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SANCTIONING THE AMBULANCE CHASER

*Anita Bernstein**

Great moments in American legal history ensued when “prominent lawyers, without the prior invitation of the client, approached a person in legal trouble and offered their services.”¹ Among these clients “in legal trouble” were familiar names from past centuries: Dred Scott, John Peter Zenger, Aaron Burr.² Sometimes those who did the soliciting were famous too, notably the man who went on to become an especially great president of the United States, a lawyer who dived “unabashedly” into solicitation.³

How far Abraham Lincoln would go to chase a new client emerges in the backstory of *Illinois Central Railroad Co. v. County of McLean*,⁴ in which the eminent litigator convinced the state supreme court that a county in central Illinois could not tax railroad-owned property. Lincoln must have been keen to speak for a client in the dispute. Taking the vulgarism “working both sides of the street” one step further, he pursued three prospects. The first prospect was the one he won: Lincoln solicited the Illinois Central Railroad’s business by writing a letter to its general counsel. He also initiated preliminary discussions with McLean officials about representing the county *against* the railroad. Earlier he had sought

* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. Thanks to Rick Abel for his insightful comments on a draft, and to the Loyola faculty, students, and staff, John Nockleby prominent among them, who built a stimulating and hospitable environment for the *Frontiers* conference. Bill Araiza, David Leonard, and Rick Hasen of the Loyola faculty, hosting my stay in Los Angeles, added to these kindnesses. I am grateful also to bar-counsel colleagues Mark Armitage of Michigan, William Smith of Georgia, and Robert Saltzman of New York, who, continuing their longtime support of my work, honed the Article’s questions and fostered its answers. Joshua Benfey, BLS class of 2009, excelled at everything he did for the project, including research assistance by varied means, electronic troubleshooting, and data management. I extend my thanks also to the Brooklyn Law School faculty research fund for its support.

1. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 786 (Hornbook Series student ed. 1986).

2. See *In re Ades*, 6 F. Supp. 467, 475–76 (D. Md. 1934) (summarizing cases).

3. WOLFRAM, *supra* note 1, at 785–86.

4. 17 Ill. 291 (1855).

yet another client on the other side, writing to the clerk of nearby Champaign County with an offer to represent it, along with McLean County, in its dispute with Illinois Central, the client he later represented. Three sides of the street: the winning side, the losing side, and a side that stayed out of the fray.⁵

Lincoln's overtures violated no rules: the organized American bar did not classify solicitation as among the central improprieties of the profession until the 1908 publication of the American Bar Association's Canons of Professional Ethics ("Canons").⁶ The ABA perpetuated this stance in its later compilations, the Model Code of Professional Responsibility ("Model Code")⁷ and the Model Rules of Professional Conduct ("Model Rules").⁸ If the Canons or their ABA-authored successors had been governing law, the correspondence between Lincoln and McLean County officials alone, to say nothing of his solicitations on the other side of the street, would have sufficed to get Honest Abe disbarred "in probably any state of the Union."⁹ Nineteenth-century lawyers who disapproved of solicitation, however, saw the practice as bad etiquette rather than a breach of professional responsibility.¹⁰ Today, those who write and enforce the law of professional conduct express condemnation of solicitation initiatives like Lincoln's through blackletter disciplinary rules on the books in every American jurisdiction.

The typical current prohibition, following Model Rule 7.3, makes lawyers subject to discipline if they communicate with individuals in real time—in person, on the telephone, or by other electronic media—with an offer to represent them, if a significant motive behind the overture is pecuniary gain. All jurisdictions exempt at least some targets from the ban: lawyers may solicit employment from persons with whom they already have certain professional or personal relationships. Two jurisdictions, Virginia and the District of Columbia, liberalize the ban by making

5. This solicitation tale is told in Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 547-48 (1982).

6. ABA CANONS OF PROF'L ETHICS (1908).

7. Adopted in 1969, effective January 1, 1970.

8. Replacing the Model Code in 1983.

9. Boden, *supra* note 5, at 548.

10. HENRY S. DRINKER, LEGAL ETHICS 211 n.6 (1953).

permission the norm and prohibition the exception.¹¹ Their stated permissiveness is a distinct minority position. Solicitation not done in real time—that is, letters to prospective clients, of the kind Lincoln wrote when trying to be retained both by and against the Illinois Central Railroad—was prohibited in the first version of the Model Rules too, but the ABA had to withdraw that ban after the Supreme Court determined that written solicitation was commercial speech protected by the First Amendment.¹² The Model Rules continue to subject written solicitation to close regulatory attention.¹³ Ethics opinions from the ABA and state bar authorities buttress the blackletter law, entrenching disapproval of solicitation into state-level regulation.¹⁴

This mixed view of the practice—that is, the association of it with idealism and “pecuniary gain,”¹⁵ bravery and bottom-feeding, the rescue of vulnerable clients and the manipulation of vulnerable clients—suggests that solicitation is sanctioned, in the two contradictory meanings of this term. From the possibility that “sanctioning” means both disapproval and condonation, normative and descriptive questions arise. The normative question asks whether solicitation is a bad thing. On the descriptive side, one might wonder whether the bar in fact reacts to solicitation as a bad thing beyond its rule books, at the level of enforcement.

Bringing benefits to American civil justice as it does, solicitation cannot be entirely blameworthy. Commentators in law reviews (the majority of whom defend solicitation, although usually without enthusiasm) have pointed out that changing disciplinary law to permit the initiation of employment-seeking contact with laypeople whom the soliciting lawyer does not already know would convey information to these prospective clients,¹⁶ empower the downtrodden

11. See *infra* Part I.

12. See *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 438–39 (2007).

13. See MODEL RULES OF PROF'L CONDUCT R. 7.3(b)–(c) (2007).

14. Victor P. Filippini, Jr., Note, *Soliciting Sophisticates: A Modest Proposal for Attorney Solicitation*, 16 U. MICH. J.L. REFORM 585, 587 (1983).

15. MODEL RULES OF PROF'L CONDUCT R. 7.3(a).

16. See Richard L. Abel, *How the Plaintiffs' Bar Bars Plaintiffs*, 51 N.Y.L. SCH. L. REV. 345, 358 (2006–2007); Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 462 (1987) [hereinafter Abel, *Too Few Claims*]; Evan R. Levy, Note, *Edenfield v. Bane: In-Person Solicitation by Professionals Revisited—What Makes Lawyers Different?*, 58 ALB. L. REV. 261, 280 (1994).

injured masses,¹⁷ enhance price competition (and probably also lower the cost of legal services),¹⁸ and narrow a real gap between disadvantaged lawyers and their better-off counterparts, who are now free to solicit away at their country clubs or from a large repeat-business client base.¹⁹ Elementary analysis of this market for legal services reveals the potential gains. Moreover, state actors like the bar cannot suppress this commercial speech without a reason. Bans on solicitation, which clash with a prevailing acclaim for entrepreneurial hustle²⁰ and the American libertarian ideology that sees “no harm in asking,”²¹ demand justification as constraints on expression.²²

The ABA has sited this justification in a lawyer’s power to persuade. In its comments to Model Rule 7.3, it notes that the vulnerability of a layperson in need of legal services and the powerful words of a professional trained to argue effectively combine to create “a potential for abuse.”²³ Without the preexisting relationship that presumably mitigates this potential, in-person contact “is fraught with the possibility of undue influence, intimidation, and over-reaching.”²⁴ Advertising and written solicitations at least have the virtue of forcing the lawyer to commit to a particular text that can be reviewed later if challenged.²⁵ They

17. See Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 324–25 (1986) (referring to the Bhopal experience).

18. WOLFRAM, *supra* note 1, at 787–88; Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court’s Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 44, 58–59 (1985).

19. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 468–77 (1978) (Marshall, J., concurring); McChesney, *supra* note 18, at 89–90 (reviewing condoned “indirect” means of soliciting new work); see also David B. Wilkins, *Class Not Race in Legal Ethics: Or Why Hierarchy Makes Strange Bedfellows*, 20 L. & HIST. REV. 147, 148 (2002) (arguing that elite lawyers can be seen as eschewing solicitation only if one believes “that the restrictions in the ethics codes” do not apply to these lawyers).

20. Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27, 32–33 (2004).

21. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936).

22. H.L.A. Hart tried, unsuccessfully in the view of one feminist philosopher, to defend the choice made in Britain to criminalize a polite, words-only offer from a prostitute to a man on a street. Karen Busby, *The Maleness of Legal Language*, 18 MANITOBA L.J. 191, 197 (1989) (quoting H.L.A. Hart, *LAW, LIBERTY AND MORALITY* 45 (1963)).

23. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 1 (2007).

24. *Id.*

25. *Id.* cmt. 3.

also give the client time to think, away from silver-tongued advocacy.²⁶

Good or bad, then? Factual material would inform the normative debate. Public records of lawyer discipline, though notoriously incomplete and opaque, would shed some light on solicitation as a disciplinary offense. The most basic questions about the prohibition still languish unexplored.²⁷ How does the bar enforce its ban? Which bad behaviors by lawyers does enforcement expose?

Investigating these questions, I have had in mind a personal injury lawyer and the trope of an ambulance chaser. This stereotype can, of course, be severed from solicitation: any lawyer able to seek work from a paying client can violate a ban. Surveying solicitation in the aftermath of the Bhopal disaster, Deborah Rhode identified personal injury, criminal defense, and public interest practice as the occupational subsets that rely most on “personal overtures to previously unknown parties”²⁸ Of these three, public interest clients may now be solicited without penalty,²⁹ and criminal defense, performed by a small and specialized cohort, can be excluded from the larger category of work that lawyers do for clients who enter the legal system by choice.³⁰ Prohibiting live in-person overtures to prospective clients thus presses especially hard on lawyers who specialize in, or wish to prosecute, personal injury claims made on behalf of plaintiffs. Like the prohibition of solicitation, the sobriquet of ambulance chaser is sometimes applied to lawyers who seek other kinds of work but fits personal injury practice most closely.³¹ As the

26. *Id.* cmt. 2.

27. See Rhode, *supra* note 17, at 325 (lamenting the “absence of systematic data on the frequency and consequences of solicitation”).

28. Rhode, *supra* note 17, at 326.

29. See *In re Primus*, 436 U.S. 412, 422–25, 439 (1978).

30. See generally *Ficker v. Curran*, 950 F. Supp. 123, 126 (D. Md. 1996) (striking down a thirty-day ban on soliciting criminal defense clients notwithstanding the Supreme Court’s approval of such a ban for personal injury clients, because the criminal-solicitation prohibition at issue presented “entirely different issues and interests than [did] a similar ban on solicitation of personal injury plaintiffs”). “The profession is unconcerned with solicitation of criminal defendants for two reasons: there isn’t much money to be made from it; and most criminal defense is done by salaried PDs.” E-mail from Richard L. Abel, Michael J. Connell Professor of Law, to author (Jan. 22, 2008, 11:51 a.m.) (on file with author) [hereinafter Abel Message].

31. The famed personal injury lawyer who called himself the King of Torts reveled in this phrase. “I’m not an ambulance chaser,” he once said, according to his obituary; “I’m usually there before the ambulance.” Angela Townsend, *Melvin Belli, “King of Torts,” Dies*, USA TODAY, July 10, 1996, at 3A.

Second Circuit noted when it approved a defamation claim brought by a lawyer who specialized in employment discrimination litigation, the offending term evokes an image of a personal injury advocate and implicitly makes an accusation of improper solicitation.³² A survey of the solicitation ban as enforced and understood is especially pertinent to the personal injury bar, and the frontiers of tort law that this Symposium examines.

My investigation of the ban begins with what it purports to prohibit. I review the Model Rules prohibition, the District of Columbia and Virginia variations that liberalize it, federal-level bans, and the ABA's rationale for the prohibition in Part I, "Sanctioning = Disapproving." The next Part considers sanctioning as condoning: Part II looks at the extraordinarily low level of enforcement of this prohibition.³³ Part III supposes that a prohibition that is emphatically written and reaffirmed in blackletter yet only seldom enforced must be "expressive," an academic adjective that I use here to mean that the prohibition serves to lay down contrasting approved and disapproved ways to represent paying clients.³⁴ The ban deters solicitation through norm-pressure rather than enforcement.

Declaring solicitation a lapse of professional conduct and a disciplinary offense while doing almost nothing to punish it may be a compromise, an attempt by the bar to recognize both the sunny idealism/heroism/client-rescue aspect of solicitation and its dark squalor/"pecuniary gain"/client-manipulation side.³⁵ If so, the compromise is rotten and should be abandoned, in the spirit of cleansing that caused the ABA in the Model Rules to throw out the

32. *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 151–53 (2d Cir. 2000). Older case law also uses this term to refer to a personal injury lawyer who solicits clients.; *Smallberg v. State Bar*, 297 P. 916, 917, 919–20 (Cal. 1931); *In re Kelly*, 243 F. 696, 704–05 (D. Mont. 1917); *Edler v. Frazier*, 156 N.W. 182, 185 (Iowa 1916).

33. A leading work in this nascent genre of empirical studies of underenforced professional-responsibility rules is Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).

34. "The standard sociological explanation is symbolic politics: an ethical norm is advanced as a claim to social superiority." Abel Message, *supra* note 30.

35. *Cf.* LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 67 (1980) ("The bar's traditional aversion to solicitation *in theory*, coupled with an inability to define what is actually meant by the term, has made the regulation of solicitation one of the most controversial issues facing the profession today.") (emphasis in original); Zacharias, *supra* note 33, at 1004 (observing that "the decision to adopt but not to enforce the advertising rules may reflect a tacit compromise").

how-do-we-look prohibitions strewn through the Model Code—or, if one prefers, the doctrine of desuetude, by which a prohibition becomes eroded and then abrogated as a consequence of nonenforcement.³⁶ A ban on solicitation, like every other modern rule of professional responsibility, ought to be cogent and transparent. Modifying this rule to emulate its liberal District of Columbia and Virginia variations would continue to honor client protection while making the restriction more intelligible to those affected by its constraint.

I. SANCTIONING = DISAPPROVING

The ABA, through its Model Rules, encourages states to codify a prohibition of solicitation. On the books with modifications in the overwhelming majority of American jurisdictions, the Model Rules provide that “[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain,”³⁷ unless one of a few exceptions apply: lawyers may solicit employment from family members, close friends, fellow lawyers, and persons with whom they already have professional relationships.

Rejecting the categorical ban on spoken or real-time overtures to strangers whenever the representation could transfer pecuniary value to the lawyer, Virginia and the District of Columbia prohibit solicitation only where one of three conditions is present: (1) the lawyer knows that the target could not exercise reasonable judgment; (2) the target has made known a desire not to receive communication from the lawyer; or (3) the lawyer’s overture involves coercion or duress.³⁸ This version of the ban resembles the ABA’s Discussion Draft of 1980,³⁹ an experiment in permissiveness that had not been

36. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 148 (2d ed. 1962) (claiming that statutes can lose their effect “with the tacit consent of all”) (quoting JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 190 (2d ed. 1921)).

37. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2007).

38. VIRGINIA RULES OF PROF’L CONDUCT R. 7.3(a) (2007); DISTRICT OF COLUMBIA RULES OF PROF’L CONDUCT R. 7.1(b)(1) (2007).

39. MODEL RULES OF PROF’L CONDUCT R. 9.3 (Discussion Draft 1980), available at http://www.abanet.org/cpr/mrpc/kutak_1-80.pdf:

(a) A lawyer shall not initiate contact with a prospective client if:

attempted in the predecessor Model Code and one that the ABA abandoned the following year in its 1981 Draft.⁴⁰

The Model Rules and the large majority of jurisdictions condemn solicitation for being crucially different from advertising, the other time-honored method for lawyers to gain new clients whom they cannot reach through networks, introductions, and preexisting relationships. Regulators may not like the looks of advertising, but for the last few decades they have been tolerating it. Most practitioners today are too young to remember the ban on “self-laudation,” a rule of enforced gentility that held firm until the Supreme Court held that lawyers have a First Amendment right to advertise.⁴¹ This development in commercial-speech doctrine forced the profession to yield on advertising to a degree that it has never budged on solicitation. One marketing strategy located midway between the two—direct mailings sent to persons believed to be in need of legal services—has vexed the Supreme Court, which in 1988 found that a ban on such mailings infringed a free-speech right,⁴² but seven years later concluded in *Florida Bar v. Went for It, Inc.*, a 5-4 decision containing a trenchant dissent, that a state could force lawyers to let thirty days pass after an accident before writing to prospective clients offering to represent them.⁴³

The ban continues unabated, with extensions rather than liberalizations following the *Went for It* decision. Fifteen states have joined Florida in prohibiting lawyers from writing to prospective personal injury clients until a month or more elapses after the accident in question. Restrictions vary: some states impose a waiting period only in wrongful death cases; some only for approaches

(1) the lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the person solicited has made known a desire not to receive communication from the lawyer; or

(3) the solicitation involves coercion, duress, or harassment.

40. See GILLERS & SIMON, *supra* note 12, at 607 (2007) (reprinting both drafts of the Model Rules and Model Code of Prof'l Responsibility DR 2-104).

41. See *In re RMJ*, 455 U.S. 191, 206-07 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). On self-laudation, see ABA CANONS OF PROF'L ETHICS 672 (1908) (prohibiting it); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1980) (prohibiting any public communication that contains a “self-laudatory” statement).

42. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479-80 (1988).

43. 515 U.S. 618, 635 (1995).

following a mass disaster; some increase the wait time. Alabama, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Missouri, Nevada, New Jersey, South Carolina, Tennessee, and Wyoming all impose a waiting period before certain personal injury solicitations can commence,⁴⁴ and other states have announced the prospect of their adding such a provision to their professional-responsibility rules.⁴⁵ Before these waiting periods were enacted, one leading professional organization for the plaintiffs' bar, the American Association of Justice (back when it was called the Association of Trial Lawyers of America), had already promulgated a code of conduct that required its members to refrain from unrequested contacts with injured persons and uninvited visits to disaster sites.⁴⁶ Federal law has since 1996 imposed a waiting period on lawyers before they may solicit clients following an aviation disaster,⁴⁷ and prohibits lawyers who practice before the Internal Revenue Service from committing whatever actions their home jurisdictions condemn as improper solicitation with respect to their work before the IRS.⁴⁸

II. SANCTIONING = CONDONING: ENFORCEMENT 2002–07

A. Solicitation in the Disciplinary Annals

Just over 1.3 million licenses to practice law subject individuals in the United States to discipline for violating rules of professional conduct.⁴⁹ Most of these individuals stay clear of the disciplinarians

44. ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT § 81: 2001–08 (2008); GILLERS & SIMON, *supra* note 12, at 439–47. Kentucky adds misdemeanor criminal penalties to the disciplinary offense of soliciting a client before thirty days elapses. KY. REV. STAT. ANN. § 21A.300 (LexisNexis 2008).

45. Will Hornsby, *A Look at the Year to Come: Lawyer Advertising in 2008*, LAWYERS USA, Jan. 28, 2008, at 25.

46. ASS'N OF TRIAL LAWYERS OF AM. CODE OF CONDUCT (approved July 31, 1988), available at <http://ethics.iit.edu/codes/coe/roscoe.pound.amer.trail.lawyers.foundation.code.conduct.html>.

47. Aviation Disaster Family Assistance Act of 1996, Pub. L. No. 104-264, 110 Stat. 3265 (codified as amended at 49 U.S.C. § 1136(g)(2) (2000)). An amendment in 2000 extended the waiting period from 30 to 45 days. The National Transportation Safety Board enforces the ban. See *NTSB Sues Lawyer for Soliciting Accident Victims' Families*, AVIATION DAILY, Feb. 13, 1998.

48. 31 C.F.R. § 10.30(a)(2) (2007).

49. ABA Ctr. for Prof'l Responsibility, *Survey on Lawyer Discipline Systems* (2006), available at <http://www.abanet.org/cpr/discipline/sold/home.html>. For the purpose of looking at disciplinary enforcement it seems more pertinent to count licenses rather than individuals.

as they go about their work, but each year several thousand receive a sanction. It is frustratingly difficult to come up with a more precise count. Non-public reprimands shrouded in vague aggregations, “diversionary” responses that remove contrite low-level offenders from the disciplinary apparatus, and notoriously inadequate reporting from some jurisdictions suggest that the ABA estimate of 1,903 private and 4,309 public sanctions in 2006, the most recent year studied, falls very short.⁵⁰ Let us use this total, approximately 6,200, as an underestimate of the number of sanctions issued each year.

Given the denominator of 1.3 million, and a sanction rate that seems to nail about one half of 1 percent of the vulnerable population, how many sanctions for solicitation might one expect to see in a given year?⁵¹ The exercise in algebra becomes even more confounded. Initiating “live, in-person” contact with a nonclient to offer one’s legal services is a disciplinary offense in almost every American jurisdiction,⁵² as was mentioned, but some state bars are known for their vigorous enforcement of their disciplinary rules and others for laxity. Some state bars are reputed to care more than others about solicitation in particular.⁵³

Perhaps most confounding to an estimate of how much solicitation enforcement to expect, disciplinary rules vary in the proportion of practicing lawyers to whose work they pertain. One would expect relatively few sanctions for violating state counterparts to Rule 7.4(d)(1) of the Model Rules,⁵⁴ a provision that applies only to lawyers who call themselves specialists, and relatively many for wider-ranging prohibitions like the rules against neglecting clients and commingling client property. The records confirm this

50. For elaboration on these difficulties, see Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 & n.2 (2007).

51. The verb “to see” occludes a key problem in reviewing disciplinary practices: the large fraction of sanctions that are withheld from view. Admonition or private reprimand is only one of several disciplinary responses that keep the lawyer’s name and sanction out of public records. See ABA Joint Comm. on Prof’l Sanctions, *Standards for Imposing Lawyer Sanctions* R. 2.6 (1992) [hereinafter ABA, *Standards*], available at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf.

52. See *supra* notes 12–15, 38–41 and accompanying text (noting exceptions of Virginia and the District of Columbia).

53. Louisiana and Florida have reputations for relatively aggressive enforcement. At the other end of the range, my research found several states whose rosters of published sanctions of lawyers in the last five years include zero references to solicitation.

54. MODEL RULES OF PROF’L CONDUCT R. 7.4(d)(1) (2007).

prediction.⁵⁵ A few other rules line up at one extreme or the other, but most do not. Solicitation seems to fall at the wider-ranging end of the spectrum. Although some job descriptions give lawyers little motive or opportunity to solicit anyone, only a rare employer will forbid the lawyers on its payroll to retain clients on their own initiative, and the bulk of work for which clients retain counsel gets done for what the ABA primly calls pecuniary gain. On the offenses spectrum, solicitation of nonclients with the motive of enhancing one's own wealth appears relatively tempting and easy to commit.

And so when an administrator with extensive disciplinary experience inside a large state bar told me, in response to my question about the sanction rate for solicitation, that a single instance of discipline in any state during any three-year period would be more than par, I was surprised.⁵⁶ He proved right, as I elaborate below. Perhaps state counterparts to Model Rule 7.3 are violated only very rarely. Alternatively, this offense might be extraordinarily underreported. From my review of the disciplinary record, I favor a third inference: solicitation is condoned.

The well-informed estimate that one instance of discipline in three years would be a lot in any state's disciplinary annals suggested to me that reading and considering every account of discipline for solicitation reported during the last five years, and from there trying to gauge the state of disciplinary law for this offense, would be a manageable task. The chief challenge was to locate a full, or nearly full, set of these published instances. As was mentioned, lawyer discipline in the United States falls short on transparency: complete data-sets in this area are elusive as a unicorn. Accordingly, from the start I could never aspire to generalize about all instances of discipline for solicitation, just the fraction of them that I had to hope would be large. I summarize my research design here for any reader who wonders whether it retrieved enough of the total to support my main claim: that is, the bar tolerates solicitation.

55. See generally Anita Bernstein, *Foreword: What Clients Want, What Lawyers Need*, 52 EMORY L.J. 1053, 1056 (2003) (observing that neglect, failure to communicate, and failures of diligence occupy more than half the volume of lawyer discipline, expressed as both complaints and sanctions).

56. For an unsurprised reaction, see Hornsby, *supra* note 45, at 26 ("It's no secret that most state disciplinary agencies put a low priority on enforcing ethics rules that govern client development.").

My state-bar informant kindly posted a query on the disciplinarians' listserv (an online mailing list), which gave me early leads and anecdotes as background for various electronic queries. Next, my research assistant and I turned to decisional law published in Lexis and Westlaw. We sought terms like "7.3," "DR 2-103," and "direct . . . contact."⁵⁷ With these searches completed, my assistant then visited the website of every state bar and supreme court to review online databases of disciplinary actions.⁵⁸ When a state did not have a database for him to search, he got on the phone.⁵⁹ These searches away from Lexis and Westlaw yielded about twenty-five new instances for the list. I checked the *ABA/BNA Lawyers' Manual on Professional Conduct*,⁶⁰ a proprietary database jointly published by the ABA and the Bureau of National Affairs. My research assistant then did a succession of searches on Google, just to sweep what might remain, which turned up no hitherto missed instances of discipline.

All instances of solicitation discipline that these methods retrieved are gathered in the Appendix, which lists them in alphabetical order by state. I refer to a few of them later in the text and footnotes of this Article.⁶¹ Where citations to decisional law exist, the Appendix provides them; for each instance of discipline not officially reported yet public, the Appendix gives a URL (that worked at the time this Symposium issue was published).⁶² Undoubtedly, some sanctions for solicitation are excluded from the survey because they took the form of private reprimands: my contention about these unreported sanctions is that they too amount to condoning.⁶³

57. *Mutatis mutandis* for the minority of jurisdictions that have not adopted the Model Rules or who number their solicitation bans as something other than 7.3.

58. About half the states have websites suited to this research. Others provide less useful data (for example, archives that cannot be searched) or no information at all.

59. He reported to me that these phone calls "were in some cases elucidating," but they led to no instances of discipline that he did not already have.

60. ABA & BUREAU OF NAT'L AFFAIRS, ABA/BNA LAWYERS MANUAL ON PROF'L CONDUCT, <http://www.bna.com/products/lit/mopc.htm>.

61. See *infra* notes 73–76 and accompanying text.

62. See *supra* note 52.

63. See *Daily Gazette Co. v. Comm. on Legal Ethics*, 326 S.E. 2d 705, 711 (W. Va. 1984) (holding that the private reprimand could not be used as a sanction because it conflicts with constitutional principles of open government). See generally Levin, *supra* note 50, at 34–49 (offering constitutional and common law arguments against secrecy in discipline).

Finally, in pursuit of softer data about solicitation bans as enforcers perceive them, I also conducted telephone interviews of several lawyers who enforce disciplinary rules, including officials in the solicitation-tolerant jurisdictions of the District of Columbia and Virginia. For contrary views, I contacted bar counsel who had gone after solicitation and attorneys based at the ABA's Center for Professional Responsibility. At the ABA annual meeting in August 2007, I attended programs and a reception that drew bar counsel, where I was able to speak informally to other enforcers about solicitation in their jurisdictions. One goal I had for these conversations was to see whether an attitude toward this particular disciplinary offense would emerge.⁶⁴

B. Whittling the List

The sixty-two instances of discipline for solicitation reported from 2002 to 2007 might exaggerate the extent to which the bar imposes penalties for this offense.

1. Solicitation Coupled With a Behavior about Which the Bar Appears to Care More

Only about half the reported cases put any emphasis on solicitation. This offense, though fundamental and central for my purpose, frequently turned up as a lesser charge in a multi-count set of accusations that paid heed to something worse. The Colorado lawyer who collected compensation to which he knew he was not entitled and mishandled client property—and who also did not show up at his disciplinary hearing—probably would have been disbarred anyway even if he had not solicited the heirs of the estate he had looted.⁶⁵ Sanctions are imposed on a per-lawyer rather than a per-transgression basis, and most lawyer sanctions announced to the public respond to more than one offense. Accordingly, a disciplinary authority that adjudicated a charge of solicitation, found it credible, and sanctioned the offending lawyer might well have imposed the same penalty absent solicitation, in response to other offenses in the record.

64. The attempt was inconclusive. I thought I detected a bit of boredom with the topic but am not sure.

65. *People v. Cozier*, 74 P.3d 531, 538 (Colo. 2003).

Schemes for lawyer discipline contain few assignments of relative weight for particular offenses of the kind that appear in sentencing guidelines and felony hierarchies. A regular reader of the disciplinary sheets learns that the bar has a couple of strong antipathies: to anything resembling intentional conversion of client property, for example, and to deceit that produces gain for the lawyer. It seems fair to infer that if a lawyer received a sanction following substantiated accusations of both solicitation and theft from a client trust account, the two offenses did not each contribute equally to the weight of the sanction.

Lines emerge. If Model Rule 7.3 were written in the District of Columbia or Virginia mode that this Article has provisionally endorsed, then all solicitations that hurt clients would remain under the disciplinary umbrella. Any duress, coercion, harassment, or exploitation of client vulnerability that accompanies solicitation warrants disapproval. Solicitations alleged to hurt only “the public, or the legal system,”⁶⁶ however—a conclusory judgment that demands no overt showing of harm—would not, under this approach, subject lawyers to discipline. Model Rule 7.3, as was noted, takes a contrary position. Lawyers are subject to discipline for solicitation even when their overtures treat prospective clients fairly, and eschew duress and coercion. Benign overtures thus fill the cases that a whittling study must preserve.⁶⁷ Do disciplinarians sanction the no-harm-to-clients category of solicitation? Or do they sanction it?

And so the whittling proceeds: when an account of discipline for solicitation included findings that the attorney violated other rules that the *Standards for Imposing Lawyer Sanctions* regards as necessary for the protection of clients, and for whose violation the ABA recommends disbarment or suspension when clients are hurt, I excluded that case, along with those that included theft or overt venality by the lawyer. On this corner of my cutting-room floor lie combinations of solicitation with other offenses, including repeated

66. ABA, *Standards*, *supra* note 51, at R. 7.1.

67. As the Court stated:

By “benign” commercial solicitation, I mean solicitation by 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.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 472 n.3 (1978) (Marshall, J., concurring).

neglect,⁶⁸ assisting in the unauthorized practice of law,⁶⁹ giving advice to a client that was contrary to the client's interests,⁷⁰ and improper retention of a retainer fee.⁷¹

2. Priors

One respondent deemed “no stranger to the disciplinary process” who testified falsely in one of his prior proceedings⁷² embodies the next whittling-down category, also taken from the *Standards*: prior disciplinary offenses, which the ABA ranks highest on an eleven-item list of “aggravating circumstances . . . that may justify an increase in the degree of discipline to be imposed.”⁷³ Here my premise is that, just as a lawyer who receives a sanction following an accusation of both solicitation and theft is being punished for theft rather than solicitation, or (at most) for theft made more egregious because the lawyer preceded it by soliciting his victim, a lawyer with a history of disciplinary offenses who receives a sanction following an accusation of solicitation is being punished for his unruliness—or his sociopathic refusal to stay in line—rather than, or at most made worse by, the soliciting he did. Prior disciplinary offenses counted for this purpose only if they were not limited to solicitation.

3. Technical Violations

Model Rule 7.3 and its state-level variations subject lawyers to discipline for writing to prospective clients without conspicuously including words like “Advertising Material.”⁷⁴ These provisos turn otherwise proper written solicitations into sanction-worthy offenses, and a sizeable fraction of the disciplinary docket includes reprimands for this lapse.⁷⁵ The substantive content of the communications in such cases does not violate any disciplinary provisions. I eliminated

68. See *infra* Appendix Nos. 25, 45.

69. See *infra* Appendix No. 29.

70. See *infra* Appendix No. 38.

71. See *infra* Appendix No. 54.

72. Sup. Ct. Att’y Disciplinary Bd. v. Bjorklund, 725 N.W.2d 1, 1 (Iowa 2006).

73. ABA, *Standards*, *supra* note 52, at R. 9.21.

74. See, e.g., N.J. RULES OF PROF’L CONDUCT R. 7.3(b)(5)(i) (2007) (insisting that written solicitations be labeled ADVERTISEMENT, using capital letters); OHIO RULES OF PROF’L CONDUCT 7.3(e) (2007) (mandating lengthy boilerplate called “Understanding Your Rights” as an addition to all written solicitations).

75. See *infra* Appendix.

these instances of discipline in the belief that they focused on careless noncompliance with (or perhaps ignorance of) technical rules, rather than on solicitation per se.

4. Runners, Hirelings, and Subordinates Who Do the Soliciting

Many lawyers who were accused of solicitation did not approach prospective clients themselves but engaged other people to do their soliciting for them.⁷⁶ Like the repeat-offender sanctions mentioned above, these instances of sanctioning looked to me like punishment for something other than the solicitation of new clients. Disciplined lawyers tended to have violated rules other than the counterparts to Model Rule 7.3, such as those governing supervision of subordinates and the ban on giving another person “anything of value” in exchange for recommending the lawyer’s services.⁷⁷

Employing what used to be called “lay runners”—nonlawyers who solicit new clients, usually for personal injury practitioners—differs from, and in crucial ways is more dangerous than, solicitation by lawyers themselves. A lay runner by hypothesis cannot answer the prospective client’s questions as well as a lawyer can.⁷⁸ To the extent they say anything to clients about rights, strategies, opportunities, or tradeoffs that diverges from what the lawyer later says, these runners sow confusion in a way that a unitary voice necessarily can forestall. Their compensation for bringing a client through the door rather than by the hour, or for achieving a satisfactory result, encourages them to overpromise; a lawyer who solicits clients, by contrast, must absorb the detriments as well as the benefits of each retainer, and thus has incentives to tell prospective clients a realistic story. Their compensation also defeats one potential defense of solicitation, which reasons that although some lawyers cannot afford to buy advertisements, none is too cash-

76. According to a bar journal article by the chief disciplinarian of Minnesota, published in the middle of the period I studied, most of the solicitation-enforcement in his office involves ill-supervised subordinates, working particularly “within the various ethnic communities in the Twin Cities.” Kenneth L. Jorgenson, *In-Person Solicitation: Not for Lawyers*, BENCH & BAR OF MINN., Sept. 2004, at 13, available at <http://www2.mnbar.org/benchandbar/2004/sept04/profresponse.htm>.

77. MODEL RULES OF PROF’L CONDUCT RS. 5.3, 7.2(b) (2007).

78. Note that the whole domain of professional regulation rests on a belief that, with respect to serving clients, credentialed lawyers are more competent than amateurs.

strapped to solicit a new client, and so permitting solicitation would help disadvantaged lawyers earn a living.⁷⁹ Because of the additional dangers, and absence of offsetting benefits, that third-party soliciting agents pose—and because using subordinates or lay runners for solicitation violates other rules—I deemed this subset of solicitation distinct from solicitation done by lawyers themselves and removed these cases from consideration.

5. The Remainder

After the removal of another case as *sui generis*,⁸⁰ there remained two, one in Wisconsin and one in Illinois. The Wisconsin case was based on reciprocity for the Illinois offense and involved the same lawyer, one Timothy Michael Whiting, once listed on a roster of top lawyers under forty.⁸¹ Mr. Whiting sent a letter to the family of a Wisconsin woman who had been killed by a careless driver. He emphasized his connections to both Illinois and Wisconsin:

I am also writing because I believe due to my past and present connection with Wisconsin, I am in a position to offer your family assistance in bringing justice to those who maliciously caused this incident. My firm specializes in catastrophic automobile accidents and wrongful death cases such as your family's case. Moreover, conveniently enough, we have offices in both Chicago, where the crash took place, and in Delavan, Wisconsin, which is in your locale. In addition, in the past I have handled police chase cases in Illinois that have also resulted in the wrongful death of a family member. Therefore, based on my firm's expertise and experience in cases similar to yours and the

79. See Levy, *supra* note 16, at 281 (attributing this claim about distributive justice to Justice Marshall's concurrence in *Ohralik*).

80. *In re McElroy*, 637 S.E.2d 705 (Ga. 2006), which reports the voluntary surrender of a license following a charge of solicitation, provides no details about Mr. McElroy's misconduct. The relinquishment followed a negotiation whose terms are not public. An official of the Georgia bar informed me that the totality of the circumstances warranted this severe-looking consequence. Telephone interview with William Smith III, General Counsel, State Bar of Ga. (Jan. 4, 2008). If the facts of *McElroy* had been reported, I would have excluded it on the "runners" criterion. See *supra* Part II.B.4.

81. *In re Whiting*, 667 N.W.2d 355, 356 (Wis. 2003); Whiting Law Group, Biography for Managing Partner Timothy M. Whiting, <http://www.wlglaw.net/attorneys/tmw.htm> (last visited Nov. 5, 2008).

fact that we can serve you [sic] and your family's interests both in Wisconsin and Illinois, I would be honored to be able to help in any way I can.

I realize this tragic event is still very fresh, and I apologize for the interruption of you [sic] and your family's grieving. However, in order to properly pursue an action against the police department, an immediate investigation by private investigators and photographers is necessary to preserve the evidence. Thus, if you plan on pursuing your mother's case, I highly recommend you act quickly.⁸²

The Illinois Supreme Court had issued a public reprimand, accepting without comment a recommendation from the state Attorney Registration and Disciplinary Committee.⁸³

Recall the (conservatively estimated) denominator: 6,200 sanctions a year, or 31,000 from 2002 to 2007. Observers agree that the disciplinary rules are underenforced.⁸⁴ even if the 6,200 figure were complete, which it is not, it excludes many violations in fact. Whether we count Timothy Michael Whiting as a numerator of 2 or 1, the whittled-down fraction is a tiny number.⁸⁵

Recall that before commencing to whittle down the number, for the 2002–2007 period I had found sixty-two instances of discipline in

82. Letter from Timothy Michael Whiting to the Zakrzewicz Family (2001) (on file with author).

83. Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, Recently Filed Disciplinary Decisions from the Supreme Court as of Thursday January 23, 2003, http://www.iardc.org/co_pressreleases_copy9.html (last visited Nov. 5, 2008).

84. This consensus brings together a range of commentators not generally inclined to reach the same conclusions on other issues. See RICHARD L. ABEL, *AMERICAN LAWYERS* 143–50 (1989) (observing consistent lack of enforcement over several decades); WOLFRAM, *supra* note 1, at 80 (observing that lawyer “discipline is selective, episodic, [and] subject to constraints of fluctuating budgets and personnel ability”); Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 950 (1995) (contending that lawyers have their own slovenly enforcement of their rules to blame for the low esteem in which the public holds them); David B. Wilkins, *Legal Realism for Lawyers*, 104 *HARV. L. REV.* 469, 503 (1990) (“The rules of professional conduct are chronically underenforced.”).

85. And so it is curious that one catalogue of underenforced rules of professional responsibility does not mention solicitation. Zacharias, *supra* note 33, at 999–1001 (naming other candidates: the obligation to report misconduct by other lawyers, unauthorized practice in the form of advising clients in states where the lawyer holds no license, obligations to expedite litigation, and prohibitions on paying clients' costs and on making statements to the press while litigation is pending).

response to charges that included solicitation, amounting to one-fifth of 1 percent of all discipline imposed, a much larger number than 2/31,000 but still small. Anyone inclined to retain any of the cases I took out—believing, for instance, that violation of the rule against paying people to recommend employment is intrinsic to solicitation rather than a separate transgression,⁸⁶ or that failure to label one's written solicitation as advertising material amounts to more than a technical lapse—will not significantly change the bottom line by restoring them. In practice, the disciplinary docket read sanctioning to mean condoning, just as clearly as the blackletter rules read sanctioning to mean disapproving.

III. SOLICITATION BANS AS “EXPRESSIVE” (OF WHAT?)

A. Lawyer Regulation and Expressive Law

The gap between sweeping bans of solicitation on one hand and widespread toleration of this practice on the other invites recourse to what commentators, in a literature that emerged in the 1990s, have called the “expressive function of law . . . [or] (for short) ‘expressive law.’”⁸⁷ “It must be expressive” constitutes one possible explanation for an almost complete lack of enforcement.⁸⁸ This perspective on positive law maintains that regulations or doctrines influence behavior even where individuals face little or no enforcement in the form of sanctions. Put slightly differently, law can generate norms;⁸⁹ and members of communities hew to norms even when they have reason to believe that law enforcers will not formally punish noncompliance.

86. Rick Abel took this position. See Abel Message, *supra* note 30. I think it may be correct.

87. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 n.2 (2000).

88. Fred Zacharias focuses on two other explanations: the regulation in question may be hortatory rather than enforceable by design; alternatively, the disciplinary authorities may have inadequate resources to enforce all the rules and so focus on the ones they deem most important. Zacharias, *supra* note 33, at 1003. In my view, “expressive law” as a rationale touches on both of those possibilities.

89. Matthew Adler observes that the “norms” and the “expressive” literatures consider related and overlapping, yet not exactly the same, material. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1373–74 (2000); see also Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 680–85 (1998) (distinguishing “social meaning” from “norms”).

Going beyond this description of how positive law can function, writers have elaborated on expressive law in normative terms. They find an expressive “ought” or “should” inside legislation apart from whether and how much it interferes with human activities. Richard Pildes, for instance, finds considerable expressive content in laws governing elections and voting, a domain that imposes few sanctions on the citizenry.⁹⁰ In a co-authored article, he sees the jagged shape of an invalidated election district as expressive of an unfortunate “race consciousness [that] has overridden all other, traditionally relevant redistricting values.”⁹¹ Expressive theorists, most prominently Dan Kahan, have pointed out that just as law inhibits and shapes behavior regardless of whether individuals suffer sanctions, the application of law-based sanctions can, in expressive effect, amount to almost no sanction at all. Kahan’s obvious-yet-trenchant illustration of “no sanction at all” is a fine or a community-service sentence following a criminal conviction.⁹² Focusing on the expressive function of law in this normative mode permits an observer to be neutral on the normative value of a law as written while holding strong views about the normative value of a law as perceived and enacted. Kahan and Tracey Meares have argued that setting up reverse-sting operations to anticipate drug deals (“reverse” in the sense of targeting customers rather than vendors) outside the inner city would offer the expressive benefit of making drug-law enforcement appear universal and desirable, rather than focused almost exclusively on harassing nonwhite populations.⁹³ Kahan and Meares hold no brief for reverse-sting operations as described in the ethnic-neutral language of a police manual; they take this maneuver as a law enforcement given, and seek to share it with a different set of spectators.

90. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1541 (2000); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2535 (1997).

91. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 526–27 (1993).

92. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

93. Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 818–19 (1998).

With this quick summary I take no position on the doubts that scholars have raised about this genre,⁹⁴ and say only that for anyone who thinks “expressive law” may have value as a means to understand or improve legal doctrine, lawyer regulation presents an especially congenial proving-ground for the hypothesis. It works better, in my view, than constitutional law and state-sponsored punishment, the two fields where expressive-law studies have flourished. Lawyer regulation, unlike American public law generally, has been allowed to constrain individuals because of its concern with appearances and public relations,⁹⁵ whereas this concern as a sole basis for government actions that constrain the larger public will often affront equal protection.⁹⁶ Governments might be too big or ill-defined (“We the People”) to do much expressing,⁹⁷ or to justify their acts with reference to expressive value; but the legal profession as embodied in a state bar contains a discrete membership understood to have relinquished some of the liberties and prerogatives that attach to citizens outside the profession. This field also offers an expressive-law writer a unique boon in contrast to the law of punishment: Whereas a few particular criminal laws—bans on littering, for example—are widely seen as not too enforced, we have here an entire rule book, not just the solicitation ban in it, perceived to lack teeth,⁹⁸ thus giving outsiders a setting that approaches law without sanctions. Any look at any lawyer regulation fills a gap in the expressive-law literature, which so far has had little to say about rules of the legal profession.⁹⁹

94. See Adler, *supra* note 89; Patricia Funk, *Is There an Expressive Function of Law?: An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007), available at <http://aler.oxfordjournals.org/cgi/content/full/9/1/135>.

95. More so in the Code than the Rules, yet the idea is manifest in the Rules as well. See *infra* Part IV.

96. “Rational basis” analysis under the Equal Protection Clause—as indulgent as judicial scrutiny gets—might demand more than flattering anyone’s appearance.

97. Adler, *supra* note 89, at 1410–12.

98. See *supra* note 87 and accompanying text.

99. For rare exceptions, see Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1630 (2007) (suggesting that when the Supreme Court forced law schools to allow military recruiters on their campuses, it ignored the “expressive element in law schools’ placement operations”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (arguing that mandatory pro bono might be better than charging lawyers fees to help the poor because of expressive concerns).

B. Expressions

As suggested by the examples noted above (jagged electoral districts signify a preoccupation with race, community-service sentences are not punishment), that which expressive law expresses is at least in part in the eye of us beholders. One cannot look it up. An observer who esteems the solicitation ban might see it as communicating a concern for the welfare of vulnerable laypeople or disapproval of predatory behavior by lawyers. Unavoidable subjectivity means that onlookers may well disagree with me about what this ban expresses; but anyone who looks for an expressive message in the prohibition of solicitation need not defer to the ABA's homily about "overwhelmed" clients, "importuning" by "trained advocates," and the need to fend off a "fraught" encounter,¹⁰⁰ any more than one must accept a slap on the wrist as constituting real punishment.

1. Messages from the Written Ban

a. Repeat-player clients outrank one-shotters

By allowing lawyers to solicit retainers from their existing clients and to exploit their professional and personal relationships to gain new work, the ban on solicitation expresses disapproval for the formation of a new relationship when lawyers initiate it overtly. In the personal injury context of this Article, repeat-player clients—including insurance companies, product manufacturers, hospitals, and other institutions that provide medical services—are unimpeded by the solicitation ban; they have their counsel. Injured persons are one-shotters: individuals who find themselves needing lawyers for the first time or for an unfamiliar crisis. To the extent that the relevant population of lawyers is inhibited by the solicitation ban, these prospective clients have to negotiate alien territory unaided. They can expect little or no legal advice until they make their way to the office of a lawyer whom they do not know, a threshold that most injured persons with valid claims do not cross.¹⁰¹

Critics of the solicitation ban have been noting for nearly a century, to little avail, that it is unfair to give insurance claims

100. MODEL RULE OF PROF'L CONDUCT R. 7.3 cmt. 1 (2007).

101. Abel, *Too Few Claims*, *supra* note 16, at 448.

adjusts the access to injured persons that plaintiffs' lawyers do not have.¹⁰² An agent for an insurer or other repeat player can approach a prospective plaintiff immediately after a traumatic impact, waiver in hand, and obtain a full release before this person has had a chance to seek legal advice.¹⁰³ Extraordinarily egregious terms might be invalidated later in court, but as a general rule, an injury victim who regrets having signed a waiver too hastily must expect to be stuck with her bargain.¹⁰⁴ Unpersuaded by an amicus brief detailing this argument,¹⁰⁵ the majority in *Went for It* upheld Florida's thirty-day ban on written solicitation by deeming it necessary to prevent intrusive and invasive conduct, even though the state did not similarly thwart whatever intrusions and invasions insurers would choose to pursue. "The rule, in short, was not narrowly tailored to protect accident victims," wrote one luminary soon after the decision came down.¹⁰⁶ "It appears crafted to protect the insurance industry."¹⁰⁷

To the extent that an overture from a lawyer comes across to the target as intrusive or abusive rather than an offer of welcomed legal assistance—a theme that the *Went for It* majority pressed heavily—banning solicitation does nothing to protect another group of targets, existing or past clients, except insofar as it reduces the volume of overtures to them.¹⁰⁸ "There is far less likelihood that a lawyer would

102. Minor Bronaugh, *The Ambulance Chaser vs. the Claim Agent*, LAW NOTES, Oct. 1920, at 126. The defendant in the famous case of *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929), kept an insurance adjuster in its onsite infirmary, ready to present patrons of rides like the Flopper with releases to sign. Robert N. Strassfeld, *Taking Another Ride on Flopper: Benjamin Cardozo, Safe Space, and the Cultural Significance of Coney Island*, 25 CARDOZO L. REV. 2189, 2226 (2004).

103. A column in a lawyers' journal featuring anecdotes from practitioners related a story about a client who had driven a car that ran off the road. With traumatic edema so severe that the dental surgeon who treated him called him a pumpkin head, this man was placed in a no-visitors room. An insurance adjuster slipped past the nurses, entered the room, and left with a signed release. *War Stories*, PA. LAWYER, May–June 2003, at 42, 43.

104. See, e.g., *Shepherd v. Allstate Ins. Co.*, 562 So. 2d 1099 (La. Ct. App. 1990) (rejecting claims of duress and fraud even though the plaintiff alleged she had been in pain when signing the agreement, had not read it, and believed that the \$250 she received had been an advance for her medical expenses).

105. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 639–40 (1995) (discussing Brief for the Association of Trial Lawyers of America as Amici Curiae Supporting Respondent).

106. Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went for It, Inc.*, 49 ARK. L. REV. 703, 721 (1997).

107. *Id.*

108. One argument from the anti-solicitation camp objects to the swarm of letters that victims receive from lawyers when they or their relatives survive a serious accident that receives

engage in abusive practices against an individual who is a former client,” the ABA tells us in commentary to Model Rule 7.3, with no further explanation.¹⁰⁹ An earlier comment presumes that “abuse” involves a “prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services,” who will find it “difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately.”¹¹⁰ Existing relationships do not lack the same difficulty. An extensive literature depicts professionals generally, not just lawyers, as disabling: in dealing with clients they assert their expertise, insist that their occupational skills are necessary to resolve a problem, push away alternative sources of help, and pump up demand for their costly services.¹¹¹ There is no reason to suppose that a longstanding professional-client relationship weakens these levers of manipulation.

b. Cream rises

Here I begin with an axiom: the rule book of a self-regulated profession will not contain provisions designed to be bad for its membership. Lawyers may appear chafed or restricted by provisions in the Model Rules, but every Thou Shalt Not commandment in it, drafted and enforced by the legal profession, must necessarily have been written to advance the interests of this group and only incidentally to take prerogatives away from any individual.

newspaper or television attention, or was noted in a police blotter. See *Power of Attorneys, Lawyers, Meeting by Accident*, Dec. 2001, http://www.power-of-attorneys.com/meet_by_accident.htm. Again one has to wonder about selective regulation. See *infra* Part III.B.1.d. A few years ago I let my house listing lapse when the real estate agents I had engaged for the standard three-month period failed to find a buyer. Day ninety-one brought several letters and post cards from brokers eager to pick up the listing. They did put me in mind of buzzards, but their move seemed reasonable enough; I even sent an e-mail message to one of them praising the cleverness and wit of her pitch. Life went on. I have never heard anyone attack real estate agents for pelting property owners with paper, or propose that they be silenced in the *Went for It* mode. True, the failure to sell one’s house before a listing expires is less traumatic than literal trauma. But getting a few written solicitations from strangers (even soon after a terrible accident) that one can quickly throw in the trash does not blight anyone’s life.

109. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt 4 (2007).

110. *Id.* cmt 1.

111. See Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1296 (1994) (citing IVAN ILLICH, *DISABLING PROFESSIONS* 25–28 (1977), and other critiques of the professions).

Bountiful employment for lawyers can coexist with a ban on lawyers' seeking new employment, in other words, only if one starts from the premise that asking for an opportunity to perform lucrative work is neither necessary nor sufficient for obtaining it.

As observed (with polite restraint) by Thurgood Marshall in his *Ohralik* concurrence, the repeat-player advantage noted above with respect to clients applies also to those who counsel them.¹¹² The ban on solicitation declares that social forces rather than overt recruitment efforts should allocate representation to clients and remunerative work to lawyers.¹¹³ These forces coalesce in the lawyer's reputation: his current and past clients, his roles in wider communities, his school affiliations, his home, his appearance, his office address, and the colleagues and family and friends who have known him, preferably for some time, and connect him to respected sources of tradition.

The crux of one's reputation is its independence from the words about oneself that one might speak, or wish to speak. Lawyers cannot script, rewrite, or erase their reputation, at least not overtly. It exists as a condition external to them. When it is good, the anti-solicitation ideology maintains that clients will come to them offering remunerative work. When it is not so good, or still developing, this ideology tells deficient lawyers to respond with patience rather than hustle. Perhaps "bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services"¹¹⁴ will offer some conditional welcome to these fledglings and non-elite aspirants. Until then, all lawyers, whether they have enough remunerative work to make a living or not, may take comfort in the certitude that cream rises.

c. Clients as lawyers' property

A third iteration of the conservative politics in the message of the ban equates solicitation with poaching. Wealthy or sophisticated clients will make their own decisions about whether to consult their existing lawyers or look for others. A different set of prospects is

112. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468–77 (1978) (Marshall, J., concurring).

113. *See id.* at 474–75.

114. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 4.

lying hurt and bleeding on the ground (or terrified of the telephone as a vector for their creditors, or about to lose their homes), too weak to find their own lawyers or unattractive to the networks that match clients with attorneys by genteel means.

Some minority of this second set bear pecuniary value, and the lawyers close to these clients who think that this value belongs to them—and who may have prospected this value through solicitation themselves—will regard the overtures of their peers as a danger to their economic interests.¹¹⁵ A lawyer hungry or aggressive enough to eschew more delicate alternatives and cross Model Rule 7.3 will probably not defer to the embedded labor, or entitlement, that made the client belong to someone else.¹¹⁶ Solicitation is an affront because it threatens the holdings of another lawyer who got there first.¹¹⁷

d. Thin, selective protection of the ostensibly vulnerable

In an earlier work about aggression as a legal concept, I argued that both public-law and private-law regulation of behaviors that individual targets experience as boundary-crossing should be evaluated in tripartite terms: (1) the invasion or violation, on one side of the ledger; (2) the gain to the invader, on the other side; and (3) the external social judgment that balances the two against each other. Although the exercise does not determine whether a particular practice should be condoned or prohibited, it uses a taxonomy that facilitates borrowing and precedent-making, so that persons drafting a rule about sexual harassment, for instance, could consider lessons from the law of predatory pricing, undue influence, and aggressive panhandling, *inter alia*.¹¹⁸ This perspective associates lawyers who solicit new clients with other actors who walk up to relatively vulnerable strangers and try to initiate a relationship, or at least a

115. See WOLFRAM, *supra* note 1, at 786–88 (suggesting that the solicitation ban functions to reduce economic risks for lawyers).

116. See generally Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1074 (2005) (describing Locke's labor theory of property).

117. Leslie C. Levin, *Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers*, 37 ARIZ. ST. L.J. 589, 608–611 (2005) [hereinafter Levin, *Lawyers in Cyberspace*] (discussing lawyers' comments on a listserv, where lawyers complained that ambulance chasers steal cases).

118. Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1 (2001).

round of dealings, that will generate financial or legal consequences for the persons to whom they speak. If the lawyer does not use a subordinate or runner to make this overture (a premise I have been trying to hew to when looking for the center of solicitation), then we may assume that solicitations that become known to the disciplinary offices were unwanted by the prospective clients, because someone would have had to complain.

The prospective client thus occupies the first leg of the triangle, which contains a sense of being invaded or violated. The third leg of the triangle, the external one, reaches a clear written conclusion about in-person, live solicitation that accepts this perceived invasion or violation. It forbids the practice categorically. The aggressor's second-leg point of view—maybe she really needs the work, or deeply believes her target needs a lawyer like her, and also knows that advertising, written solicitation, and the genteel forces that make cream rise will not connect her to this prospective client—appears utterly disregarded.

Elsewhere, the law regulates the same category of invasion—an aggressive individual approaches a vulnerable person and proposes a round of dealings that have financial or legal consequences for the target—with much more solicitude for the interests of the aggressor. We have already remarked on the insurance claims adjuster who rushes up to injured persons, perhaps literally chasing them in ambulances in a way that lawyers are not allowed to do, with a waiver in hand for them to sign without the advice of counsel.¹¹⁹ More examples abound. Police officers are not entirely inhibited by the Fourth Amendment when they want to kick open household doors,¹²⁰ peer into dark automobiles¹²¹ and into buildings via infrared imaging,¹²² or rifle through garbage cans.¹²³ Lying to federal investigators can be prosecuted as a felony, even when the liar did

119. See *supra* notes 105–110 and accompanying text.

120. See Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 341–49 (2002) (reviewing a pattern of judicial deference).

121. Kendra Hillman Chilcoat, *The Automobile Exception Swallows the Rule: Florida v. White*, 90 J. CRIM. L. & CRIMINOLOGY 917, 940 (2000) (“Courts seldom place limits any longer on searches and seizures under the automobile exception. Instead, judges use judicial deference to police officials as justification to permit greater latitude by the police.”) (footnotes omitted).

122. Michael L. Huskins, Comment, *Marijuana Hot Spots: Infrared Imaging and the Fourth Amendment*, 63 U. CHI. L. REV. 655, 656 (1996).

123. *California v. Greenwood*, 486 U.S. 35, 40–44 (1988).

not swear to tell the truth.¹²⁴ Two chief lawyers of the Bush administration refused to condemn the torture of suspects in offshore U.S. custody and the practice of rendition, whereby the government transports individuals to foreign destinations knowing they will be tortured or killed.¹²⁵ Persons charged with sexual assault who proceeded with physical contact without receiving a go-ahead from their target can benefit from their “mistake of fact” on the question of consent.¹²⁶ What recipients experience as rape, torture, homicide, bullying, home invasion, and so on, in short, may be acceptable behaviors in a particular context. Live, in-person solicitation of strangers for pecuniary gain is categorically unacceptable, always.

2. Messages from the Wan Enforcement Rate

Sanctioning = Disapproving (a rigid ban) combined with *Sanctioning = Tolerating* (extraordinarily little enforcement of the ban) expresses a mixed message. Notwithstanding the Model Rules’ contention that solicitation threatens prospective clients with the risk of abuse,¹²⁷ one expressive message of underenforcement—consistent with the another ABA statement that solicitation is not really a threat to clients¹²⁸—tells lawyers that although solicitation does not subject lawyers to discipline, the practice is tacky. It’s food for lawyer jokes, something that happens but that they would never do.¹²⁹ The very rare occasions of public sanctions announce that the practice does occasionally attract disciplinary attention: you could get in trouble, goes the message, and wouldn’t you be embarrassed? All those ambulance chasers out there, don’t we all know that, and look, they came after *you*. Meanwhile, do what you have to do. As long as you keep your overtures discreet and do not offend the people you

124. 18 U.S.C. § 1001 (2006).

125. Dan Froomkin, *The Gonzales Legacy*, WASHINGTONPOST.COM., Nov. 7, 2007, http://www.washingtonpost.com/wp-dyn/content/blog/2007/11/07/BL2007110701444_pf.html (describing the stated views of attorneys general Alberto Gonzales and Michael Mukasey).

126. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 637–38 (4th ed. 2006) (describing the prevailing rule that a mistaken yet genuine belief in the partner/victim’s consent precludes criminal liability for rape or sexual assault).

127. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt (2007).

128. *See id.* at cmt. 4.

129. A study of a large trial lawyers’ listserv identified scorn and anger toward “ambulance chasing.” Levin, *Lawyers in Cyberspace*, *supra* note 117, at 608–12.

solicit (or the lawyers on whose business you encroach¹³⁰) enough to make them complain, you will be fine.

This shrugging at the mixed message suggests cynicism about the bar's attitude toward lawyers who pursue clients overtly. One can find no evidence that leaving solicitation undisturbed promotes an image of lawyers as delicate, restrained professionals in the shrinking violet mode. Nor do newer anti-solicitation measures like the thirty-day ban seem to be eroding the stereotype of lawyers as greedy predators.¹³¹

IV. CONCLUSION: THE TROUBLE WITH A MIXED MESSAGE ON SOLICITATION

Lawyer regulation should not sanction any behavior in both (opposing) senses of the word sanction. That which is not wrong and also offers benefits ought to be at least tolerated, if not approved, in codes of conduct. That which is punished ought to be wrong.

This stance amounts to a mandate from the ABA, which in its transition from the Model Code to the Model Rules jettisoned those of its provisions that focused only on appearances or public relations. The current plenary prohibition of misconduct, Model Rule 8.4, borrows many of the Model Code prohibitions but omits the one telling lawyers to refrain from any conduct that reflects adversely on their fitness to practice law.¹³² Lawyers, as was mentioned, under the current rules do not have to refrain from "self-laudatory" communications as they did under the Code.¹³³ What they do to publicize themselves need no longer be "dignified,"¹³⁴ whatever that means. Judges governed by the Code of Judicial Conduct have to

130. *Id.* at 610 (identifying a perception among trial lawyers that solicitation is objectionable because it amounts to client-stealing).

131. On the futility of image-burnishing initiatives in general, see Michael C. Dorf, *Can the Legal Profession Improve Its Image?: Americans Believe Lawyers to Be Necessary but Dishonest, Survey Finds*, FINDLAW'S WRIT, April 17, 2002, <http://writ.news.findlaw.com/dorf/20020417.html>; on the futility of solicitation measure in particular, see Editorial, *Restrain Greedy Lawyers*, [Cleveland] PLAIN DEALER, June 3, 1999, at 8B (remarking that Ohio's 30-day ban "doesn't go nearly far enough. But it's a bit better than nothing.").

132. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(6) (1983).

133. *Id.* DR-101(A).

134. *Id.* DR 2-101(B), DR 2-101(H), DR 2-102(A); see also Steven A. Delchin & Sean P. Costello, *Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients*, 30 SETON HALL L. REV. 64, 64-70 (1999) (referring to the business-getting efforts of a real estate lawyer in New York).

avoid even the appearance of impropriety, but when the Model Rules rejected this erstwhile Canon 9 of the Model Code, they excused lawyers from this dictum.¹³⁵

The need to care less about appearances and more about real harms has grown stronger since the Rules replaced the Code a generation ago. An occupation that continues to grow, become more diverse on several fronts, and connect more to a complex global economy cannot govern itself with clubhouse rules, enforcing dogmas too hidden for newcomers to look up and learn. The opaque ban on solicitation burdens and baffles relatively disadvantaged lawyers, adding in effect another layer of comfort for the privileged. The same regressive politics continues to hurt clients. Liberalizing the solicitation rules would deliver more information to them, especially about the cost of legal services. Contrary to the claims of solicitation-suppressors, the rise of advertising and communication technology has not eliminated clients' need for in-person, live colloquy about what lies ahead.¹³⁶

Liberalizing, for this purpose, does not commend a retreat from regulation.¹³⁷ The bar should retain its concern about the “potential for abuse” that solicitation raises—a concern that remains in view in the two jurisdictions that have gone furthest to relax this ban. Coercion, duress, pestering a layperson who does not want to be pestered, and proposing a lawyer-client relationship to someone in no condition to consider this proposal must subject a lawyer to discipline. The rewritten rule on solicitation that I advocate also depends on reliable enforcement of related rules, particularly those governing supervision of subordinates and the giving of money or

135. MODEL CODE OF PROF'L RESPONSIBILITY DR 9-101 (“Avoiding Even the Appearance of Impropriety”).

136. In the Supreme Court's solicitation cases Justice O'Connor expressed the belief—a misguided one, in my view—that disadvantaged individuals who could benefit from legal advice do not need solicitation, because advertising gives them the information they would otherwise lack. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633–34 (1995); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 480 (1988) (O'Connor, J., dissenting).

137. In other contexts I have argued, sometimes with reference to “the new regulation” or “responsive regulation,” that switching to a lighter touch on regulation and doctrine does not constitute surrender on substantive pursuits, and can yield strong results. *See e.g.*, Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J.L. & POL'Y 79 (2007) (offering alternative strategies congruent with the quest for same-sex marriage); Anita Bernstein & Joseph Bernstein, *An Information Prescription for Drug Regulation*, 54 BUFF. L. REV. 569 (2006) (outlining techniques to extract post-marketing information about prescription drugs).

other consideration to lay runners.¹³⁸ Sensible regulation would recognize that because lawyers' offers to represent lay individuals can be both good and bad for the public, they warrant a more nuanced response than the mix of condoning and condemning reported in the Appendix to this Article.

138. In conversation with me following the oral portion of this Symposium, John Fabian Witt advocated persuasively for a modification of the bans on fee splitting and the paying of referral fees, arguing that only these more drastic reforms can give low-income individuals any hope of obtaining legal counsel for a multitude of their needs. Interview with John Fabian Witt, Professor of Law & History, Columbia Law Sch., in L.A., Cal. (Jan. 2008). I agree that if the problem is access to legal services, my modest (and amply precedented) suggestions do not go far enough. This large problem is, however, beyond the reach of this Article, which seeks to ameliorate the smaller ills of hypocrisy and lack of transparency.

BERNSTEIN, SANCTIONING THE AMBULANCE CHASER

*Appendix: Instances of Discipline for Solicitation
Reported to the Public, 2002–2007*

In this five-year period, more than half (i.e., twenty-six) of U.S. jurisdictions reported no instances of discipline for solicitation. The reports are noted below with case citations if citations are available, and URLs if not.

ALABAMA

1. Elizabeth V. Addison, ASB 06-24(A) (Ala. State Bar Apr. 6, 2007), http://www.alabar.org/bbc/minutes/0407/April6_Board_Meeting.pdf (worse behavior).
2. Henry Dailey, Jr., ASB 04-292(A) (Ala. State Bar May 19, 2006), http://www.alabar.org/bbc/minutes/0506/2006,_May_19_Board_Meeting.pdf (technical violations).
3. Angela Leigh Daniel, ASB 04-166(A) (Ala State Bar Dec., 8, 2006), http://www.alabar.org/bbc/minutes/1206/Board_Meeting_Minutes_December_8,2006.pdf (technical violations).

ARKANSAS

4. Sheila F. Campbell, CPC No. 2003-179 (Sup. Ct. Comm. Prof'l Conduct 2004), <http://courts.state.ar.us/opc/20040226/2003-179.htm> (prior record, technical violations).
5. S. Gene Cauley, CPC No. 2003-157 (Sup. Ct. Comm. Prof'l Conduct 2004), <http://courts.state.ar.us/opc/20040610/2003-157.htm> (technical violations).

6. Michael E. Crawley, CPC No. 2005-153 (Sup. Ct. Comm. Prof'l Conduct 2006),
<http://courts.state.ar.us/opc/20060302/2005-153.html>
(technical violations).
7. George Michael Deloache, CPC No. 2005-156 (Sup. Ct. Comm. Prof'l Conduct 2006),
<http://courts.state.ar.us/opc/20060302/2005-156.html>
(technical violations).
8. William Bruce Leasure, CPC No. 2001-143 (Sup. Ct. Comm. Prof'l Conduct 2002),
<http://courts.state.ar.us/opc/20020606/2001-143.htm>
(hirelings).
9. Jean M. Madden, CPC No. 2004-023 (Sup. Ct. Comm. Prof'l Conduct 2004),
<http://courts.state.ar.us/opc/20040701/2004-023.htm>
(prior record, technical violations).
10. Lori A. Mosby, CPC No. 2002-151 (Sup. Ct. Comm. Prof'l Conduct 2003),
<http://courts.state.ar.us/opc/20030710/2002-151.htm>
(prior record, technical violations).
11. Michael Anthony Price, CPC No. 2002-087 (Sup. Ct. Comm. Prof'l Conduct 2002),
<http://courts.state.ar.us/opc/20021107/2002-087.htm>
(worse behavior, prior record, hirelings).

ARIZONA

12. *In re* Lamm, DC No. 01-1570 (Disciplinary Comm'n Mar. 26, 2003),
http://www.supreme.state.az.us/dc/Matrix/2003_MatrixFINAL.pdf (worse behavior).

COLORADO

13. *People v. Cozier*, 74 P.3d 531 (Colo. O.P.D.J 2003) (worse behavior, prior record).

FLORIDA

14. *The Florida Bar v. Barrett*, 897 So. 2d 1269 (Fla. 2005) (worse behavior, hirelings).
15. *The Florida Bar v. Gold*, 937 So. 2d 652 (Fla. 2006) (worse behavior).

GEORGIA

16. *In re McElroy*, 281 Ga. 317 (Ga. 2006) (either sui generis or hirelings) (see note 87 and accompanying text).

ILLINOIS

17. *In re Dombrowski*, No. 01 CH57 (Attorney Registration & Disciplinary Comm'n Jan. 20, 2004), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type "Dombrowski" in the "Respondent Information" field and then click "submit") (worse behavior, prior record, hirelings).
18. *In re Griffin*, No. 02 CH 41 (Attorney Registration & Disciplinary Comm'n May 22, 2003), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type "Griffin" in the "Respondent Information" field and then click "submit") (worse behavior, prior record).
19. *In re Harrison*, No. 02 CH 84 (Attorney Registration & Disciplinary Comm'n Mar. 15, 2004), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type "Harrison" in the "Respondent Information" field and then click "submit") (worse behavior).
20. *In re Milks*, No. 99 CH 20 (Attorney Registration & Disciplinary Comm'n Nov. 14, 2003), *available at* http://www.iardc.org/rd_database/rulesdecisions.html

- (type “Milks” in the “Respondent Information” field and then click “submit”) (worse behavior, hirelings).
21. *In re* Rojek, No. 2367971, 01 CH 38 (Ill. Mar. 13, 2002) (IARDC Database), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type “Rojek” in the “Respondent Information” field and then click “submit”) (worse behavior, hirelings).
 22. *In re* Shefler, No. 3127682, 05 CH 35 (Ill. July 19, 2007) (IARDC Database), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type “Shefler” in the “Respondent Information” field and then click “submit”) (worse behavior).
 23. *In re* Smith, No. 6203411, 02 CH 53 (Ill. Sept. 19, 2003) (IARDC Database), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type “Smith” in the “Respondent Information” field and then click “submit”) (worse behavior).
 24. *In re* Thomas, No. 6197708, 05 CH 85 (Ill. Nov. 1, 2006) (IARDC Database), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type “Thomas” in the “Respondent Information” field and then click “submit”) (worse behavior, prior record).
 25. *In re* Vajdik, No. 6210308, 01 CH 121 (Ill. Jan. 23, 2003) (IARDC Database), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type “Vajdik” in the “Respondent Information” field and then click “submit”) (worse behavior, hirelings).
 26. *In re* Whiting, No. 6230517, 02 CH 23 (Ill. Jan. 23, 2003) (IARDC Database), *available at* http://www.iardc.org/rd_database/rulesdecisions.html (type “Whiting” in the “Respondent Information” field and then click “submit”).

INDIANA

27. *In re Allen*, 770 N.E.2d 826 (Ind. 2002) (technical violation).
28. *In re Coale*, 775 N.E.2d 1079 (Ind. 2002) (worse behavior).
29. *In re Milks*, 810 N.E.2d 719 (Ind. 2004) (worse behavior, hirelings).

IOWA

30. Iowa Sup. Ct. Att’y Disciplinary Bd. V. Bjorklund, 725 N.W.2d 1 (Iowa 2006) (worse behavior, prior record).
31. Iowa Sup. Ct. Att’y Disciplinary Bd. V. Johnston, 732 N.W.2d 448 (Iowa 2007) (worse behavior, prior record).

KENTUCKY

32. *Howes v. Ky. Bar Ass’n*, 214 S.W.3d 319 (Ky. 2007) (worse behavior, prior record).
33. *Martin v. Ky. Bar Ass’n*, 214 S.W.3d 322 (Ky. 2007) (prior record).

LOUISIANA

34. *In re Broome*, 815 So. 2d 1 (La. 2002) (worse behavior, prior record).
35. *In re Gibson*, 856 So. 2d 1173 (La. 2003) (worse behavior, prior record).
36. *In re Hackman*, 833 So. 2d 916 (La. 2002) (prior record, hirelings).
37. *In re Jones*, 952 So. 2d 673 (La. 2007) (worse behavior).

MASSACHUSETTSⁱ

38. Admonition No. 04-44 (2004),
<http://www.mass.gov/obcbbo/admon2004.htm> (worse behavior).
39. Admonition No. 05-25 (2005),
<http://www.mass.gov/obcbbo/admon2005.htm> (worse behavior).

MICHIGAN

40. Felt, No. 01-163-GA (June 20, 2002),
<http://www.adbmich.org/coveo/notices/2002-06-20-01n-163.pdf> (hirelings).

MISSISSIPPI

41. *Miss. Bar v. Turnage*, 919 So. 2d 36 (Miss. 2005) (worse behavior, hirelings).

MINNESOTA

42. *In re Dehen*, 721 N.W.2d 607 (Minn. 2006) (technical violations).

NORTH CAROLINA

43. *Lawrence J. Kissling, III*, Vol. 11, No. 4 (Dec. 2006) Reprimands,
<http://www.ncbar.gov/discipline/actions.asp?page=1&keywords=kissling> (technical violations).
44. *Stafford, Greg*, Vol. 8, No. 3 (Fall 2003) Reprimands,
<http://www.ncbar.gov/discipline/actions.asp?page=1&keywords=stafford> (technical violations).

NEW JERSEY

45. *In re De Laurentis*, 796 A.2d 223 (N.J. 2002) (worse behavior).
46. *Jay Edelstein*, *Disciplinary Summaries* at 57,
<http://www.judiciary.state.nj.us/oe/OAEDisciplinarySummaries1990-2006.pdf> (2003) (technical violations).

NEW YORK

47. *In re* Shapiro, 780 N.Y.S.2d 680 (N.Y. App. Div. 2004) (worse behavior, prior record).
48. *In re* Weinstein, 772 N.Y.S.2d 275 (N.Y. App. Div. 2004) (worse behavior).
49. Raymond H. Wong PC v. Xue. 233 N.Y.L.J. 24 (2005) (non-disciplinary [injunction against solicitation]).ⁱⁱ

OHIO

50. Akron Bar Ass'n v. Amourgis, 862 N.E.2d 501 (Ohio 2007) (worse behavior, hirelings).
51. Butler County Bar Ass'n v. McKenzie, 772 N.E.2d 636 (Ohio 2002) (technical violations, hirelings).
52. Columbus Bar Ass'n v. Moreland, 780 N.E.2d 579 (Ohio 2002) (worse behavior, hirelings).

OREGON

53. Damian M. Idiart, OSB No. 01061, Or. State Bar Bulletin, Public Reprimand (Dec. 2005), <https://www.osbar.org/publications/bulletin/05dec/discipline.html> (hirelings).

TENNESSEE

54. Larry Fitzgerald, No. 10953 (2003), <http://www.tbpr.org/NewsAndPublications/Releases/Pdfs/010953-20031024.pdf> (worse behavior, prior record).
55. Robert L. Martin, No. 18106 (2005), <http://www.tbpr.org/NewsAndPublications/Releases/Pdfs/martin%2027525-5%20rel632453584251542420.pdf> (technical violations).

TEXAS

56. Geronimo Delarosa, No. 05648700 (2003), <http://www.texasbar.com/Content/ContentGroups/Publications3/Journal/2003/November/Discipline.htm> (worse

behavior).

57. Alberto Huerta, No. 10177500 (2006),
<http://www.texasbar.com/Content/ContentGroups/Publications3/Journal/20061/December5/Disc%20Acts%20Dec%202006.PDF> (worse behavior).

58. Jerome K Wade, No. 20633700 (2003),
http://www.texasbar.com/Content/ContentGroups/Publications3/Journal/20041/April3/Disciplinary_Actions.htm
(worse behavior).

VERMONTⁱ

59. Anonymous, No. 2002.214 (2002),
http://dol.state.vt.us/gopher_root4/prof_conduct_bd/38.prb
(technical violations).*

WISCONSIN

60. *In re Whiting*, 667 N.W.2d 355 (Wis. 2003).

WEST VIRGINIA

61. *Lawyer Disciplinary Bd. v. Lakin*, 617 S.E.2d 484 (W. Va. 2005) (worse behavior).

i. Admonitions in Massachusetts and Vermont are classified as nonpublic. See Mass.gov, How to File a Complaint, <http://www.mass.gov/obcbbbo/complaint.htm>; VermontJudiciary.org, Permanent Rules Governing Establishment and Operation of the Professional Responsibility Program, <http://www.vermontjudiciary.org/Committees/prbrules/prbao9.htm#Types%20of%20Sanctions>. However, because these were mentioned in reports accessible to the public—albeit with the attorneys' names omitted—they are included here. Omitting them would of course reduce the total of sixty-two to fifty-nine and raise the total number of jurisdictions that issued no public sanctions for solicitation in the five-year period from twenty-six to twenty-eight.

ii. In this decision, Mr. Xue received pointed criticism from the New York court for his solicitation, which may also be tantamount to a public reprimand that was not an instance of discipline.

