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tion of relevant empirical data which can be evaluated in light of policy goals, so as to result in a practical, workable plan.<sup>95</sup> The court is usually confined to a consideration of the case at hand, and can formulate rules to control like situations, but any broader discussion will likely constitute dicta.

In contrast stands the legislature, of which Van Alstyne has said:

The potential scope of the legislative vision . . . is much broader. In the process of legislative consideration the range of relevant data is more expansive, transmutation of policy decisions into statutory form is more flexible, and evaluation of practical considerations may be better informed.<sup>96</sup>

Therefore, the questions which must be asked in determining how to modify the doctrine of governmental immunity can be asked only by the legislature, since it alone has the machinery, time, and resources to provide the most accurate and objective answers.

*Daniel J. Graziano, Jr.  
John B. Tehan*

## THE SOLICITATION RULE: ETHICAL RESTRICTIONS AND LEGAL FICTIONS

### *A Preview*

The present rules forbidding an attorney from soliciting professional employment are ill-advised, ineffective, and inherently arbitrary. These restrictions favor wealthy and established lawyers to the detriment of poorer, younger, and less established members of the bar. The sanctions, deeply rooted in the common law, are stagnant remnants of a time when the legal profession was a small, select, financially elite group, economically able to afford this laudable expression of altruism.<sup>1</sup> Financial and social disparities existing within

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95. *Id.* at 164.

96. *Id.* at 163.

1. See H. DRINKER, *LEGAL ETHICS* 210 (1953); 2 W.S. HOLDSWORTH, *HISTORY OF THE ENGLISH LAW* 509-12 (3rd ed. 1927); R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 87-93 (1953). One commentator has observed that

The canons of ethics on business-getting are still built in terms of a town of twenty-five thousand . . .—a town where reputation speaks itself from mouth to mouth, even on the other side of the railroad track; and reputation

the profession in modern times have undermined and antiquated the validity and exigency of this concern.<sup>2</sup> It is the purpose of this article to critically examine the existing rules against solicitation and to illustrate their arbitrary nature, while underscoring the thesis that the rules are an ineffective and inept method of restraining the ethical violations at which they are purportedly directed.

The constraints placed upon solicitation are patently arbitrary. While Canons 27 and 28 of the American Bar Association Canons of Professional Ethics<sup>3</sup> and Code 2 of the American Bar Association Code of Professional Responsibility<sup>4</sup> expressly forbid solicitation of any kind,<sup>5</sup> there are three notable exceptions to this general rule. First, bar associations exercise a limited form of solicitation which includes general advertising by the bar association concerning the desirability and necessity of competent legal counsel in certain transactions, the establishment of lawyer referral systems, and the publication of law lists presenting biographic materials concerning participating attorneys. Second, labor unions and public interest groups have been extended restricted solicitation privileges consistent with their constitutionally-protected rights of free speech and association.<sup>6</sup> Finally, attorneys

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not only of the oldster, but of the youngster. The youngster is watched when he hangs out his shingle; watched if he be a hometown boy, watched doubly if he be not.

K.N. Llewellyn, *The Bar's Troubles, and Poultices—and Cures?* 5 LAW AND CONTEMPORARY PROBLEMS 115-16 (1938).

2. See J. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962); A. BLAUSTEIN & C. PORTER, *THE AMERICAN LAWYER* (1954).

3. ABA CANONS OF PROFESSIONAL ETHICS (1957) [hereinafter cited as ABA CANONS].

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1971) [hereinafter cited as ABA CODE].

5. ABA CANON 27 states, in pertinent part, that:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations.

ABA CANON 28 provides that:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship, or trust make it his duty to do so. . . . It is disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes. . . .

The restrictions of ABA CODE 2 are similar.

6. See *NAACP v. Button*, 371 U.S. 415 (1963) (Va. statute regulating barratry, champerty, and maintenance held unconstitutional as inhibiting the freedoms of speech and association); *Bhd. of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964) (first and fourteenth amendments held to prevent state from interfering with activities of railroad workers' brotherhood in advising members to obtain legal advice and in recommending specific lawyers). See also *In re Bhd. of R.R. Trainmen*, 150 N.E.2d 163 (Ill. 1958).

are permitted to solicit clientele, indirectly by political campaigning and directly by "country-club" activities.<sup>7</sup> There is no surer method for an attorney to wave his academic and legal credentials before the public eye than to campaign for public office. However, since the public is presumably benefitted by the presence of competent attorneys in governmental positions of trust, this publicity is unavoidable. On the other hand, the "country-club" brand of solicitation, where lawyers engage, at the indirect subsidy of the national treasury,<sup>8</sup> in extensive social activities to drum up business, is ethically questionable. It is the established practitioner, and not the young, solo, or unestablished one, who is able to "play nine" on Monday mornings with a foursome of business prospects. It is the established practitioner who is able to offer his cottage at the shore to potential clients. It is the established practitioner who is able to "wine and dine" would-be "customers."

This final exception to the rules against solicitation is indicative of the arbitrary nature of the current limitations.<sup>9</sup> It is in this light, then, that the arguments in favor of the restrictive rules must be analyzed.

#### *The Traditional Rationale*

The traditional arguments in favor of the rules against solicitation are four in number:

1. *Neglect of the Client's Interests.* The most fundamental objection to solicitation concerns the breach of the lawyer's duty to his client. A typical judicial response to this violation of duty is found in *In re Katzka*, where the court stated that the "business of ambulance chasing" made it "impossible for an attorney to give honorable service to clients and courts."<sup>10</sup>

Since the solicitor's only concern, it is argued, is to make his "business" as lucrative as possible, his livelihood depends upon a rapid turnover of cases. To accomplish this, he must employ a team of runners who will make a mad scramble to the bedside of the injured potential client to secure the valuable retainer. To meet this added cost, group settlements and exorbitant fees become the unavoidable standard operating procedure. The soliciting lawyer, the argument continues, usually has a large number of claims against

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7. See *In re Cohn*, 139 N.E.2d 301 (Ill. 1957) (Bristow, J., specially concurring).

8. INT. REV. CODE OF 1954 § 162(a) provides for deductions from gross income of all ordinary and necessary business expenses.

9. This article is concerned primarily with the inherently arbitrary nature of the rules, rather than their arbitrary application. As to their application, compare *In re Cohn*, 139 N.E.2d 301 and *In re Donaghy*, 83 N.E.2d 560 (Ill. 1948), with *In re Katz*, 241 N.Y.S. 317 (1st Dep't 1930) and *In re Ades*, 6 F. Supp. 467 (D. Md. 1934). See also 67 A.L.R.2d 859.

10. 232 N.Y.S. 573, 577 (1929). See generally 67 A.L.R.2d 859, 864 (cases cited therein); J. COHEN, THE LAW—BUSINESS OR PROFESSION? 174-75 (Rev. ed. 1924).

the same insurer. Since his real skills lie in the apparently evasive art of solicitation, negotiations between the solicitor and the insurance company inevitably take the form of lump sum settlements with no concern for the merits of each individual case.<sup>11</sup> Thus the solicitor is charged with inadequate settlements, exorbitant fees, overreaching, and under-representation.

Such practices are, of course, unethical.<sup>12</sup> Case law, state and federal statutes, and bar association codes provide sufficient redress for these abuses.<sup>13</sup> While the principal objections are, at best, logically tenuous and factually questionable, two unwarranted suppositions underlie the entire argument. First, it is presumed that no competent attorney would solicit employment, or, conversely, that lawyers who do solicit are incompetent.<sup>14</sup> This presumption is grounded upon the notion that an attorney who breaches the bar's ethical code cannot be an effective counsellor.<sup>15</sup> Even granting that solicitors as a class might be incompetent lawyers, it cannot be seriously posited that, absent present restrictions, capable attorneys would not engage in solicitation. Indeed, if the current ethical prohibitions were withdrawn, there is no reason to believe that *all* attorneys would not solicit employment. Second, the major argument assumes that solicitors will invariably subordinate their client's interests to their own gain. This presumption, too, is based on the theory that solicitors, being experts at solicitation and neophytes at litigation, make poor lawyers. If this be so, an offending attorney should be punished with more rapidity and severity than current procedures provide.<sup>16</sup> If this is not so, this particular rationale for the rules against solicitation fails to meet the test of relevancy.

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11. See N.Y.U.L. REV. 182, 185-86 (1955); *Philadelphia Bar Investigates Contingent Fee Scandals*, 12 J. AM. JUD. SOC'Y 144 (1929).

12. See *State Bar v. Richards*, 84 N.W.2d 136 (Neb. 1957); *State ex rel. Lee v. Buchanan*, 191 So. 2d 33 (Fla. 1966); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS; ABA CANONS OF PROFESSIONAL ETHICS; ABA CANONS OF JUDICIAL ETHICS 269, 416, 463; MO. BAR ADMINISTRATION, ADVISORY OPINIONS 17 (1958); *Committee on Professional Ethics, Opinions*, 10 MISS. LAWYER 6 (1963).

13. There are four classes of remedies. First, once it is public knowledge that an attorney engages in unethical practices, presumably his volume of business will decline. Second, state and federal courts possess the power to reprimand, censure, suspend, or disbar a violator. The ABA CANONS (29, 31, and 41 in general; 7, 10, 12, 15, 22, 28, and 30 in specific) afford sufficient grounds for bar association control of these offenses. Further, civil actions in tort and/or contract are available to an injured party for any of these abuses. Finally, the presentation of fraud, whether it be related to the claim, the testimony, or the evidence, is clear grounds for disbarment and criminal sanctions. See generally 67 A.L.R.2d 859.

14. See *Chreste v. Commonwealth*, 186 S.W. 919 (Ky. Ct. App. 1916), *aff'd*, 198 S.W. 929 (Ky. 1917); *In re Brooklyn Bar Ass'n*, 227 N.Y.S. 666 (2d Dep't 1928); J. COHEN, *supra* note 10, at 173-200.

15. *Id.* See also note 8 *supra* with text.

16. At present, bar association actions against ethical violators are slow, secretive, and cumbersome. The procedure entails filing a complaint, an extensive investigation,

2. *Impairment of the Administration of Justice.* A standard criticism levelled against solicitation is that it "stirs up litigation." The stirring up of litigation was a common law felony, closely aligned to the crimes of barratry,<sup>17</sup> champerty,<sup>18</sup> and maintenance.<sup>19</sup> The Minnesota Supreme Court has explained that

[t]he general purpose of the law . . . was to prevent intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which could disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law.<sup>20</sup>

The fear of the common law was that, if a claim was stirred up, the instigating party would control the result.<sup>21</sup> While public policy demands that parties before a court have a real interest in the outcome of the litigation, it must be noted that the rules against solicitation only peripherally address themselves to this issue. Its solution lies not in the current prohibitions, but in the enforcement and improvement of measures against corruption in the legal system.<sup>22</sup>

It is, moreover, an objective obligation of the court system to enforce all valid, substantial claims. Members of the bar, as officers of the court and fiduciaries of the litigants, have a dual obligation to foster the resolution of societal conflicts and to protect and enforce their client's rights.<sup>23</sup> If this be the primary purpose of the court system, stirring up justifiable litigation is not only an acceptable activity, but, indeed, an essential one. Since most clients are unfamiliar with the methods of securing legal counsel and are faced with the practical pressure for immediate settlement, it is the enforcement of the rules rather than their violation that vitiates the important public policy of resolving conflicts. Apparently, however, the law is more con-

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committee hearings, judicial approval, and appellate confirmation. Punishment is meted out only where there is a "clear case of misconduct affecting the character and standing of the lawyer as an attorney." 67 A.L.R.2d 859, 863. See also note 7 *supra*.

17. Barratry: "The offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." BLACK'S LAW DICTIONARY 190 (4th ed. 1968).

18. Champerty: "A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subjects sought to be recovered." *Id.* at 292.

19. Maintenance: "An unauthorized and officious interference in a suit in which the offender has an interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action." *Id.* at 1106.

20. *Gammons v. Johnson*, 78 N.W. 1035, 1037 (Minn. 1899).

21. WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE 142 (1921); *Holloway v. Lowe*, 7 Porter 488 (Ala. 1838).

22. ILL. REV. STAT. ch. 38, §§ 65, 66 (1957) is a typical state response to corruption in the courts.

23. See *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

cerned with a shotgun-blast regulation of the profession than with the rectification of the individual's substantive rights.<sup>24</sup>

The anti-solicitor's argument does not, however, stop here. A natural consequence, it is asserted, of stirring up litigation is the congestion of court calendars.<sup>25</sup> This theory stands upon weak grounds. First, it directly contradicts the argument that solicitors invariably settle their cases at the bargaining table. Second, it reflects a paranoid tendency by the bar in ascribing its own failure to remedy the court-congestion problem upon other, more susceptible individuals.

Finally, the solicitor is charged with fostering fraudulent claims, perjurious testimony, and manufactured evidence.<sup>26</sup> Presuming that the solicitor's practice depends on a rapid flow of cases, this argument insists that, where a tort occurs and the litigant's resulting physical or mental condition is borderline, the soliciting attorney will encourage fraud. From this, "it is but a short step from exaggeration of an injury to the manufacture of a claim."<sup>27</sup> Investigations have generally supported this notion by revealing instances of fictitious claims and perjurious testimony.<sup>28</sup>

There is, of course, a vital public policy against fraud in the court system.<sup>29</sup> It is not clear, however, that the solicitation of professional employment increases the occurrence of fraud. Even accepting that solicited claims are less substantial and less valid than non-solicited ones, it does not necessarily follow that soliciting attorneys will attempt to perpetrate fraud upon a court since

[a]ny temptation . . . to exaggerate the validity of a claim to secure employment is reduced by the fact that there will be no compensation if the claim is invalid.<sup>30</sup>

Further, in the federal court system, 28 U.S.C. § 1331(b) denies costs, and even grants the courts the discretion to impose them, to the plaintiff who advances unmeritorious claims. An attorney is also subject to severe reprimand for this conduct.<sup>31</sup>

3. *Tendency of Solicitation to Expand.* A major rationale for disciplinary actions in solicitation cases is its deterrent effect. The Wisconsin Supreme

24. See F. C. HICKS, ORGANIZATION AND ETHICS OF THE BENCH AND BAR 261-69 (1932).

25. See *In re Rothbard*, 232 N.Y.S. 582 (2d Dep't 1929) (cases cited therein).

26. See, e.g., *In re Kopleton*, 241 N.Y.S. 171 (1st Dep't 1930); 67 A.L.R.2d 859, 921-24.

27. 20 THE GREEN BAG 145 (1908), cited in 30 N.Y.U.L. REV. 182, 187 (1955).

28. See, e.g., 14 MASS. L.Q. 1 (1928).

29. See note 20 *supra*, with text.

30. 25 U. CHI. L. REV. 674, 679 (1958). See 2 BOSWELL, THE LIFE OF JOHNSON 47-48 (Hill ed. 1887).

31. See note 11 *supra*.

Court has noted that "the punishment . . . for unprofessional conduct should be influenced by . . . the effect that it may have upon others with a view of stamping out the evil."<sup>32</sup> The practice tends, if left unguarded, to increase and perpetuate itself. If it is impossible to obtain clients because of the over-aggressive competition of others, the temptation is, indeed, great to employ the same practices that are channeling clients into other law offices. While this criticism is telling, it is open to attack on two grounds. First, the theory that discipline leads to obedience has been impaired, in recent years, by leading criminologists here and in England.<sup>33</sup> Rather than discouraging the unethical practice, an overzealous enforcement of the solicitation rules could result in a more sophisticated and less perceivable violation of them. The principal criticism misses the mark, secondly, in its continued presumption that the profession, if not strictly regulated, would discard ethical priorities. In those areas where solicitors have gained control of a field of litigation, there is an understandable tendency for those abstaining members of the bar to also engage in the practice.<sup>34</sup> The argument, however, cuts both ways. If expanded solicitation were allowed, with rigorous enforcement of the undesirable side effects, attorneys would not be forced into this ethical dilemma.

4. *Detriment to the Profession.* The final objection to solicitation is the social ill-repute it brings upon the profession by its unfair competition and its commercializing effects.

Rather than aiding the young attorney in establishing his practice, the rules against solicitation inhibit him.<sup>35</sup> It is the established lawyer who can afford the luxuries of the country-club and the campaign trail. The young attorney is at a distinct disadvantage to his established counterpart who has clients, connections, and capital. In short, rather than improving the bar's public image, this discrimination serves only to underscore the disparities and inequities existing within the profession.

Further, the bar fears that the public would lose respect for the profession if its goals were commercially rather than service oriented. Witness Julius Cohen's remark that:

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32. *State v. Kiefer*, 222 N.W. 795, 796-97 (Wisc. 1929). *See also State v. Rubin*, 142 So. 2d 65, 67 (Fla. 1962) ("disciplinary . . . proceedings . . . are solely for the purpose of purging the roll of legal practitioners of an unworthy or disreputable member.").

33. *See A. GOLDSTEIN, CRIME, LAW, AND SOCIETY* (1971); I INBAU *et al.*, *CRIMINAL JUSTICE* 443-51 (1968); *REPORT OF THE ROYAL COMM'N ON CAPITAL PUNISHMENT* (1953).

34. *See, e.g.*, the virtual domination by solicitors of personal injury suits in Chicago. *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U.L. REV. 895 (1953).

35. *See Price Discrimination in Medicine*, 1 J.L. AND ECON. 20 (1958). *But see* ABA CANONS OF PROFESSIONAL ETHICS No. 27 (1908):

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust.



The basis of the relationship between lawyer and client is one of unselfish devotion, of disinterested loyalty to the client's interest, above and beyond his own. Let the lawyer seek you for his own profit and you despise him.<sup>36</sup>

Further note Canon 12's dictate that:

It must never be forgotten that the profession is a branch of justice and not a mere money-getting trade.<sup>37</sup>

And heed Henry Drinker's observation that lawyers differ from other individuals merely

in being members of a profession. This is not a fancied conceit, but a cherished tradition, the preservation of which is essential to the lawyer's reverence to his calling.<sup>38</sup>

The answer to these contentions lies in the public's conceptualization of the attorney. The vaunted public opinion of the profession, so cherished and nurtured by the bar, is not wholeheartedly shared by the public itself.<sup>39</sup> The very idea of the lawyer as a "disinterested champion of justice" is in conflict with the popular notions of an effective attorney in the adversary system. It is the rare layman who is able to grasp the legal sophism that an attorney, owing his "entire devotion," "warm zeal," and "utmost learning and ability" to his client's interests, has similar obligations to the court and to his colleagues. Finally, the idea that "disrespect for the lawyer leads to disrespect for law" is unfounded in light of the common law experience.<sup>40</sup> The reader need look no farther than Lawyer Tulkinghorn in Dickens' *Bleak House* to find a popular depiction of the legal profession. And yet, the common law tradition is squarely grounded upon the social principle of law.<sup>41</sup> Here again the prohibitions against solicitation bring disrepute, rather than distinction, upon the profession.

#### *Countervailing Considerations*

Aside from the considerations discussed above, there are other factors which militate in favor of an expansion of the current solicitation rules.

36. J. COHEN, *supra* note 10, at 197.

37. ABA CANON 12 (1957).

38. H. DRINKER, *supra* note 1, at 211.

39. See D. Riesman, *Some Observations on Law and Psychology*, 19 U. CHI. L. REV. 30 (1951). It is the present author's opinion that a great deal of the public "esteem" placed in the profession is attributable to the public relations work done by the bar to prevent the publication or production of materials "reflecting upon or derogatory to lawyers." 77 A.B.A. REP. 261 (1952). See COUNTRYMAN & FINMAN, *THE LAWYER IN MODERN SOCIETY* 378-92 (1966). The ABA has gone so far as to establish a standing committee on public relations for just this purpose.

40. 25 U. CHI. L. REV. 674, 681 (1958). See also R. POUND, *supra* note 1; T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (4th ed. 1948).

41. *Id.*

Since the solicitation of professional employment is not *malum in se*, the present sanctions form a bar-imposed code of profession etiquette.<sup>42</sup> The frequency and notoriety with which the rules are violated attest to the proposition that these prohibitions have lost support among members of the bar.<sup>43</sup> And, as Henry Drinker has maintained in his defense of the traditional rules, the only significant reduction of the problem has come from the abolition of the actions most frequently solicited.<sup>44</sup>

All the ethical violations cited by the proponents of the rules have corresponding actions for their remedy.<sup>45</sup> Placing the feared detriment to the profession to one side, clients, courts, and counsellors are sufficiently protected by existing legal vehicles. As to the supposed ill-repute solicitation brings upon the bar, it is time that the profession and its members come to grips with the separate problem of making their rhetoric consistent with their actions. Every member of the bar takes an oath of office, similar to that set forth in the margin,<sup>46</sup> pledging himself to the highest duties of honor. There is nothing inconsistent with that oath, or the principles it encompasses, and a more expansive solicitation rule. In short, if the profession is so concerned with its public image, then let it give the public no grounds on which it can be disparaged.

Finally, the right to practice law should include the right to employ all lawful means of achieving success at it. There are, it is true, distinct differences between the attorney and other members of the community. The most

42. H. DRINKER, *supra* note 1, at 64.

43. In one area, it is estimated that 95% of all serious personal injury claims were solicited. *See* note 32 *supra*.

44. H. DRINKER, *supra*.

45. *See* note 11 *supra*.

46. ABA Recommended Oath of Admission:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of \_\_\_\_\_;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.  
SO HELP ME GOD.

notable and the most important ones are, of course, the special relationships existing between the lawyer and his client and between the lawyer and the court. However, with the enforcement of all pertinent restrictions and with a positive effort by the individual attorney to maintain and upgrade the profession, these relationships can be left intact, while liberalizing the present rules.

#### *Conclusion*

Current sanctions prohibit solicitation of any action except in rare situations. The continued validity and vitality of these restrictions are necessarily predicated upon an acceptance of their underlying presumptions: (1) that the rules are the most effective means of controlling certain diverse ethical violations; and (2) that, absent these prohibitions, attorneys would, successfully and with impunity, engage in these breaches of conduct and duty. It has been a purpose of this article to illustrate the invalidity of these assumptions. Legal devices to curb ethical violations are in existence and readily available. In light of the many considerations advanced here, the rules must be reformulated on some basis other than unqualified prohibition. Where to draw the line, however, is quite a different story.

*Gregory A. Adamski*