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ATTORNEY ADVERTISING AND SOLICITATION ON THE INTERNET: COMPLYING WITH ETHICS REGULATIONS AND NETIQUETTE

"Do you want to get a green card for permanent residence in the United States? THE TIME TO START IS NOW!!"¹

I. INTRODUCTION

In April 1993, the Phoenix law firm Canter & Siegel posted the above advertisement offering legal representation services for potential immigrants² to thousands of Internet³ newsgroups.⁴ The message reached users⁵ as far away as Germany, Denmark, South Africa, and Australia.⁶

Shortly after the firm posted the ad, it was *flamed*⁷ by thousands of

1. John Burgess, *Who'll Make "The Net" Gain? Global Community Wrestles With Issue Of Advertising*, WASHINGTON POST, April 26, 1994, at C01.

2. Dwight Silverman, *The Info Highway's Getting Billboards; Mindful That Breaching Etiquette Can Infuriate Users, Advertisers Are Probing Cyberspace For Niches*, THE HOUSTON CHRON., June 19, 1994, at Business 1.

3. The *Internet* is "[t]he collection of networks and routers that use the TCP/IP protocol suite and function as a single, large network. The Internet reaches government, commercial, and educational organizations around the world." DOUGLAS E. COMER, *THE INTERNET BOOK* 294 (1995). *TCP/IP* stands for Transmission Control Protocol/Internetwork Protocol. Rick Ayre, *Making the Internet Connection*, PC MAGAZINE, Vol. 13, No. 17, Oct. 11, 1994, at 126. The use of the TCP/IP allows the transfer of information between many different types of computers. *Id.*

4. A *newsgroup* is "[a] single bulletin board in the network news service. A single user can subscribe to multiple newsgroups; each newsgroup contains articles relating to a single topic." COMER, *supra* note 3, at 299.

5. A *user* is a person who uses a program or network from the outside, as opposed to a programmer, maintainer, or hacker who understands the internal processes of the program or network. ERIC S. RAYMOND, *THE NEW HACKER'S DICTIONARY* 429-430 (2d ed. 1993).

6. Burgess, *supra* note 1 at C01. Users worldwide were able to read the message when they attempted to read newsgroup postings. *Id.*

7. *Flamed* is a "slang term used in electronic communication to mean an emotional or inflammatory note, often written in response to another message. The word is sometimes used as a verb, meaning to write an inflammatory message." COMER, *supra* note 3, at 291.

irate users who felt that the firm had broken the rules of *netiquette*.⁸ Over 30,000 responses to the posted message crashed the firm's Internet provider's computer which resulted in the provider terminating the firm's access to the Internet.⁹ The firm also received several death threats and thousands of harassing phone calls.¹⁰ Through the flames and repeated harassment, users expressed the understood rule that the Internet is off-limits to advertisers.

Other law firms utilizing the Internet for advertising¹¹ employ much less intrusive methods.¹² For example, Venable, Baetjer & Howard of Baltimore has its own server¹³ that interested users can access to read articles authored by Venable attorneys.¹⁴ Most Internet users find Venable's method of advertising acceptable because only interested users access the information.¹⁵ In contrast, the techniques employed by Canter & Siegel forced many unwilling network users to repeatedly view the same advertisements.¹⁶

This comment examines how attorneys can advertise their professional services using the Internet. This comment first traces the history

8. *Netiquette* is the conventions and guidelines that users of the Internet follow when using newsgroups, electronic-mail, and other Internet features. DANIEL P. DERN, *THE INTERNET GUIDE FOR NEW USERS* 238 (1994). Some Internet sites offer guidelines for new users to follow when using the USENET or other electronic mail networks. *Id.* The guidelines of The World, an Internet access service run by Software Tool & Die, offers three reasons for the prohibition of commercial advertisements on almost all USENET newsgroups. *Id.* First, is a fear that if advertisements were allowed, the network would become filled with nothing but advertisements. *Id.* Second, most Internet information is carried by corporate and government networks. *Id.* Most corporations have no interest in promoting other company's products and the government networks prohibit advertising because it would be an unapproved government subsidy of the advertised product. *Id.* Third, if other newsgroup sites discover that commercial messages are originating from The World, then the other sites would cut The World off from the network. *Id.*

9. *Internet Advertising: Ethics and Etiquette*, ONLINE LIBRARIES & MICROCOMPUTERS, June 1994, available in Lexis/Nexis Library, News/Curnws file. The firm's Internet access provider was Internet Direct, Inc. *Id.* To regain Internet access, Canter & Siegel threatened the provider with a \$250,000 lawsuit. *Id.*

10. Silverman, *supra* note 2.

11. Thom Weidlich, *Firms Post Ads Politely On Internet*, NAT'L L.J., May 9, 1994, at A6 (discussing law firms that use passive forms of advertising).

12. *Id.* Instead of receiving unwanted junk mail, users must select the information the firms provide from menus. "It is the difference between a religious organization that runs an orphanage and a preacher on the corner outside my office with a bullhorn," wrote one Internet user who responded to a [National Law Journal] request for comments on the two approaches. *Id.*

13. Venable's server can be accessed at <http://venable.com>.

14. Weidlich, *supra* note 11.

15. *Id.*

16. Mark Hansen, *Lawyers' Internet Ad Angers Users*, 80 July A.B.A. J. 26 (1994). "[T]he way in which [Canter's advertising] was posted forced anyone who scans several topics to see the same ad, over and over again." *Id.*

of regulations on attorney advertising and solicitation in the United States Supreme Court from *Bates v. State Bar of Arizona*¹⁷ to *Shapero v. Kentucky Bar Association*.¹⁸ Next, this comment analyzes several methods of attorney advertising and solicitation available on the Internet to determine whether the communications violate ethics regulations¹⁹ or breach netiquette. While the issue of attorney advertising on the information superhighway has not yet been addressed in the courts, analogies to traditional forms of advertising suggest guidelines for attorneys to follow when advertising on the Internet. This comment concludes that attorneys can and should carefully engage in advertising and solicitation on the Internet if all ethics regulations and netiquette are followed. The Appendix contains a proposed Model Code for Advertising and Solicitation in Cyberspace for attorneys to follow when advertising on the Internet, and for states to consider adopting when revising ethics regulations.

II. BACKGROUND

The United States Supreme Court opened the floodgates for expanded attorney advertising²⁰ when it issued its landmark opinion in *Bates v. State of Arizona*.²¹ Before the *Bates*²² decision, the American

17. 433 U.S. 350 (1977).

18. 486 U.S. 466 (1988).

19. To make this determination, the contact must first be characterized as in-person, live telephone, written, or recorded communication. See *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding that a State may prohibit in-person and live telephone solicitation for pecuniary gain). See also *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding that written and recorded communications may be regulated by reasonable time, place, and manner restrictions). The solicitation must then be analyzed to determine whether there is a possibility of undue influence, intimidation, or overreaching in the contact because of coercion, duress, or harassment. See *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). States may prohibit solicitation that has a likelihood of involving coercion, duress, or undue influence. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding that solicitation involving coercion, duress, or undue influence may be prohibited).

20. See *Central Hudson Gas v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting). Chief Justice Rehnquist dissented as follows:

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board v. Citizens Consumer Council*, 425 U.S. 748 (1976). The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Board*.

Id.

21. *Bates*, 433 U.S. 350.

Bar Association,²³ through both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, and most states prohibited all attorney advertising.²⁴ After the Court decided *Bates*,²⁵ attorneys continually challenged states' advertising limitations in the United States Supreme Court. This resulted in a broadening of the scope of permissible advertising.²⁶ In the most recent United States Supreme Court case affecting the analysis of attorney advertising²⁷ and solicitation²⁸ cases, *Shapero v. Kentucky Bar Association*,²⁹ the Court extended Constitutional protection to include attorney advertising by targeted direct-mail solicitation.³⁰ The following sections trace the progression of

22. *Id.*

23. Louise L. Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 GEO. J. LEGAL ETHICS 393 (1991). The original ABA Canons of Professional Ethics adopted in 1908 stated that "solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional." *Id.* at 398 citing 41 MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 27 (as adopted in 1908).

24. *Id.* The legal profession has historically considered the solicitation of clients to be inappropriate. *Id.* at 394. In the English Inns of Court, the lawyers refused to compete for clients because they feared that doing so would destroy the intimacy of the profession and would reduce their status to that of tradesman. *Id.* at 395. The English customs were transplanted to colonial America as the profession developed in the new continent because most new attorneys studied law at the Inns of Court. *Id.* However, over time the number of bar members increased and many of them competed for clients in an essentially unregulated profession. *Id.* at 396-397. Because of the many problems facing the profession, the Alabama State Bar Association adopted the first formal Code of Ethics for the American legal profession. *Id.* at 397. The issue of solicitation of clients was specifically addressed by a rule stating that "special solicitation of particular individuals to become clients ought to be avoided." *Id.* at 397 citing 118 ALA. XXIII. The Canons of Professional Ethics adopted by the American Bar Association in 1908 used the Alabama Code of Ethics as a model. *Id.* at 398.

25. *Bates*, 433 U.S. 350.

26. *Id.* at 383 (holding that a state may not subject attorney advertising to blanket suppression); *In re Primus*, 436 U.S. 412, 438-39 (1978) citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding that states may prohibit in-person solicitation of clients for pecuniary gain); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) citing *In re R.M.J.*, 455 U.S. 191, 203 (1982) (holding that states may not subject targeted direct-mail solicitation to blanket suppression).

27. *Advertising* is defined as, "[a]ny oral, written or graphic statement made by the seller in any manner in connection with the solicitation of business, and includes, without limitation because of enumeration, statements and representations made in a newspaper or other publication or on radio or television or contained in any notice, handbill, sign, catalog, or letter, or printed on or contained in any tag or label attached to or accompanying any merchandise." BLACKS' LAW DICTIONARY 50 (5th ed. 1979).

28. *Solicitation* is defined as, "[a]n appeal for something; to apply to for obtaining something; to ask earnestly; to ask to the purpose of receiving; to endeavor to obtain by asking." BLACKS' LAW DICTIONARY 1248 (5th ed. 1979).

29. *Shapero*, 486 U.S. 466.

30. *Id.* at 476 Additionally, the American Bar Association has amended its rules for attorney advertising and solicitation several times to reflect United States Supreme Court

decisions. The current American Bar Association guidelines for attorney advertising and solicitation are embodied in the Model Rules of Professional Conduct, Rules 7.1, 7.2, and 7.3, and the Model Code of Professional Responsibility, DR 2-101. Rule 7.1 addresses communications concerning a lawyer's services. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1992). Rule 7.2 broadly addresses advertising. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1992). Rule 7.3 covers direct contact with prospective clients including live telephone contacts. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1992). Disciplinary Rule 2-101 speaks to publicity. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1992).

Most of the United States Supreme Court attorney advertising cases were narrowly decided and the dissenting opinions strongly urged that only a complete prohibition would be effective in protecting the public. *Shapero*, 486 U.S. at 480-491 (O'Connor, J., with whom Rehnquist, C.J., and Scalia, J., join, dissenting); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 673-680 (1985) (O'Connor, J., with whom Burger, C.J., and Rehnquist, J., join, concurring in part, concurring in the judgment in part, and dissenting in part); *In re Primus*, 436 U.S. at 440-446 (Rehnquist, J., dissenting); *Bates*, 433 U.S. at 386-388 (Burger, C.J., concurring in part and dissenting in part); *Id.* at 389-404 (Powell, J., with whom Stewart, J., joins, concurring in part and dissenting in part); *Id.* at 404-405 (Rehnquist, J., dissenting).

The *Bates* majority opinion was joined by five Justices with four Justices dissenting in part. 433 U.S. at 350. The *Primus* majority opinion was joined by six Justices with two Justices concurring in the judgment and one Justice dissenting. 436 U.S. 412. The judgment in *Ohralik* was unanimous. 436 U.S. 447. The majority opinion in *Central Hudson* was joined by five Justices with three concurring in the judgment and one dissenting in the judgment and opinion. 447 U.S. 557. The *Shapero* opinion was joined by four justices with two Justices concurring and dissenting in part and three Justices dissenting. 486 U.S. 466. Three Justices concurred in a dissenting opinion written by Justice O'Connor in *Shapero*, 486 U.S. at 480-491 (O'Connor, J., with whom Rehnquist, C.J., and Scalia, J., join, dissenting). In the dissenting opinion, O'Connor stated as follows:

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in light of that doctrine. . . . I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

Id. at 491.

The Supreme Court had the opportunity to reexamine the protections given to attorney advertising in the recently decided *Florida Bar v. Went For It, Inc.* case. No. 94-226, 1995 WL 365648 (U.S. June 21, 1995). The *Florida Bar* case involved a lawyer and a lawyer referral service suing the Florida Bar ("Bar") alleging that the Bar's rules prohibiting lawyers from direct mail solicitation of personal injury or wrongful death clients within thirty days of the accident are unconstitutional under the First Amendment. *Id.* at *2. Before enacting the regulation, the Bar conducted a two-year study on the affects of attorney advertising. *Id.* The Bar determined that the abovementioned rule should be adopted and the Florida Supreme Court agreed, adopting the amendment. *Id.* The U.S. Supreme Court analyzed the regulation under the intermediate scrutiny framework set forth in *Central Hudson*. *Id.* at *4. The Court reviewed the regulation and the government's rationale behind enacting it and held that the Bar's regulation survives the test established in *Central Hudson* because the challenged regulation furthered a substantial governmental interest protected by a narrowly drawn regulation which advanced the interest in a direct and ma-

United States Supreme Court cases addressing attorney advertising and solicitation from the 1977 *Bates*³¹ decision to the 1988 *Shapiro*³² case.

A. *BATES V. STATE BAR OF ARIZONA*

In *Bates v. State Bar of Arizona*,³³ the United States Supreme Court first recognized First Amendment³⁴ protection for attorney advertising.³⁵ The appellants in *Bates* were two Arizona attorneys who placed a newspaper advertisement offering "legal services at very reasonable fees" and listed a standard fee schedule.³⁶ The president of the Arizona State Bar filed a complaint with the Board of Governors of the State Bar, and the Arizona Supreme Court reviewed the case.³⁷ The Arizona Supreme Court upheld the constitutionality of the disciplinary rule prohibiting attorney advertising.³⁸ While the attorneys conceded that their advertisement was a clear violation of Arizona's disciplinary rule prohibiting advertising,³⁹ they asserted that the rule violated their First

terial way. *Id.* at *10. Justice Kennedy authored a vigorous dissenting opinion joined by Justices Stevens, Souter, and Ginsburg. 1995 WL at *11-16.

31. 433 U.S. 350.

32. 486 U.S. 466.

33. *Bates*, 433 U.S. 350.

34. U.S. CONST. amend I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

35. *Bates*, 433 U.S. at 383 (holding that advertising by attorneys may not be subjected to blanket suppression).

36. *Id.* at 354.

37. *Id.* at 356.

38. *Id.* at 356.

39. Disciplinary Rule 2-101(B) incorporated in Rule 29(a) of the Supreme Court of Arizona, 17A ARIZ. REV. STAT., p.26 (West, Supp. 1976) cited in *Bates*, 433 U.S. at 355.

(B) A Lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. The rule also stated several exceptions to the general prohibition as follows:

However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

Amendment right to free speech.⁴⁰

In a five-to-four decision, the United States Supreme Court held that a blanket suppression of attorney advertising violated the First Amendment.⁴¹ The Court reasoned that commercial speech advertising professional services is entitled to some First Amendment protection.⁴² However, the Court expressly limited its holding by declaring that a state may prohibit advertising that is false, deceptive, or misleading and may place reasonable restrictions on the time, place, and manner of advertising.⁴³

B. *IN RE PRIMUS* AND *OHRALIK V. OHIO STATE BAR ASSOCIATION*

One year after *Bates*, the Court addressed the issue of in-person solicitation of clients in the companion cases of *In re Primus*⁴⁴ and *Ohralik v. Ohio State Bar Association*.⁴⁵ These two cases, decided the same day, illustrate the wide range of possibilities of in-person solicitation.⁴⁶

Primus involved a South Carolina attorney who was an officer of the Columbia branch of the American Civil Liberties Union.⁴⁷ In July 1973, a businessman called the South Carolina Council on Human Relations, where *Primus* was a paid attorney, and requested that an attorney speak with some women who were being sterilized as a condition of the contin-

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102(A)(6) [biographical information that may be listed "in a reputable law list or legal directory"], directed to a member or beneficiary of such organization.

Id.

40. *Id.* at 356.

41. *Id.* at 383.

42. *Id.* at 363 citing *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

43. *Id.* at 383-384. See also *Virginia Pharmacy Bd.*, 425 U.S. at 771-772 (holding that a while a state may not prohibit truthful advertising by pharmacists, states may place reasonable time, place, and manner restrictions on the advertising).

44. *Primus*, 436 U.S. 412 (1978).

45. *Ohralik*, 436 U.S. 447.

46. ABA Model Rule 7.3 places live telephone contact in the same category as in-person contacts. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1992).

47. *Primus*, 436 U.S. 412, 414 (1978) (hereinafter in text and footnotes, ACLU).

The ACLU was organized in 1920 by individuals who had worked in the defense of the rights of conscientious objectors during World War I and political dissidents during the postwar period. It views itself as a "national non-partisan organization defending our Bill of Rights for all without distinction or compromise." ACLU, Presenting the American Civil Liberties Union 2 (1948). The organizations activities range from litigation and lobbying to educational campaigns in support of its avowed goals.

Id. at n.2.

ued receipt of Medicaid assistance.⁴⁸ When Primus spoke to the group of women, she met Mary Etta Williams, a woman sterilized after the birth of her third child.⁴⁹ In August 1973, the ACLU informed Primus that it would be willing to provide representation for the sterilized mothers.⁵⁰ Primus then wrote a letter⁵¹ to Williams informing her of the ACLU's offer.⁵²

The South Carolina Supreme Court held that Primus violated the South Carolina Disciplinary Rules⁵³ "by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal

48. *Id.* at 415.

49. *Id.*

50. *Id.* at 416.

51. *Primus*, 436 U.S. at 417 n.6.

52. *Primus*, 436 U.S. at 417. Williams subsequently showed the letter to the doctor involved and his attorney. *Id.* The patient later released the doctor from liability. *Id.*

53. *Id.* at 419. The Court held that Primus had violated Disciplinary Rules DR2-103(D)(5)(a) and (c) and DR2-104(A)(5) of the Supreme Court of South Carolina. *Id.* DR2-103(D)(5) provides:

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

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

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

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

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

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

Primus, 436 U.S. at 419 n.10 citing Disciplinary Rules.

DR2-104(A)(5) provides:

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

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Primus, 436 U.S. at 419 n.11 citing Disciplinary Rules.

services.”⁵⁴ The United States Supreme Court reversed the decision of the South Carolina Supreme Court because *Primus*’ actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain.”⁵⁵ The United States Supreme Court held that in-person attorney solicitation is permissible when the attorney is motivated by political objectives rather than pecuniary gain.⁵⁶ However, the Court reiterated that states may reasonably regulate the time, place, and manner of solicitation and may prohibit solicitation that is misleading, overbearing, deceptive, or involves undue or improper influence.⁵⁷

While *Primus* involved an attorney with a political objective, *Ohralik*⁵⁸ was an example of an ambulance chaser⁵⁹ who solicited a client for his own financial benefit. Ohralik approached and offered professional services to an eighteen year old girl while she was lying in traction in her hospital bed⁶⁰ recovering from injuries she sustained in an automobile accident.⁶¹ After discussing the accident and her injuries, the attorney asked her to sign a representation agreement.⁶² She refused and said that she would have to speak with her parents about it first.⁶³ Ohralik returned to the hospital two days later and the girl signed the

54. *Primus*, 436 U.S. at 421-422. Additionally, *Primus*’ associate was staff counsel for the non-profit organization. *Id.*

55. *Id.* at 423.

56. *Id.*

57. *Id.* at 439-440.

58. *Ohralik*, 436 U.S. 445.

59. BLACK’S LAW DICTIONARY 80 (6th ed. 1990).

A popular name for one who solicits negligence cases for an attorney for a fee or in consideration of a percentage of the recovery. Also, a term describing the practices of some attorneys, on hearing of a personal injury which may have been caused by the negligence or wrongful act of another, of at once seeking out the injured person with a view to seeking authority to bring action on account of the injury.

Id.

60. *Primus*, 436 U.S. at 449.

61. *Id.* The lawyer learned about the automobile accident from the postmaster’s brother while he was picking up his mail. *Id.* at 450. The attorney then called the girl’s parents who told him that she was in the hospital recovering from her injuries. *Id.* The parents requested Ohralik to come to their home before visiting the girl in the hospital. *Id.* at 450. Ohralik visited the girl’s parents’ home, found out the details of the accident, and then proceeded to the hospital where he found the girl lying in traction in her room. *Id.* at 451.

62. 436 U.S. at 451.

63. *Id.* The attorney attempted to visit the girl’s friend who was a passenger in the car and also was injured, but found out that the passenger had been released from the hospital earlier that day. *Id.* at 451. He then left the hospital for another visit with the girl’s parents. *Id.* They stated that they spoke with their daughter and that she would now agree to his representation. *Id.*

agreement.⁶⁴

Subsequently, the eighteen year old girl filed a complaint with the Grievance Committee of the Geauga County Bar Association.⁶⁵ The Supreme Court of Ohio eventually suspended Ohralik indefinitely.⁶⁶ Ohralik argued on appeal to the United States Supreme Court that his in-person solicitation of the client was Constitutionally indistinguishable from the newspaper advertisement in the *Bates*⁶⁷ case.⁶⁸ The Court affirmed the decision of the Ohio Supreme Court stating that a case of this nature is an example of the potential for overreaching that exists in an attorney's in-person solicitation of clients.⁶⁹ The Court rejected Ohralik's argument and stated that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment."⁷⁰ The Court unanimously held that a state may discipline an attorney for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose the dangers of undue influence and coercion.⁷¹ The Supreme Court reviewed the First Amendment protec-

64. *Ohralik*, 436 U.S. at 451. In between hospital visits, Ohralik visited the passenger's home, without being asked, and offered representation to her. *Id.* at 452. During this visit, he concealed a tape recorder and recorded the conversation. *Id.* The passenger agreed to the representation but later discharged the attorney. *Id.* at 451-452. After he was discharged, Ohralik filed a lawsuit against the passenger for breach of contract. *Ohralik*, 436 U.S. at 452. The passenger paid the attorney one-third of her eventual insurance recovery in settlement of the lawsuit. *Id.*

65. *Id.* at 452. Additionally, the passenger filed a complaint with the Grievance Committee of the Geauga County Bar Association. *Id.*

66. *Id.* at 453.

67. *Bates*, 433 U.S. 350.

68. *Ohralik*, 436 U.S. at 455.

69. *Id.* at 469.

70. *Id.*

71. *Id.* at 449. The ABA Model Rules of Professional Conduct place live telephone contact on the same level as in-person solicitation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1992). Comment 1 to Rule 7.3 provides the following reason for holding live telephone contacts to the same standards as in-person contacts:

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the lay person to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client . . . may 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. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 cmt. 1 (1992). The California State Bar Standing Committee On Professional Responsibility and Conduct addressed telephone solicitation in a Formal Opinion in 1988. CAL. ST. B. COMM. PROF. RESP., Form. Op. 1988-105 (1988). The Committee stated that "like face-to-face solicitation, telephone solicitation would be virtually immune to effective oversight and regulation by the state because it is

tions given to all commercial speech in the following case.

C. *CENTRAL HUDSON GAS V. PUBLIC SERVICE COMMISSION OF NEW YORK*

In *Central Hudson Gas v. Public Service Commission of N.Y.*,⁷² the United States Supreme Court re-examined the protections given to all commercial speech, including attorney advertising, by the First Amendment.⁷³ The Court developed a four-part test to determine whether a state may prohibit or regulate commercial speech.⁷⁴

The Central Hudson Gas & Electric Corporation brought suit challenging a New York Public Service Commission regulation completely banning promotional advertising by utilities.⁷⁵ At the state level, the New York Court of Appeals held that the state's interest in the conservation of energy outweighed the value of advertising in the uncompetitive electric utility market and decided that the state could constitutionally prohibit the advertising.⁷⁶

The United States Supreme Court reversed the decision and developed a four-part test⁷⁷ to use in determining whether a state may prohibit commercial speech.⁷⁸ First, for commercial speech to enjoy First Amendment protection, it must concern lawful activity and not be misleading.⁷⁹ Second, for a state to regulate commercial speech there must be a substantial state interest.⁸⁰ Third, the regulation must directly advance the asserted interest.⁸¹ Fourth, the regulation must be no more extensive than necessary.⁸² The Court held that the regulation banning

difficult or impossible to obtain reliable proof of what actually took place and the solicitation is not visible or otherwise open to public scrutiny. Furthermore, like in-person solicitation, telephone solicitation can involve undue pressure on the potential client for an immediate yes-or-no answer to the offer of representation." *Id.*

72. *Central Hudson Gas*, 447 U.S. at 557.

73. *Id.*

74. *See infra* note 77.

75. *Central Hudson Gas*, 447 U.S. at 557.

76. *Id.* at 562.

77. The U.S. Supreme Court described the analysis as follows:

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 governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 567.

78. *Id.*

79. *Central Hudson Gas*, 447 U.S. at 559.

80. *Id.*

81. *Id.*

82. *Id.*, 447 U.S. at 567.

promotional advertising by the state's electric companies⁸³ was unconstitutional under the First Amendment⁸⁴ because while the regulation in question directly advanced a substantial state interest, the total ban of advertising was more extensive than necessary to serve that interest.⁸⁵

The subsequent attorney advertising cases applied the new four-part test when determining whether the commercial speech in the form of attorney advertising could enjoy First Amendment protection. One case dealt with an attorney who violated a state's advertising language restriction and another addressed the First Amendment protections of targeted direct mail solicitation.⁸⁶

D. *IN RE R.M.J.*

*In re R.M.J.*⁸⁷ was the first attorney advertising case to apply the *Central Hudson*⁸⁸ four-part test.⁸⁹ In response to the United States Supreme Court's 1977 decision in *Bates v. State Bar of Arizona*,⁹⁰ the Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri revised its rule⁹¹ regulating attorney advertising.⁹²

83. In December 1973, the Public Service Commission of New York ("Commission") ordered all electric utilities in the state to cease all advertising promoting the use of electricity. *Central Hudson Gas*, 447 at 559. The Commission ordered the advertising prohibition because of a study finding that the utility system within New York State did not have sufficient fuel reserves or supply sources to fulfill all customer demands for the 1973-1974 Winter. *Id.* at 559-560. Three years later, after the fuel shortage ended, the Commission continued the advertising ban. *Id.* at 560. *Central Hudson Gas & Electric Corporation* opposed the ban on First Amendment free speech grounds. *Id.*

84. *Central Hudson Gas*, 447 U.S. at 572 n.14.

85. *Id.* at 573.

86. See *supra* note 30 for a brief description of the *Central Hudson* analysis applied in the most recent Supreme Court case addressing attorney advertising, *Florida Bar v. Went For It, Inc.*

87. *In re R.M.J.*, 455 U.S. 191 (1982).

88. *Central Hudson Gas*, 447 U.S. 557 (1980).

89. See *supra* notes 77-85 and accompanying text for a description of the four-part test.

90. 433 U.S. 350 (1977).

91. Before the 1977 revision, the rule was stated as follows:

(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine or book.

(B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or by other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. . . .

In re R.M.J., 455 U.S. 192, 194 n.1 quoting MO. SUP. CT. RULES ANN., Rule 4, DR2-101, 63 (Vernon 1981) (historical note).

92. *In re R.M.J.*, 455 U.S. 192.

The new rule⁹³ permitted attorney advertising but limited it to certain types of information and required specific language.⁹⁴ The rule allowed lawyers to mail a dignified "brief professional announcement card stating new or changed associates or addresses, change of firm name, or similar matters."⁹⁵ However, the rule limited lawyers to sending the announcement cards only to clients, former clients, other lawyers, personal friends, and relatives.⁹⁶ The announcement cards could contain only limited information⁹⁷ in specific language.⁹⁸

After the rule change, a lawyer, R.M.J., ran advertisements and mailed announcement cards in violation of the restrictions.⁹⁹ First, the advertisements violated the language restrictions by specifying practice areas not allowed under the rule.¹⁰⁰ Second, the lawyer mailed an-

93. The revised rule is stated as follows:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with his firm, use or participate in the use of any form of public communication respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim.

In re R.M.J., 455 U.S. at 195 n.4, quoting Mo. REV. STAT., SUP. CT. RULE 4, DR2-101(A) (1978).

94. *In re* R.M.J., 455 U.S. at 194. The addendum to the rule provided:

The following areas for field of law may be advertised by use of the specific language hereinafter set out:

1. General Civil Practice
2. General Criminal Practice
3. General Civil and Criminal Practice

If a lawyer or law firm uses one of the above, no other area can be used . . . If one of the above is not used, then the lawyer or law firm can use one or more of the following:

1. Administrative Law
2. Anti-Trust Law
- [Portion omitted]
22. Trial Practice
23. Workers Compensation Law

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

If one or more of these specified areas of practice are used in any advertisement, the following statement must be included . . . "Listing of the above areas of practice does not indicate any certification of expertise therein."

In re R.M.J., 455 U.S. at 195 n.6 quoting Rule 4, Addendum III (Adv. Comm. Nov. 13, 1977).

95. *In re* R.M.J. 455 U.S. at 196-197.

96. *Id.* at 196.

97. See *supra* notes 93 and 94.

98. See *supra* notes 93 and 94.

99. *In re* R.M.J., 455 U.S. at 197-198.

100. The attorney advertised that he was licensed in Missouri and Illinois. *In re* R.M.J., 455 U.S. at 197. The advertisement contained the statement that the attorney was "Admitted to Practice Before THE UNITED STATES SUPREME COURT." *Id.* It listed practice areas not authorized by the rule. *Id.* For example, he listed "personal injury" and "real estate" instead of the authorized "tort law" and "property law." *Id.* Additionally, he listed practice areas not addressed in the rule, such as "contract," "aviation," "securities-bonds,"

nouncement cards to "persons other than lawyers, clients, former clients, personal friends, and relatives"¹⁰¹ in violation of the rule.¹⁰²

The Supreme Court of Missouri upheld the constitutionality of the rule and issued a private reprimand.¹⁰³ The United States Supreme Court reversed the Missouri court's decision¹⁰⁴ and held that the rule violated the First Amendment because it failed the fourth part of the *Central Hudson* test.¹⁰⁵ The Court reasoned that the rule was broader than necessary to protect the public from coercion and undue influence¹⁰⁶ and that the advertising was not inherently misleading or misleading in practice.¹⁰⁷ However, the Court reiterated that states "retain the authority to regulate advertising that is inherently misleading or has proved to be misleading in practice"¹⁰⁸ but the regulation must be no more extensive than necessary to further the state interest.¹⁰⁹

E. *SHAPERO V. KENTUCKY BAR ASSOCIATION*

The most recent United States Supreme Court case affecting the analysis of attorney advertising is *Shapero v. Kentucky Bar Association*,¹¹⁰ decided in 1988.¹¹¹ The Court held that a Kentucky Supreme Court Rule¹¹² prohibiting targeted, direct-mail solicitation by attorneys for pecuniary gain violated the First Amendment.¹¹³

The defendant, Shapero, applied to the Kentucky Attorneys Advertising Commission¹¹⁴ for approval of a letter¹¹⁵ that he planned to send

"pension & profit sharing plans," "zoning & land use," "entertainment/sports," "food, drug & cosmetic," and "communication." *In re R.M.J.*, 455 U.S. at 197 n.8.

101. *In re R.M.J.* 455 U.S. at 197-198.

102. *Id.*

103. *Id.* at 198.

104. *Id.* at 207.

105. *See supra* note 77.

106. *In re R.M.J.*, 455 U.S. at 203-206.

107. *Id.* at 207.

108. *Id.* at 207.

109. *Id.*

110. *Shapero*, 486 U.S. 466.

111. The most recent U.S. Supreme Court case attorney advertising case was decided on June 21, 1995. *Florida Bar v. Went For It, Inc.*, No. 94-226, 1995 WL 365648 (U.S. June 21, 1995). *See supra* note 30 for a brief description of the case and the Supreme Court's analysis.

112. The relevant rule provided that:

A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Shapero, 486 U.S. at 470 n.2 (1988) quoting Ky. Sup. Ct. Rule 3.135(5)(b)(i) (1988).

113. *Shapero*, 486 U.S. at 471.

114. *Id.* at 469 n.1. The responsibilities of the Commission are outlined as follows:

to potential clients whom he knew had foreclosure suits filed against them.¹¹⁶ The Advertising Commission denied approval of the letter because of a Kentucky Supreme Court Rule¹¹⁷ which prohibited targeted mailings "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."¹¹⁸ The Kentucky Supreme Court upheld the Commission's rejection of the letter and the attorney appealed to the United States Supreme Court.¹¹⁹

The Supreme Court reversed the decision of the Kentucky Supreme Court¹²⁰ and held that a state may not prohibit lawyers from soliciting clients for pecuniary gain by sending truthful and nondeceptive letters to people known to face particular legal problems.¹²¹ In reaching its decision, the United States Supreme Court reviewed commercial speech protections and the line of cases dealing with attorney advertising and solicitation.¹²² The Court reiterated that "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest."¹²³ The Court

The Attorneys Advertising Commission is charged with the responsibility of 'regulating attorney advertising as prescribed' in the Rules of the Kentucky Supreme Court. Ky. SUP. CT. Rule 3.135(3) (1988). The Commission's decisions are appealable to the Board of Governors of the Kentucky Bar Association, Rule 3.135(8)(a), and are ultimately reviewable by the Kentucky Supreme Court. Rule 3.135(8)(b). Any attorney who is in doubt as to the propriety of any professional act contemplated by him also has the option of seeking an advisory opinion from a committee of the Kentucky Bar Association, which, if formally adopted by the Board of Governors, is reviewable by the Kentucky Supreme Court.

Shapero, 486 U.S. at 469.

115. *Shapero*, 486 U.S. at 469. The proposed letter read as follows:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Id. at 469.

116. *Id.*

117. *Id.* at 466.

118. *Shapero*, 486 U.S. at 469-470.

119. *Id.* at 470-471.

120. *Id.* at 471.

121. *Id.* However, the Court specifically outlined several methods that a state could use to regulate attorney solicitation without violating the First Amendment. See *infra* notes 128 and 129 and accompanying text.

122. *Shapero*, 486 U.S. at 472-478.

123. *Id.* at 473 citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* 471 U.S. 626, 637 (1985) and *Central Hudson Gas*, 447 U.S. at 565.

repeated its holding in *Ohralik*,¹²⁴ that a state may categorically ban in-person solicitation of clients for pecuniary gain.¹²⁵ The Court found targeted, direct-mail solicitation similar to print advertising because both have a much lower risk of overreaching and undue influence than in-person solicitation.¹²⁶

However, the Court limited its holding to categorical bans of targeted, direct-mail solicitation, emphasizing that a state may enact rules "designed to prevent the potential for deception and confusion [as long as they are] no broader than reasonably necessary to prevent the perceived evil."¹²⁷ For example, the state may require lawyers to file letters with a state agency and the agency may require the lawyer to prove that the person targeted faces the particular legal situation.¹²⁸ Also, states may require the letter to be labeled as an advertisement and may require that the letter contain information "directing the recipient how to report inaccurate or misleading letters."¹²⁹

While the narrow issue of attorney advertising using the information superhighway has not yet been addressed by the courts, analogies to traditional forms of advertising suggest guidelines for attorneys to follow when advertising on the Internet. The following sections apply the traditional rules for attorney advertising to various electronic forms of advertising and solicitation.

III. ANALYSIS: APPLYING ETHICS REGULATIONS TO CYBERSPACE

Attorney advertising on the Internet can take several forms. The analysis of whether current ethical guidelines are breached depends upon the form and content of the advertising. To determine whether a particular method for solicitation on the Internet violates existing ethics regulations, analogies to traditional forms of advertising are helpful.

A law firm can operate a *server*¹³⁰ which users can access to find information about the firm and specific legal issues. A user accessing a law firm's server is analogous to a client walking into the office or calling the firm on the telephone and asking for information about the firm or its lawyers.

A lawyer or firm can post an advertisement to a *USENET*¹³¹ or simi-

124. *Ohralik*, 436 U.S. 447.

125. *Shapero*, 486 U.S. at 471 citing *Ohralik*, 436 U.S. at 447. See *supra* note 71 (discussing the correlation between in-person and live telephone contacts).

126. *Shapero*, 486 U.S. at 475.

127. *Id.* at 473 citing *In re R.M.J.*, 455 U.S. at 202.

128. *Id.* at 477.

129. *Shapero*, 486 U.S. at 478.

130. See *infra* note 142 and accompanying text for the definition of a server.

131. See *infra* note 165 for a brief background of the term USENET.

lar type *newsgroup*¹³² for interested parties to read. With the important distinction that newsgroups are very narrowly focused,¹³³ attorney postings to newsgroups are similar to newspaper or magazine advertisements.

The lawyer can send an *electronic mail*¹³⁴ message directly to a prospective client or can communicate online in a chat group with other users.¹³⁵ Electronic mail messages sent directly to prospective clients are comparable to traditional letters except that electronic mail messages are received by the potential client almost immediately. A lawyer offering his services while participating in a chat group or conference discussion is similar to a lawyer offering representation to a person encountered at a cocktail party or called directly on the telephone.

Technology may develop in the near future to enable an attorney to contact a prospective client through the use of *virtual reality*¹³⁶ and *artificial intelligence*.¹³⁷ If new technologies develop which allow attorneys to contact clients using virtual reality, the contact should be deemed identical to an in-person contact because the goal of virtual reality is to simulate the real world as closely as possible.

In determining whether netiquette might be breached by distributing a particular advertisement, attorneys should look to past examples of Internet advertising for guidance. If a particular advertising attempt was met with the type of reaction that Canter & Siegel encountered,¹³⁸ attorneys should not use the method in promoting their legal services. Attorneys should conduct themselves in a professional manner¹³⁹ and should follow netiquette when utilizing the Internet for solicitation purposes in order to promote the legal profession as responsible and sensitive to the needs of the Internet community.

The following sections analyze five different forms of attorney advertising and solicitation available on the information superhighway. Attorneys have an ethical obligation to follow the regulations of the state in which they are licensed to practice.¹⁴⁰ In order to maintain a profes-

132. See *infra* notes 160 and 171 for a definition of newsgroup.

133. See *infra* notes 169 and 170 for examples of narrowly focused newsgroups.

134. See *infra* notes 187, 188, and 201 for a description of electronic mail.

135. See *infra* notes 218 and 219 for a brief introduction to chat and conference features.

136. See *infra* note 228 for a description of virtual reality.

137. See *infra* note 229 for a description of artificial intelligence.

138. See *supra* notes 7-10 and accompanying text.

139. The ABA Mission and Goals states that one of the goals of the Association is to "achieve the highest standards of professionalism, competence, and ethical conduct." CREEDS OF COURTESY AND PROFESSIONALISM: MISSION AND GOALS OF THE AMERICAN BAR ASSOCIATION, Goal V. (1991).

140. JOHN R. LUND, CHAIRMAN, LAWYERS ON LINE: ETHICAL PERSPECTIVES IN THE USE OF TELECOMPUTER COMMUNICATIONS, A.B.A. Standing Committee on Lawyer's Responsibility for Client Protection 51 (1986).

sional image in the eyes of the Internet community, attorneys must follow the rules of netiquette. The comment concludes that attorneys must follow both ethics regulations and netiquette and suggests that the best form of advertising for attorneys is to establish Web pages and BBSs which provide the public with vast amounts of information about the attorney's services without the possibility of undue influence or overreaching. Following the conclusion, the Model Code for Advertising and Solicitation in Cyberspace contained in the Appendix suggests guidelines for attorneys to follow when advertising on the Internet and states to adopt when revising disciplinary regulations.

A. LAW FIRM SERVERS

In order to encourage the availability of legal information and "increase public understanding of and respect for the law,"¹⁴¹ lawyers and law firms should operate servers¹⁴² accessible by other attorneys, current and potential clients, and the general public. A potential client accessing a law firm server is analogous to a client telephoning the firm or walking into the office and asking for information, neither of which are prohibited by the ABA regulations.¹⁴³ However, when establishing a server that is open to the general public's access, attorneys must be aware that the Internet is a multi-state and international network.¹⁴⁴

The Baltimore law firm Venable, Baetjer & Howard has its own server which users can access to obtain information about the firm and to

141. MISSION AND GOALS OF THE AMERICAN BAR ASSOCIATION, Goal IV, adopted 1981.

142. The definition of a *server* is somewhat vague. It can be everything from a normal personal computer with some extra hard drive bays and a boosted power supply to a machine with multiple processors, error correction code memory, redundant power supplies, and hardware fault monitoring. Frank Derfler and David Greenfield, *Things Are Seldom What They Seem*, PC MAGAZINE, June 28, 1994, at 43. A server works with a client (a computer client not human client) to divide the work of processing data between two or more machines. Suruchi Mohan, *What, Really, Is Client/Server Computing*, LAN TIMES, Sept. 6, 1993, at 75. Under a client/server system, a given application is divided into separate modules that are sent to different locations based on which location is best suited to process the information. *Id.* In a typical client/server system, the client, usually a desktop personal computer, ordinarily runs the application with the server providing services such as data storage, application storage, printing, and communications. Alison Eastwood, *Client-Server Computing: Much-Hyped, or Myth-Understood*, COMPUTING CANADA, Aug. 1, 1991, at 21. For the purposes of this article, server means any computer accessible by the public including World Wide Web, Gopher, and Bulletin Board servers.

143. The ABA Model Rules of Professional Conduct and Model Code of Professional Responsibility do not prohibit attorneys from soliciting potential clients who walk into the law office or call the firm on the telephone.

144. Because communications can easily enter a multitude of jurisdictions, the jurisdiction with the most restrictive advertising regulations effectively becomes the controlling jurisdiction. Scott Maker, *Advertising Legal Services: The Case for Quality and Self-Laudatory Claims*, U. FLA. L. REV. 969, 1011, n. 9 (1985).

read articles written by the firm's attorneys.¹⁴⁵ Venable's server includes electronic copies of the firm's newsletters, Workplace Labor Update, and The NII Oracle.¹⁴⁶ The server is accessible via the Internet and is part of the World Wide Web¹⁴⁷ which allows users to send and receive text, graphics, and sound.¹⁴⁸ The use of the World Wide Web links hypertext found in the firm's articles directly to the referenced material.¹⁴⁹ This linking feature allows users interested in the particular text to access the referenced material at the push of a button or the click of a mouse.¹⁵⁰ For example, if an article cited a recent Supreme Court case and the reader wanted to view the text of the decision, the user could directly access the opinion with the click of a mouse.¹⁵¹

San Francisco's Heller, Ehrman, White & McAuliffe uses a system similar in function to Venable's server.¹⁵² The firm advertises in Market-Place, a part of the Global Network Navigator on the World Wide Web.¹⁵³ The firm's electronic advertisement consists of articles about software and intellectual property law, general information about the firm, and the resumes of the attorneys working for the firm.¹⁵⁴

The advertising methods employed by firms such as Venable and Heller are analogous to someone calling the firm on the telephone or walking into the law office and requesting information about the firm. When analyzed in light of the *Central Hudson* four-part test,¹⁵⁵ a state may not prohibit these methods of advertising. A government regulation prohibiting a law firm from setting up an Internet node or advertising in

145. Thom Weidlich, *Firms Post Ads Politely On Internet*, NAT'L. L. J., May 9, 1994, at A6. Venable's World Wide Web page is located at <http://venable.com>.

146. *Id.*

147. The World Wide Web ("Web") is an Internet resource that utilizes a network of servers that use hypertext links embedded in documents to find and access other data and resources. HARLEY HAHN AND RICK STOUT, *THE INTERNET COMPLETE REFERENCE* 496 (1994). The Web uses a browser to read documents containing hypertext and navigates the Internet at the click of a mouse to follow the link to an additional resource. *Id.* Hypertext appears as bold or underlined text on the screen but contains information allowing the browser to locate additional information about the subject. *Id.*

148. Robb Mandelbaum, *Hanging Your Shingle in Cyberspace*, THE AM. LAW., June 1994, at 95-96.

149. *Id.* at 95.

150. Hahn, *supra* note 147, at 496 (describing a document containing hypertext information about trees linked to many additional and more detailed documents).

151. Mandelbaum, *supra* note 148 at 95.

152. Heller's server can be accessed through the GNN's law firm database at <http://gnn.com/gnn/bus/LegalFin.html> or directly at <http://gnn.com/gnn/bus/hewm/index.html>.

153. *Id.* The Global Network Navigator ("GNN") is a commercial service that offers Internet access and software through the World Wide Web. Rick Ayre, *Making the Internet Connection*, PC MAG., Oct. 11, 1994, at 134.

154. Mandelbaum, *supra* note 148, at 95.

155. The test was outlined in *Central Hudson Gas*, 447 U.S. at 564-566. See *supra* note 77 for a detailed description of the four-part test.

a service specifically set aside for advertising would be much broader than necessary to further the governmental interest in protecting the public from the evils of overreaching, undue influence, and fraud.¹⁵⁶ A narrower regulation prohibiting the server from containing false or misleading information¹⁵⁷ would successfully advance the governmental interest in protecting the public. Prohibiting the use of this technology would be similar to prohibiting clients from walking into a law office and asking for information about the firm.¹⁵⁸ Operating a server with information about a law firm is not intrusive and cannot subject potential clients to undue influence because only interested people access the information available on the server and the firms make no attempt to solicit the users as clients.¹⁵⁹ States should encourage law firms to operate servers on the World Wide Web or similar networks to expand the public's access to information about legal services.

B. NEWSGROUP POSTINGS

Another type of Internet advertising is posting messages to newsgroups.¹⁶⁰ With the important distinction that newsgroups are very narrowly focused,¹⁶¹ attorney postings to newsgroups are similar to newspaper or magazine advertisements. While a complete prohibition of newsgroup posting would be unconstitutional, the First Amendment permits reasonable regulations on commercial newsgroup postings¹⁶² and states may be justified in limiting the use of newsgroup postings to advertise for clients. Attorneys should also be aware that newsgroup postings attract a multi-state and international audience before posting an

156. *Shapero*, 486 U.S. at 476 citing *Zauderer*, 471 U.S. at 641 and *Ohralik*, 436 U.S. at 457-458, 464-465 (holding that states may regulate attorney advertising through means no broader than necessary to protect the public from fraud, undue influence, and overreaching).

157. See *supra* notes 107-108 and accompanying text.

158. See *supra* note 143.

159. Denis Campbell, Jr., Venable's director of client services, stated that the firm developed its Internet node "to present itself as being on the technological cutting edge" and gains clients from the service "only on very rare occasions." Mandelbaum, *supra* note 145 at 95. The firm estimates that between 12 and 15 people per hour browse the firm's node during peak times. *Id.* Daniel Appelman of Heller, Ehrman stated that the firm "gets quite a few calls as a result of people seeing the material about our firm. Some of them are interested in becoming clients, and some of them are interested in just finding out more about us." *Id.* at 96.

160. COMER, *supra* note 3, at 159. *Newsgroups* are discussion groups in which people inform each other about different topics and engage in electronic debates. Ayre, *supra* note 3, at 134. As October, 1994, there were almost 10,000 different newsgroups located around the Internet. *Id.*

161. See *infra* notes 169 and 170 for examples of narrowly focused newsgroups.

162. See *supra* notes 43, 127 and accompanying text.

advertisement.¹⁶³

The Phoenix law firm Canter & Siegel utilized newsgroup postings when promoting the firm's immigration practice.¹⁶⁴ The firm posted an advertisement to thousands of USENET¹⁶⁵ newsgroups using a mass mailing technique known as *spamming*.¹⁶⁶ Newsgroups cover virtually any topic and most are very narrow in scope.¹⁶⁷ For example, one newsgroup is devoted to discussions of politics in Alberta, Canada,¹⁶⁸ and another is limited to discussions of the Ethernet/IEEE 802.3 protocols.¹⁶⁹ While there are some newsgroups devoted to legal discussions,¹⁷⁰ and posting of a legal advertisement to them may be appropriate, the vast majority of newsgroups discuss topics completely unrelated to the law.¹⁷¹

Most users considered the technique employed by Canter & Siegel a breach of netiquette.¹⁷² They expressed their dissatisfaction with the firm's advertising technique by sending the firm tens of thousands of angry electronic-mail messages, including several death threats,¹⁷³ and by making harassing phone calls to the firm.¹⁷⁴ However, in a letter to the American Bar Association Journal, Martha Siegel of Canter and Siegel claimed that the firm received over 20,000 positive responses, about 1,000 of whom became paying clients.¹⁷⁵

While the firm's advertisement broke the implicit Internet prohibition of advertising, no current ethics rules or state regulations were vio-

163. See *supra* note 144.

164. See *supra* note 1 and accompanying text.

165. COMER, *supra* note 3, at 159. The term USENET originally applied to the network of computers using dial-up connections. *Id.* The term now refers to all types of sites that exchange network news regardless of the type of network they use. *Id.*

166. See Silverman, *supra* note 2. *Spamming* is sending information (electronic-mail or newsgroup postings) to a large number of indiscriminate locations. *Id.*

167. COMER, *supra* note 3 at 158-159.

168. *Id.* at 158.

169. JOHN R. LEVINE & CAROL BAROUDI, *THE INTERNET FOR DUMMIES* 135 (1993). The newsgroup address for discussions of the Ethernet/IEEE 802.3 protocols is comp.dcoms.lans.ethernet. *Id.*

170. *Id.* at 138. The newsgroup addresses for two newsgroups discussing law in general and computing law are respectively misc.legal and misc.legal.computing. *Id.*

171. COMER, *supra* note 3, at 165. In early 1994 there were over 6600 separate newsgroups divided into hundreds of categories. *Id.* There are now almost 10,000 newsgroups available. Ayre, *supra* note 3, at 135.

172. See *supra* note 8 defining netiquette.

173. Burgess, *supra* note 1.

174. Martha Siegel, *Internet Ads Aren't All Bad*, SAN FRANCISCO EXAMINER, July 10, 1994, at B-5.

175. Martha Siegel, *Letter from Martha S. Siegel to the American Bar Association Journal*, A.B.A. J., September, 1994, 13.

lated by the conduct¹⁷⁶ and neither the Arizona State Bar Association nor the Tennessee Bar Association Board of Professional Responsibility have initiated any disciplinary proceeding.¹⁷⁷ If a state enacted a rule prohibiting all newsgroup advertising postings by attorneys, the United States Supreme Court would likely find the regulation overbroad and therefore unconstitutional.¹⁷⁸ The posting of an advertisement to a newsgroup is similar to placing a conventional newspaper advertisement in a periodical with a very narrow scope. Both advertising methods are read by people who intentionally turn to the page of the newspaper or access the newsgroup. As in the newspaper advertisements in *Bates*,¹⁷⁹ the possibilities of overreaching, undue influence, and duress do not exist in

176. There are no laws prohibiting the posting of advertisements or regulating the content of messages on USENET or anywhere else on the Internet. *Advertising Invading Cyberspace Universe, Company to Offer Paid Messages on Internet*, CLEVELAND PLAIN DEALER, May 11, 1994, at 2C. Because widespread use of the Internet is so new, there is no case law dealing with free speech on the network. Peter H. Lewis, *On-Line Services Struggle With Censorship Issues*, STAR TRIB., June 30, 1994, Metro Ed., at 1A. Lewis Rose of Arent, Fox, Kinter, Plotkin & Kahn states that because there is no regulation of the Internet, he has seen "[p]onzi schemes, chain letters, and people promoting a whole host of unlawful activities." Sandra Torry, *Niche Practices Answer the Call of Technology*, WASH. POST, March 28, 1994, at f7. In an editorial, the New Jersey Law Journal stated that "[o]nce the unwritten rules are no longer unquestioningly accepted, they must be replaced with written ones that can be enforced." *Law of the Net*, NEW JERSEY L.J., July 11, 1994, at 16. In an editorial in The San Francisco Examiner, Martha Siegel attempted to defend her firm's newsgroup postings and, ironically, suggested guidelines for future advertisers which would have not allowed her firm's postings. Martha Siegel, *Internet Ads Aren't All Bad*, THE SAN FRANCISCO EXAMINER, July 10, 1994, at B-5. Siegel suggests two general rules for Internet advertising. *Id.* First, newsgroup postings should not be limited by subject, but by demographics. *Id.* Second, advertisements should include an electronic header identifying the posting as an advertisement. *Id.* Using an electronic filter, users could then eliminate all advertisements from their newsgroup browsings. *Id.* While Siegel's second suggestion would be very useful, the first guideline would be ineffective. For example, under the first suggested guideline an advertiser could rationalize posting an advertisement for a car to a newsgroup discussing futures markets because people who are interested in the markets generally have money to spend on automobiles. A rule limiting advertising by subject would be much more beneficial. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE section (e). With such a rule, a book wholesaler could post an advertisement for a new book of poetry to a newsgroup discussing literature.

177. Telephone Interview with Deloris, Tennessee Bar Association Board of Professional Responsibility (April 6, 1995). Both Canter and Siegel are licensed to practice in Tennessee and neither are licensed in Arizona. *Id.* Both attorneys surrendered their Florida licenses for an unrelated incident in 1987. *Id.*

178. The fourth prong of the *Central Hudson* test states that the regulation must not be "more extensive than is necessary to serve [the governmental] interest." *Central Hudson Gas*, 447 U.S. at 566. See *supra* note 75 for the other three prongs.

179. See generally *Bates*, 433 U.S. 350 (involving attorneys who placed a newspaper advertisement promoting their law firm in violation of Arizona Supreme Court rule prohibiting such conduct).

newsgroup postings because the user controls which information he accesses.¹⁸⁰ Therefore, the Court would probably not allow a state to completely prohibit newsgroup postings.

However, the Constitution allows a state to prohibit advertising that is false, deceptive, or misleading¹⁸¹ and allows a state to reasonably restrict the time, place, and manner of advertising.¹⁸² Therefore, a state could regulate the location and wording of the postings and could prohibit false, deceptive or misleading postings.¹⁸³ States should restrict the postings to only newsgroups whose topic of discussion is related to the services offered in the advertisement¹⁸⁴ and should require the attorney posting the message to include the states in which he is licensed to practice¹⁸⁵ and the words "ADVERTISING MATERIAL" at the beginning and end of the posting.¹⁸⁶ This type of restriction would both further the state's interest in protecting and educating the public and would allow attorneys to advertise their professional services without misleading the public into believing that the attorney is licensed in the user's state or country.

C. DIRECT ELECTRONIC MAIL SOLICITATION

Another form of Internet advertising is sending electronic mail or *e-mail*¹⁸⁷ directly to a prospective client. While an e-mail communication at first glance appears identical to a traditional United States Postal Ser-

180. The dangers of "overreaching and misrepresentation [are] not encountered in newspaper announcement advertising." *Id.* at 367.

181. *Bates*, 433 U.S. 350, 383-384.

182. *Primus*, 436 U.S. at 439 (1978); *Bates*, 433 U.S. at 385; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771.

183. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE section (c)(3).

184. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE sections (d) & (e).

185. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE section (h).

186. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE section (g).

187. A very broad definition of electronic-mail, frequently simply called e-mail, is non-interactive communication of text, data images, or voice messages between a sender and designated recipients by systems utilizing telecommunications links. Erik Mortensen, *Electronic Mail Is One Of Many Different Technologies*, OFFICE, August, 1989, at 24. While electronic-mail once meant "exchanging private electronic messages by means of PC or server-based terminal emulation software with protocol management capabilities," the definition is rapidly changing. J.B. Miles, *It's Hard to Keep Track of the Ever-Changing Face of Electronic-Mail* (Data Lines) (Column), GOV'T COMPUTER NEWS, Feb. 1, 1993, at 47. One author predicts that "[t]ext-based E-mail will start to go the way of the dodo bird by mid-decade." Frank Vitaliano, *Get Ready for Video E-mail* (Networking Tactics) (Column), DIGITAL NEWS & REV., Sept. 4, 1992, at 9. "Full-color, full-motion video E-mail with Post-it-style notes for spreadsheet values, or with 3-D graphs, will most likely become the new

vice delivered letter, the two types of communication are very different in impact. E-mail exchanges are different from traditional letters because of the speed of transmission,¹⁸⁸ the mode of information transmission,¹⁸⁹ and the difficulty of regulation.¹⁹⁰ While sending e-mail to prospective clients is in most instances ethical, attorneys should be prepared to face the backlash of angry users if any netiquette rules are violated.¹⁹¹ Additionally, attorneys must recognize that e-mail can be sent across state lines and worldwide¹⁹² in virtually the same time that it takes a message to be sent across the street.

In *Shapero*,¹⁹³ holding that a state can not completely prohibit direct mail solicitation, the United States Supreme Court reasoned that the relevant inquiry is "whether the mode of communication poses a serious danger that lawyers will exploit [a potential client's] susceptibility"¹⁹⁴ to undue influence. E-mail communications pose a danger of lawyers exploiting a potential client's susceptibility to undue influence. For example, an attorney who hears about an airplane crash on the radio could send e-mail offering representation to the victim's families and it would be transmitted over the Internet almost instantly,¹⁹⁵ before the traditional letter would even be postmarked.

In the example, the plane crash victim's family members in their emotional state are far more susceptible to undue influence immediately after learning of the accident than they would be several days later. Electronic mail communication poses a serious danger that a lawyer will exploit this susceptibility. A letter takes at least a day, and usually several, to reach the addressee, therefore the possibility of undue influence due to the family's emotional state is significantly lower when the letter arrives.

When limiting the holding in *Bates*¹⁹⁶ to Arizona's blanket suppres-

paradigm." *Id.* The technology making these advances possible is the development of fiber optic amplifiers based on a erbium laser-diode developed by AT&T Bell Labs. *Id.*

188. Electronic-mail messages can be sent and received in hours at most and usually within minutes. RICHARD J. SMITH & MARK GIBBS, *NAVIGATING THE INTERNET* 14 (1993). "[M]ost electronic-mail users refer to the regular postal service as 'snail mail.'" *Id.*

189. *See infra* note 201.

190. *Shapero*, 486 U.S. at 476-479 (holding that because a state can effectively regulate direct mail solicitation through other means, a complete prohibition is not justified); *Ohralik*, 436 U.S. at 463-468 (holding that a state's prohibition of in-person solicitation was justified because only a complete prohibition would allow effective oversight and regulation of the legal profession).

191. *See supra* notes 1-10 and accompanying text for a description of one law firm's experience when it violated netiquette rules.

192. *See supra* note 144.

193. *Shapero*, 486 U.S. 466.

194. *Id.* at 475.

195. *See supra* note 188.

196. *Bates*, 433 U.S. at 384.

sion of print advertising, the United States Supreme Court stated that "the special problems of advertising on the electronic media will warrant special considerations"¹⁹⁷ but did not define the considerations. In *Shapiro*,¹⁹⁸ the Court held that the inquiry as to whether a state can prohibit a form of advertising is whether the mode of communication poses a serious danger of undue influence or coercion.¹⁹⁹ The Court stated that the "lawyer advertising cases have never distinguished among the various modes of written advertising"²⁰⁰ but did not address advertising utilizing the electronic media.

E-mail communications are different from written advertising because of the mode of transmission of information. Electronic mail is transmitted over phone lines, local area networks, fiber optic networks, satellite links, or a combination thereof.²⁰¹ Electronic mail can reach millions²⁰² of users worldwide with the push of a button at virtually no cost; traditional letters and newspaper advertisements are not so far reaching. The Supreme Court in considering a state restriction on Internet advertising would probably look at the "special problems of advertising on the electronic media"²⁰³ and would give "special consideration"²⁰⁴ when determining whether a state can regulate in a particular manner.

In *Ohralik*,²⁰⁵ the Court upheld a state's categorical prohibition of in-person solicitation for two reasons. First, the ban is necessary because in-person solicitation is abundant with the possibilities of over-

197. *Id.* at 385.

198. *Shapiro*, 486 U.S. at 474.

199. *Id.* at 475.

200. *Id.* at 473-474.

201. Electronic mail can be sent through a variety of communications hardware. It can be sent through client/server systems operating through Local Area Networks (LANs). Bob Metcalfe, *Here's How to Take Client Server Software for a Spin on the Iway*, *INFOR WORLD*, Sept. 19, 1994, at 54. It can be sent over fiber optic networks with full motion video and sound. Frank Vitaliano, *Get Ready for Video E-mail*, *DIGITAL NEWS & REVIEW*, Sept. 14, 1992, at 9. Electronic mail can be sent worldwide using satellite communications linking international networks. Paul Desmond, *Technology Raced Ahead in the 80's*, *NETWORK WORLD*, Dec. 25, 1989, at 1. Electronic-mail can be sent and received from the Internet using a phone line to access a commercial service such as CompuServe or Prodigy. Rick Ayre, *Making the Internet Connection*, *PC MAGAZINE*, October 11, 1994, at 132-134.

202. In 1992, the number of direct internet users was estimated at 5,000,000. Smith, *supra* note 188, at 20. The number of users is expected to grow to over 1,000,000,000 by the year 2000. *Id.* In 1994, the number of computers was estimated at 2,217,000. Comer, *supra* note 3, at 70. Due to the limits of the TCP/IP, the Internet utilizing existing technology can connect a maximum of 4,294,967,296 computers. *Id.*

203. *Bates*, 433 U.S. at 385.

204. *Id.*

205. *Ohralik*, 436 U.S. at 447.

reaching, fraud, undue influence, and invasion of privacy.²⁰⁶ Second, any attempt by the state to regulate in-person solicitation, other than an absolute prohibition, would not be effective because the solicitation is not visible or otherwise open to public scrutiny.²⁰⁷

For both of the reasons outlined in *Ohralik*,²⁰⁸ a state may regulate the solicitation of clients using direct e-mail. First, the possibility of an attorney exerting undue influence on an emotionally distraught potential client is prevalent because of the promptitude of the communication.²⁰⁹ States could prohibit attorneys from soliciting using e-mail where the possibility of undue influence and coercion exists. Second, states could require attorneys to file copies of any advertisements sent via e-mail with the state bar.²¹⁰ This would allow the bar to review the communication for the possibilities of coercion and undue influence and would make the solicitation open to public scrutiny.

While there are currently no regulations prohibiting direct e-mail solicitation, attorneys should consider whether the communication may be construed by a court or disciplinary board as overreaching or exerting undue influence.²¹¹ Further, the rules of netiquette dictate that the Internet is primarily non-commercial and therefore attorneys should be prepared to face the backlash of millions of angry users if the attorney abuses the resource.²¹² In addition, because some states regulate the language that attorneys can use on their letterhead and business cards,²¹³ attorneys must also ensure that any signature files²¹⁴ they attach to e-mail messages comply with ethics regulations.²¹⁵

206. *Shapero*, 486 U.S. at 476 citing *Zauderer*, 471 U.S. at 641 and *Ohralik*, 436 U.S. at 457-458, 464-465.

207. *Shapero*, 486 U.S. at 476 citing *Ohralik*, 436 U.S. at 457-458, 464-465.

208. *Ohralik*, 436 U.S. 447.

209. See Smith, *supra* note 188.

210. See *supra* note 128.

211. *Primus*, 436 U.S. at 439-440. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE, sections (c)(2) and (c)(3).

212. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE, section (i).

213. See APPENDIX: MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5 (1993) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102 (1983).

214. "Signature files generally consist of a few lines of text that are appended to any piece of email sent or posts made to public news groups. These files often consist of contact and employment information, and often may include quotations and even disclaimers." David J. Loundy, *Lawyers' Electronic Ads Leave Bad Taste*, CHI. DAILY L. BUL., March 9, 1995, at 6.

215. *Id.* "There has been some discussion in legal [newsgroups] that descriptive language that may be fairly standard for some professions may raise ethics issues for attorneys using the same type of information in their signatures." *Id.* See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE, section (a).

D. CHAT GROUPS

Attorneys who have access to America Online,²¹⁶ CompuServe,²¹⁷ or similar services can participate in chat groups or conference areas.²¹⁸ Chat groups are similar to groups of people standing around and talking about various issues except that the participants express themselves via a keyboard in real time.²¹⁹ As in other forms of cyberspace solicitation, attorneys must be aware that the participants in chat groups may be from other states and countries.²²⁰ While current technology limits on-line chat groups to textual interactions, a three dimensional graphical interface will be available in the near future.²²¹

States could prohibit attorneys from soliciting clients during a real time forum discussion because of the danger of an advocate trained in the art of persuasion exerting undue influence on a prospective client.²²² Attorneys may argue that chat groups involve only the written word and

216. America Online, based in Vienna Virginia, was founded by the Internet Center in October 1993. Brendon M. Macaraeg, *America Online, contained within Rick Ayre, Making the Internet Connection*, PC MAGAZINE, Oct. 11, 1994, at 142. America Online was the first commercial service to offer a Windows based graphical interface and provides excellent e-mail and newsgroup access. *Id.*

217. CompuServe is a commercial service accessible through the Internet and via dial-up modem connection. RICHARD J. SMITH AND MARK GIBBS, *NAVIGATING THE INTERNET* 290 (1993). CompuServe provides its subscribers with an internal email system with Internet access, discussion groups, product and service information, and downloadable software. *Id.*

218. America Online describes chat and conference features as areas "where you can communicate in 'real-time' with other America Online members." America Online, *Welcome New Member!*, brochure (on file with author). To interact with other members who are participating in a discussion, the user types comments and then presses the enter key. *Id.*

219. The communication takes place in real-time and as one user types statements, the words appear on the screens of all the other participants simultaneously. Mary Kathleen Flynn, *Talk Shows in Cyberspace*, U.S. NEWS & WORLD REPORT, July 4, 1994, at 70. While "conferencing via computer is not so different from the face-to-face version . . . the biggest difference between an online conference and other public meetings is that you have to express yourself via the keyboard." *Id.* One user described the intimate feeling of an online chat stating that "virtual communities can almost make you feel you're in a place like television's 'Cheers,' where everyone knows your name." *Id.* Real-time "describes an application which requires a program to respond to stimuli within some small upper limit of response time (typically milli or microseconds)." ERIC S. RAYMOND, *THE NEW HACKER'S DICTIONARY* 350 (1993).

220. *See supra* note 144.

221. Amy Cortese, *Cyberlounges for Cyberschmoozers*, BUSINESS WK., April 3, 1995, at 8. The article describes a technology developed by Japan's Fujitsu Cultural Technologies which will be available on CompuServe in July. *Id.* In the graphical interface, called WorldsAway, users will be able to select a body and head for their animated character and can then interact with other participants with the typed textual comments appearing as balloons above the character's heads. *Id.*

222. States may prohibit attorneys from soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers of undue influence and coercion. *Ohralik*, 436

the danger of undue influence is not as prevalent as in an oral conversation. However, attorneys are also trained to write persuasively and as technology brings the chat groups closer in perception to in-person contacts,²²³ the ability of states to prohibit solicitations while participating in such a discussion is strengthened because the possibility of undue influence and coercion also increase. In addition, the communication takes place over phone lines when both the attorney and the user use their modems to access the discussion.²²⁴ Because the danger exists that an attorney may misuse chat groups to exert undue influence over a prospective client and the communications are not visible or otherwise open to public scrutiny, attorneys should not attempt to solicit clients from real-time chat discussions.²²⁵

E. FUTURE TECHNOLOGY

While the future cannot be accurately predicted, technology is rapidly advancing and as it develops new forms of advertising are created.²²⁶ Multimedia computers utilizing text, sound, graphics, and video in various combinations are now readily available to the average consumer.²²⁷ In the future, multimedia computers will probably be created that offer the user an interface with virtual reality²²⁸ and artificial intelligence²²⁹ features.

U.S. at 455. The definition of in-person extends to live telephone contacts. *See supra* note 71.

223. *See supra* note 221.

224. Live telephone solicitations can be completely prohibited. *See supra* note 71.

225. *See* APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE section (c).

226. Jerry Zeidenberg, *Multimedia Computing: A Virtual Reality by 2001*, COMPUTING CANADA, Nov. 9, 1992, at S17 (1). Today's multimedia computers combine full-motion video, sound, graphics, and text. *Id.* The article's author predicts that within ten years, multimedia computers will accept voice command through speech recognition systems. *Id.* David Palmer of Grass Roots Research, Inc. predicts that in the future multimedia computers will be combined with data networks, artificial intelligence, and on-line audio and video libraries. *Id.* Scientists are currently working on systems that can recognize facial expressions and on systems that can be commanded by brainwaves. *Id.*

227. Robert D. Sprague, *Multimedia: The Convergence of New Technologies and Traditional Copyright Issues*, 71 DENV. U. L. REV. 635, 635 (1994).

228. Virtual reality attempts to create a completely realistic experience to the user through the use of visual, auditory, and other stimuli. *Id.* at 639-640.

229. Artificial intelligence attempts to make machines exhibit intelligent behavior and simulate human characteristics. Robert Anderson et al., *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future*, 66 S. CAL. L. REV. 1761, 1807 (1993). Artificial intelligence includes several technologies including expert systems, neural networks, virtual reality, and artificial life. *Id.* It can be used to solve complex problems, recognize patterns, and make decisions based on complex rules. *Id.*

Imagine the following scenario from the not too distant future. A person who was arrested the previous night for drunken driving returns home after spending the night in jail. He sits down to his virtual reality terminal to relax and is greeted by the virtual image of an attorney who learned about the arrest.²³⁰ The attorney's image appears very realistic but is actually a reproduction made using virtual technology and an artificial intelligence computer. The virtual attorney asks the person about the arrest and advises him about his options using a set of rules outlined in the artificial intelligence program. The accused drunk driver accepts the attorney's offer of representation because the attorney already seems familiar with the case.

In the previous example, the use of virtual technology coupled with artificial intelligence enticed the new client into accepting representation. While no actual in-person contact was made, the client was the victim of an overzealous attorney exploiting technology and the new client's susceptibility to undue influence.

States could probably prohibit virtual contacts where the user has no control over whether the information is received but should allow the user to obtain this virtual attorney information if the user so chooses.²³¹ Virtual reality attempts to imitate the real world as closely as possible. Therefore, a virtual contact would probably be considered in-person solicitation even though it occurs over hundreds or thousands of miles of connecting lines. States should completely prohibit attorney initiated virtual contacts²³² because the communication is almost identical to in-person solicitation.²³³

IV. CONCLUSION

Attorneys should use the Internet to provide current and potential clients, other attorneys, and the general public with as much information as possible about the practice of law and about the particular lawyer or law firm's proffered services. However, when attorneys do so, they must

230. The attorney himself may not even know about the arrest but may have directed his computer to access the record of all persons arrested for drunk driving from the previous night and commanded his machine to contact them offering representation.

231. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1087 (1994) (discussing the use of the information superhighway for distributing unsolicited information).

232. See APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE, section (c).

233. A virtual reality system interacts with the user through sight, sound and touch giving the user the feeling of reality. Harvey P. Newquist, *Virtual Reality's Commercial Reality*, COMPUTERWORLD, Mar. 30, 1992, at 93. For one reporter's description of a virtual reality encounter, see Jim Nash, *Our Man in Cyberspace Checks Out Virtual Reality: Inside the Goggles, You're a Cartoon Character for an Hour*, COMPUTERWORLD, October 15, 1990, at 109.

be aware of the ethical implications of their actions and the effect of their actions on the reputation of the legal community.

The best means for providing information to the public is to establish World Wide Web pages and BBSs for interested users to access. Only after users contact the attorneys or law firms should solicitations be made. Following the guidelines outlined in the Model Code for Advertising and Solicitation in Cyberspace contained in the Appendix allows attorneys to provide the public with vast amounts of information about the legal profession without giving the appearance of being overzealous and without the risk of being accused of exerting undue influence on a prospective client.

Attorneys must be aware when advertising on the Internet through any medium that the communications reach a multi-state and international audience. Therefore, all advertisements must comply with the most stringent state regulations. Lawyers should carefully follow all ethical regulations and should consider netiquette guidelines before placing any advertisement. At a minimum, lawyers must ensure that all advertisements can not be construed by a court as involving coercion, duress, harassment, or undue influence and must not distribute communications that are false, deceptive or misleading. Before placing an advertisement, attorneys should consider the affect their action has on other users, other Internet advertisers, the legal profession, and the Internet community.

BRIAN G. GILPIN

APPENDIX: MODEL CODE FOR ADVERTISING AND SOLICITATION IN CYBERSPACE²³⁴

A lawyer or law firm may advertise services through the electronic media, such as newsgroups, servers, electronic mail, bulletin boards, and other technology so long as the communication complies with this and all other disciplinary rules.

A. Definitions.

- (1) **Newsgroup:** A forum or conference area where users can post messages, files, and other information about a specific topic.
- (2) **Server:** Includes computers hosting World Wide Web pages, Gopher systems, and modem accessible systems.
- (3) **Bulletin Board:** A service that enables users to input or store information and files for others to read, use, or retrieve.
- (4) **Real-time:** An application which requires a response to stimuli within a reasonably small upper time limit.
- (5) **Substantially interferes:** Forcing any particular user or group of users to repeatedly view the same communication; and anything that a reasonable network user considers to be substantial interference; includes system crashes, slowdowns, and overloads.
- (6) **Negative response:** Any response that would be considered negative to a reasonable network user including flames, hate mail, threats, and other forms of harassment.

B. Requirements.

1. A copy, electronic or otherwise, of an advertisement or other communication with a prospective client shall be kept for two years after its last dissemination along with a record of how, when, and where the communication occurred.
2. Any communication made pursuant to this rule shall include the words "ADVERTISING MATERIAL" at the beginning and end of the communication unless the communication was sent in response to a request made by a potential client.
3. Any communication made pursuant to this rule shall include, at a minimum, the name, law firm, street address, licensed states of practice, electronic mail address, and telephone number of at least one lawyer responsible for the communication's content.

C. Limitations.

1. A lawyer or law firm shall not in real-time, or through a means designed to reasonably represent the real world, contact or solicit professional employment from a prospective client with whom the lawyer or law firm has no prior family or professional relationship when a significant motive for the lawyer's doing is the lawyer's pecuniary gain. Nor shall a lawyer solicit professional employment through any electronic means if:

234. Some of the suggested rules were incorporated from *Internet Advertising: Ethics and Etiquette*, ONLINE LIBRARIES & MICROCOMPUTERS, June 1994 available in Lexis/Nexis Library, News/Curnews file.

(a) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(b) the communication involves coercion, duress, harassment, or undue influence; or

(c) the communication is false, deceptive or misleading.

(2) A lawyer shall not advertise professional services using electronic media where the communication is directly and indiscriminately distributed to a substantial number of newsgroups or electronic mail addresses.

(3) A lawyer may only post messages to newsgroups whose topic scope includes the proposed representation.

(4) A lawyer shall not advertise professional services using electronic media where the communication substantially interferes with another's use of the media or invades the privacy of other users.

(5) If any negative response to a communication made pursuant to this rule occurs, the attorney may respond only in a courteous, dignified, and professional manner.

(6) Attorneys shall not forge approval for a message to be posted to a moderated newsgroup nor shall attorneys create or send cancel messages directed at the newsgroup postings of another.