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William E. Hornsby, Jr.

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SPAMMING FOR LEGAL SERVICES: A CONSTITUTIONAL RIGHT WITHIN A REGULATORY QUAGMIRE

WILLIAM E. HORNSBY, JR.†

Twenty-five years have passed since the Supreme Court ruled that lawyers could advertise their services and states could not ban them from doing so.¹ Over that time, several lawyers have engaged in client development practices that embarrassed, annoyed, or outraged many of their colleagues.

Soon after the *Bates* decision, a lawyer in Madison, Wisconsin, started driving a hearse with the message “No Frills Wills” on the side panel. He also produced outlandish television commercials advertising his clinic. For example, in one spot the lawyer portrays a prisoner being led to the electric chair. When asked if you had any last words, he says that he should have called the legal clinic.²

In the 1990s, a lawyer in New York ran a series of print ads showing her in suggestive poses. In one ad, she is wearing a leather mini-skirt and sitting on a motorcycle. The copy reads, “We’ll ride anything to get to your closing on time.”³

At about the same time, a lawyer practicing in Hawaii sought to represent sailors by distributing condoms. The packaging included his name, phone number, and slogan, “Saving Seaman the Old-Fashioned Way.”⁴

More recently, lawyers have used newspapers, television, and the Internet to advertise their services to families of victims of mass disasters such as the E2 nightclub stampede in Chicago⁵ and the Staten Is-

† Staff Counsel to the American Bar Association Standing Committee on the Delivery of Legal Services. The views expressed by the author should not be construed as the policies or views of the ABA or any of its entities, but only those of the author.

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

2. Tom McCann, *Like It Or Not, Television Advertising Keeps Growing*, Chicago Lawyer 14 (Nov. 2003).

3. Ad on file with the author.

4. William E. Hornsby, Jr., *Marketing and Legal Ethics* 41-42 (ABA 2000).

5. Amheet Sachdev, *Lawyer’s Web Link to Club’s Tragedies Raises Questions*, Chicago Trib. 1 (Mar. 5, 2003).

land Ferry crash in New York.⁶

These advertising campaigns have four things in common. First, they are constitutionally permissible under the commercial doctrine of free speech. Second, they all appear to have been in compliance with the governing state ethics rules.⁷ Third, they provoked an adverse response from other practitioners.⁸ And fourth, the lawyers believed their marketing would be economically successful.

Given this history, it would seem likely that some number of lawyers will add unsolicited commercial e-mails to their quiver of client development techniques.⁹ If the technique were to prove economically successful, it might not be limited to a handful of lawyers who are willing to incur the wrath of their colleagues, but may become far more widespread.¹⁰

This article examines the sources of regulations governing lawyers who spam. The first section examines the status of the constitutional doctrine governing the lawyer's commercial speech. The second section discusses the application of the state ethics rules to unsolicited commercial e-mails as a form of client development. The third section analyzes whether lawyers are subject to legislative control and therefore are regulated by statutes governing spam. The final section discusses the consequences of multiple sources of regulation and concludes that compliance with myriad ethics rules and state statutes would not be difficult for maverick lawyers providing personal legal services in single jurisdictions, but may pose insurmountable obstacles for multi-state law firms that would be the most likely to use unsolicited e-mails as a responsible client development tool.

A. THE CONSTITUTIONAL RIGHTS AND LIMITATIONS OF A LAWYER TO SPAM

Today's iteration of lawyer advertising began in 1977, when the U.S. Supreme Court ruled, in *Bates v. State Bar of Arizona*,¹¹ that states did

6. *Ferry Victim Ad Raises Ire*, *Newsday.com* (Oct. 25, 2003).

7. Hornsby, *supra* n. 4, at 41 (quoting the chair of the Hawaii State Bar Committee on Advertising and Solicitation on the condom dissemination, "Dignity, taste and humor cannot be regulated by the Bar Association. It is only in the area of factual misrepresentation to the public that we are obligated to get involved and impose appropriate prophylactic measures").

8. McCann, *supra* n. 2, where Madison lawyer Ken Hur states, "I had a lot of fun putting my friends in the ads and everything, but the American Bar Association and the lawyers' groups were always complaining about me. The establishment, they never let up."

9. In fact lawyers were among the first spammers. See Feist, *infra* n. 41.

10. In this respect, law firms would join major corporations that are currently spamming potential customers for services such as banking and communications. Saul Hansell, *Big Companies Add to Spam*, *N.Y. Times A1* (Oct. 28, 2003).

11. *Bates*, 433 U.S. at 350.

not have the right to ban lawyers from advertising. This case ended a sixty-nine year ban, which began when the ABA included a prohibition of advertising in its original 1908 Canons.¹²

The Court in *Bates* addressed a newspaper ad, which listed a variety of legal services and their prices. The scope of the decision was unclear at the time. Was it to be narrowly applied only to this medium? Did it apply to the content of commercial messages regardless of the media used? Was there a constitutional distinction between advertising and solicitation (which was also prohibited by the ABA Model Code and state rules at the time of the *Bates* decision)? To address the uncertainty, the ABA adopted new provisions of its Model Code just six weeks after the Court's decision. These code provisions stressed the content of the message over the type of media, with a focus on a prohibition against false and misleading communications. While the model provisions did not limit advertising to newspapers, they did prohibit television advertising and direct mail solicitations.¹³

The next year, the Supreme Court heard two cases that clarified the rights of the states to govern solicitation. In *Ohralik v. Ohio State Bar Association*,¹⁴ the Court held that states can ban lawyers from soliciting potential clients in-person when they do so for their pecuniary gain. The Court reasoned that lawyers in this situation are subject to overreaching conduct and that they are trained in the art of persuasion. This combination justifies the state in the creation of a ban. However, at the same time, the Court held, in *In re Primus*,¹⁵ that a lawyer may solicit a potential client in-person when doing so as a matter of public interest and not for pecuniary gain.

In 1980, the Court set out the standard that has governed commercial speech ever since. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹⁶ the Court stated:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advanced the government interest asserted, and whether it is not more extensive than necessary to serve that interest.

12. *Lawyer Advertising at the Crossroads* 29 (ABA 1995).

13. DR 2-101(C)(7) and DR 2-103(A); see generally Lori B. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* (ABA 1980).

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

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

16. 447 U.S. 557, 566 (1980).

The test was applied two years later, in *In the Matter of R.M.J.*¹⁷ *Inter alia*, the case challenged a state ethics rule that prohibited lawyers from sending cards announcing the opening of the lawyer's office to anyone other than "lawyers, clients, former clients, personal friends and relatives."¹⁸ The Court indicated it was not clear "that an absolute prohibition is the only solution There is no indication within the record of a failed effort to proceed along such a less restrictive path."¹⁹ Absent a state showing of the need to limit recipients of mailed information and a rule crafted to be "no more extensive than reasonably necessary,"²⁰ the state failed to pass the *Central Hudson* test.

The Court next addressed mailed solicitations in 1988, in *Shapero v. Kentucky Bar Association*.²¹ In this case, the petitioner had submitted a letter to the state's advertising commission for approval, as the Kentucky rules required. The letter was to be sent to potential clients faced with foreclosure actions. At that time, approximately half the states had ethics rules like Kentucky, which prohibited lawyers from sending target mail "to those in need of legal services."²² The commission refused to approve the letter, not because of its content, but because of the intent to distribute it in violation of the rule.

The Court concluded first, that direct mail was like advertising rather than in-person solicitation. It then probed the difference between solicitation letters mailed to the public in general and those mailed to targeted recipients. The Court noted that "[t]he First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable."²³

In both *R.M.J.* and *Shapero*, the Court permitted the marketing endeavors because the state had failed to set out a substantial interest that the rules sought to protect. As a result, they failed the *Central Hudson* test. However, the most recent Supreme Court case addressing the constitutionality of mailed solicitations did pass that test. In *The Florida Bar v. Went For It, Inc.*²⁴ the Court let stand an ethics rule banning lawyers from sending letters seeking personal injury or wrongful death representation within thirty days of the date giving rise to the need for the representation.

17. 455 U.S. 191 (1982).

18. *Id.* at 206.

19. *Id.*

20. *Id.* at 207.

21. 486 U.S. 466 (1988).

22. Hornsby, *supra* n. 4, at 11.

23. *Shapero*, 486 U.S. at 469.

24. 515 U.S. 618 (1995).

In its analysis of the application of *Central Hudson*, the Court observed that the state interest justifying limitations on truthful nondeceptive speech was to protect “the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.”²⁵ This met the Bar’s objective of curbing activities that “negatively affected the administration of justice.”²⁶ To show that the rule directly and materially addressed the state’s interest, the Court relied on survey information showing that Florida residents believed that direct mail solicitations were an invasion of their privacy.²⁷

These cases suggest that the constitutional right of a lawyer to send uninvited commercial e-mails that are truthful and nondeceptive is substantial, but not unrestricted. Any rule or law that restricts that right must pass the *Central Hudson* test. First, we note that an outright ban has never passed this test. Next, the state must identify a substantial interest. Objecting to a method of solicitation that is economically efficient is not sufficient. However, if e-mailing is invasive enough to create a demonstrable negative affect on the administration of justice, the rule or law is likely to create a constitutionally acceptable limitation on truthful and nondeceptive speech.

As applied to some controls found within the legislation governing spam, constitutional rights, and limitations, are not particularly clear. First, as long as e-mail solicitations are viewed as a type of advertising and not like in-person solicitation, with its potential for overreaching, a ban on these e-mails would be inconsistent with the current case law.

However, the constitutionality of creating and maintaining a “do not contact” list is questionable, with arguments that go both ways. The inability of lawyers to reach potential clients in need of legal services through e-mail may be perceived as tantamount to a ban on this type of speech, even if it is the potential client who holds the means of controlling that ban. On the other hand, the e-mail could be deemed an invasion of privacy to the extent that it creates an adverse perception of the system of justice, similar to the justification that led to the constitutionality of the Florida thirty-day rule. If a jurisdiction could demonstrate this public perception, it could pass the *Central Hudson* test, as the Florida Bar did.

25. *Id.* at 625.

26. *Id.*

27. The Florida Bar’s research is suspect. Justice Kennedy objects to it in his dissent, a point which is dismissed by the majority by stating that the Court does not have the obligation of examining the bar’s methodology. But even on its face, the statistics reported by the Court generally show that less than half those surveyed objected to receiving the direct mail information. This amounts to putting the First Amendment to a vote and then accepting the result expressed by the minority.

A requirement to include an opt-out option would seem to be a more reasonable restraint, since it would not be deemed a ban and yet would enable the potential client to exercise control as an informed consumer. The intrusion to the privacy of the recipient would not be eliminated, but perhaps limited sufficiently to prevent the e-mail from a lawyer from creating an adverse perception of the system of justice.

Labeling requirements are most likely to be constitutionally sound, however. While they permit the message to be conveyed, they forewarn the viewer that it is commercial speech, and therefore permit those viewers who do not want or need the information to merely delete it. In fact, the existence of labeling requirements argues against the constitutionality of a "do not contact" list, because the labeling is itself a less restrictive measure of governing the state's interest. It is interesting that the state rules of ethics frequently include both client-controlled bans and labeling requirements.

B. THE APPLICATION OF STATE ETHICS RULES TO SPAM

The preamble to the American Bar Association's Model Rules of Professional Conduct states,

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested in the courts.²⁸

Therefore, lawyers are subject to the state rules of professional conduct that are adopted by the highest court of the jurisdiction where they are licensed to practice. In over forty states, these rules are based on the ABA Model Rules of Professional Conduct.²⁹ Issues of client development, including solicitation are addressed under a section of the Model Rules entitled "Information About Legal Services."

When lawyers began to use the Internet as a vehicle for client development it was a novelty that the ethics rules had not anticipated and, of course, did not specifically address. Therefore, lawyers had no direction on the extent to which the rules applied to Web sites, listservs, e-mails and chat rooms. However, a series of ethics opinions unanimously concluded that it is ethical for lawyers to use the Internet for client development, as long as that usage is done in an ethical manner and the lawyer

28. ABA Model R. Prof. Conduct, Preamble par. 10 (2003).

29. Although the state rules are based on the ABA Model R. Prof. Conduct, the exact content of the rules governing client development varies considerably from state to state. See <<http://www.abanet.org/adrules>> for links to the state rules.

complies with all of the applicable rules governing his or her conduct.³⁰ This may seem like a circular conclusion, but the point is important. The opinions stress that it is the content of the message, not the type of media, that is significant.

The ABA Model Rules were revised in 2002 as a result of a comprehensive initiative.³¹ These revisions included changes to Rule 7.3, Direct Contact with Prospective Clients. Of particular interest, the rule now specifically addresses “electronic communication” as well as the previous “written” and “recorded” communications.

Written, recorded, and electronic communications are grouped distinctly from in-person, live telephone, and real-time electronic communications under the rule. The latter types of client development are of greater concern to the legal profession because the potential client is subjected to overreaching by the lawyer during direct contact. As a result, the rule bans lawyers from these types of communications under most circumstances.³² The comment to Rule 7.3 states, “[t]he use of general advertising, and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely.”³³

Model Rule 7.3 regulates electronic communications in three ways. First, if a communication is sent to someone “known to be in need of legal services in a particular matter,”³⁴ it must be labeled as “Advertising Material” at the beginning and ending of the communication.³⁵ This provision resulted from the *Shapero* decision, which permits lawyers to send mailed communications to those known to be in need of the lawyer’s services.³⁶ Although this direct or targeted mail is more economical for the lawyer, it also increases the risk that the recipient, who for some reason

30. See Ala. Ethics Op. RO-96-07 (1996); Az. Ethics Op. 99-04 (1997); Cal. Ethics Op. 2001-155 (undated); Ill. Ethics Op. 96-10 (1996); Utah Ethics Op. 97-10 (1997).

31. The ABA House of Delegates approved many recommendations of the initiative known as Ethics 2000. Ethics 2000 began in 1997 as an endeavor to conduct a periodic comprehensive review of the Model Rules and recommend changes that reflected the most current thought on ethical obligations of lawyers. See <<http://www.abanet.org/cpr/ethics2k.html>>.

32. The ban on in-person solicitation is consistent with the Supreme Court’s decision in *Ohralik*, 436 U.S. at 447. However, the Court has never found that live telephone or real-time electronic communications are tantamount to in-person solicitation and pose the same risks of overreaching. Including them in the ban is a logical extension advanced by the ABA and adopted by most states.

33. ABA Model R. Prof. Conduct 7.3, comment par. 3. The expectation for the bar to regulate advertising in a way that permits information to flow cleanly and freely originates with *Bates* 433 U.S. at 384.

34. ABA Model R. Prof. Conduct 7.3(c).

35. *Id.*

36. *Shapero*, 486 U.S. at 469.

is in need of legal services, will be alarmed to receive mail from a lawyer. The rule is designed to alert the recipient that the mail is nothing more than an advertisement.

Of course this provision is of little consequence with e-mail, since the economy of scale facilitates the delivery of messages to anyone and everyone. The lawyer has no economic advantage to limiting the mailing to only those who have been in an accident or who have had a judgment entered against them and may need bankruptcy services. Hence the lawyer who spams potential clients is generally not contacting those known to be in need of legal services in a particular matter. The obligation to label the communication would therefore not typically apply.

The other ways that Model Rule 7.3 regulates electronic communications may be more significant to a discussion of spamming. Under Rule 7.3(b), a lawyer may not solicit in a way that involves "coercion, duress or harassment."³⁷ The comment explaining this rule states, "[I]f after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)."³⁸ Although there is no indication that this provision was intended to apply to the widespread use of e-mail as a client development tool, it clearly creates an obligation on lawyers who may use this technique. Since the rule assumes the perspective of the potential client, it suggests that the lawyer has an obligation to know those whom he or she is soliciting. This is a feature that distinguishes solicitation from advertising. It seems reasonable that a lawyer could defend against allegations of harassment when multiple e-mails to a recipient are limited and inadvertent by giving the recipient an opt-out option within the e-mail.

Model Rule 7.3(b) also obligates a lawyer to avoid sending communications to a prospective client who has made known that he or she does not wish to receive the communication.³⁹ Ironically, this rule was not structured in response to spam even though it was probably seldom used in any other context. It is, however, a rule that would work in harmony with a "do not contact" list and would no doubt place a burden on the lawyer who sends e-mail solicitations to cross-reference with the list and delete those who appear on it.⁴⁰

The current restraints imposed by the ABA Model Rules are reasonable. They do not create difficult burdens for lawyers and are likely to be effective in the control of excessive contacts from those who are seeking

37. ABA Model R. Prof. Conduct 7.3(b).

38. *Id.* at Rule 7.3(b) comment at par. 5.

39. *Id.*

40. However, as discussed, the existence of a "do not contact" list governing e-mails for legal services may not be constitutionally sound.

clients through e-mail. However, many states have failed to adopt either the Ethics 2000 version of the ABA Model Rules, which specifically governs "electronic communications" or its predecessor, which implicitly governs this type of client development. Instead, the state rules include a wide variety of obligations that create greater difficulties without necessarily offering solutions that would address the problems of spam.

As an illustration, consider the plight of Laurence Canter. In 1994, Canter and his partner sent unsolicited e-mails to thousands of people who were using usenet newsgroups. They were seeking clients for their immigration practice.⁴¹ Canter was admitted in Tennessee and was disciplined there for violations incurred as a result of his spamming. Of course, there was no prohibition against sending unsolicited e-mails. Instead, he was charged with the violation of three advertising and solicitation rules. Then, Tennessee DR 2-101(N) required written communications soliciting professional employment to be labeled "This is an Advertisement." If a lawyer represented that he or she was a specialist, the communication had to include an additional disclaimer, as required by DR 2-101(C). The representation of a lawyer as an "immigration attorney" was sufficient to invoke that rule. DR 2-101(F) required a lawyer to submit a copy of any advertising copy within three days of its dissemination. Canter did not comply with any of these provisions.

He failed to label his e-mail as an advertisement. He truthfully referred to himself as an immigration lawyer, but did not include a disclaimer that he was not certified as a specialist. And he failed to send a copy of his communication to the state within three days of its dissemination. As a result, he was suspended from the practice of law for one year.⁴²

While Canter could have complied with the requirements in Tennessee fairly easily, did he also need to comply with the requirements in the states where his solicitation appeared? If so, he would have had to file copies and pay filing fees with state authorities in Florida,⁴³ Texas,⁴⁴ Kentucky,⁴⁵ and New Mexico.⁴⁶ He would have had to include disclaim-

41. See Sharael Feist, *Father of Modern Spam Speaks*, CNET/News.com (Mar. 26, 2002) (available at <<http://news.com.com/2008-1082-868483.html>>).

42. *In re Canter*, No. 95-831-O-H (Tenn. Bd. Prof. Resp. Feb. 25, 1997). Although he was suspended for his spamming, Canter was disbarred for other reasons. See <<http://www.tomwbell.com/NetLaw/Ch12/InReCanter.html>>. One reason for the harshness of his sanction may have been his failure to defend himself and offer mitigation. *Id.* Canter left practice in 1995. See *supra* n. 41.

43. Fla. Rules Prof. Conduct 4-7.7 (2003).

44. Tex. Disciplinary Rules Prof. Conduct 7.07 (2003).

45. KY. Bar Assn. Advertising SCR 3.130 (2003).

46. N.M. Rules Prof. Resp. 16-707 (2003).

ers required in Iowa,⁴⁷ Wyoming,⁴⁸ and Alabama.⁴⁹

A lawyer in this circumstance also has to comply with myriad labeling requirements. Some go far beyond the simple requirement of ABA Model Rule 7.3(c) to label a communication as "Advertising Material." Florida requires a lawyer who sends electronic communications to put "legal advertisement" in the subject line.⁵⁰ Louisiana requires lawyers to state, "This is an advertisement for legal services" in the subject line.⁵¹ Communications in Alabama must start with the sentence "If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure or written communication]."⁵² A New Jersey rule requires a lawyer to provide information about reporting misleading communications at the end of the solicitation.⁵³

The quandary the lawyer faces is not the difficulty of complying with the rules of any particular state, but of complying with the rules of all of the states. This raises the burden of compliance and recasts the message into one that may be dominated by disclaimers and labels, serving the purpose of neither the sender nor the recipient. This again illustrates that compliance by a lawyer seeking clients in a limited geographic area, such as those promoting personal injury, family law, or bankruptcy, is not difficult, but law firms promoting legal services on a national basis can be overwhelmed – if they seek to comply with the various state rules.

C. THE APPLICATION OF STATUTES TO LAWYERS WHO SPAM

Beginning in 1998, state legislatures started passing laws governing unsolicited commercial e-mails.⁵⁴ Over thirty-five states now have some form of statutory regulation governing aspects of spam.⁵⁵ The laws tend

47. IA Code Prof. Resp. DR 2-101(A) (2003). The rules require lawyers to state, "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by the rules of the Supreme Court of Iowa." *Id.*

48. WY Rules Prof. Conduct for Attorneys at Law 7.2(g) (2003). Lawyers are to state, "The Wyoming State Bar does not certify any lawyer as a specialist or expert. Anyone considering a lawyer should independently investigate the lawyer's credentials and ability and not rely upon advertisements or self-proclaimed expertise." *Id.*

49. AL Rules Prof. Conduct 7.2(e) (2003). The rule requires lawyers to state, "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers." *Id.*

50. FL Rules Prof. Conduct 4-7.06(c)(3).

51. LA Rules Prof. Conduct 7.2(b)(iii)(B) (2003).

52. AL Rules Prof. Conduct 7.3(B)(2)(vii).

53. NJ Rules Prof. Conduct 7.3(b)(5)(iii) (2003).

54. See generally David Sorkin, *Spam Laws: United States: State Laws: Summary* (1999-2003) (available at <<http://www.spamlaws.com/state/summary.html>>) (listing the summaries of state spam laws).

55. *Id.*

to target sexually explicit material and that which is distributed on a deceptive basis, however they are not limited to those types of communications. They also include a variety of remedies.

Sexually explicit material is governed through labeling requirements, such as an obligation to include in the subject line the designations "ADV:ADLT," "ADV:ADULT," and "ADULT ADVERTISEMENT."⁵⁶ Deceptive e-mails are addressed through the prohibitions of falsified routing information, the use of a third-party's domain name, and misleading subject lines.

Other controls within these laws would have an impact on lawyers who used unsolicited commercial e-mail as a client development tool. Many state statutes require labeling, obligating senders to include "ADV" in the subject line.⁵⁷ Several states include requirements that the e-mails have opt-out mechanisms, although the required details vary somewhat from state to state.⁵⁸ The most substantial limitations are those of California and Delaware, where laws now make it illegal to send unsolicited commercial e-mails altogether. Senders may only send e-mails to those who have opted in.⁵⁹

Most recently, the U.S. Senate has passed legislation governing spam, the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*.⁶⁰ The bill passed by a vote of ninety-seven to zero. Like the state provisions, the Act prohibits false and misleading communications and deceptive subject lines. It also requires effective opt-out procedures. Unlike the states, this Act authorizes the establishment of a "do-not-contact" registry.⁶¹

Given that the legal profession is largely self-governed, controlled by the states' highest courts and subject to the rules of professional conduct, and given that these state laws impose additional and perhaps overlapping obligations, the question arises as to whether lawyers are subject to

56. *Id.*; see Alaska, Louisiana and Texas, for example.

57. *Id.* Note also that this mechanism allows e-mail recipients to delete commercial e-mails without ever seeing them by setting their controls to delete all incoming messages with ADV. *Id.* Therefore, it is a more restrictive device than one that merely warns the viewer that the message is commercial. *Id.*

58. *Id.* For example, Illinois requires senders to include an e-mail address or a toll free telephone number. *Id.* Michigan and Nevada require the sender to include a legal name, street address and domain name along with its opt-out information. *Id.*

59. *Id.*

60. Pub. L. No. 108-187, 117 Stat. 2699 (2003).

61. *Id.* The act, known as the *CAN SPAM Act of 2003*, went into effect on January 1, 2004. It generally preempts state laws specifically governing spam and will alleviate some of the challenges of multi-state compliance discussed here. However, the act does not supersede state laws that do not specifically address electronic mail, but may otherwise govern it in a broader context.

the statutorily imposed laws. Simply put, are lawyers exempt from statutes governing spam?

As noted above, the legal profession is *largely* self-governing. The preamble to the ABA Model Rules of Professional Conduct states on this point, “[t]o the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination.”⁶²

Clearly self-regulation is not absolute. But at what point does the profession’s independence yield to governmental regulation? What is the application of the doctrine of separation of powers in this context?

In *Chambers v. Stengel*,⁶³ the Supreme Court of Kentucky debated the issue when a lawyer challenged the constitutionality of a criminal statute that prohibited lawyers from sending direct mail solicitations seeking representation from accident or disaster victims within thirty days of the event. The majority stated that,

Pursuant to its police power, the General Assembly may enact legislation to protect the Commonwealth’s citizens’ health and welfare and such statute is presumed to be constitutional if it appears that the provisions have a substantial tendency to provide such protections. . . . In upholding the constitutionality of these statutes, we find that the General Assembly enacted a valid exercise of police power which protects both Kentuckians and Kentucky lawyers from predatory activity.⁶⁴

A dissenting opinion states, “[w]e may be rightly offended, as was the General Assembly, in the public’s outcry against the particular lawyer solicitation that the statute was drafted to preclude. However, the power to effect discipline to the members of the Kentucky bar lies solely within judicial boundaries.”⁶⁵

Even if a jurisdiction could criminalize a lawyer’s conduct without a violation of the separation of powers doctrine, we must note that the statutes regulating spam frequently do not create criminal laws, but rather call for civil enforcement, either privately or through the state attorneys general.⁶⁶

While authorities have obviously not yet emerged exploring the application of spam statutes to lawyers, an analogous line of cases has examined whether consumer protection statutes govern their conduct.

The Washington Supreme Court has held that lawyers are subject to the state’s consumer protection statute when applied to business aspects of the practice of law that are legitimate concerns of the public, such as

62. ABA Model R. Prof. Conduct Preamble par. 11.

63. *Chambers v. Stengel*, 37 S.W.3d 741 (Ky. 2001).

64. *Id.* at 743-44.

65. *Id.* at 745.

66. Sorkin, *supra* n. 54.

billing, collection, and client retention. In *Short v. Demopolis*,⁶⁷ the Court separated ethical obligations, which are within the domain of the court under the Separation of Powers doctrine, and the pragmatic concerns of the public, which subject lawyers to statutes. The court concluded that there is no reason a dual representation cannot co-exist.⁶⁸

The court in *Short* relied on *Heslin v. Connecticut Law Clinic of Trantolo and Trantolo*.⁶⁹ This Connecticut Supreme Court case addressed the application of that state's consumer protection act to the law firm's fee and advertising practices. The court concluded that the statute's overlap with the state's ethics rules governing the same conduct did not cause the statute to violate the Separation of Powers doctrine. The court determined that "it is no derogation of the judiciary's power to recognize that the power is not, in every respect, an exclusive one."⁷⁰

Other states have rejected this co-terminus regulation of the practice of law, at least within the context of consumer protection. In *Rousseau v. Eshlman*,⁷¹ the New Hampshire Supreme Court determined that the state's consumer protection statute did not apply to lawyers because it did not specifically say so and the statute included an exemption for "trade or commerce otherwise permitted under laws as administered by any regulatory board." The court concluded that its professional conduct committee governing lawyers qualified as a such a regulatory board.

Similarly, the New Jersey appellate court did not apply its consumer fraud statute to lawyers because the law did not specifically do so. The court, in *Vort v. Hollander*,⁷² stated that lawyers are regulated "in the first instance, if not exclusively by the New Jersey Supreme Court."⁷³

Finally, in *Cripe v. Leiter*,⁷⁴ the Illinois Supreme Court advances the rationale set out in *Vort* as it concludes that the consumer protection statute does not apply to an area regulated by the court. "Accordingly, the attorney-client relationship in this state, unlike the ordinary merchant-consumer relationship, is already subject to the extensive regulation by this court. . . . Absent a clear indication by the legislature, we will not conclude that the legislature intended to regulate attorney-client relationships through the Consumer Fraud Act."⁷⁵

The answer to the question of whether statutes governing spam apply to lawyers who may use it as part of their client development appears

67. *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984).

68. *Id.* The dissent refers to this as a "vague dual existence." *Id.* at 168.

69. *Heslin v. Ct. Law Clinic of Trantolo*, 461 A.2d 938 (Conn. 1983).

70. *Id.* at 945.

71. *Rousseau v. Eshleman*, 519 A.2d 243 (N.H. 1986).

72. *Vort v. Hollander*, 607 A.2d 1339 (N.J. 1992).

73. *Id.* at 1342.

74. *Cripe v. Leiter*, 703 N.E.2d 100 (Ill. 1998).

75. *Id.* at 106.

to be a definite maybe. Not only are the jurisdictions divided on this analogous application of consumer fraud legislation, but also no sound basis emerges for this division. The cases are not separated by the regulation of ethical and pragmatic matters. Neither are they distinguished by the legal functions at issue such as billing or advertising. Nevertheless, this analogy suggests the possibility that anti-spam statutes do not apply to lawyers who use unsolicited e-mail to market their practices.

D. THE IMPACT OF MULTIPLE SOURCES OF REGULATION

Assuming that lawyers have a constitutional right to seek clients through unsolicited commercial e-mails and that those lawyers are subject to the state rules of professional conduct governing solicitations, and, perhaps, statutes governing spam in general, what is the impact of these sources of regulation?

Lawyers deliver their services in different geographic settings. There are those who provide personal legal services, typically within a single state, or at best a few adjacent states, and those who provide corporate and institutional services within partnerships that market and practice on a multi-state, national, or even international basis.

In the event the lawyer in the single jurisdiction needs to comply only with the rules of professional conduct governing the state in which he or she is admitted, compliance is not difficult. Consider, for example, *Canter*.⁷⁶ Had he labeled his e-mail as an advertisement, included the disclaimer about his specialty and filed a copy of his message with the state bar, he may have fully complied and avoided disciplinary action resulting from his spam.

On the other hand, if the state statutes apply, the lawyer's obligation is not limited to the state of admission. Instead the exposure extends to the jurisdictions of the recipients. Hence a lawyer sending e-mails to those in every state needs to comply with the laws of each state. This creates a difficult, but not particularly impossible burden.

Lawyers who practice in multi-state firms have the obligation to comply with the rules of the states in which they seek and represent clients.⁷⁷ In addition, if the statutes apply, they are obligated to comply with these provisions, as well. Full compliance is not only administratively impractical, but also results in labeling and disclaimer obligations that distort the message in a way that undermines any marketing benefit that may result from the use of this tool.

As a result, lawyers providing personal legal services are better able to seek clients through unsolicited e-mails compared to those serving the corporate marketplace. This result should be the opposite of the intent of

76. *In re Canter*, *supra* n. 42.

77. See ABA Model R. Prof. Conduct 8.5.

these regulations. Instead of protecting unsophisticated consumers against the possibility of overreaching, the result is the elimination of messages to corporate entities that are best able to assimilate the information and impose marketplace controls to govern abuses. As the illustrations at the beginning of this article demonstrate, those providing personal services are more likely to exercise client development techniques that are brash and controversial. Meanwhile, law firms that could effectively convey a marketing message in a cost-effective way to a wide audience of prospective clients are restrained, if not prohibited, from doing so through this method of communication.

