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SUBJECTIVE AND OBJECTIVE: YOU CAN'T HAVE ONE WITHOUT THE OTHER: A RECOMMENDATION FOR MODEL RULE 7.3

I. INTRODUCTION

A woman arrives at a courthouse with her son. She speaks little to no English and is a bit overwhelmed by her surroundings. All that she knows is that her son has been arrested, and she must appear before a judge somewhere in the building. People brush by her, rushing to make their own respective court appearances. Mr. Solomon Cohn, an attorney, happens to notice her as he walks by. Cohn asks her if she needs assistance, to which she replies, "Yes." After she explains her situation to him, Cohn guides her to the proper courtroom and offers to represent her son's interests.¹

While some might view this encounter as a philanthropic or gratuitous gesture, the Supreme Court of New York held otherwise.² The court convicted Cohn of the crime of solicitation of business on behalf of an attorney and sentenced him to an unconditional discharge.³ In discussing this case, ethicist Monroe Freedman strongly disagreed with the court's holding.⁴ He instead proclaimed that Cohn "should have been given a citation as 'Attorney of the Year.'"⁵

For most people, the term "attorney solicitation" conjures up stereotypical images of "ambulance chasing" attorneys who prey on bed-ridden accident victims.⁶ Whether the solicitation occurs in the

1. See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 118 (1975) (citing *In re Cohn*, 352 N.Y.S.2d 461 (1974)).

2. See *Cohn*, 352 N.Y.S.2d at 462.

3. See *id.*

4. See FREEDMAN, *supra* note 1, at 118.

5. *Id.*; see also Louise L. Hill, *Solicitation By Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 416 (1990) (discussing Freedman's characterization of attorney Solomon Cohn).

6. See John H. Wilbur, Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L. REV. 677, 684 (1954); Joe Wishcamper, Comment, *Benign Solicita-*

personal injury context,⁷ or simply through the practice of "giving unsolicited legal advice . . . [and accepting] . . . employment resulting from such advice,"⁸ both the United States Supreme Court and the American Bar Association ("ABA") condemn this practice. Based on the belief that the primary source of the "substantive evils"⁹ inherent in attorney solicitation is the prospect of pecuniary gain,¹⁰ the ABA's *Model Rules of Professional Conduct* Rule 7.3 prohibits almost all attorney solicitation *motivated by a pecuniary interest*.¹¹ Freedman's commendation of the attorney engaged in solicitation in the previous scenario, however, suggests that the permissibility of such conduct should not rise or fall based on subjective motive alone. In fact, Freedman implies that, even if a court examined a subjective factor such as an attorney's motive, it would also need to consider objective aspects of the solicitation. These include the nature of the attorney's actions and the circumstances under which the solicitation took place.¹²

As it stands today, *Model Rule 7.3*, which regulates and proscribes attorney solicitation, employs only a subjective analysis in ascertaining the permissibility of an attorney's conduct.¹³ *Model*

tion of Clients by Attorneys, 54 WASH. L. REV. 671, 671 (1979); see, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 469 (1978) (concerning attorney Albert Ohralik, who engaged in "ambulance chasing" when he solicited two automobile accident victims).

7. See *Ohralik*, 436 U.S. at 449; see also *Attorney Grievance Comm'n v. Gregory*, 536 A.2d 646 (Md. 1988) (addressing solicitation in the criminal context).

8. *Ohralik*, 436 U.S. at 458.

9. See *id.* at 461.

10. See Victor P. Filippini, Jr., *Soliciting Sophisticates: A Modest Proposal for Attorney Solicitation*, 16 U. MICH. J.L. REFORM 585, 590 n.34 (1982); see also Evan R. Levy, *Edenfield v. Fane: In-Person Solicitation by Professionals Revisited-What Makes Lawyers Different?*, 58 ALB. L. REV. 261, 280 n.140 (1994) (identifying the stirring up of litigation and assertion of fraudulent claims as additional evils plaguing attorney solicitation).

11. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (1998). But see MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(b) (1998) (permitting the in-person solicitation of clients with whom an attorney had a prior professional relationship, or who are family members).

12. See FREEDMAN, *supra* note 1, at 119.

13. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1998) ("A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client . . . when a significant motive for the law-

Rule 7.3's legislative history indicates that the ABA instituted a purely subjective analysis because of its reading of the United States Supreme Court's holdings in *Ohralik v. Ohio State Bar Ass'n*¹⁴ and *In re Primus*.¹⁵ These cases held in part that the evils associated with solicitation were attributable to an attorney's pecuniary motive.¹⁶ Accordingly, the Court refused to afford First Amendment protection to attorney solicitation, and effectively prohibited all pecuniary-motivated attorney solicitations.¹⁷ Based on its interpretation of the Court's holding, the ABA promulgated an ethical rule containing a subjective test proscribing attorney solicitation based solely on the soliciting attorney's subjective motive.¹⁸

If the ABA sought to accurately codify the Supreme Court's approach, however, the language of *Model Rule 7.3* is oversimplified. As Freedman suggests, the Court's treatment of attorney solicitation should not—and does not—rest on purely subjective criteria.¹⁹ Indeed, the Court's analysis of the respective solicitations in both *Ohralik* and *Primus* contain *both* subjective and objective components. In fact, both Justice Marshall's concurrence in *Ohralik*²⁰ and Justice Rehnquist's dissent in *In re Primus*²¹ emphasized, to varying degrees, the need for an objective element in assessing the permissibility of attorney solicitations.

Ironically, over a decade later in *Edenfield v. Fane*,²² the Court relied solely on an objective analysis when it distinguished the impermissibility of pecuniary-motivated attorney solicitations from those of accountant solicitations.²³ In *Edenfield*, the Court struck down a statute that prohibited accountants from engaging in

yer's doing so is the lawyer's pecuniary gain.”)

14. 436 U.S. 447 (1978).

15. 436 U.S. 412 (1978).

16. *See id.* at 422; *Ohralik*, 436 U.S. at 464.

17. *See Ohralik*, 436 U.S. at 456.

18. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1998); *see also infra* Part IV.

19. *See* FREEDMAN, *supra* note 1, at 118.

20. *See Ohralik*, 436 U.S. at 468-77 (Marshall, J., concurring in part and concurring in the judgment).

21. *See Primus*, 436 U.S. at 440-46 (Rehnquist, J., dissenting).

22. 507 U.S. 761 (1993).

23. *See id.* at 775-76.

commercial solicitation when their motive for doing so was purely pecuniary.²⁴ The *Edenfield* Court's emphasis on objective criteria, such as the nature of the profession and the circumstances surrounding the solicitation, reflected the need to incorporate an objective component into the language of *Model Rule 7.3*. Therefore, as the ABA's Ethics 2000 Committee on the Evaluation of the Rules of Professional Conduct convenes this fall²⁵ to reevaluate *Model Rule 7.3*, the Committee should revise the solicitation rule to reflect an analysis with both a subjective and an objective component. Not only will the inclusion of an objective factor produce a rule that mirrors that of the Supreme Court, but it will also better serve public interest and public policy concerns.

This Comment posits that, in amending *Model Rule 7.3*, the ABA Ethics 2000 Committee should adopt a two-prong subjective-objective analysis to determine when attorney solicitations are permissible. Part II discusses the history of attorney solicitation, how it acquired its poor reputation, and why the fears surrounding it require both subjective and objective criteria to adequately gauge its peril. Part III examines *Model Rule 7.3*'s pecuniary motive language and critiques it in light of the legislative history and the rationale behind its adoption. Part IV explores the United States Supreme Court's treatment of attorney solicitation and its analysis containing both subjective and objective criteria in evaluating the propriety of attorney solicitations. Part IV demonstrates how the Court's reliance on objective factors in effectively upholding a pecuniary-motivated accountant solicitation in *Edenfield* necessitates the addition of an objective component to *Model Rule 7.3*. Part V analyzes the public policy rationales that expose the weaknesses of a purely subjective test, thereby demonstrating the need for an objective analysis. Part VI concludes that a test encompassing both a subjective and an objective component not only codifies the desires expressed by Justices Marshall and Rehnquist's minority opinions, but helps restore accountability to a legal system that will continue to anonymously

24. See *id.* at 777.

25. For more information on the ABA Ethics 2000 Committee and the re-drafting of the Model Rules, see *American Bar Association, Center for Professional Responsibility* (visited May 21, 1999) <<http://www.abanet.org/cpr/ethics2k.html>>.

victimize pro se litigants so long as a purely subjective solicitation rule exists.

II. REPLETE WITH A REPUTATION: ATTORNEY SOLICITATION AND ITS HISTORY

Attorney solicitation, frequently derided as “ambulance chasing,”²⁶ conjures up pejorative, stereotypical images of attorneys who coerce bed-ridden accident victims into retaining them as counsel to sue for their personal injuries. While not limited to the personal injury context,²⁷ almost all attorney solicitation activity has been condemned by the United States Supreme Court²⁸ because of a well-established fear of the “substantive evils”²⁹ inherent in and perpetuated by such activity.³⁰ This fear clearly stems from the long history of ill-repute associated with attorney solicitation.

Solicitation traces its roots, and its pejorative reputation, back to ancient Greek and Roman times. Society had viewed attorneys who actively sought out clients with skepticism and suspicion³¹ because of the way they sought to interfere in litigation proceedings. Appropriately called “intervenors”³² in Greek society, these attorneys often took advantage of the limited privileges they had to intervene on behalf of others and were frequently charged with abusing the legal

26. See Wilbur, *supra* note 6, at 684; see, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 469 (Marshall, J., concurring in part and concurring in the judgment) (illustrating a classic example of an attorney engaged in “ambulance chasing”).

27. See Wilbur, *supra* note 6, at 684-85. See generally Wishcamper, *supra* note 6, at 675 (contrasting “ambulance chasing” with benign forms of solicitation).

28. *But see In re Primus*, 436 U.S. at 422 (carving out an exception to the otherwise prophylactic ban on attorney solicitation for non-pecuniary solicitations that seek to preserve civil and political rights).

29. *Ohralik*, 436 U.S. at 461.

30. See Filippini, *supra* note 10, at 590 n.34; see also Levy, *supra* note 10, at 280 n.140 (quoting *Ohralik*, 436 U.S. at 461 (explaining that such evils include “stirring up litigation, assert[ing] fraudulent claims, debasing the legal profession, and [inflicting] potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation”).

31. See Hill, *supra* note 5, at 370 & n.13.

32. *Id.* at 372-73.

process.³³ They were regarded as “sycophants,” or “individual[s] who voluntarily undertook the prosecution of a matter, being motivated by money, prestige, [and] political advantage,”³⁴ or who did so purely to harass their opponents.³⁵ This aura of distrust that emerged in Greek society carried over into Roman times.³⁶ Even where advocacy was a recognized profession,³⁷ Roman attorneys, or “calumniators,”³⁸ also vexatiously litigated frivolous or baseless actions on behalf of litigants.³⁹ This conduct fueled society’s continued distrust of advocates’ involvement in the legal system.

Even when the practice of obtaining legal representation carried over into the English legal tradition,⁴⁰ it was still accompanied not only by the same “ancient prejudice against representation, but also [by] . . . the perception that these advocates encouraged . . . profit-seeking lawsuits in particular.”⁴¹ English advocates, or “champions,”⁴² unsurprisingly developed reputations for being dishonest, greedy individuals who, much like their predecessors, were motivated purely by their own financial interests.⁴³ Champions were said to perpetuate and promote barratry,⁴⁴ champerty,⁴⁵ and

33. *See id.* at 372-73 & nn.23-26.

34. *Id.* at 371.

35. *See id.* at 372 & n.23.

36. *See id.* at 372.

37. *See id.* at 373.

38. *Id.*

39. *See id.* For a more thorough discussion of the historical treatment of attorney solicitation, see HENRY SANDWITH DRINKER, *LEGAL ETHICS* (1953) and MICHAEL GAGARIN, *EARLY GREEK LAW* (1986).

40. *See Hill, supra* note 5, at 374.

41. *Id.* at 375.

42. *Id.* at 370.

43. *See id.* at 375.

44. Black’s Law Dictionary defines “barratry” as “[t]he offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise.” BLACK’S LAW DICTIONARY 150 (6th ed. 1990); *see also* Robert E. Gipson, Comment, *Advertising, Solicitation and the Profession’s Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1181-82 & 1182 n.6 (1972) (comparing the prohibition of solicitation to “historical animus against ‘stirring up litigation’ and to the prevention of barratry, champerty and maintenance . . .”).

45. Black’s Law Dictionary defines “champerty” as a “bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds; . . . one type of ‘maintenance’” BLACK’S LAW DICTIONARY 231 (6th ed. 1990); *see*

maintenance.⁴⁶ Hence, the English legal system traditionally discouraged its attorneys from soliciting business.⁴⁷

In modeling its legal system after the English, the proponents of the American legal system acquired the same distaste for attorney solicitations.⁴⁸ In fact, the American Bar Association's unfavorable view of solicitation prompted it to enact the Canons of Ethics in 1908.⁴⁹ The original Canons codified a solicitation prohibition, denouncing attorney solicitation as "unprofessional" behavior.⁵⁰

However, with respect to the rules proscribing solicitation, the ethical canons were regarded as ineffective.⁵¹ Much of their failure was attributable to the ABA's use of vague and ambiguous language,⁵² and the overall failure of the Canons to properly govern attorney conduct.⁵³ The need for more decisive language and finite standards⁵⁴ forced drafters of the Canons, and later the *Model Code*

also Gipson, *supra* note 44, at 1182 n.6 (explaining the meaning and historical significance of champerty).

46. Black's Law Dictionary defines "maintenance" with respect to lawsuits as "[a]n officious intermeddling in a lawsuit . . . or assisting either party, with money or otherwise, to prosecute or defend the litigation." BLACK'S LAW DICTIONARY 954 (6th ed. 1990); *see also* Gipson, *supra* note 44, at 1182 n.6 (explaining the meaning and historical significance of maintenance).

47. *See* Hill, *supra* note 5, at 375 n.51.

48. *See, e.g.,* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977). *Bates* explained that the ban on attorney advertising and commercial speech first originated as a rule of etiquette in the legal profession. *See id.* The English viewed commercial speech as being affiliated with "trades," which differed from the view that a law practice was an esteemed form of public service. *See also, e.g.,* DRINKER, *supra* note 39, at 210-12 (discussing the historical treatment of attorney solicitation). Note also that one functional and contemporary equivalent of an American "lawyer," ironically enough, is an English "solicitor." *See* Hill, *supra* note 5, at 377 & n.60.

49. *See* Gipson, *supra* note 44, at 1182. *See generally* DRINKER, *supra* note 39, at 23-25 (providing additional historical background on the evolution of American legal ethics).

50. *See* CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). The original wording of the Canon states that the "solicitation of business by . . . personal communications, or interviews, not warranted by personal relations, is unprofessional." *Id.*

51. *See* FREEDMAN, *supra* note 1, at 127.

52. *See id.*

53. *See id.*

54. The ABA's Special Committee on Evaluation of Ethical Standards sought to revise the Canons for three main reasons: first, the Canons failed to

of *Professional Responsibility*,⁵⁵ to pinpoint the precise solicitous conduct the Committee sought to proscribe. In doing so, the Committee could better draft a rule proscribing attorney solicitation that would effectively assuage any fears associated with such ill-reputed conduct.

The drafters identified seven concerns that an ethics rule governing solicitation should address. First, the rules should seek to protect potential clients from "deception, overreaching, undue influence, intimidation, and misrepresentation" by attorneys who may coerce them into retaining the attorney's services.⁵⁶ Second, the rules should shield clients from situations where an attorney's undue influence could force them into making uninformed and impromptu decisions.⁵⁷ Specifically, the drafters believed that face-to-face contact is "offensive to the sensibilities of a client"⁵⁸ and invasive of one's privacy.⁵⁹ Moreover, such direct contact with a client fails to

address important areas of attorney conduct; second, they failed to offer guidelines as to practical sanctions for behavior; and third, they proved incapable of addressing the changing conditions in both the legal system and society at large. *See id.* at 129. Hence, the Committee formulated a revised set of guidelines, namely the *Model Code of Professional Responsibility*, which replaced the Canons in 1969. *Model Code* DR 2-104 replaced Canon 27 as the rule governing attorney solicitation. It stated, subject to limited exceptions, that "a lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 (1983).

55. In 1984, the ABA replaced the *Model Code of Professional Responsibility* with the *Model Rules of Professional Conduct*. The ABA felt that *Model Code* DR 2-104 was too restrictive. *See* Lori B. Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808, 811 (1982) (discussing features of the *Model Rules of Professional Conduct* Rule 7.3 which improved and more clearly defined the scope of attorney solicitation).

56. Filippini, *supra* note 10, at 590 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-4 (1983) (stating that a "lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter").

57. *See* Comment, *A Critical Analysis of Rules Against Solicitation By Lawyers*, 25 U. CHI. L. REV. 674, 683 (1958).

58. *Id.*

59. *See* *Breard v. Alexandria*, 341 U.S. 622, 644-45 (1951) (upholding a municipal ordinance prohibiting the door-to-door solicitation of magazine sub-

give the client an opportunity to compare the quality of the soliciting attorney's services, prices, and qualifications with those of others not before the client.⁶⁰ Without this opportunity to interview and research various attorneys, clients are denied the critical opportunity to make an informed choice regarding which attorney is capable of best representing their interests.⁶¹

Third, the rules should work toward eliminating the fear that in-person solicitations will "stir up litigation,"⁶² and flood the courts with lawsuits.⁶³ Fourth, the rules should address the fear that an attorney may subordinate a client's best interest to that of an attorney's own pecuniary interest if and when the two conflict.⁶⁴ Indeed, solicitation might arguably increase fraudulent claims because a soliciting attorney not only "suggests to the claimant the possibility of asserting a . . . claim, but also assures [the claimant] of professional support in prosecuting [the] suit."⁶⁵

The fifth concern expressed a belief that the ethics rules governing solicitation should preserve the standards, reputation, and integrity of the legal profession.⁶⁶ This rationale derives from a fear that "disrespect for lawyers leads to a disrespect for [the] law."⁶⁷ Sixth, the rules should aim "at maintaining the self-perceived status of lawyers."⁶⁸ This concern stemmed from the notion of

scriptions because such activity constituted an invasion of privacy).

60. See *Ohralik*, 436 U.S. at 457-58.

61. See *id.*

62. Comment, *supra* note 57, at 675.

63. See generally *id.* (discussing the implications of stirring up litigation).

64. See Filippini, *supra* note 10, at 590 n.34. But see Charles A. Pulaski, Jr., *In-Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided?*, 1979 ARIZ. ST. L.J. 23, 55-60 (1979) (arguing that an attorney's better judgment can be equally blurred by political motivations).

65. Comment, *supra* note 57, at 679 (paraphrasing *Report of the Committee of Censors, Philadelphia Bar Ass'n*, 14 MASS. L.Q. SUPP. 44, 59 (1928)).

66. See Filippini, *supra* note 10, at 591 (ascertaining that in-person solicitations are not per se undignified). Filippini argued that if an attorney solicits in a discrete, tactful, and non-coercive manner, such behavior could arguably restore a sense of professionalism to the legal profession. See *id.*

67. Comment, *supra* note 57, at 681. The article also contemplates the argument "that solicitation works to the detriment of the legal profession by concentrating legal business in the hands of a few lawyers." *Id.* at 682.

68. Filippini, *supra* note 10, at 591-92.

“professional hubris”;⁶⁹ since attorneys are members of an esteemed and “learned profession [that] perform[s] a public service,”⁷⁰ they should “avoid the commercialism of ordinary trades and businesses.”⁷¹ Lastly, a solicitation rule should decrease competition in the profession, promote harmony, and prevent “client stealing.”⁷² With these concerns in mind, the ABA sought to revamp the *Model Code* and its solicitation canon, and formulate a rule which would eradicate the evils of attorney solicitation.

III. THE DEVELOPMENT OF AND LEGISLATIVE HISTORY BEHIND MODEL RULE 7.3

After considering the foregoing fears and concerns, the ABA drafted the Model Code solicitation provisions to serve as an outright ban on all solicitation activity.⁷³ The ABA believed that an outright

69. *Id.* at 592.

70. *Id.*

71. *Id.* (paraphrasing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977)).

72. *Id.* Filippini infers this from his reading of the *Model Code of Professional Conduct* EC 2-3, EC 2-4, DR 2-103 & DR 2-104. *See id.* at 592 n.44.

73. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 (A) (1983) (stating that “a lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . ”); *see also* Hill, *supra* note 5, at 382 (“In a blanket provision, the Canons asserted that solicitation of business by . . . personal communications, or interviews, not warranted by personal relations, is unprofessional”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-4 (1983) (“A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter.”).

The *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct* have in fact permitted only a few exceptions to the otherwise blanket ban on in-person attorney solicitation. The Model Code and the Model Rules do permit the in-person solicitation of business from a friend or family member, where a personal relationship existed between the attorney and the client prior to a legal employment relationship, or where the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) & EC 2-4 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) & cmt.(4) (1998). Another exception is one carved out for pro bono organizations and other legal aid services. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(2)&(3) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(d) & cmt.(4)&(6) (1998). Furthermore, the Model Code permits employment resulting from the offering of unsolicited advice to a close friend,

ban was necessary in order to abolish the peril and harm that invariably infected every in-person attorney solicitation. The ban, characterized as a "prophylactic" measure,⁷⁴ sought to shield lay people from *any* danger resulting from such an encounter.⁷⁵

However, the ABA drafters of the Model Code provisions were forced to reconsider the outright ban on solicitation⁷⁶ when the United States Supreme Court handed down their decisions in *Ohralik v. Ohio State Bar Ass'n*⁷⁷ and *In re Primus*.⁷⁸ These opinions elucidated the fact that "there might be some instances in which in-person contact by a lawyer may produce fewer dangers[,] or even be in the potential clients' best interest."⁷⁹ In formulating a rule proscribing in-person solicitation, the ABA looked to the Supreme Court for guidance in developing one that clarified an attorney's role, and provided a restrictive, yet constitutional framework to guide the ethical practice of law.⁸⁰ The product of the ABA's revision of the existing Model Code provision was the codification of a modified set of ethics rules known as the *Model Rules of Professional Conduct*.⁸¹ Indeed, the legislative history of *Model Rule 7.3* clearly indicates that

whereas the Model Rules only permit solicitations of a friend where there has been a prior professional or personal relationship. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 (A)(1) & EC 2-4 (1983) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) & cmt.(4) (1998) (illustrating the distinction between the Model Code and Model Rules on this point).

74. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978).

75. Note that both the Model Code and the Model Rules allow for exceptions to the otherwise "outright" ban on in-person solicitation. See *supra* note 73 and accompanying text.

76. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 & EC 2-4 (1983).

77. 436 U.S. at 468.

78. 436 U.S. at 438-39.

79. Andrews, *supra* note 55, at 811.

80. See ELAINE REICH, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 182-83 (1987).

81. While both the *Model Rules of Professional Conduct* and *Model Code of Professional Responsibility* are in effect today, the majority of jurisdictions adhere to the Model Rules. In comparing the language of *Model Rules of Professional Conduct* Rule 7.3 with *Model Code of Professional Responsibility* DR 2-104(A)(1)-(3), which banned virtually all employment resulting from a solicitation, it is clear that *Model Rule 7.3* allows more latitude. See *supra* note 73 and accompanying text.

the rule parallels the precise language and approach used by the Supreme Court in its treatment of a pecuniary-motivated attorney solicitation in *Ohralik*.⁸² Accordingly, *Model Rule 7.3* reads as follows:

(a) 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.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if: . . . (2) the solicitation involves coercion, duress or harassment.⁸³

As the language of *Model Rule 7.3* indicates, the ABA interpreted the Supreme Court's holding in *Ohralik* to signify that the "evil [in solicitation activity] was thought likely to occur when a

82. The Drafting Committee actually rejected an earlier version of the rule which did not contain the pecuniary motive language from the *Ohralik* opinion. The earlier version read:

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b): (1) if the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client; (2) under the auspices of a public or charitable legal services organization; or; (3) under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if: (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; (2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or (3) the communication involves coercion, duress or harassment.

REICH, *supra* note 80, at 182-83.

83. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1998) (emphasis added).

lawyer significantly motivated by pecuniary gain privately solicited employment.”⁸⁴ Therefore, the ABA implemented a solicitation ban which employed the attorney’s subjective pecuniary motive as a gauge for improper conduct. Based on its reading of *Ohralik*, the ABA believed that “there [was] far less likelihood that a lawyer would engage in abusive practices against an individual . . . where the lawyer [was] motivated by considerations *other* than the lawyer’s pecuniary gain.”⁸⁵

In codifying a purely subjective test, however, the ABA failed to exactly mirror the Supreme Court’s analysis of attorney solicitations. Rather, upon close examination of the Court’s opinions in both *Ohralik* and *Primus*, and later in *Edenfield*,⁸⁶ one observes that the Court actually employed both objective and subjective factors in its analysis of attorney solicitation. Moreover, the Court recognized that while it was important to assess the soliciting attorney’s subjective motives, objective factors—such as the circumstances under which the solicitation took place—should also be considered in ascertaining the permissibility of a solicitation.⁸⁷ By including objective factors in its analysis, the Court could obtain a more precise idea of exactly what transpired during the solicitation encounter. Therefore, to best reflect the Supreme Court’s approach, the ABA Ethics 2000 Committee should redraft *Model Rule 7.3* to include both an objective and subjective analysis.

IV. ATTORNEY SOLICITATION ANALYZED: THE SUPREME COURT’S TWO-STEP APPROACH

A. Commercial Speech and Solicitation: A Foreshadowing of Sorts

Even before the Supreme Court addressed solicitation in the context of the legal profession, its treatment of other forms of commercial speech foreshadowed its future conclusions about attorney

84. REICH, *supra* note 80, at 183-84.

85. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 cmt.(4) (1998) (emphasis added).

86. 507 U.S. 761 (1993).

87. See *Ohralik*, 436 U.S. at 464; *Primus*, 436 U.S. at 427-35, 442-44 (Rehnquist, J., dissenting).

solicitation. Traditionally, commercial speech had gone unprotected. The Court, however, finally afforded limited constitutional protection to commercial speech, or speech that does "no more than propose a commercial transaction,"⁸⁸ when it carved out an entirely new area of constitutionally protected speech⁸⁹ in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁹⁰ There, the Court invalidated a Virginia statute that prevented a pharmacist from advertising prices of prescription drugs.⁹¹ In employing a balancing test, the Court found that the interests of free enterprise and the free flow of commercial information outweighed the state's interest in "maintaining a high degree of professionalism on the part of licensed pharmacists."⁹²

In seeking to preserve those interests, however, the Court did not grant absolute protection to all forms of commercial speech. In fact, the Court specifically limited the holding of *Virginia Board of Pharmacy* to its facts, and refused to extend its rationale to other professions, let alone attorney commercial speech.⁹³ Rather, in the case of professional solicitations conducted by professionals, the Court would "require consideration of quite different factors [since] . . . lawyers . . . render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception"⁹⁴ This statement is significant because it

88. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). For more background on the commercial speech doctrine, see Fred S. McChesney, *Commercial Speech In the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985) and Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487 (1986).

89. See Levy, *supra* note 10, at 261-62.

90. 425 U.S. 748 (1976). Commercial speech traveled a long, complex road before finally receiving limited constitutional protection. For a chronology and explanation of the Supreme Court's jurisprudence, see Jeffrey M. Brandt, *Attorney In-Person Solicitation: Hope for a New Direction and Supreme Court Protection After Edenfield v. Fane*, 25 U. TOL. L. REV. 783, 786 n.27 (1994).

91. See *Virginia Bd. of Pharmacy*, 425 U.S. at 749-50.

92. *Id.* at 766.

93. See *id.* at 773 n.25.

94. *Id.*

demonstrates that the Court regarded professional solicitation—specifically that of attorneys—as distinct from other forms of commercial speech. In dicta, moreover, the Court indicated that the very nature of professional solicitations required the consideration of different factors when analyzing and evaluating professional solicitation cases.⁹⁵ This insight into the Court’s jurisprudence proved to be quite instrumental in examining the Court’s eventual treatment of attorney solicitation cases.

B. Leaving the Balancing Behind: The Supreme Court’s Employment of a Two-Prong, Subjective and Objective Analysis of Attorney Solicitation

1. The two prongs revealed

Although the Court alluded to attorney solicitation in other commercial speech cases,⁹⁶ the Supreme Court finally directly

95. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977). In *Bates*, the Supreme Court heard a case involving an advertisement for legal services that two young attorneys placed in a local newspaper. See *id.* at 354. The Court struck down a ban prohibiting attorney advertising on the grounds that while a state may proscribe false and misleading attorney advertising, it can not impose a blanket ban, as such a prohibition was unconstitutional. See *id.* at 383-84. The Court was careful to limit the *Bates* holding to its facts, and thereby dispelled any hope of applying it to attorney in-person solicitations. See *id.* at 366. The Court condemned the “in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence . . . [because it] . . . might well pose dangers of overreaching and misrepresentation not encountered in . . . advertising.” *Id.* at 366. While the Court’s dicta did not proscribe it completely, the Court implied that, by virtue of the dangers solicitation possessed that advertising lacked, the Court would not afford attorney solicitation the same constitutional protection afforded to attorney advertising. See *id.* at 366, 383-84; see also Paul S. Manning, *Ohralik v. Ohio State Bar Association: Do Bans on In-Person Solicitation by Attorneys Make Sense?*, 3 GEO. MASON U. CIV. RTS. L.J. 329, 336 (1993) (explaining that the Court denied solicitation First Amendment protection because, unlike advertising, in-person solicitation created an enhanced opportunity for an attorney’s strategic or manipulative behavior).

96. See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 645 (1951) (describing solicitation as a “misuse of the great guarantees of free speech,” even in the context of a salesman soliciting door to door, selling magazine subscriptions); *Virginia State Bd. of Pharmacy*, 425 U.S. at 773 n.25 (acknowledging the “en-

addressed the issue in *Ohralik v. Ohio State Bar Ass'n*,⁹⁷ and in *In re Primus*.⁹⁸ When the Court finally characterized the nature of attorney solicitation, it described it as a "business transaction in which speech is an essential but subordinate component."⁹⁹ The Court's articulation signified that it regarded attorney solicitation as a form of speech undeserving of the same protection it afforded other forms of commercial speech. Although the Court previously invoked a balancing test of sorts in analyzing other commercial speech cases,¹⁰⁰ the Court seemed to abandon this approach when it was forced to circumscribe the boundaries of permissible attorney in-person solicitation.¹⁰¹ Instead of a balancing test, the Court opted for a lower level of judicial scrutiny.¹⁰²

In explaining this standard of judicial scrutiny, the Court articulated the following rationale upon which it based its analysis: "The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs . . . [They seek] to discipline a lawyer for soliciting employment *for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert.*"¹⁰³ This rationale contains two components: a subjective and an objective component. The first component, as indicated by the terms "soliciting employment for pecuniary gain,"¹⁰⁴ refers to an analysis of subjective factors, namely the attorney's motive for soliciting. This factor is codified in the language of *Model Rule 7.3*, and reflected in the rule's legislative history.¹⁰⁵

hanced possibility for confusion and deception if [attorneys] were to undertake certain kinds of advertising").

97. 436 U.S. 447 (1978).

98. 436 U.S. 412 (1978).

99. *Ohralik*, 436 U.S. at 457.

100. *See id.* at 455 ("The balance struck in *Bates* does not predetermine the outcome in this case."); Brandt, *supra* note 90, at 787-88.

101. *See, e.g., Ohralik*, 436 U.S. at 466-67 (discussing how and why the Court condoned Ohio's prophylactic solicitation rule).

102. *See id.* at 457.

103. *Id.* at 464 (emphasis added).

104. *Id.*

105. *See REICH, supra* note 80, at 183-86.

The Court also employed a second component in its analysis—one which was *not* codified in *Model Rule 7.3*, nor discussed in its legislative history.¹⁰⁶ The second component, as illustrated by the phrase “under circumstances likely to result in adverse consequences,”¹⁰⁷ refers to an analysis of objective factors, namely the circumstances surrounding the actual solicitation. Together, these factors provided the Court with both the means and the tools with which to determine whether an attorney solicitation was permissible.¹⁰⁸

2. *Ohralik* and *Primus* are put to the test

The Court utilized this two-part approach in its simultaneous yet seemingly dichotomous decisions dealing with attorney solicitation cases. In *Ohralik*, the Supreme Court confronted a classic case of ambulance chasing. Albert Ohralik, a licensed attorney, learned of an auto accident involving two young women, Carol McClintock and Wanda Lou Holbert.¹⁰⁹ Ohralik twice approached McClintock at her hospital bed, offering to represent her in suing for personal injury damages.¹¹⁰ McClintock finally agreed to Ohralik’s representation, and signed a contingency fee agreement.¹¹¹ Ohralik also approached Holbert at her home the day she returned from the hospital, and urged her to retain his services.¹¹² He used a concealed tape recorder to record and preserve evidence of Holbert’s oral assent to the representation.¹¹³ When Holbert and McClintock discharged Ohralik as their attorney, he refused to withdraw as the attorney of record.¹¹⁴ Consequently, both filed complaints against Ohralik for violations of

106. *See id.*; MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1998).

107. *Ohralik*, 436 U.S. at 464.

108. *See id.*; *Primus*, 436 U.S. at 434.

109. *See Ohralik*, 436 U.S. at 449.

110. *See id.* at 450.

111. *See id.*

112. *See id.* at 451.

113. *See id.*

114. *See id.* at 452.

the *Ohio Code of Professional Responsibility*¹¹⁵ for engaging in direct in-person solicitation.¹¹⁶

In reviewing the Ohio Supreme Court's decision, the United States Supreme Court noted that "[t]he solicitation of business by a lawyer through direct, in-person communication with the prospective client ha[d] long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client."¹¹⁷ The Court's two-part subjective and objective analysis served three important interests: "[first,] reduc[ing] the likelihood of overreaching . . . and undue influence on laypersons; [second,] protect[ing] the privacy of [such] individuals; and [third,] . . . avoid[ing] situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest."¹¹⁸

In employing the subjective prong of its analysis, the Court readily determined that Ohralik was motivated by his own selfish, pecuniary interests.¹¹⁹ First, Ohralik insisted on a contingency fee agreement—"thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer."¹²⁰ Second, even after the two victims rightfully discharged Ohralik, he demanded a share of their insurance recovery to settle a lawsuit he audaciously filed against the women for breach of contract.¹²¹ The Court explained that "impermissible solicitation[s] [are those] undertaken for purposes of the attorney's pecuniary gain and . . . [do] . . . not includ[e] offers of service to indigents without charge."¹²² Since Ohralik's conduct was motivated solely by the potential for his own financial benefit, he engaged in an impermissible solicitation.

115. *Ohralik* called for an interpretation of Ohio's adaptation of the *Model Code of Professional Responsibility*. It read in part: "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." *Id.* at 453 n.9.

116. *See id.* at 452-53.

117. *Id.* at 454.

118. *Id.* at 461.

119. *See id.* at 467-68.

120. *Id.* at 467.

121. *See id.* at 452.

122. *Id.* at 462-63 n.20.

After its subjective analysis of the solicitation, the Court analyzed the objective circumstances surrounding it.¹²³ In fact, the Court declared that the appropriate focus of its analysis was Ohralik's *conduct*, and not his motives.¹²⁴ The circumstances surrounding the solicitation revealed a coercive and overreaching encounter. Ohralik approached McClintock and Holbert immediately following a car accident which hospitalized both victims.¹²⁵ The Court reasoned that, despite any value it may have in apprising victims of their legal rights, approaching a vulnerable individual is intrusive.¹²⁶ The Court recognized that Ohralik's presence prevented either woman from carefully deliberating and arriving at a well-thought-out decision.¹²⁷ In upholding the state's prophylactic ban on pecuniary-motivated in-person solicitation under such circumstances,¹²⁸ the Court concluded that Ohralik's improper motive and objectively dangerous conduct resulted in an impermissible solicitation—one which the First Amendment would not protect.¹²⁹ The Court's reliance on both objective and subjective factors yielded a holding which not only upheld a prohibition of pecuniary-motivated in-person attorney solicitations, but also formulated a new standard regulating attorney solicitation practices. Therefore, contrary to the ABA drafters' reading of the holding, the Court actually employed an analysis containing *both* subjective and objective components.

123. *See id.* at 463.

124. *See id.*; *see also* Wishcamper, *supra* note 6, at 676 & n.27 (explaining that the Court placed its primary focus on the circumstances of the solicitation).

125. *See Ohralik*, 436 U.S. at 449.

126. *See id.* at 465.

127. *See id.* at 457.

128. The Court refused to require the state to prove actual injury to McClintock and Holbert. *See id.* at 466-68. It acknowledged that the occurrence of an in-person solicitation is not likely to be visible to the public-at-large, and consequently goes unwitnessed. *See id.* at 466. Since it would be difficult to obtain reliable proof that the incident occurred, the Court determined that a prophylactic ban was appropriate in prohibiting all pecuniary-motivated solicitations that take place under coercive circumstances. *See id.* at 466-67.

129. *See id.* at 467-68.

While the Court employed the identical analysis in *In re Primus*,¹³⁰ a distinct result emerged.¹³¹ In *Primus*, ACLU attorney Edna Smith Primus contacted Mary Etta Williams who had been allegedly sterilized pursuant to a Medicare policy requiring the sterilization of all Medicare beneficiaries.¹³² Upon learning of Williams's alleged desire to institute a lawsuit, Primus wrote Williams a letter informing her of the ACLU's offer of pro bono representation in the matter.¹³³ Rather than filing a lawsuit against the doctor who sterilized her, Williams instead filed a complaint with the state bar against Primus for solicitation.¹³⁴

With *Ohralik* before it, the Court could easily distinguish Primus's conduct. The Court's majority first analyzed Primus's subjective motive.¹³⁵ Unlike *Ohralik*'s pecuniary motive,¹³⁶ the Court characterized Primus's motive as one of "seeking to further political and ideological goals through . . . advis[ing] a lay person of her legal rights and . . . that free legal assistance [was] available"¹³⁷ In fact, the Court heralded Primus's politically-motivated solicitation because such conduct promoted the civil rights of *others*,¹³⁸ and not the pecuniary interests of the attorney.¹³⁹

The Court went on to engage in an objective analysis of the nature and circumstances under which the solicitation took place.¹⁴⁰ The Court first distinguished *Ohralik*'s overreaching and intrusive solicitation from that of Primus's by noting the manner in which the solicitation occurred.¹⁴¹ The solicitation in *Primus* did not take place under conditions which placed Williams in a vulnerable or

130. 436 U.S. 412 (1978).

131. *See id.* at 422. Interestingly enough, though surely not a coincidence, the Court decided *Ohralik* and *Primus* on the very same day. *See id.* at 412; *Ohralik*, 436 U.S. at 447.

132. *See Primus*, 436 U.S. at 416-17.

133. *See id.* at 416.

134. *See id.* at 417.

135. *See id.* at 422.

136. *See Ohralik*, 436 U.S. at 467.

137. *Primus*, 436 U.S. at 414.

138. *See id.* at 422.

139. *See Ohralik*, 436 U.S. at 470 (Marshall, J., concurring in part and concurring in the judgment).

140. *See Primus*, 436 U.S. at 422.

141. *See id.*

compromising position.¹⁴² Primus sent Williams a letter following an initial, informal meeting by the parties. The letter was not misleading, and unlike a direct, face-to-face meeting, it did not present the same risks of overreaching that existed in *Ohralik*.¹⁴³ The letter merely contained pertinent information which informed Ms. Williams in a non-coercive manner about her rights and about the lawsuit.¹⁴⁴ Moreover, the act of sending it would allow her to have time and space to deliberate and arrive at a well-reasoned decision regarding her involvement.¹⁴⁵ Therefore, by applying a subjective and objective analysis, the Court found Primus's solicitation to be permissible. It lacked the impermissible motive and circumstances which would otherwise condemn such behavior.¹⁴⁶ Together, *Ohralik* and *Primus* established the two poles of permissible and impermissible attorney solicitations¹⁴⁷ determined by both a subjective and objective analysis.

While the majority opinions in each case relied quite heavily on an objective analysis, the true importance of employing an objective analysis is better discussed in the cases' minority opinions. Both Justice Marshall's concurrence in *Ohralik*¹⁴⁸ and Justice Rehnquist's dissent in *In re Primus*¹⁴⁹ focus—in varying degrees—on the significance of the objective component of the Court's analysis. Although Justice Marshall agreed with the majority's holding in condemning

142. *See id.* at 435.

143. *See Ohralik*, 436 U.S. at 468.

144. *See Primus*, 436 U.S. at 416-17 n.6. The relevant portion of the letter read:

The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation [We] would like to explain what is involved so you can understand what is going on [I]f you are interested, let me know, and I'll let you know when we will come down to talk to you about it.

Id. at 416 n.6.

145. *See id.* at 435.

146. *See id.* at 422.

147. *See Ohralik*, 436 U.S. at 471 (Marshall, J., concurring in part and concurring in the judgment) ("Our holdings today deal . . . with situations at opposite poles of the problem of attorney solicitation.").

148. *See id.* at 468-77 (Marshall, J., concurring in part and concurring in the judgment).

149. *See Primus*, 436 U.S. at 440-46 (Rehnquist, J., dissenting).

Ohralik's conduct, his concurrence argued that "[w]hat is objectionable about Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it."¹⁵⁰ Justice Marshall contended that an emphasis on the objective circumstances under which a solicitation occurred would promote what he deemed to be "'benign' solicitations"¹⁵¹ or in other words,

solicitation by advice and information that is truthful and that is presented in a non-coercive, 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.¹⁵²

Similarly, Justice Rehnquist noted the importance of considering objective factors.¹⁵³ Unlike Justice Marshall, however, Justice Rehnquist disagreed with the majority opinions in both *Primus* and *Ohralik*.¹⁵⁴ Justice Rehnquist instead endorsed the use of a *purely* objective test to assess an attorney's conduct.¹⁵⁵ Justice Rehnquist emphasized that to condemn Ohralik's pecuniary solicitation, while

150. *Ohralik*, 436 U.S. at 470 (Marshall, J., concurring in part and concurring in the judgment).

151. *Id.* at 472 (Marshall, J., concurring in part and concurring in the judgment).

152. *Id.* at 472 n.3 (Marshall, J., concurring in part and concurring in the judgment); cf. *Louisville Bar Ass'n v. Hubbard*, 139 S.W.2d 773, 775 (Ky. 1940) (stating that an "attorney may personally solicit business . . . where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered . . .").

153. *See Primus*, 436 U.S. at 443 (Rehnquist, J., dissenting).

154. *See id.* (Rehnquist, J., dissenting). In discussing the Court's holdings in *Ohralik* and *Primus*, Justice Rehnquist sardonically remarked that:

One tale ends happily for the lawyer and one does not. If we were given the latitude of novelists in deciding between happy and unhappy endings for the heroes and villains of our tales, I might well join in the Court's disposition of both cases But I remain unpersuaded by the Court's opinions in these two cases that there is a principled basis for concluding that the First . . . Amendment[] forbid[s] South Carolina from disciplining *Primus* here, but permit[s] Ohio to discipline Ohralik in the companion case.

Id. at 440-41.

155. *See id.* at 443 (Rehnquist, J., dissenting).

permitting Primus's politically-motivated one, was unjustified.¹⁵⁶ He further argued that

to the extent [the analysis] focuses upon the motive of the speaker, it is subject to [the] manipulation [of] . . . clever practitioners And we may be sure that the next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of 'political association' to assure [that his conduct is upheld].¹⁵⁷

Consequently, Justice Rehnquist urged the Court to adopt a purely objective standard because the "danger of . . . [adverse] consequences is [not] minimized simply because a lawyer proceeds from political conviction rather than for pecuniary gain."¹⁵⁸

An objective standard is a more effective measure of appropriate conduct. Since a state can more readily regulate objective conduct, as opposed to the motives underlying it,¹⁵⁹ consistent outcomes are more likely to result. More specifically, "the difficulty of drawing distinctions on the basis of . . . the motive . . . is a valid reason for avoiding the undertaking where a more objective standard is readily available."¹⁶⁰ Accordingly, the heavy emphasis on an objective standard in both the majority and minority opinions suggests that the Ethics 2000 Committee should revamp *Model Rule 7.3* to include an objective component.

*C. The Minority Becomes the Majority: Relying on Objective Factors in Edenfield v. Fane*¹⁶¹

While the circumstances and nature of the solicitation played a significant role in shaping the holdings of both *Ohralik* and *Primus*,

156. *See id.* (Rehnquist, J., dissenting).

157. *Id.* at 442 (Rehnquist, J., dissenting).

158. *Id.* at 445 (Rehnquist, J., dissenting); *see also* Hill, *supra* note 5, at 416 (indicating that a motive test is ineffective because seeking political gain, favor, or publicity could also reap indirect pecuniary benefits).

159. *See Primus*, 436 U.S. at 443 (Rehnquist, J., dissenting) (arguing that the "inquiry must focus on the character of the conduct which the State seeks to regulate . . . [as] [t]he State is empowered to discipline for conduct which it deems detrimental to the public interest . . .").

160. *Id.* (Rehnquist, J., dissenting).

161. 507 U.S. 761 (1993).

the Court's holding in *Edenfield v. Fane*, decided over a decade after *Ohralik*, further revealed the necessity and validity of an objective analysis. In *Edenfield*, Scott Fane, a certified public accountant, challenged the Florida Board of Accountancy Administration's rule prohibiting certified public accountants from engaging in any uninvited, direct solicitation for business purposes.¹⁶² Fane, who had recently moved to Florida, sought to utilize telephone and in-person solicitations to develop his client base and generate business.¹⁶³ In challenging the Florida ban on First and Fourteenth Amendment grounds, Fane argued that solicitation was protected commercial speech.¹⁶⁴

Despite the Court's holding in *Ohralik*, which condemned pecuniary-motivated attorney solicitations, the Court struck down the Florida ban.¹⁶⁵ The Court declared, contrary to its rationale in *Ohralik*, that solicitation "is commercial expression to which the protections of the First Amendment apply."¹⁶⁶ While this pronouncement seemingly contradicted the Court's previous declaration in *Ohralik*,¹⁶⁷ the Court reiterated the importance of an objective analysis in assessing the permissibility of a solicitation.¹⁶⁸ Writing for the majority, Justice Kennedy emphasized that *Ohralik* did not stand for the proposition that "all personal solicitation is without First Amendment protection (citation omitted) There are, no doubt, detrimental aspects to personal commercial solicitation in certain circumstances"¹⁶⁹ In distinguishing *Ohralik* from *Edenfield*, where both professionals possessed pecuniary motivations, the *Edenfield* Court employed *only* an objective analysis¹⁷⁰ in upholding

162. *See id.* at 763.

163. *See id.* at 763-65.

164. *See id.* at 764-65.

165. *See id.* at 763.

166. *Id.* at 765.

167. *See Ohralik*, 436 U.S. at 457.

168. *See Edenfield*, 507 U.S. at 774-75; *see also* Brandt, *supra* note 90, at 809 (arguing that objective factors will enhance the effectiveness of a solicitation rule).

169. *Edenfield*, 507 U.S. at 765.

170. Some may argue that the Court was forced to employ an objective analysis in order to successfully distinguish *Edenfield* from *Ohralik*, because both professionals shared the same pecuniary motive for soliciting their respective clients. While this theory could undermine the Court's approach in

the accountant's solicitation in the latter case.¹⁷¹ This is exemplified by Kennedy's statement that the circumstances in *Edenfield* "are not so inherent or ubiquitous that solicitation of this sort is removed from the ambit of First Amendment protection."¹⁷²

Accordingly, in affording First Amendment protection to accountant's solicitations under the commercial speech doctrine, the Court first determined that the solicitation survived the scrutiny imposed by the newly-created, four-part *Central Hudson* test.¹⁷³ However, apart from the constitutional analysis, the Court sought to further distinguish *Ohralik* from *Edenfield*. It did so by invoking an objective analysis. First, the Court distinguished *Edenfield* based on the nature of the solicitation, as well as on the skills and training in the art of persuasion possessed by the professional involved.¹⁷⁴ The

Edenfield, it would only truly undermine it if the Court had relied solely on a subjective analysis in *Ohralik*, and employed only an objective analysis to distinguish Fane's conduct. But since the Court relied on both subjective, and arguably more heavily on objective criteria in rendering its respective opinions, this is not likely the case.

171. Justice O'Connor's dissent noted the Court's difficulty in viably distinguishing these two cases. O'Connor failed to see how professional distinctions alone could produce inconsistent results in these two cases. See *Edenfield*, 507 U.S. at 779 (O'Connor, J., dissenting). She argued that since all professionals receive specialized training, accountants are just as likely to use their training and expertise to mislead or coerce naive prospective clients as an attorney might be inclined to. See *id.* (O'Connor, J., dissenting). In sum, she did not believe that, constitutionally, these cases warranted different outcomes. See *id.* (O'Connor, J., dissenting).

172. *Id.* at 766.

173. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980). This case, decided after the attorney solicitation cases, replaced the previous balancing test with a more formal, four-part analysis: whether (1) the speech was lawful and not misleading; (2) the state's interests in proscribing speech were substantial; (3) the challenged regulation advanced these interests in a direct and material way; and (4) the extent of the restriction on protected speech was reasonably related to the interests served. See *id.* at 566. The *Edenfield* Court held that the first three prongs of the *Central Hudson* test were satisfied, and upheld the speech without reaching the fourth prong of the analysis. See *Edenfield*, 507 U.S. at 767; L. Kyle Heffley, *Commercial Speech Face-to-Face Solicitation by Certified Public Accountants (But Not Attorneys?) Is Protected Speech Under the First Amendment*, 16 U. ARK. LITTLE ROCK L.J. 683, 694-95 (1994) (discussing the Court's holding and expounding on the reasoning behind it).

174. See *Edenfield*, 507 U.S. at 774. But see *Edenfield*, 507 U.S. at 779-80

potential for manipulation and overreaching is greater when an attorney, professionally trained in the art of persuasion, solicits a client in a face-to-face encounter.¹⁷⁵ In contrast, accountants receive "training [which] emphasizes independence and objectivity, not advocacy."¹⁷⁶

The Court made an additional distinction relating to the degree of susceptibility of the client. Attorneys who are inclined to solicit business tend to solicit clients who are either indigent or vulnerable, and desperate for legal assistance, as the victims arguably were in *Ohralik*.¹⁷⁷ On the other hand, the Court characterized the "typical client of a CPA [to be] far less susceptible to manipulation . . . [because] prospective clients are sophisticated and experienced business executives who understand the services that a CPA offers."¹⁷⁸

Finally, the Court distinguished accountant solicitations from attorney solicitations based on their respective nature. The Court condemned attorney solicitation on the basis that it unduly pressures and often coerces a client into accepting representation without

(O'Connor, J., dissenting) (asserting that distinctions drawn based on the profession of the solicitor should not be sustained).

175. *See id.* at 775; *see also* *Fane v. Edenfield*, 945 F.2d 1514, 1521 (11th Cir. 1991) (Edmondson, J., dissenting). Edmondson believed that the potential for abuse stemmed from an attorney's "specialized knowledge beyond that of their solicited clients." *Id.* Moreover,

[t]his special leverage, or ability to pressure others . . . is not so much a function of their oratory skill; instead, it stems from the gap in knowledge between the professional and the lay person The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance.

Id. *See, e.g.,* *Brandt, supra* note 90, at 804 (expounding on Judge Edmondson's dissent, and arguing that, while lawyers are specifically trained to serve as advocates, few are actually involved in litigation or advocacy in their respective practices).

176. *Edenfield*, 507 U.S. at 775; *see also* *Heffley, supra* note 173, at 698-99 (attributing the holding to professional distinctions). *But see Fane*, 945 F.2d at 1521 (Edmondson, J., dissenting) (arguing that professional distinctions are not a sound basis for distinguishing attorney from accountant solicitations because CPAs have the same capacity and specialized knowledge as do attorneys to entice, coerce, or intimidate potential clients).

177. *See Ohralik*, 436 U.S. at 449-51.

178. *Edenfield*, 507 U.S. at 775. *But see Brandt, supra* note 90, at 805 (questioning whether or not potential clients of CPA's are truly experienced and sophisticated).

affording the client adequate time to make a rational decision.¹⁷⁹ Conversely, accountants are likely to solicit clients by “meet[ing] [them] in their own offices at a time of [the client’s] choosing.”¹⁸⁰ Such an environment is “conducive to rational and considered decisionmaking by the prospective client, in sharp contrast to the ‘uninformed acquiescence’ to which the accident victims in *Ohralik* were prone.”¹⁸¹ Moreover, an informal office meeting does not pressure the potential client, nor does it create an expectation that the client must retain the accountant then and there.¹⁸² Thus, the emphasis the Court placed on objective factors in assessing the permissibility of a solicitation, whether it be in the attorney or accountant context, exemplifies the need for the incorporation of an objective analysis in *Model Rule 7.3*.

V. PUBLIC POLICY RATIONALES

Apart from the justifications and rationales offered by the Supreme Court in the attorney and accountant solicitation cases, a rule that incorporates both an objective and subjective component would better serve public policy interests. Specifically, because this two-prong test seeks to prevent pecuniary-motivated solicitations that occur in overbearing and oppressive circumstances, the adoption of such a test would effectively eliminate the dangerous type of solicitation seen in *Ohralik v. Ohio State Bar Ass’n*.¹⁸³ Further, such a rule would also permit solicitations to occur under benign circumstances that seek to promote civil rights or the public interest as seen in *In re Primus*.¹⁸⁴ This sort of benign solicitation¹⁸⁵ serves to promote two public policy interests: first, it encourages philanthropic work and community outreach in making legal services more

179. See *Ohralik*, 436 U.S. at 457.

180. *Edenfield*, 507 U.S. at 776.

181. *Id.* at 775.

182. See *id.* at 776; see also Brandt, *supra* note 90, at 805-06 (explaining the limitations on the Court’s rationale).

183. 436 U.S. 447 (1978).

184. 436 U.S. 412 (1978).

185. See *Ohralik*, 436 U.S. at 472 n.3 (Marshall, J., concurring in part and concurring in the judgment).

accessible;¹⁸⁶ and second, it helps to dispel the poor image of attorneys as greedy professionals.¹⁸⁷

The *Model Rules of Professional Conduct* Rule 7.3 insinuates that attorneys possess an affirmative duty, by virtue of their profession, to make legal counsel available both to indigents and to the community at large.¹⁸⁸ In promoting philanthropic behavior, the Bar seeks to "assure the maximum amount of useful information to the public with the minimum amount of potential harm."¹⁸⁹ According to the Preliminary Report of a National Survey by the Special Committee to Survey Legal Needs of the American Bar Association, thirty-three percent of respondents had never consulted a lawyer, while another twenty percent of those surveyed had given serious thought to consulting a lawyer, but failed to do so.¹⁹⁰ The ABA study further revealed that one of the most common reasons laypeople do not seek out attorneys is because they do not know where or how to find competent legal assistance.¹⁹¹ Moreover, the same study

186. *See id.* at 470-71 (Marshall, J., concurring in part and concurring in the judgment). Justice Marshall reminded the Court that attorneys possess both a responsibility to perform pro bono work and a "responsibility for providing legal services for those unable to pay . . ." *Id.* (Marshall, J., concurring in part and concurring in the judgment). Moreover, he urged, "[E]very lawyer, regardless of professional prominence or professional workload, should . . . participate in serving the disadvantaged." *Id.* at 471 (Marshall, J., concurring in part and concurring in the judgment).

187. *See id.* at 471-72 (Marshall, J., concurring in part and concurring in the judgment).

188. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1998); *see also* FREEDMAN, *supra* note 1, at 118 (discussing the legal profession's duty to make legal counsel available to the public). *See generally* Wilbur, *supra* note 6 (discussing the scope of an attorney's affirmative duty to provide legal services to those in need of representation). Recall that the Supreme Court heralded the pro bono solicitation of attorney Primus in *In re Primus* for her selfless efforts to advance the civil liberties of the client. *See Primus*, 436 U.S. at 422.

189. LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 86 (1980).

190. *See* BARBARA A. CURRAN & FRANCIS O. SPALDING, PRELIMINARY REPORT OF A NATIONAL SURVEY BY THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS OF THE AMERICAN BAR ASSOCIATION 85-86 (1980).

191. *See id.* at 94-95 tbl. 7.1 (reporting that 48.3% of those surveyed strongly agreed that a lot of people do not obtain counsel because they do not know who to retain, or whether the person is competent to represent them).

indicated that 56.8% of those surveyed agreed that the legal system favored the rich and powerful at the expense of the lower and middle classes.¹⁹² Yet 69.8% of respondents also believed that the legal system can effectively contend with the problems of laypeople, and not solely those of the wealthy.¹⁹³ Collectively, these conflicting responses indicate that laypeople perceive the legal system as inaccessible or unavailable to them.¹⁹⁴

The Supreme Court recognized the ever-growing need to make legal services known¹⁹⁵ and available to disadvantaged individuals.¹⁹⁶ In response, the Bar hoped to make legal services available

192. *See id.* at 95.

193. *See id.*

194. Likewise, the Supreme Court even recognized that the absence of commercial speech results in public disillusionment with the profession:

The absence of [commercial speech] . . . reflect[s] the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because . . . of an inability to locate a competent attorney [T]he profession . . . condon[es] the actions of [an] attorney who structures his social or civic associations so as to provide contacts with potential clients.

Bates v. State Bar of Ariz., 433 U.S. 350, 370-71 (1977).

195. The Court admitted that, while there is a need to make legal services available, a stigma associated with legal commercial speech exists because attorney advertising and solicitation appears unprofessional. *See id.* The Court emphasize[d] the need for information that will assist persons desiring legal services to choose lawyers [While] advertising is the most commonly used and useful means of providing information as to goods and other services . . . it generally has not been used with respect to legal . . . services . . . [because it] . . . would tend to mislead rather than inform.

Id. at 397 (Powell, J., concurring in part and dissenting in part). Despite this need, the Court limited its holding in *Bates v. State Bar of Arizona*, and failed to automatically afford in-person solicitation the same protection that the Court afforded to pharmacists engaged in commercial speech. *See id.* at 366 n.17.

196. *See Ohralik*, 436 U.S. at 471 (Marshall, J., concurring in part and concurring in the judgment). The Court hailed attorney Primus for "communicating an offer of free assistance by attorneys . . . to advance the civil-libert[y] objectives" of Williams, a disadvantaged client—speech "protected by the First and Fourteenth Amendments." *Primus*, 436 U.S. at 422. The Court went on to say that "The First and the Fourteenth Amendments require a measure of protection for . . . 'advising another that his legal rights have been infringed.'" *Id.* at 432 (quoting *NAACP v. Button*, 371 U.S. 415 (1963)).

through the implementation of programs and services such as group legal service plans, lawyer referral programs, bar-sponsored legal clinics, and public service law firms.¹⁹⁷ Nonetheless, the "profession recognizes that less success has been achieved in assuring that persons who can afford to pay modest fees have access to lawyers competent and willing to represent them."¹⁹⁸ This problem is most prominent in large, diverse metropolitan communities where the legal community is more isolated.¹⁹⁹ Unless the legal community can reach out to middle and lower-class populations, "consumers will be forced to select legal representation on the basis of haphazard and often irrelevant criteria."²⁰⁰ Hence, a rule allowing for benign solicitations would encourage attorneys to reach out to make their legal services known and available to those in need.

Not only does a benign solicitation rule increase the availability of legal services, but it also provides attorneys with actual opportunities to educate the public about their legal rights.²⁰¹ The *American Bar Association Journal* recently reported that the ban on solicitation not only makes it more difficult for low-income individuals to learn about their legal rights, but it unfairly provides insurance company defendants with an easy opportunity to settle claims quickly and cheaply.²⁰² If individuals are ignorant of their legal rights and remedies, victims are deprived of the justice they deserve.

Furthermore, a Model Rule permitting benign solicitations would improve the image of legal professionals. By encouraging the performance of at least fifty hours of yearly pro bono legal services,²⁰³ the ABA hopes that attorneys will reach out to their local communities, and educate citizens about their legal rights and available services.²⁰⁴ Moreover, the ABA hopes that this involvement

197. See *Bates*, 433 U.S. at 398; *Ohralik*, 436 U.S. at 473-75 (Marshall, J., concurring in part and concurring in the judgment).

198. *Bates*, 433 U.S. at 398.

199. See Maute, *supra* note 88, at 533.

200. *Id.* (citing B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES* 1826 (1970)).

201. See *id.* at 532-33.

202. See Michael Higgins, *A New Attitude*, 83 A.B.A. J. 27, 27 (1997).

203. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1998).

204. See *id.* Rule 6.1 cmt.(1).

will provide attorneys with opportunities to fulfill their professional and community responsibilities in championing the causes of the disadvantaged.²⁰⁵ If attorneys fail to perform pro bono work, a modern version of the medieval idea “that . . . courts ought to exist only for those sufficiently aggrieved to pursue their remedies”²⁰⁶ will manifest itself. Interjecting this notion into social thought will produce a result whereby “the wealthy, knowledgeable, and aggressive are favored over the poor, ignorant and timid.”²⁰⁷ By allowing benign solicitations, not only can attorneys offer immediate assistance to clients, but they can work to improve their professional image.

Finally, while the *Model Rules* lay a foundation for basic ethical concerns that should guide attorneys in their practice, they exemplify only a framework of bare minimum standards for ethical behavior: “the [Model] Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules [They] simply provide a framework for the ethical practice of law.”²⁰⁸ It is imperative that attorneys realize the limitations inherent within the Rules because “a professional ideal contains explicitly moral features [but] does not even guarantee that the realization of that ideal is compatible with living a morally acceptable life. [There is no] guarantee that a good lawyer will be or even can be a good person.”²⁰⁹

Lawyers should remember that apart from their professional lives, they too are people—much like the clients they represent. They should hold fast to personal morals and common sense notions of justice to guide their professional actions and decisions. Due to the inherent limitations imposed by the ethics rules, however, while certain behavior may conform to an individual’s personal ethics or morals, it may offend those set forth in the ethics rules or statutes. In other words, irrespective of whether it is permissible under the

205. *See id.*

206. Gipson, *supra* note 44, at 1189.

207. *Id.*

208. MODEL RULES OF PROFESSIONAL CONDUCT Scope 14 (1998).

209. Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 38, 51 (David Luban ed., 1983).

parameters of *Model Rule 7.3*, many attorneys would nonetheless offer to assist a pro se individual out of sympathy, perhaps empathy, or because their individual morals dictate it. A rule employing both an objective and a subjective analysis would not only condone these interactions, but facilitate them. It would also allow attorneys who subscribe to a higher set of individual moral standards to act in accordance with them.²¹⁰

VI. CONCLUSION

Model Rule 7.3 is only partially successful in enacting an ethics rule regarding attorney solicitation that is not only consistent with, but reflective of, the Supreme Court's jurisprudence. In articulating the standard for evaluating attorney solicitations, the Court stated that the rule was intended to "discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert."²¹¹ However, the "pecuniary motive" language of *Model Rule 7.3* adopts only a subjective analysis. In disregarding the objective analysis, the drafters crafted a rule that is difficult to apply²¹² because it is "subject to manipulation by clever practitioners."²¹³ Practically speaking, a purely subjective rule proves to be ineffective in addressing all of the "evils" inherent in attorney solicitation.²¹⁴ In fact, the modern trend, as reflected by the Court's opinion in *Edenfield v. Fane*,²¹⁵ seems to advocate the use of objective factors. Whether Justice Rehnquist's dissent in *Primus* influenced other members of the Court or whether they acted of their own accord, the Court employed a purely objective analysis in *Edenfield*.²¹⁶ In doing so, the Court communicated the importance of evaluating the circumstances surrounding a solicitation to better assess its viability.

210. See generally *id.* (reconciling professional responsibility with personal morals).

211. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978).

212. See *Wishcamper*, *supra* note 6, at 680.

213. *In re Primus*, 436 U.S. 412, 442 (1978) (Rehnquist, J., dissenting).

214. See *Wishcamper*, *supra* note 6, at 680.

215. 507 U.S. 761 (1993).

216. See *id.* at 775-76.

More importantly, however, public policy concerns mandate the incorporation of an objective component. Because a two-pronged test can more effectively address both the subjective and objective evils that plague attorney solicitations, it will successfully weed out inherently dangerous solicitations, while permitting benign solicitations to occur. As Justice Marshall argued, attorneys have a duty to serve and represent the disadvantaged.²¹⁷ As attorney Solomon Cohn did in the opening scenario,²¹⁸ one way of providing legal services to indigent clients with important personal or public issues is through happenstance meetings and subsequent offering of services. A rule that permits these benign solicitations—solicitations free of pecuniary motives and coercive circumstances—not only promotes philanthropy among attorneys and improves their reputation, but it helps return accountability to the justice system. Without some form of safe attorney solicitation, the justice system will continue to anonymously victimize innocent pro se clients who simply are ill-equipped to tackle the system.

The Ethics 2000 Committee of the American Bar Association should revamp *Model Rule 7.3* and formulate a rule that eliminates the dangers associated with solicitation. Such a rule would better serve and protect pro se and indigent clients. Furthermore, it will help restore accountability to the legal system and the legal profession to its roots—where attorneys are individuals willing to devote their time, energy, and a piece of themselves to serving others.

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217. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 471 (1978) (Marshall, J., concurring in part and concurring in the judgment).

218. See *supra* Part I.

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