

Winter 1978

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Recommended Citation

First Amendment--Attorney Solicitation, 69 J. Crim. L. & Criminology 505 (1978)

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FIRST AMENDMENT—ATTORNEY SOLICITATION

Ohralik v. Ohio State Bar Association, 98 S. Ct. 1912 (1978).
In Re Primus, 98 S. Ct. 1893 (1978).

INTRODUCTION

After finding in its last term that the first amendment protected the restrained and truthful newspaper advertisements of attorneys,¹ the United States Supreme Court this term considered for the first time whether attorneys' in-person solicitation of clients was similarly protected. Two disparate cases were presented. In *Ohralik v. Ohio State Bar Association*,² the Court found³ that "the Bar—acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."⁴ Those circumstances involved a lawyer's visits to a hospitalized accident victim,⁵ secret tape recordings of conversations with his prospective "clients" to assure proof of their assent to his representation, refusal to withdraw from the case upon request, and lawsuits filed by him against the "clients" for their alleged breach of contract. That, according to the Court, constituted purely commercial and unprotected conduct.⁶ By contrast, in *In re Primus*⁷ the Court found⁸ that the first amendment's "zone of associational freedoms" did protect the solicitation of an A.C.L.U. attorney, found by the Court to have been motivated not by financial gain but by a desire to express political and associational beliefs.⁹ The attorney in *Primus* spoke to a group concerning their legal rights, suggested the possibility of a lawsuit, and later offered aid through the A.C.L.U.'s legal services.

¹ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

² *Ohralik v. Ohio State Bar Ass'n*, 98 S. Ct. 1912 (1978).

³ The vote of the Justices in *Ohralik* was 6-2-0, Marshall, J., concurring in part and concurring in the judgment; Rehnquist, J., concurring; and Brennan, J., taking no part in the decision.

⁴ 98 S. Ct. at 1915.

⁵ The accident victim was in the hospital and in traction when attorney Ohralik solicited her. *Id.*

⁶ *In re Primus*, 98 S. Ct. 1893, 1899 (1978) (interpreting the holding in *Ohralik*). See note 87 *infra*.

⁷ 98 S. Ct. 1893 (1978).

⁸ In *Primus* the vote was 5-2-1, Marshall, J., concurring in part and concurring in the judgment; Blackmun, J., concurring; Rehnquist, J., dissenting; Brennan, J., taking no part in the decision.

⁹ 98 S. Ct. at 1902-05.

The Court expressly limited these decisions to their respective fact situations.¹⁰ The Court did not state whether the first amendment would protect attorney solicitation falling somewhere between these extremes. Such solicitation—labelled "benign" commercial solicitation by Justice Marshall—would involve:

advice and information that is truthful and that is presented in a noncoercive, nondeceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.¹¹

OHRALIK V. OHIO STATE BAR ASSOCIATION

In *Ohralik*, appellant Albert Ohralik, a member of the Ohio Bar, contacted the family of a young woman, Carol McClintock, with whom he was casually acquainted, after learning that she and her friend were injured in an automobile accident. Ohralik was subsequently invited to the McClintock's home. There he answered questions about the family's liability to suit and suggested that they hire a lawyer. Having been told that the decision was up to Carol, Ohralik proceeded to visit her in the hospital, where she was lying in her

¹⁰ The *Ohralik* Court reached its decision "on the basis of the undisputed facts of record." 98 S. Ct. at 1924. The Court held that although the lower court had not found proof of any actual harm, in light of the state's interest in preventing the potential evils associated with solicitation the absence of specific proof of harm was immaterial. "The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." *Id.* at 1925.

In *Primus* the Court specifically limited its decision to the fact situation before it in phrasing the issue.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a non-profit organization with which the lawyer and her associates are affiliated.

98 S. Ct. at 1895.

¹¹ 98 S. Ct. at 1927 n.3 (Marshall, J., concurring).

room in traction. Ohralik told Carol that he would represent her and asked her to sign an agreement to that effect. She agreed to discuss the matter with her parents. Ohralik then returned to the McClintock residence, this time carrying a concealed tape recorder. After re-examining the McClintock's insurance policy, Ohralik learned that it included an uninsured motorist clause that would provide benefits to both victims. He informed Carol's parents that they could sue for these benefits and was told that their daughter had called to agree to Ohralik's representation. Two days later, Ohralik returned to the hospital to have Carol sign a contract which entitled Ohralik to one-third of Carol's anticipated recovery.¹²

Ohralik also visited the second injured woman, Wanda Lou Holbert, and again secretly recorded the conversation. He informed Wanda that he was handling her friend Carol's case and that she was eligible for benefits under the McClintock's insurance policy. In response to Ohralik's query about whether Wanda would file a claim, Wanda replied that she "did not understand what was going on."¹³ However, in response to Ohralik's offer to represent her, Wanda replied, "OK."¹⁴

Subsequently Wanda's mother attempted to repudiate her daughter's assent, but Ohralik insisted that Wanda had entered into a binding agreement. One month later Wanda confirmed in writing that she did not wish to be represented. Carol McClintock also eventually discharged Ohralik. Ohralik filed breach of contract suits against both women. In settlement, Carol McClintock paid Ohralik one-third of her insurance proceeds, which had been obtained through the efforts of another lawyer.¹⁵

Both women filed complaints against Ohralik with the Grievance Committee of the County Bar Association, which in turn filed a formal complaint with the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline. The Board found that Ohralik had violated two Disciplinary Rules of the Ohio Code of Professional Responsi-

bility.¹⁶ The Board rejected Ohralik's claim that his conduct was protected under the first and fourteenth amendments, and recommended that Ohralik be given a public reprimand. The Ohio Supreme Court, agreeing with the Board that Ohralik's conduct was not constitutionally protected, increased the punishment to indefinite suspension.¹⁷

On Ohralik's appeal, the United States Supreme Court, speaking through Justice Powell, stated that it would answer in part the question of first amendment protection of attorney in-person solicitation.¹⁸ Powell explained that the issue was not controlled by *Bates v. State Bar of Arizona* (lawyers' truthful newspaper advertisements protected by the first amendment),¹⁹ or by *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* (first amendment protected a pharmacist's purely commercial advertisement).²⁰ The *Ohralik* opinion found that advertising and solicitation had different degrees of first amendment protection and that the state had different countervailing interests in regulating the two activities.²¹

Ohralik had argued that his solicitation of clients, like advertising, served two important purposes: it apprised clients of their legal rights and informed them of the availability of a lawyer. Therefore, Ohralik reasoned, the state must show that its regulations dealt solely with an actual harm which the state had a compelling interest in deterring.

The Court responded that "in-person solicitation of professional employment by a lawyer does not

¹⁶ DR 2-103(A) of the Ohio Code provides:

"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 in relevant part:

"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:

"(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client."

Id. at 1917 n.9.

¹⁷ *Id.* at 1917.

¹⁸ *Id.* at 1915.

¹⁹ 433 U.S. 350 (1977).

²⁰ 425 U.S. 748 (1976).

²¹ 98 S. Ct. at 1918. It was never clearly established in the opinion what the difference was between the degrees of first amendment protection of the activities in *Virginia Bd.* and those in *Ohralik*.

¹² 98 S. Ct. at 1915-16.

¹³ *Id.* at 1916.

¹⁴ *Id.*

¹⁵ *Id.* at 1916-17. Ohralik initially abandoned his breach of contract claim against Wanda Lou Holbert, apparently because he felt an ethical question could arise from a contract having its origin in controversy. However, Ohralik filed a suit against Wanda after his disciplinary hearing. Ohralik dismissed this suit with prejudice after the rendering of the Ohio Supreme Court decision. *Id.* at 1917 n.7.

stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment."²² In support of this, the Court noted its recent conclusion in *Virginia Board* that there exists a "common-sense" distinction between commercial and non-commercial speech.²³ Furthermore, the Court defined this distinction by noting that "speech proposing a commercial transaction . . . occurs in an area traditionally subject to government regulation."²⁴ The Court concluded that commercial speech was given only limited constitutional protection to avoid dilution of the first amendment protection afforded non-commercial speech, which it was feared would occur if the scope of full first amendment protection was broadened to include commercial speech.²⁵

The Court distinguished pure speech from conduct which involved some speech elements. The Court stated that the first amendment permits regulation of conduct even if a substantial part of that conduct was "initiated, evidenced, or carried out by means of language, either spoken, written, or printed."²⁶ Examples of government regulation of written or spoken 'conduct' included the exchange of information about securities,²⁷ corporate proxy statements,²⁸ exchange of price information by competitors,²⁹ and employer's threats of retaliation for their employees' union activities.³⁰

Similarly, the Court found that *Bates* was not controlling because different state interests were involved in that case. The Court noted that solicitation may involve more pressure than the advertising permitted in *Bates* and that it often demands

an immediate response without affording an opportunity for reflection or comparison. Thus, solicitation may encourage speedy and uninformed decision-making. Indeed, the Court found that in-person solicitation is "as likely as not" to *discourage* people from "engaging in critical comparison[s] of the 'availability, nature and prices' of legal services."³¹ The Court concluded that in-person solicitation might actually disserve the *Bates* goal of fostering informed and reliable decision-making. It was only through a footnote that the Court recognized the value and necessity of providing information about the availability of legal services to low and middle income individuals.³²

The Court further noted that the State regulations against solicitation did not prohibit the dissemination of information about legal rights and remedies. What was prohibited was "using the information as bait with which to obtain an agreement to represent [the people approached] for a fee."³³ However, the Court offered no further explanation as to why such conduct could be regulated. Finally, the Court noted that *Ohralik's* conduct did not fall into one of the areas of traditionally protected activity—political expression, associational freedom or mutual assistance.³⁴

In conclusion, the Court stated that "[a] lawyer's procurement of remunerative employment is . . . only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation."³⁵ The Court found that the limited first amendment protection of *Ohralik's* solicitation, therefore, permitted regulation in furtherance of important state interests, including a general concern for the pro-

²² 98 S. Ct. at 1918. It might be well to note at this point Justice Marshall's view of the correlation between advertising and solicitation. "The relevant comparison, however, at least is between *truthful* in-person solicitation of employment and truthful advertising." 98 S. Ct. at 1928 n.5 (Marshall, J., concurring) (original emphasis).

²³ 98 S. Ct. at 1918 (citing 425 U.S. at 771 n.24).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1918-19 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)).

²⁷ *Id.* at 1919 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969)).

²⁸ *Id.* (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)).

²⁹ *Id.* (citing *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921)).

³⁰ *Id.* (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)).

³¹ *Id.* at 1919 (quoting 433 U.S. at 364). The Court provided no support for its assertion that these evils had, in fact, occurred. Nor did the Court quote statistics tending to show that the results feared were "as likely as not" to occur.

³² *Id.* at 1919 n.15. This subordination of the right of consumers to information reflects a remarkable change in attitude from *Virginia Bd.* and *Bates*, where the Court emphasized the right of consumers to a "free flow of information." 433 U.S. at 364; 425 U.S. at 757.

³³ 98 S. Ct. at 1920.

³⁴ *Id.* The Court acknowledged that this contention was not made by *Ohralik*.

³⁵ *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 439-43 (1963)). *Button* recognized differences in traditional areas of government regulation and other commercial speech, however. Hence the *Button* Court speaks not solely of a pecuniary gain motivation but of "private gain, *servicing no public interest*," 371 U.S. at 440 (emphasis added), and "oppressive, malicious or avaricious use of the legal process for purely private gain." *Id.* at 443 (emphasis added).

tection of consumers and regulation of commercial transactions, and a special responsibility for maintenance of professional standards. The evils of solicitation were said to include the possibility of "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, and misrepresentation."³⁶ The Court admitted that these were "sweeping terms,"³⁷ but found it unnecessary to explain how the broadly-described evils were directly associated with solicitation. Ohralik had conceded that "the State has a 'compelling' interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'"³⁸ Since Ohralik recognized the existence of important state interests in the regulation of solicitation, the Court concluded, there could be no further dispute that application of the State regulations to Ohralik's activity was constitutional.

Although Ohralik conceded that the state might regulate certain evils of solicitation, he argued that none of those evils were present in his activities. Ohralik claimed that the Court must determine not whether the state could regulate hypothetical evils of solicitation, but whether the state could regulate solicitation *per se*, regardless of whether those evils were found to be present.

The Court purportedly agreed with Ohralik that "the appropriate focus is on appellant's conduct."³⁹ However, the Court went on to note that "[a]ppellant's argument misconceives the nature of the State's interest [in prophylactic regulation]."⁴⁰ Thus, the actual focus of the Court's discussion was not on the "appellant's conduct" but on the general, potential harms which the State's prophylactic regulations were designed to prevent.⁴¹

The Court concluded that Ohralik's solicitation created a situation that was "inherently conducive to overreaching and other forms of misconduct,"⁴²

and that the State appropriately perceived "the potential for harm in circumstances such as those present in this case."⁴³ In support of this conclusion, the Court cited studies of the detrimental effects of the door-to-door selling industry.⁴⁴ Comparing lawyers who solicit clients with door-to-door salesmen of ordinary consumer products, the Court warned that the problems inherent in the door-to-door selling industry would be multiplied when "a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person."⁴⁵ The Court concluded, "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."⁴⁶

The Court finally noted that requiring proof of actual injury in each case would be difficult, since solicitation was by nature more private than advertising.⁴⁷ If proof of actual harm were required, the Court reasoned, effective oversight and regulation by the state or legal profession would be effectively eliminated. Hence, the Court held that prophylactic regulations did not unduly infringe the limited first amendment protection of commercial solicitation. The Court therefore held that Ohio Disciplinary Rules DR 2-103(A) and DR 2-104(A), were not unconstitutional.

⁴³ *Id.*

⁴⁴ *Id.* at 1923 n.23. One source cited observed "[t]he door to door selling technique strips from the consumer one of the fundamentals in his role as an informed purchaser, the decision as to when, where, and how he will present himself to the market place . . ." *Id.* (quoting 37 Fed. Reg. at 22939 n.44).

⁴⁵ *Id.* at 1923. Among the specific harms feared were invasion of privacy and obtrusiveness. In note 25 the Court also cited *Breard v. Alexandria*, 341 U.S. 622 (1951), in support of the contention that a solicited individual may be distressed by even a well-meaning lawyer. 98 S. Ct. at 1924 n.25. However, *Breard* dealt not with a professional such as a lawyer who is trained not only in persuasion but also in high moral standards. *Breard* dealt with a door-to-door salesman of magazines.

⁴⁶ 98 S. Ct. at 1924 (footnote omitted). The Court's conclusion that injury would occur "more often than not," is in direct contradiction to its positive outlook in *Bates*. In *Bates*, in an equally unsupported statement, the Court found "one to thousands" odds in favor of principled lawyers. 433 U.S. at 379.

⁴⁷ 98 S. Ct. at 1924. The foreseeable difficulties in proof mentioned by the Court included the fact that unlike advertising, in-person solicitation is not visible or otherwise open to public scrutiny. Also, often there is no other witness than the person solicited and the lawyer. And it was feared that the person solicited, if distressed, would not recall specific details of the solicitation at a later date.

³⁶ 98 S. Ct. at 1921.

³⁷ *Id.*

³⁸ *Id.* at 1922 (citing the appellant's brief).

³⁹ *Id.* at 1923. The Court had previously discussed and discarded an overbreadth argument, noting that since *Bates* it was recognized that the overbreadth standard was not applicable to commercial speech. 98 S. Ct. at 1922 n.20.

⁴⁰ *Id.* at 1923.

⁴¹ No authority was cited to support the proposition that a state may validly enact prophylactic regulations in the area of even limited first amendment rights.

⁴² 98 S. Ct. at 1923.

IN RE PRIMUS

In *In re Primus*, appellant Edna Smith Primus was a lawyer associated with a South Carolina firm. She also served as an uncompensated officer and cooperating lawyer with the A.C.L.U. and was paid a retainer for her work as legal consultant for the South Carolina Council on Human Relations, a local nonprofit organization. The case before the Court arose when Primus accepted an invitation of the Council to speak to a group of women who had been sterilized as a condition of continued receipt of medical assistance. Primus informed the women of their legal rights and suggested the possibility of filing a lawsuit. Approximately one month later, the A.C.L.U. informed Primus that it was willing to provide legal assistance to these women. Having been informed that one of the participants in the earlier meeting, Mrs. Williams, wished to file a suit, Primus extended the A.C.L.U.'s offer of free legal representation to her in a letter. Subsequently, Williams showed the letter to the doctor who would have been sued. She then informed Primus that she did not intend to sue. No further communication was had between Williams and Primus.⁴⁸

Meanwhile, the lawyer representing Williams' doctor filed a complaint with the Board of Commissioners of Grievances and Discipline of the South Carolina Supreme Court, based upon the letter of Primus to Williams. The lawyer claimed that the letter was "solicitation in violation of the Canons of Ethics."⁴⁹ The Board found Primus guilty of violating Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the Supreme Court of South Carolina,⁵⁰ and recom-

mended that a private reprimand be issued. The South Carolina rules were such that DR 2-

geographical area in which the association exists.

"(2) A military legal assistance office.

"(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

"(4) A bar association representative of the general bar of the geographical area in which the association exists.

"(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

"(a) The primary purposes of such organization do not include the rendition of legal services.

"(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

"(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

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

Id. at 1898 n.10.

South Carolina's Disciplinary Rule 2-104(A) provides:

"(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

"(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

"(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5), to the extent and under the conditions prescribed therein.

"(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2-103(D)(1), (2), or (5) may represent a member or beneficiary thereof to the extent and under the conditions prescribed therein.

"(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

"(5) If success in asserting rights or defenses of

⁴⁸ 98 S. Ct. at 1897.

⁴⁹ *Id.*

⁵⁰ South Carolina's Disciplinary Rule 2-103(D) provides:

"(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

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

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

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

"(c) Operated or sponsored by a governmental agency.

"(d) Operated, sponsored, or approved by a bar association representative of the general bar of the

103(D)(5) recognized the constitutional rights in question as protecting an attorney cooperating with legal service activities only when:

"(a) The primary purposes of such organizations do not include the rendition of legal services.

"(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purpose of such organization.

"(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

"(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter."⁵¹

The court found that the A.C.L.U. failed to meet conditions (a) and (c) because it has as its primary purpose the rendition of legal services, and because it might benefit financially from a successful prosecution of the suit for money damages. The court therefore held that Primus' activity was not constitutionally protected and increased the Board's recommended sanction to a public reprimand.⁵²

In reversing, the United States Supreme Court emphasized that the solicitation in *Primus* was protected speech because it was motivated by a desire to express political and associational views,⁵³ whereas the unprotected solicitation in *Ohralik* involved a purely commercial motivation.⁵⁴ The Court said that the ultimate question in *Primus* was whether, "in light of the values protected by the First and Fourteenth Amendments, these differences [in motivation] materially affect the scope of state regulation of the conduct of lawyers."⁵⁵ Noting the difference between the regulation of commercial affairs and of political expression or associational freedoms, the Court stated:

The approach we adopt today in *Ohralik*, . . . that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result

his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."

Id. at 1898 n.11.

⁵¹ *Id.* at 1898 n.10.

⁵² In re Edna Smith, 268 S.C. 259, 233 S.E.2d 301 (1977).

⁵³ 98 S. Ct. at 1900.

⁵⁴ *Id.* at 1899. See also *id.* at 1906, 1908.

⁵⁵ *Id.* at 1900.

in adverse consequences, cannot be applied to appellant's activity on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, appellant may not be disciplined unless her activity *in fact* involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.⁵⁶

The Court then discussed the actual *Primus* solicitation—not in light of the rationale used in *Ohralik* but, instead, in relation to that used in *NAACP v. Button*.⁵⁷

In *Button*, the United States Supreme Court reversed a state court decision which had held that the activities of N.A.A.C.P. attorneys constituted "solicitation of legal business" in violation of state law.⁵⁸ The Court found that the state regulation sought to limit expression and associational activity, and that such regulation could only be done "with narrow specificity."⁵⁹ The Attorney General of Virginia in *Button* had used many of the justifications for state regulation of solicitation later advanced in *Ohralik*.⁶⁰ However, unlike *Ohralik*, where these interests were held to be sufficient to justify prophylactic regulations by the state, in *Button* the state was deemed to have "failed to advance any substantial regulatory interest in the form of substantive evils flowing from [the N.A.A.C.P.'s] activities, which can justify the broad prohibitions which it has imposed."⁶¹

In *Primus*, the Court recognized that its interpretations of *Button* established the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."⁶² *Primus* also reiterated the principle that a state may seek to correct the substantive evils of undue influence,

⁵⁶ *Id.* at 1906 (citation omitted) (emphasis added). By categorizing Primus' activity as political expression, the Court avoided the *Ohralik* inquiry of whether the activity was commercial or non-commercial, speech or conduct.

⁵⁷ 371 U.S. 415 (1963).

⁵⁸ *Id.* at 428-29.

⁵⁹ *Id.* at 433, quoted in 98 S. Ct. at 1900.

⁶⁰ Among the evils were lay control of the litigation process and the traditional evils of common-law maintenance, champerty, and barratry. In re Primus, 98 S. Ct. at 1900 (citing 371 U.S. at 438). See *Ohralik v. Ohio State Bar Ass'n*, 98 S. Ct. at 1921.

⁶¹ 98 S. Ct. at 1901 (quoting 371 U.S. at 444). Specifically the state failed to prove a malicious intent or that the prospect of pecuniary gain motivated the N.A.A.C.P.

⁶² 98 S. Ct. at 1901 (quoting *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971)). See 433 U.S. at 376 n.32.

overreaching, misrepresentation, invasion of privacy and lay interference resulting from solicitation—but such regulations may not significantly impair associational freedoms.⁶³

The lower court decision in *Primus*⁶⁴ had stressed that in *Bulton*, the N.A.A.C.P. was primarily a political organization, whereas in the instant case the A.C.L.U. principally sought to render legal services. However, the Supreme Court disagreed with that distinction based on the history of the A.C.L.U. and its work with controversial issues and unpopular defendants. The Court found that in the A.C.L.U., as in the N.A.A.C.P., litigation was not a “technique of resolving differences” but rather “a form of political expression” and “political association.”⁶⁵ The Court was also unpersuaded by the suggestion that, since the A.C.L.U. had requested counsel fees in *Primus*, it was therefore motivated by financial gain. The Court reasoned that since counsel fees were awarded only at the discretion of the courts, a fee request did not indicate a motive of pecuniary gain. Furthermore, *Primus* and the A.C.L.U.’s lawyers would not personally share in any monetary recovery.⁶⁶

The *Primus* Court emphasized that “exacting scrutiny” must be applied in evaluating government regulations of associational freedoms.⁶⁷ The state must demonstrate a subordinating and compelling interest⁶⁸ and must regulate in a way that avoids unnecessary infringement of first amendment rights.⁶⁹ In light of this standard, the Court considered the state interests asserted in

Primus—that is, prevention of “undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils thought to inhere generally in solicitation by lawyers of prospective clients, and to be present on the record before us.”⁷⁰ The Court stated that, although in *Ohralik* wholly commercial conduct was subject to broad prophylactic rules, such rules dealing with associational freedoms are suspect.⁷¹ Therefore, “precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”⁷²

The *Primus* Court concluded that the South Carolina disciplinary rules swept so broadly that they had “a distinct potential for dampening the kind of ‘cooperative activity that would make advocacy of litigation meaningful,’ . . . as well as for permitting discretionary enforcement against unpopular causes.”⁷³ The Court also found that the alleged state interests were unsupported by the record. The Court found no evidence that *Primus*’ solicitation letter was misleading, involved an invasion of privacy or provided a significant opportunity for overreaching, coercion, conflict of interest or lay interference with the attorney-client relationship. The Court noted that for the state to establish an interest in regulating solicitation it must show that the solicitation was malicious or for pecuniary gain *servicing no public interest*.⁷⁴ This South Carolina had failed to do. Hence, the Court concluded, although broad prophylactic regulations of solicitation were permissible for purely commercial transactions such as found in *Ohralik*, those prophylactic regulations could not stand consistently with the first amendment, where political expression and association would be abridged.⁷⁵

The remainder of the opinion noted that the state might continue to regulate time, place, and

⁶³ 98 S. Ct. at 1902 (citing *United Mine Workers of America v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967)).

⁶⁴ *In re Edna Smith*, 268 S.C. 259, 233 S.E.2d 301 (1977).

⁶⁵ 98 S. Ct. at 1902–03 (quoting 371 U.S. at 429, 431).

⁶⁶ The Court chose to ignore the conjecture found in note 21 that *Primus* might have benefitted financially through her increased reputation or as a result of any award of counsel fees to the attorneys with whom she associated in an expense-sharing arrangement. 98 S. Ct. at 1902 n.21. This financial motivation and the new policy of the A.C.L.U. to award individual attorneys counsel fees, *id.* at 1904 n.25, are possible points for distinguishing future cases.

⁶⁷ *Id.* at 1905 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976)).

⁶⁸ 98 S. Ct. at 1905 (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)). Note that the standard is a “compelling” state interest, as opposed to an “important” state interest required in *Ohralik*. 98 S. Ct. at 1920.

⁶⁹ 98 S. Ct. at 1905 (quoting 424 U.S. at 25).

⁷⁰ 98 S. Ct. at 1905.

⁷¹ *Id.* (quoting 371 U.S. at 438).

⁷² 98 S. Ct. at 1905 (quoting 371 U.S. at 438).

⁷³ 98 S. Ct. at 1905 (citations omitted). Among the reasons for concluding the rules swept too broadly were that they permitted punishment for solicitation in the absence of proof of any specific evils and that people in any way associated with the organization must suppress giving advice in fear of disciplinary action. *Id.*

⁷⁴ *Id.* at 1907.

⁷⁵ *Id.* at 1908. The Court recognized that the line between those activities permissibly regulated prophylactically and those which could not legally be so regulated would be difficult to draw. The Court also concluded that “that is no reason for avoiding the undertaking.” *Id.* at 1908 n.32.

manner of solicitation; draw narrow rules to deal with harm resulting from solicitation; and insist that lay organizations not exert actual control over ensuing litigation.⁷⁶ Although the regulations in *Primus* were found to be unconstitutionally broad, the Court stated that carefully tailored regulations would not necessarily abridge first amendment freedoms.⁷⁷

ANALYSIS

There is little doubt, as Justice Marshall noted in his concurring opinion, that the disparate factual situations of *Ohralik* and *Primus* made it easy for the Court to avoid discussion of an intermediate "benign" type of solicitation—that is, an offer of truthful legal advice or information to someone capable of freely and rationally choosing to accept or reject it.⁷⁸ The disparate facts also allowed the Court to avoid a second line-drawing problem—that between pure commercial speech or conduct, and non-commercial speech. However, such line-drawing is crucial in light of the radically different levels of scrutiny afforded commercial and non-commercial speech.

As Justice Rehnquist pointed out in his dissent, the Court's traditional "commonsense" distinctions between commercial and non-commercial speech are inadequate.⁷⁹ These "commonsense" distinctions were first recognized by the Court in a footnote to the *Virginia Board* decision: a) the disseminator of commercial information would supposedly know more about his product than would, for example, a news reporter, and therefore the commercial speaker was said to be more able to verify the truth of his speech; b) since advertising was considered the "*sine qua non* of commercial profits," there would be little likelihood that such advertising would be chilled; and c) the hardness of advertising made it less necessary to tolerate inaccurate statements for fear of chilling the speaker.⁸⁰ After this perfunctory introduction to the "commonsense" distinctions between commercial and

non-commercial speech, those distinctions were regarded as being well-established in *Bates*. There, the Court relied on the "knowledge of the disseminator" and the hardness of commercial speech to support its conclusion that the first amendment overbreadth doctrine was not applicable to commercial speech.⁸¹ The *Bates* Court added to the list of "commonsense" distinctions its observation that commercial speech was generally more calculated than non-commercial speech, so that strict requirements of truthfulness not allowed under traditional first amendment protection would involve little chance of inhibiting the spontaneity of commercial speech.⁸²

Primus accepted these assumptions without closely examining their validity. However, it is not self-evident that the disseminator of commercial information knows more about his product than does the news reporter, since a retail merchant who advertises may be less able to vouch for the truth of his statements than the news reporter, who has intensively investigated his story. Similarly, if the Court is correct in its observation that advertising is the "*sine qua non* of commercial profits," such advertising may be especially necessary for the small or newly-established business. To chill the access to the advertising marketplace of such a commercial enterprise may well limit its ability to compete with larger businesses able to hire professionals to untangle the protected from the unprotected. And finally, if spontaneity of speech is a factor in determining first amendment protection, then the politician who "shoots from the hip" would be on safer ground than those who carefully prepare what they say.⁸³

In *Ohralik*, the Court distinguished commercial from non-commercial speech based on a new "commonsense" observation—that speech proposing a commercial transaction "occurs in an area traditionally subject to government regulation."⁸⁴ However, the areas of traditional government regulation cited by the Court involved what the Court had classified as *conduct* mixed with speech elements—for example, the exchange of securities information and corporate proxy statements.⁸⁵ The Court placed *Ohralik's* solicitation in this *conduct* category,⁸⁶ thereby implying that the solicitation

⁷⁶ Justices Marshall and Blackmun felt that this paragraph of the opinion was dicta. 98 S. Ct. at 1909 (Blackmun, J., concurring) and 98 S. Ct. at 1927 (Marshall, J., concurring in part).

⁷⁷ However, the Court declined to delineate the precise areas of permissible state regulation. 98 S. Ct. at 1908 n.33.

⁷⁸ *Ohralik v. Ohio State Bar Ass'n*, 98 S. Ct. at 1927 n.3 (Marshall, J., concurring in part).

⁷⁹ 98 S. Ct. at 1910 (Rehnquist, J., dissenting).

⁸⁰ 425 U.S. at 771 n.24.

⁸¹ 433 U.S. at 381.

⁸² *Id.* at 383.

⁸³ See Note, 68 J. CRIM. L. & C. 624, 631-32 (1977).

⁸⁴ 98 S. Ct. at 1918.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1918.

was purely commercial speech,⁸⁷ and accorded it only limited first amendment protection.⁸⁸ Hence, the distinction between commercial conduct and speech may, in reality, have been a mere shorthand method for concluding how much first amendment protection the Court wished to recognize.

The majority of cases cited in support of conduct being traditionally subject to regulation did not, however, consider the first amendment implications.⁸⁹ One case which did consider the first amendment, *Giboney v. Empire Storage & Ice Co.*,⁹⁰ dealt with picketing of a place of business to induce the owner not to sell to non-union peddlers. In *Giboney*, the picketing considered to be conduct subject to regulation was part of an illegal course of action in violation of antitrust laws.⁹¹

Meanwhile, the *Ohralik* Court failed to mention cases which held that "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize or curb the exercise of First Amendment rights."⁹² Placing *Ohralik's* solicitation in the conduct category therefore only suggested that his activity was commercial, not that it was necessarily outside the first amendment protection afforded other types of commercial speech.

Similarly, *Ohralik* failed to support its conclusion that the appropriate level of judicial scrutiny of commercial speech restrictions was lower than that of restrictions on non-commercial speech. The Court attempted to justify this undefined lower

⁸⁷ In its discussion of conduct traditionally subject to regulation the Court cited examples of purely commercial transactions involving speech elements. *Id.* at 1918-20. The Court then placed *Ohralik's* solicitation within this conduct category, *Id.* at 1919, thereby implying the conclusion that *Ohralik's* solicitation was also a purely commercial transaction. This conclusion is supported by the Court's summary of its *Ohralik* holding in *Primus*: "Under certain circumstances, [prophylactic regulation] . . . is appropriate in the case of speech that simply 'propose[s] a commercial transaction,' *Pittsburgh Press Co. v. Human Relations Comm'n.*, . . . See *Ohralik*." In re *Primus*, 98 S. Ct. at 1908.

⁸⁸ 98 S. Ct. at 1920.

⁸⁹ *Id.* at 1919 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)).

⁹⁰ 336 U.S. 490 (1949).

⁹¹ *Id.* at 502, 504.

⁹² *Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (statute to force NAACP registration of members). Cf. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (statute requiring prior authorization to distribute religious pamphlets).

level of scrutiny by declaring that it was necessary to prevent dilution of the broader first amendment protection enjoyed by non-commercial speech.⁹³ Potential dilution of traditional first amendment protection was not a factor considered in earlier commercial speech cases, which relied on the "hardiness" of commercial speech to support the different levels of protection.⁹⁴ The Court seemed to assume that if the protection was to be equal for commercial and non-commercial speakers alike, the result would be a weakening of protection of the latter, rather than a strengthening of the protection enjoyed by the former. The Court could just as easily have upheld full first amendment protection for commercial speech, including solicitation.

In *Virginia Board* and *Bates* the Court had emphasized the positive aspects of professional advertising. It noted that advertising was a means by which the professional could "reach out and serve the community" by providing information about his services.⁹⁵ And, while recognizing the problems of advertising, the Court stated that it "is nonetheless dissemination of information as to who is producing and selling what product, for what reason, at what price." That information, the Court reasoned, was essential to enlightened public decision-making.⁹⁶ In each of these cases the asserted evils of advertising were weighed against the benefits. And, although it was recognized that advertising might have an adverse effect on the administration of justice by "stirring up litigation," the Court noted that "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."⁹⁷

By contrast, when presented with the allegation in *Ohralik* that solicitation would "stir up litigation," the Court did not weigh potential harms against benefits. Instead, it accepted *Ohralik's* concession that there were potential harms associated with solicitation, and that the state had a right to prevent them.⁹⁸ The Court did not analyze each suggested potential harm in *Ohralik* to determine whether in fact it was directly connected with solicitation. In contrast, *Bates* considered each individual alleged harm to determine its relationship with advertising and to ascertain any countervail-

⁹³ 98 S. Ct. at 1918. See also note 21 *supra* and accompanying text.

⁹⁴ See 433 U.S. at 381; 425 U.S. at 771 n.24.

⁹⁵ 433 U.S. at 370.

⁹⁶ 425 U.S. at 765.

⁹⁷ 433 U.S. at 376.

⁹⁸ 98 S. Ct. at 1922.

ing value of the advertisements.⁹⁹ Hence, in *Ohralik* the Court may have loaded its scales for weighing state interests and first amendment rights, by looking only to the possible harms of solicitation and by not further considering the positive aspects of solicitation.

The existence of countervailing positive aspects of solicitation was suggested in one footnote of the *Ohralik* opinion. Here, the Court acknowledged "the importance of providing low and middle income individuals with adequate information about the availability of legal services."¹⁰⁰ However, the Court did not directly consider the informative aspects of solicitation. Rather, it suggested alternative means of communicating this information, including advertising. But, advertising is generally cost-effective only in standard areas of legal work, and may not provide the individual attention and advice of a personal consultation or solicitation.¹⁰¹ And even when misused, as in *Ohralik*, the "clients" were nevertheless provided with some information about their legal rights and remedies.¹⁰²

Ohralik presumed that most attorneys would take advantage of their training in the "art of persuasion" by playing on the weakness of potential clients. The Court assumed that, given the freedom to solicit clients, lawyers would immediately turn into the proverbial "ambulance chasers." By contrast, in the previous year, the Court in *Bates* had rejected assertions that lawyers would misuse the right to advertise by stating:

We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.¹⁰³

⁹⁹ For example, the claim in *Bates* that advertising would have an undesirable economic effect was not merely assumed to be true. Rather, the Court analyzed these arguments and found them to be "dubious at best." 433 U.S. at 377.

¹⁰⁰ 98 S. Ct. at 1919 n.15.

¹⁰¹ In *Bates* the Court recognized the fact that "many services performed by attorneys are indeed unique [such that] it is doubtful that any attorney would or could advertise fixed prices for services of that type." 433 U.S. at 372.

¹⁰² Justice Marshall noted in his concurrence that despite *Ohralik*'s questionable methods, he "advised both his clients (apparently correctly) that, although they had been injured by an uninsured motorist, they could nonetheless recover on the McClintock's insurance policy." 98 S. Ct. at 1928 (Marshall, J., concurring in part).

¹⁰³ 433 U.S. at 379.

It is unclear why the *Bates* Court laid one to thousands odds¹⁰⁴ in favor of scrupulous attorneys who advertise, while in *Ohralik* it viewed solicitation by attorneys as "more often than not . . . injurious to the person solicited."¹⁰⁵ As noted in *Bates*, "[t]he appropriate response to a fraud is a sanction addressed to that problem alone, not a sanction that unduly burdens a legitimate activity."¹⁰⁶

Ohralik also virtually ignored the emphasis of previous cases on the first amendment right of consumers to information. The Court dismissed this interest by concluding that "[i]n-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services [so that] . . . it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating 'informed and reliable decision-making.'"¹⁰⁷ And "[a]lthough it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his or her legal rights, the very plight of that person not only makes him or her more vulnerable to influence but also may make advice all the more intrusive."¹⁰⁸ *Virginia Board* had offered an alternative to that highly protective attitude by stating that the Court must "assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."¹⁰⁹ The *Bates* Court "view[ed] as dubious any justification that is based on the benefits of public ignorance,"¹¹⁰ suggesting that "[i]f the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."¹¹¹

Although the potential harms caused by solicitation may be greater than those caused by advertising, the Court has not required a presentation of

¹⁰⁴ *Id.*

¹⁰⁵ 98 S. Ct. at 1924. Granted, the facts in *Ohralik* indicate abuse of solicitation. But the facts in *Primus* do not. Additionally, despite the Court's labelling of *Primus*' activities as political expression, they were nonetheless solicitation and therefore subject to the same types of misuse feared in *Ohralik*.

¹⁰⁶ 433 U.S. at 375 n.31.

¹⁰⁷ 98 S. Ct. at 1919 (citations omitted).

¹⁰⁸ *Id.* at 1923.

¹⁰⁹ 425 U.S. at 770.

¹¹⁰ 433 U.S. at 375.

¹¹¹ *Id.*

facts to verify such a conclusion. It therefore seems particularly unreasonable for the Court to emphasize so strongly the negative aspects of solicitation *per se*. In upholding the constitutionality of Ohio's disciplinary rules—rules which banned all solicitation, including intermediate “benign” types—the Court may have taken an unjustified step back to its highly protective, pre-advertising stance. If, however, *Ohralik* was really concerned with the *actual* harm suggested, although not proven, then its extensive dicta regarding the potential evils of all solicitation disserves consumers in that it may deter future attorney solicitation and thereby chill some of the information which would otherwise flow freely to an informed and reliable decision-making public.¹¹²

The position of the soliciting attorney is now unclear. If charged with commercial solicitation, he may attempt to show his solicitation was privileged by motives which were political, associational or related to mutual assistance.¹¹³ As pointed out by Justice Rehnquist in dissent, the Court is virtually encouraging an attorney to engage in a “sham” to gain first amendment protection.¹¹⁴ Although the Court has seen through shams before¹¹⁵ most solicitation involves some informative factors.¹¹⁶ Even in *Primus* the Court ignored some potential pecuniary gain¹¹⁷ in light of its conclusion that *Primus*' primary motivation was political expression.

If the attorney cannot show a relationship between his solicitation and “core first amendment freedoms” of political expression, association, and

mutual assistance, he could argue that his solicitation was not “pure commercial speech,” but rather that it served an informative purpose. Then, it could be distinguishable from the “traditional areas of government regulation” cited in *Ohralik*. Similarly, he might argue that his professional character would lower, not increase, the potential for misuse, and that the consumer's need and right to tailored, individual information is served through the personal consultation of in-person solicitation. Marshallian statistics to support such assertions of public need would be beneficial.¹¹⁸

Finally, the attorney involved in “benign” commercial solicitation should avoid conceding the existence of potential harms connected with solicitation. Such concessions in *Ohralik* permitted the Court to sidestep in-depth analysis of the asserted harms of solicitation.

CONCLUSION

In light of the limited first amendment protection already recognized for restrained, truthful professional advertising, the Court may be forced to accord similar protection to the intermediate form of “benign” solicitation. Such limited protection might permit strict rules aimed specifically at abuses of the solicitation privilege, rather than at “benign” solicitation. However, until such a case arises, attorneys must draw the illusive line between “solicitation of clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent”¹¹⁹ and other forms of solicitation involving political, associational or mutual assistance elements.

¹¹² 433 U.S. at 364. See 425 U.S. at 765.

¹¹³ See *Ohralik v. Ohio State Bar Ass'n*, 98 S. Ct. at 1920; *In re Primus*, 98 S. Ct. at 1906.

¹¹⁴ 98 S. Ct. at 1910 (Rehnquist, J., dissenting).

¹¹⁵ Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1942) with *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹¹⁶ Cf. 425 U.S. at 764–65 (informative value of pharmacist's advertising).

¹¹⁷ See note 66 *supra*.

¹¹⁸ See, e.g., 98 S. Ct. at 1928 n.4. (Marshall, J., concurring in part). In this footnote Marshall notes an ABA Special Committee to Survey Legal Needs report that there appears to be substantial underutilization of lawyers' services, especially among the middle-class majority of this country.

¹¹⁹ *Ohralik v. Ohio State Bar Ass'n*, 98 S. Ct. at 1915.