In *Rust*, the Court, rightly or wrongly, viewed discussion of abortion as "beyond the scope of the project funded,"<sup>241</sup> and thus suggested that the grant of funds for family planning services did not create a forum for abortion counseling. It would be extremely difficult to argue, however, that client solicitation is beyond the scope of a forum created for the very purpose of providing legal counsel and representation. Still this area of First Amendment doctrine remains highly unsettled, and it is difficult to predict how the Supreme Court may view it in the future.

To fully realize our nation's promise of "equal justice under the law," we must better provide basic legal services to low-income people.

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<sup>237</sup> *Id.* at 200 (citations omitted).

<sup>238</sup> Roth, *supra* note 4, at 139 (citations omitted).

<sup>239</sup> The fact that LSC is a fund rather than a specific place does not affect its status as a public forum. See *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 830 (1995), (finding that the University of Virginia's Student Activities Fund constituted a limited public forum).

<sup>240</sup> *Id.* at 829 (citations omitted).

<sup>241</sup> *Rust*, 500 U.S. at 195.

LSC programs, a necessary but not sufficient response to this challenge, are of little value to potential clients who are unaware that they have valid legal claims to make, or are turned away from their local legal services center because it lacks resources. In-person solicitation could assist these potential clients by informing them of their legal rights, encouraging their active participation in the legal process, and lowering fee-for-service legal costs. Moreover, allowing attorneys who serve low-income populations to solicit clients is not only good public policy, but also a protected First Amendment activity. For freedom of expression to be meaningful, it must protect the delivery of legal advice and representation, for these are the means by which other rights are most powerfully and consistently enforced. As has long been clear, legal services programs cannot adequately serve by standing and waiting for clients to present themselves. If low-income individuals are to have meaningful opportunities for legal representation, lawyers must be permitted to identify and solicit clients in-person.

