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EXPANDING PROTECTION FOR ATTORNEY SOLICITATION— IN RE TEICHNER

Recent controversies involving attorney solicitation of clients compel an examination of commercial speech¹ and its constitutional protections. The application of first amendment² protection to communication between an attorney and a potential client was considered recently by the United States Supreme Court in the companion cases of *In re Primus*³ and *Ohralik v. Ohio State Bar Association*.⁴ In these cases, the Court held that solicitation

1. Commercial speech describes speech arising from purely commercial transactions. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455 (1978). It is distinguished from noncommercial speech by its content. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). Although the United States Supreme Court has held that commercial speech is protected by the first amendment, it does not enjoy the same preferred position as noncommercial speech. The two types of speech have been held to be not "wholly undifferentiable," thus the "common sense differences" between speech proposing a commercial transaction and other varieties of speech have not been discarded. *Id.* at 771 n.24. Advertising has been characterized as a "classic example" of commercial speech. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). Commercial speech, however, is not confined to advertising. *Id.* at 384. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Solicitation is a form of commercial speech, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 454, but it has been distinguished from advertising. *See* note 32 *infra*.

2. The first amendment guarantees freedom of speech and association. U.S. CONST. amend. I. This amendment is applicable to the states through the fourteenth amendment. U.S. CONST. amend. XIV.

3. 436 U.S. 412 (1978). In *Primus*, allegations had been made that pregnant women had been sterilized or had been threatened with sterilization by their doctor as a condition of the continued receipt of medical assistance under the "Medicaid" program. The American Civil Liberties Union was contacted by a concerned individual in the community who wanted a representative to address some of these women. At the ACLU's request, attorney Primus arranged a meeting, advised the women of their legal rights, and suggested the possibility of a lawsuit. *Id.* at 416. Subsequently, the ACLU decided to provide free legal representation for the sterilized women. When Primus learned that one of the women wanted to bring suit, she relayed the ACLU's offer of free representation through a letter. This letter became the basis of the complaint filed against her. *Id.* at 417. The Court held that Primus' solicitation for ideological and associational reasons was protected. *Id.* at 431. *See* text accompanying notes 62-64 *infra*.

4. 436 U.S. 447 (1978). *Ohralik*, an attorney, learned of an automobile accident involving a casual acquaintance. Subsequently, *Ohralik* visited the injured party and offered to represent her. The victim did not sign a contract immediately because she wanted to discuss the matter with her parents. Nevertheless, *Ohralik* took pictures of the victim in traction and later took pictures of the accident scene. *Id.* at 450. *Ohralik* also taped a subsequent conversation with the victim's parents on a concealed tape recorder. Eventually a contingent-fee contract was signed. *Id.*

Ohralik obtained the name of the other injured party and went to her home uninvited. After *Ohralik* provided a "tip" on the possible amount of recovery, the victim, admitting she was confused, said he could represent her. *Id.* at 451. When the victim's mother attempted to repudiate the agreement, *Ohralik* refused to withdraw, thereby causing a delay in the settlement with the insurance company. Both girls discharged him and subsequently filed a complaint.

for ideological and associational reasons is protected communication,⁵ while solicitation solely for pecuniary purposes is unprotected communication.⁶

*In re Teichner*⁷ represents the Illinois Supreme Court's interpretation of *Primus* and *Ohralik*. Through an analysis of these decisions, the *Teichner* court attempted to distinguish between permissible and impermissible solicitation. In doing so, the court established a middle ground of protection for an attorney who solicits for both pecuniary and ideological reasons.⁸

The purpose of this Note is to examine the *Teichner* court's reasoning and to discuss the shortcomings of certain aspects of its decision. Further, suggestions will be made for judicial action to help clarify the status of the law in this area.

TEICHNER'S FACTS AND BACKGROUND

Teichner, a Chicago attorney, solicited clients in two similar situations in which people were injured by railroad car explosions.⁹ The first incident arose in Laurel, Mississippi, where a local minister had established a relief program and had sought legal counsel for persons injured in such an explosion. Because the minister thought local counsel to be unsatisfactory, he contacted attorney Teichner.¹⁰ Teichner thereafter attended an informational meeting arranged by the minister in his church, but he did not address the group.¹¹ Subsequently, however, Teichner did actively solicit employment. In one incident, Teichner asked an individual whose parents had been injured for permission to visit them in the hospital.¹² In a second incident, he sought and obtained a contingent-fee contract from another injured party.¹³

Id. at 452. The Court held that *Ohralik's* solicitation was solely for pecuniary purposes and was unprotected. *Id.* at 449. See text accompanying notes 57-61 *infra*.

5. *In re Primus*, 436 U.S. 412, 431 (1978). For a definition of "ideological" and "associational" see note 34 *infra*.

6. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978).

7. 75 Ill. 2d 88, 387 N.E.2d 265 (1979).

8. In effect, *Primus* and *Ohralik* represent opposite ends of the spectrum. *Ohralik* involved purely commercial speech, which was held to be unprotected. *Primus* involved speech which was purely ideological and nonpecuniary and therefore protected. *Teichner*, which involved both a financial interest and associated values, recognized a middle ground of protection. See text accompanying notes 39-42 *infra*.

9. The facts of the case are set out at 75 Ill. 2d at 95-99, 106-14, 387 N.E.2d at 267-68, 272-76.

10. The minister, Reverend Johnson, also sought legal assistance from attorneys throughout the state of Mississippi. *Id.* at 95, 387 N.E.2d at 267.

11. At that meeting, several other attorneys advised those attending of their legal rights in general terms. *Id.* at 96, 387 N.E.2d at 267.

12. Although Teichner's contact was with the son, the court viewed it as solicitation of the parents. The communication with the son was found to be indistinguishable from communication directly with the parents because it was expected that he would have an input into the parents' decision. *Id.* at 99, 387 N.E.2d at 269.

13. After obtaining the contract, Teichner gave the client a sum of money as an advance on her claim. *Id.* at 107, 387 N.E.2d at 272. Offering and advancing funds to a client is neither

The second explosion occurred in Decatur, Illinois. Teichner again solicited employment, this time requesting assistance in obtaining the names of individuals injured in the explosion.¹⁴ In addition to paying people to solicit on his behalf,¹⁵ Teichner also approached individuals¹⁶ faced with distressing emotional experiences, including a family whose home had been damaged by the explosion¹⁷ and another family confronted with the impending death of a family member.¹⁸ Moreover, Teichner involved himself in a potential conflict of interest situation.¹⁹

On the basis of these facts, the Administrator of the Attorney Registration and Disciplinary Commission²⁰ filed a complaint²¹ to institute disciplinary

uncommon nor against public policy. See *Chicago Bar Ass'n v. McCallum*, 341 Ill. 578, 589, 173 N.E. 827, 831 (1930). However, money cannot be given as a means of soliciting a case nor can living costs habitually be advanced to potential clients. See Note, *Solicitation of Clients and Advertising by Attorneys*, 9 DRAKE L. REV. 102, 107-08 (1959) [hereinafter cited as *Solicitation*]. See, e.g., *In re Moore*, 8 Ill. 2d 373, 381, 134 N.E.2d 324, 328 (1956). Further, advanced funds are subject to reimbursement and ultimately must be repaid by the client. See *Chicago Bar Ass'n v. McCallum*, 341 Ill. at 590, 173 N.E. at 831, ABA CANONS OF PROFESSIONAL ETHICS NO. 42.

14. 75 Ill. 2d at 107, 387 N.E.2d at 273.

15. An attorney cannot provide compensation for the securing of employment he would not have had otherwise. See *Chrest v. Commonwealth*, 171 Ky. 77, 97, 186 S.W. 919, 926 (1916); *Solicitation*, *supra* note 13, at 104.

16. If an attorney is given the impression that an individual wants to see him due to communications received from the family or friends of the individual, the attorney has a right to make the contact. However, it has been suggested that overeagerness generally brings the legal profession into disrepute. See, e.g., *Mason v. Papadopoulos*, 12 Ill. App. 2d 140, 149, 138 N.E.2d 821, 826 (1956).

17. 75 Ill. 2d at 108, 387 N.E.2d at 273.

18. *Id.* at 110, 387 N.E.2d at 274.

19. Teichner sought to represent the son of a decedent and the same decedent's former wife, while also representing other family members. 75 Ill. 2d at 111-13, 387 N.E.2d at 274-75. This conflict was compounded by an arrearage in support payments to the former wife for the son's benefit which could interfere with the other claims against the railroad. Teichner did not discuss the potential conflict of interest with the parties involved. *Id.* at 112, 387 N.E.2d at 275. An attorney should not represent parties with adverse interests. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(A), (B). Thus, any situation involving a present or potential conflict of interest should be avoided. H. DRINKER, *LEGAL ETHICS* 105 (1953) [hereinafter cited as *DRINKER*].

20. The Attorney Registration and Disciplinary Commission supervises disciplinary proceedings against attorneys. ILL. SUP. CT. PRAC. R. 751. Investigations are made by the Inquiry Board and hearings on complaints are conducted by the Hearing Board. The Hearing Board's report is reviewed by the Review Board in all cases where action by the court has been recommended. Finally, the Illinois Supreme Court reviews the proceeding if exceptions to the Review Board report are made. ILL. SUP. CT. PRAC. R. 753.

21. The Administrator of the Attorney Registration and Disciplinary Commission filed the complaint against Teichner. The original complaint included only the Decatur incidents. Subsequently, an amended complaint was filed which included Teichner's conduct in Laurel. While Counts I-XII of the amended complaint applied to Teichner's activities in Decatur, Illinois, only Count XIV applied to the Laurel, Mississippi, incidents. 75 Ill. 2d at 94, 387 N.E.2d at 266. It is interesting to note that while only one count applied to Laurel, those incidents provided the basis for the court's analysis.

proceedings.²² The basis for the complaint was that Teichner's solicitation of clients was improper²³ and consequently was prohibited by the Illinois Code of Professional Responsibility.²⁴ The Hearing Board determined that

22. The authority of the disciplinary proceeding derives from local statutes, canons, or the inherent power of the courts to discipline the members of the bar. See Note *Legal Ethics—Ambulance Chasing*, 30 N.Y.U.L. REV. 182, 183 (1955) [hereinafter cited as *Ambulance Chasing*]; Note, *Advertising, Solicitation, and Legal Ethics*, 7 VAND. L. REV. 677, 690 (1954) [hereinafter cited as *Legal Ethics*]. The purposes of these proceedings are to safeguard the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach. *In re Smith*, 63 Ill. 2d 250, 256, 347 N.E.2d 133, 135 (1976); *In re DiBella*, 58 Ill. 2d 5, 8, 316 N.E.2d 771, 772 (1974). Punishment of attorneys is not the objective; rather, the concern is to protect the reputation and standards of the bar so that public confidence may be warranted. See *In re Sullivan*, 33 Ill. 2d 548, 556, 213 N.E.2d 257, 261 (1965); *In re Krasner*, 32 Ill. 2d 121, 130, 204 N.E.2d 10, 14 (1965); *In re Heirich*, 10 Ill. 2d 357, 386, 140 N.E.2d 825, 839 (1956); *In re Melnick*, 383 Ill. 200, 206, 48 N.E.2d 935, 938 (1943). The disciplinary proceeding is not a criminal prosecution, but it does determine whether an attorney is unfit to remain as a member of the bar. See *In re Damisch*, 38 Ill. 2d 195, 206, 230 N.E.2d 254, 260 (1967); *In re Cohn*, 10 Ill. 2d 186, 190, 139 N.E.2d 301, 303 (1956).

23. Historically, solicitation of clients has been regarded as improper. The rules against solicitation developed as a result of the common law prohibitions on barratry, champerty, and maintenance. Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554 (1958); *Legal Ethics*, *supra* note 22, at 677. Barratry is repetitious generation of lawsuits, BLACK'S LAW DICTIONARY 190 (4th ed. 1968), and champerty is the agreement to bring a suit in exchange for a share in the recovery, *id.* at 292. Maintenance refers to the financial support of a party to a lawsuit by one without a direct interest in the suit. *Id.* at 1106. See V. COUNTRYMAN, *THE LAWYER IN MODERN SOCIETY* 156 (1966). Although the evils are known and have been recognized more recently, courts have been reluctant to clearly define what constitutes solicitation. See *In re Cohn*, 10 Ill. 2d 186, 190, 139 N.E.2d 301, 303 (1956); *In re Mitgang*, 385 Ill. 311, 331, 52 N.E.2d 807, 816 (1944). Consequently, there is no standard definition of solicitation. See *In re Moore*, 8 Ill. 2d 373, 379, 134 N.E.2d 324, 327 (1956); *In re Mitgang*, 385 Ill. at 331, 52 N.E.2d at 816.

24. The ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY (rev. 1977) was adopted by the Illinois State Bar Association to express the standards of conduct the Association expects attorneys to maintain. The Code's disciplinary rules detail the minimum level of conduct which is acceptable on the part of an attorney before disciplinary action will be invoked. DR 2-103 (prohibiting solicitation) and DR 2-104 (prohibiting employment resulting from unsolicited advice) are applicable to the Teichner case.

Where codes are adopted by statutes or incorporated into the state court rules, they are given the full force and effect of law. Otherwise the codes adopted by bar associations do not have statutory force and are not legally binding. Whether or not they are adopted by a state legislature, however, the codes serve as a guide for professional conduct and disciplinary measures may be imposed if they are violated. See *In re Hallet*, 58 Ill. 2d 239, 250, 319 N.E.2d 48, 54 (1974); *In re Krasner*, 32 Ill. 2d 121, 129, 204 N.E.2d 10, 14 (1965); *In re Heirich*, 10 Ill. 2d 357, 387, 140 N.E.2d 825, 839 (1956); *In re Mitgang*, 385 Ill. 311, 324, 52 N.E.2d 807, 813 (1944); DRINKER, *supra* note 19, at 27.

The basis for the Illinois Code's prohibition against solicitation is that law is considered to be a profession rather than a business, and solicitation is thought to be beneath the dignity of the profession. *Solicitation*, *supra* note 13, at 104. Further reasons advanced for prohibiting solicitation that is not warranted by personal relations include discouraging the growth of commercialism, preventing the decline of professional public opinion, restraining false and misleading claims and abuses, and limiting attorney competition. DRINKER, *supra* note 19, at 25; M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 114 (1975) [hereinafter cited as FREEDMAN].

Teichner's conduct fell below the ethical standards of the legal profession and recommended suspension from the practice of law for five years.²⁵ The Review Board adopted the findings of the Hearing Board with a recommendation of suspension for three instead of five years.²⁶ The Illinois Supreme Court disagreed with the Review Board in relation to Teichner's conduct in Laurel, Mississippi and found his conduct permissible.²⁷ Teichner's solicitation in Decatur, however, was found impermissible and provided the basis for the imposition of a two-year suspension from practice.²⁸

THE TEICHNER COURT'S REASONING

The *Teichner* opinion focused on the permissible scope of the state's power to prohibit certain forms of communication between attorneys and their potential clients. The court first cited to United States Supreme Court decisions which have recognized the right to associate for the purpose of advancing particular beliefs²⁹ or economic interests.³⁰ Additionally, the court noted United States Supreme Court decisions which have limited the states' power to regulate advertising by attorneys,³¹ and which have distin-

25. *In re Teichner*, No. 74-DH-18 (Hearing Bd. of Attorney Disciplinary Sys. Oct. 15, 1976), at 14.

26. *In re Teichner*, No. 74-DH-18 (Review Bd. of Attorney Disciplinary Sys. June 24, 1977), at 1.

27. 75 Ill. 2d at 107, 387 N.E.2d at 272. Although the Review Board's reports are not binding, they are granted virtually the same weight as the findings of any initial trier of fact. *In re Smith*, 63 Ill. 2d 250, 255, 347 N.E.2d 133, 135 (1976); *In re Bossov*, 60 Ill. 2d 439, 441, 328 N.E.2d 309, 310 (1975); *In re Hallett*, 58 Ill. 2d 239, 250, 319 N.E.2d 48, 54 (1974). *Contra In re Sherman*, 60 Ill. 2d 590, 593, 328 N.E.2d 553, 555 (1975) (the ultimate responsibility for determining and imposing discipline belongs to the Illinois Supreme Court).

28. 75 Ill. 2d at 116, 387 N.E.2d at 277.

29. *NAACP v. Button*, 371 U.S. 415 (1963). In *Button*, the plaintiffs challenged the constitutionality of a state statute which prohibited certain of the organization's activities as constituting improper solicitation of legal business. The Court held that solicitation by the NAACP is a mode of expression and association protected by the first and fourteenth amendments, and it could not be prohibited by the state's regulatory powers over the legal profession. *Id.* at 428.

30. *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964). This case involved the recommendation of attorneys by the Brotherhood to its members, who usually selected only recommended attorneys. The reasoning of *NAACP v. Button* was incorporated into this decision with the Court holding that the first amendment protected the associational rights of union members. *Id.* at 8.

31. *Bates v. State Bar*, 433 U.S. 350 (1977). In this attorney advertisement case, the Court held that certain commercial speech is entitled to first amendment protection. The Court reasoned that if advertising were completely suppressed, the state would be inhibiting the free flow of commercial information and inviting the public's ignorance. *Id.* at 365. However, advertising *may* be regulated to assure truthfulness. *Id.* at 383. *Bates* followed the *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), decision. In this case commercial speech was held to be entitled to first amendment protection as the Court rejected the idea that such speech was wholly outside of the range of protection. *Id.* at 761. Thus, paid advertisements were considered to be protected speech. It was held that while a state generally can regulate advertising, forms of commercial speech which serve the interests of society by assuring informed and reliable decisionmaking are clearly permissible. *Id.* at 770. See *First Nat'l*

guished advertising from in-person solicitation.³² The court focused primarily on the *Primus* and *Ohralik* decisions to illustrate the application of the first amendment to communications between attorneys and potential clients.³³

The Illinois Supreme Court interpreted *Primus* and *Ohralik* as holding that an attorney with a purely commercial interest can be restricted more severely in his expression than an attorney whose interest is purely ideological.³⁴ While noting the subtlety of the distinction between pecuniary and ideological motivation, the court stressed that the distinction still should be

Bank v. Bellotti, 435 U.S. 765 (1978) (commercial advertisement was constitutionally protected because it furthered societal interest in the "free flow of commercial information"); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (first and fourteenth amendment protection was not forfeited because a published advertisement was a paid one); *Thomas v. Collins*, 323 U.S. 516 (1945) (the idea that first amendment protections are wholly inapplicable to economic activity was rejected as unsound). The first amendment does not protect only those forms of speech and assembly that can be characterized as political. *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

32. The *Bates* Court clearly distinguished between advertising and in-person solicitation. *Bates v. State Bar*, 433 U.S. 350, 366 (1977). If the Court had intended to afford them similar treatment, it would have done so. In-person solicitation is not visible or open to public scrutiny, and the absence of witnesses makes proof difficult. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978). Further, solicitation may exert pressure and compel immediate responses. The aims and effects of solicitation are also different, for advertising tends to be informative, while solicitation offers only a one-sided presentation and perhaps encourages speedy, uninformed decisions. Sfikas, *The Tension Between Legal Solicitation and the First Amendment*, 60 CHI. B. REC. 14, 19 (1978) [hereinafter cited as Sfikas]. *Contra Simet, Solicitation of Public and Private Litigation Under the First Amendment*, 1978 WASH. U.L.Q. 93, 108 [hereinafter cited as Simet] (solicitation considered as equivalent to advertising). Thus, although some solicitation is protected under the first amendment, FREEDMAN, *supra* note 24, at 116-17, it is not categorically protected speech. See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1186 (1972) [hereinafter cited as *Advertising*].

33. 75 Ill. 2d at 100-03, 387 N.E.2d at 269-70.

34. *Id.* at 102, 387 N.E.2d at 270. Although the United States Supreme Court frequently has used the interchangeable terms "associational values" and "political or ideological expression," the terms are vague and undefined. The phrase "associational values" represents first-amendment-protected freedoms. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of liberties protected by the first amendment); Sfikas, *supra* note 32, at 20 (expressive and associational conduct have been considered to be activity at the core of the first amendment). "Associational values" is an abstract concept which includes acts for ideological or political reasons as well as for the furtherance of beliefs of another. The associational values in the solicitation cases arise when litigation is not for private disputes, but is a means of political expression. *NAACP v. Button*, 371 U.S. 415, 429 (1963). See, e.g., *In re Primus*, 436 U.S. 412, 422 (1978) (action was undertaken to express personal political beliefs and to advance the objectives of the ACLU, rather than to derive financial gain); *United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971) (collective activity undertaken to obtain meaningful access to the courts is a fundamental right within first amendment protection). Associational values are not present in conduct which is only self-serving. Additionally, associational values do not necessarily indicate a formal organization such as the ACLU or NAACP, but may be a collection of persons who have joined together for a certain object. BLACK'S LAW DICTIONARY 156 (4th ed. 1968).

attempted.³⁵ Where conduct falls between that present in *Primus* and *Ohralik*, the court noted that a determination must be made as to whether the motive and function³⁶ of the alleged solicitation entitle the speech and conduct to first amendment protection.³⁷

The court considered the Laurel and Decatur incidents independently.³⁸ Teichner's activities in Laurel were held to be tinged with the associational values that were found in *Primus* to be protected by the first and fourteenth amendments.³⁹ Additionally, although the court found that Teichner also had a pecuniary interest,⁴⁰ it held that he did not lose his first amendment protection.⁴¹ Therefore, the determination of the extent of protection afforded to Teichner's actions was not based solely on his prevailing pecuniary motive. Rather, the court determined that there was a middle ground of protected activity where the solicitation was connected with both associational values and a financial interest.⁴²

In discussing the Laurel count, the court reasoned that a certain group of poor persons would have been deprived of legal representation without Teichner's input because of hasty attempts at settlements by the railroad.⁴³ Moreover, the court noted that since the impoverished community needed attorneys for legal assistance,⁴⁴ a contingent-fee contract was their only

35. 75 Ill. 2d at 103, 387 N.E.2d at 270. This determination was based on the dissent in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 787-88 (1976) (Rehnquist, J., dissenting).

36. The motive and function factors contribute to the determination of whether the attorney's speech and conduct are entitled to the protection afforded ideological or political expression. See, e.g., *Chicago Bar Ass'n v. Edelson*, 313 Ill. 601, 611, 145 N.E. 246, 249 (1924) (motive was important in determining the propriety of the solicitation). The motive of the solicitation involves the attorney's incentives or objectives, while its function can be equated with the results of the activity. See text accompanying notes 72-76 *infra*.

37. 75 Ill. 2d at 103, 387 N.E.2d at 271.

38. As a result of this approach, the court's reasoning in *Teichner* is often difficult to follow.

39. 75 Ill. 2d at 103, 387 N.E.2d at 271. This holding was necessary because the application of the United States Supreme Court's reasoning required the Illinois court to find associational values before affording protection to Teichner. Mr. Justice Rehnquist's dissent in *Primus* is applicable: "And we may be sure that the next lawyer in *Ohralik's* shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of 'political association' to assure that insurance companies do not take unfair advantage of policy holders." *In re Primus*, 436 U.S. 412, 442 (1978) (Rehnquist, J., dissenting). It is possible that a defendant in Teichner's position could fabricate an associational relationship to cover his true pecuniary interest. *But see Sfikas, supra* note 32, at 22, where the author states that this argument "overlooks the Court's strong emphasis in both cases on the economic interest of the lawyer."

40. 75 Ill. 2d at 103, 387 N.E.2d at 271.

41. *Id.* at 105, 387 N.E.2d at 271.

42. *Id.* at 103, 387 N.E.2d at 271. Alternatively, it could be argued that the court was being subjective in its determination of a middle ground of protection and was basing it solely on the degree of misconduct involved. Under this analysis, the court may have considered *Ohralik's* conduct to be inexcusable, *Primus'* to be acceptable, and Teichner's as somewhere between the two.

43. *Id.* at 104, 387 N.E.2d at 271.

44. *Id.*

practical alternative.⁴⁵ Accordingly, Teichner's conduct was protected because it served to further the interests of the community⁴⁶ and there was no clear and convincing evidence of overreaching or other improper conduct⁴⁷ which would justify the imposition of sanctions based on this conduct alone.

In considering the Decatur counts, the court adhered to the findings of the Hearing and Review Boards.⁴⁸ Based on Teichner's attempts to obtain the names of potential clients from individuals, and on his aggressive solicitation of an emotionally distraught family,⁴⁹ the court concluded that Teichner's actions were not protected. Specifically, the court found Teichner's Decatur conduct to be faulty because it did not further the associational rights of any person or group, nor did it further the dissemination of truthful information regarding legal services.⁵⁰

The substantial contingent fee Teichner solicited in Decatur was regarded by the court as an aggravating factor.⁵¹ This contingent fee was distinguished from those in the Laurel incidents on the basis of social policy.⁵² In this instance, the fee Teichner solicited was for one-third of any settlement and up to forty or fifty percent of any judgment.⁵³ The court indicated that the high fee might not be justified by the benefits the clients would gain from Teichner's services. Additionally, the court viewed the financial interest in the client's recovery as tending to make the attorney less sensitive to the client's interests.⁵⁴ Although the solicitation itself was not

45. *Id.*

46. *Id.* at 105, 387 N.E.2d at 271. Prohibiting this type of communication was considered to be a denial of legal assistance to those otherwise unable to retain legal counsel. *Id.* at 107, 387 N.E.2d at 272.

47. *Id.*

48. See text accompanying notes 25-28 *supra*.

49. See text accompanying notes 14-18 *supra*.

50. 75 Ill. 2d at 108, 387 N.E.2d at 273.

51. Contingent fees are a typical means of compensating attorneys in tort litigation. They have been approved in Illinois because of the social value in permitting access to competent counsel regardless of one's financial situation. *Estate of Harnetiaux v. Hartzell*, 91 Ill. App. 2d 222, 228, 234 N.E.2d 81, 84 (1968). However, contingent fees have the effect of giving the attorney a pecuniary interest in the litigation. Unless they are absolutely fair, they may adversely effect the attorney/client relationship. *Pocius v. Halvorsen*, 30 Ill. 2d 73, 83, 195 N.E.2d 137, 142 (1963). They are closely scrutinized by the courts for this reason, to prevent solicitation, and to otherwise prevent denigration of the legal profession. *Id.*

52. 75 Ill. 2d at 109, 387 N.E.2d at 273. The court stated:

Although the economic imperatives which support the contingent-fee system also impel us to refrain from prohibiting its use by a community leader (such as Rev. Johnson in Laurel, Mississippi) to provide legal advice to persons who otherwise would not receive it, such considerations apply with substantially lesser force to respondent's conduct with regard to the Garners.

Id.

53. *Id.*, 387 N.E.2d at 274.

54. *Id.* at 109-10, 387 N.E.2d at 274.

viewed by the court as fraudulent or immoral, Teichner's ancillary misconduct was held to demonstrate a gross deviation from the minimum standards of conduct expected of attorneys.⁵⁵

CRITICISM OF THE TEICHNER COURT'S REASONING

The *Teichner* court held that the solicitation involved in the Laurel incidents was protected by the first and fourteenth amendments, while the solicitation involved in the Decatur incidents was not. The major problem with the court's reasoning lies in its simplistic syllogism: it found the Laurel incidents analogous to those in *Primus* and the Decatur incidents analogous to those in *Ohralik*. By misapplying the principles of these two cases, the Illinois court confounded the distinctions outlined by the United States Supreme Court.⁵⁶ Essentially, the court extended *Primus* far beyond its intended meaning.

Misapplication of the Ohralik and Primus Decisions

In *Ohralik v. Ohio State Bar Association*,⁵⁷ an attorney used hospital visits, photographs, and tape recordings to pressure two teenage girls into employing him.⁵⁸ The clients subsequently repudiated the contracts that had been elicited. The United States Supreme Court determined that *Ohralik* had been soliciting clients, in-person, for pecuniary gain and that it was constitutional to discipline him for this conduct.⁵⁹ The Court based its reasoning on the fact that such in-person solicitation for pecuniary gain was likely, under the circumstances, to pose dangers that a state has the right to

55. *Id.* at 115, 387 N.E.2d at 276. The court cited Teichner's activities as contrary to "the goal of making information about legal services available, because it dissuades individuals from seeking legal counsel." *Id.* at 116, 387 N.E.2d at 277.

56. *Primus* and *Ohralik* are decisions important to the development of the law in the solicitation area. See Simet, *supra* note 32, at 93, where it is maintained that "both cases not only involve significant First Amendment free speech questions but also have important impacts on the practice of law and the public availability of legal services" But see Young, *Supreme Court Report*, 64 A.B.A.J. 1151 (1978) [hereinafter cited as Young], where the author questions whether any guidelines were established as a result of these two decisions and notes that the only conclusive element arising from the cases is that "some kinds of personal solicitation of clients by a lawyer are protected by the First Amendment. The limits remain to be defined." *Id.*

57. 436 U.S. 447 (1978).

58. See note 4 *supra*.

59. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978). See Young, *supra* note 56, at 1152 (*Primus* and *Ohralik* discussed as recent decisions).

prevent.⁶⁰ It found, therefore, that such purely commercial speech was not protected by the Constitution.⁶¹

Unlike the *Ohralik* situation, *In re Primus*⁶² involved an attorney from the not-for-profit American Civil Liberties Union (ACLU). Following an ACLU meeting concerning sterilization, attorney Primus wrote to an individual who had expressed interest in a possible lawsuit and informed her of the ACLU's offer of free representation.⁶³ The Supreme Court held that the letter was purely ideological expression, was non-pecuniary in its motivation, and was therefore constitutionally protected.⁶⁴

The distinctions between the facts and holdings of *Primus* and *Ohralik* indicate that the first and fourteenth amendments afford varying degrees of protection to the attorney engaged in client solicitation. *Primus* protected associational solicitation with no pecuniary interest or commercial motive.⁶⁵ On the other hand, the Court has consistently prohibited solicitation that involves contingent-fee contracts.⁶⁶ The solicitation in *Primus* involved a

60. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978). Stirring up litigation, asserting fraudulent claims, debasing the legal profession and harming the solicited client by overreaching, overcharging, and misrepresenting are dangers which a state has a right to prevent. *Id.* at 461. This right of the state is based on its responsibility for maintaining standards in licensed professions. *Id.* Although these state interests exist, solicitation, despite its reprehensible qualities, does not involve "venality, fraudulent practices or moral turpitude." *In re Krasner*, 32 Ill. 2d 121, 129, 204 N.E.2d 10, 14 (1965); *In re Cohn*, 10 Ill. 2d 186, 190, 139 N.E.2d 301, 303 (1956); *Chicago Bar Ass'n v. McCallum*, 341 Ill. 578, 591, 173 N.E. 827, 832 (1930). See also *In re Moore*, 8 Ill. 2d 373, 379, 134 N.E.2d 324, 327 (1956) (solicitation is more likely to bring the profession into disrepute); *In re Veach*, 1 Ill. 2d 264, 272, 115 N.E.2d 257, 261 (1953) (solicitation rarely involves fraud or deceit, but that does not make it any less reprehensible, nor does it promote the good reputation of the bar). For a discussion of state interests, see note 91 *infra*.

61. 436 U.S. at 449. First amendment rights can be restricted where there exists a compelling state interest. However, as one author has noted, a "[p]recise definition of 'compelling' is . . . elusive. But past judicial usage implies at a minimum that courts will subject . . . solicitation restrictions to very close scrutiny and insist that there be no less drastic means available by which the state can achieve its objectives." *Advertising, supra* note 32, at 1187. Accordingly, a state must draw regulations narrowly to avoid unnecessary abridgment, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978), and any attempt to restrict first amendment liberties must be justified. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

62. 436 U.S. 412 (1978).

63. See note 3 *supra*.

64. *In re Primus*, 436 U.S. 412, 431 (1978). In so holding, the Court noted that the state's interest in preventing unnecessary litigation and in preserving the integrity of the profession did not justify the restrictions. *Id.* at 436. Although a state has the power to regulate to avoid evils before the harm occurs, it must do so with great precision. *Id.* at 438.

65. This solicitation falls within the core of first amendment protection because it is expressive and associational conduct. *Sfikas, supra* note 32, at 20.

66. Although the ACLU had a policy of requesting counsel fees, the Supreme Court held that this did not deprive Primus of *Button's* protection. *In re Primus*, 436 U.S. 412, 429 (1978). The *Primus* Court indicated that there is an important distinction between court-awarded attorneys' fees and contingent fees: "Counsel fees are awarded in the discretion of the court; awards

written letter, while in *Ohralik* in-person solicitation was at issue. The Court viewed the letter in *Primus* as falling under the first amendment's protection of associational values, for its purpose was to express the beliefs and advance the objectives of the ACLU,⁶⁷ and it was not written for financial gain. Such solicitation was purely informative⁶⁸ and noncoercive, and it triggered only remote possibilities of harm.⁶⁹ In contrast, the *Ohralik* court viewed the in-person solicitation as harboring a significant potential for harm.⁷⁰ Reading *Ohralik* and *Primus* together, it appears that the constitution protects solicitation accompanied by the traditional expressive values associated with the first amendment, and leaves unshielded that solicitation which involves pecuniary values absent the associational component.⁷¹

According to the *Teichner* court, in determining where conduct fits for first amendment purposes, the motive and the function⁷² of the activity deserve consideration.⁷³ This analysis considers equally the intent and motive of the speaker, as well as the function and purpose of the activity. Motive, however, seems to have been the more important factor in the *Ohralik* and

are not drawn from the plaintiff's recovery, and are usually premised on a successful outcome; the amounts awarded often may not correspond to fees generally obtainable in private litigation." *Id.* at 430. The Court further distinguished the fees by determining that there is "no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees." *Id.* at 431. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

67. *In re Primus*, 436 U.S. 412, 422 (1978). The letter was protected because "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *Id.* at 431.

68. In *Ohralik*, 436 U.S. 477 (1978), the argument that the commercial speech at issue was analogous to the informative advertising in *Bates* failed because in-person solicitation has been distinguished from advertising. See note 32 *supra*; Sfikas, *supra* note 32, at 19.

69. *In re Primus*, 436 U.S. 412, 436 (1978).

70. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454 (1978). For a discussion of these types of harm, see note 60 *supra*.

71. Although this appears to be a clear analysis, its application elsewhere has yet to be determined. There are not many cases to date which have relied on *Primus* and *Ohralik*, so there is no real pattern of development. See, e.g., *Jaques v. State Bar Grievance Adm'r*, 436 U.S. 952 (1978) (judgment of the Michigan Supreme Court was vacated and the case was remanded for further consideration in light of *Ohralik*); *John Donnelly & Sons v. Mallar*, 453 F. Supp. 1272 (S.D. Me. 1978) (although commercial speech is entitled to some constitutional protection, it does not have the preferred position of noncommercial speech as elucidated in *Ohralik*); *Olitsky v. O'Malley*, 453 F. Supp. 1052 (D. Mass. 1978) (the restriction of plaintiff's first amendment freedoms was found to be no greater than necessary). In Sfikas, *supra* note 32, at 22, the author stated his interpretation of the basis for determining permissible solicitation:

If the soliciting lawyer stands to gain economically from the solicitation, the disciplinary rules will be enforced. On the other hand, if the solicitation is such that it falls within the "political" arena and the solicitor is not likely to gain from the solicitation, then it would appear highly likely that any attempt to apply the disciplinary rules would be held unconstitutional.

This analysis follows the *Primus* and *Ohralik* distinctions.

72. See note 35 *supra*.

73. 75 Ill. 2d at 103, 387 N.E.2d at 271.

Primus decisions.⁷⁴ Therefore, it is arguable that the Supreme Court intended that greater emphasis should be placed on motive than on function.⁷⁵ This consideration is important, for in *Teichner* the attorney's motive involved the evils which the state has an interest in preventing.⁷⁶

The finding that Teichner's self-serving conduct in the Laurel incident was protected conflicts with the *Ohralik* and *Primus* holdings. In *Primus*, the speaker's motive and the function of the activity were based on assistance to the potential client, the true beneficiary.⁷⁷ *Primus*' ideological motive was crucial because it formed the basis of the associational element through which first amendment protection was provided. In *Ohralik*, however, the prevailing motive was pecuniary and the attorney was the beneficiary.⁷⁸ In applying the motive/function test, the Illinois Supreme Court found that Teichner's motive was also pecuniary and the function of his Laurel involvement was to benefit him financially. This situation is analagous to that in *Ohralik*, and since the defendant in *Ohralik* was not protected on this basis, neither should Teichner have been protected. Furthermore, in its consideration of the Laurel incident,⁷⁹ the *Teichner* court inappropriately reasoned that although Teichner's motive was pecuniary, to prohibit this type of communication would be to deny legal assistance to those in an unfortunate position. The court's analysis regarding this aspect of the decision was not extensive, even though the existence of a financial interest without an ideological basis warranted such treatment. Additionally, the court's reasoning was not necessarily valid in that Teichner was not indispensable in this situation. Other attorneys attended the informational meeting, and it is conceivable that one would have taken these personal injury suits on a contingent-fee basis.⁸⁰ The fact that individuals already had been informed of their rights further decreases Teichner's role in preventing their depriva-

74. This can be determined by comparing *Ohralik*, where in-person solicitation for pecuniary gain was not protected, with *Primus*, where the Court protected ideological solicitation. See text accompanying notes 77-78 *infra*. This is supported further by the basic principle that commercial interests may be subject to greater regulation than noncommercial. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

75. The motive involved has been emphasized in determining the propriety of activity. See *In re Heirich*, 10 Ill. 2d 357, 387, 140 N.E.2d 825, 840 (1956); *Chicago Bar Ass'n v. Edelson*, 313 Ill. 601, 611, 145 N.E. 246, 249 (1924). Thus, initiating litigation in order to obtain fees is unprofessional and dishonorable, but if it is done to secure the client's claims it is permissible. See *Chicago Bar Ass'n v. Edelson*, 313 Ill. at 611, 145 N.E. at 249. Although the United States Supreme Court's emphasis seems to have been on motive, it is clear that the determination of protected speech cannot be based solely on the motive involved.

76. See note 60 *supra* and note 91 *infra*.

77. See note 3 *supra*.

78. See note 4 *supra*.

79. See text accompanying notes 9-13 *supra*.

80. This is further evidenced by the fact that in actuality Teichner did minimal work in relation to these claims and distributed them to a New Orleans law firm instead. *In re Teichner*, No. 74-DH-18 (Hearing Bd. of Attorney Disciplinary Sys. Oct. 15, 1976), at 13.

tion of legal assistance.⁸¹ The community's need for information regarding the availability of legal services did not translate into a need for solicitation.

Moreover, the interests of the "Reverend's community," which allegedly had been furthered by Teichner's involvement in the Laurel incident,⁸² are distinguishable from the associational values protected in *Primus*. Although a formal association or organization is not required to obtain first amendment protection of speech, clearly the *Primus* Court did not imply that associational values could be claimed in all circumstances.⁸³ In *Primus*, first amendment protection was extended to *Primus*' solicitation on behalf of the not-for-profit ACLU. *Teichner*, however, is distinguishable. The attorney was representing himself, not a community or association. The court's view was that Teichner's activities were for the benefit of the "Reverend's community." There was, however, no "community,"⁸⁴ only injured people, and Reverend Johnson was a community leader only in the sense that he established a program of relief in Laurel. Teichner and the other attorneys were contacted by the Reverend in his attempt to help, but Teichner's activities were directed toward individuals on his own behalf; no association existed with the church.⁸⁵

The court's reasoning relies on this "nebulous associational relationship"⁸⁶ formulated to follow the requirements of *Primus*. Except for this relationship, Teichner's actions are analogous to *Ohralik*'s.⁸⁷ Thus, as the "community" associational relationship concept fails, so does the court's basis for analogizing *Teichner* to *Primus*.

On the basis of *Ohralik*, solicitation without associational values can be regulated upon a showing of compelling state interests.⁸⁸ For restriction of solicitation with associational values, however, narrow and specific regulations are required.⁸⁹ Teichner's commercial speech may have been pro-

81. In the Decatur incidents, there was no such alternative source of information. While the substantial fee was justified in the Laurel incidents, in Decatur it was considered an aggravating factor in addition to the solicitation. 75 Ill. 2d at 110, 387 N.E.2d at 274. This fact underscores an inconsistency in the court's reasoning as there *was* a need for information in Decatur.

82. *Id.* at 105, 387 N.E.2d at 271.

83. Justice Rehnquist discussed this possibility in *Primus*. See note 39 *supra*.

84. Even if there were such an entity, it still would not provide Teichner's activities with first amendment protection. The reverend's invitation to come to Laurel was to discuss the situation, not to solicit employment. Teichner was not soliciting on behalf of the "community" as he neither represented nor was employed by it. This solicitation can be distinguished from the protected activity in *In re Primus*, 436 U.S. 412 (1978), and in *NAACP v. Button*, 371 U.S. 415 (1963). In both of these cases, the attorney was representing the association and the solicitation was done on its behalf.

85. 75 Ill. 2d at 117, 387 N.E.2d at 277 (Ryan, J., specially concurring).

86. *Id.*

87. Justice Ryan's concurrence argued for this analysis by stating that "[t]here is no organization in existence with which the respondent was associated. Rev. Johnson stood as a self-appointed person in the community conducting what he thought was a helpful effort." *Id.*

88. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978).

89. *In re Primus*, 436 U.S. 412, 432 (1978).

ted by the first amendment⁹⁰ had there been no compelling state interest to justify its regulation.⁹¹ However, overreaching⁹²—a type of conduct the state has an interest in preventing—was present in Teichner's actions. In this respect *Teichner* and *Ohralik* are distinguishable from *Primus*, where the evils the state sought to prevent were not present.⁹³ In *Ohralik*, a compelling state interest existed to prohibit in-person solicitation for pecuniary gain, as it did in *Teichner*.

Since the court determined that the solicitation in *Laurel* involved associational values, a discussion should have followed addressing the applicable no-solicitation rules. The court should have examined the conformity of the rules to the "narrowly tailored" requirement of *Primus*.⁹⁴ However, since the court held that Teichner's solicitation was protected, this determination implies that the regulations were not narrow enough to constitutionally prohibit such conduct. Yet, the court did not consider this aspect of the case.

90. The first amendment overbreadth doctrine, a special exception to the rule which prohibits challenges to statutes because they might be applied unconstitutionally in circumstances other than those presently involved, does not apply. The reason for this departure from the rule is that overbroad statutes might "chill protected speech" because "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute." *Bates v. State Bar*, 433 U.S. at 380. The rationale is that the "possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Id.* It is not likely that Teichner's speech is subject to overbroad regulation. The Court has distinguished the application of the doctrine because of the "common-sense differences" between commercial speech and other varieties. The advertising involved in *Bates* was linked with commercial well-being where such speech was not considered "susceptible to being crushed by overbroad regulation." *Id.* at 381.

91. The state interests in regulating such speech include fostering favorable public attitudes toward the legal profession and preventing overreaching, undue influences, intimidation, and other forms of "vexatious conduct." It is not the solicitation itself that makes the conduct vexatious, but the motive and manner. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 470 (1978) (Marshall, J., concurring). There is nothing inherently immoral in the solicitation of business. *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 266, 98 S.W. 178, 179 (1906). Businesses normally solicit, but attorneys are distinguished because they are members of a licensed profession which requires good moral character. See *DRINKER*, *supra* note 19, at 211. Unprofessional conduct is considered to be against the public good. See *In re Mitgang*, 385 Ill. 311, 333, 52 N.E.2d 807, 817 (1944). Generally, it is unethical for an attorney to solicit and "[n]o member who cherishes the high ideals of the profession will be guilty of such unethical practices." *State v. Rubin*, 201 Wis. 30, 32, 229 N.W. 36, 37 (1930). The evils of solicitation are not thought to arise from an occasional infraction but from repeated and active solicitation. *Id.* See *In re Veach*, 1 Ill. 2d 264, 272, 115 N.E.2d 257, 261 (1953). Because the facts of the misconduct in each solicitation case vary, identical treatment is not required. *In re Damisch*, 38 Ill. 2d 195, 205, 230 N.E.2d 254, 260 (1967).

92. Overreaching results from the aggressive competition for clients which "leads to lawyers approaching clients at times when the clients are in no condition to properly consider retention of a lawyer, for example, immediately after an accident." *Advertising*, *supra* note 32, at 1184 n.23. See *Sfikas*, *supra* note 32, at 19; *Simet*, *supra* note 32, at 93; *Ambulance Chasing*, *supra* note 22, at 182.

93. *In re Primus*, 436 U.S. 412, 432 (1978). Thus, the narrowly tailored or designed regulations were not necessary.

94. See note 89 and accompanying text *supra*.

Analytical Shortcomings

Teichner's conduct in Laurel was found permissible because there was no clear and convincing evidence of overreaching or other improper conduct.⁹⁵ This should not have been the decisive factor. Circumstantial evidence is considered legal evidence.⁹⁶ Therefore, to provide clear and convincing proof, the improper conduct does not have to be demonstrated by clear and convincing evidence. Accordingly, the impropriety of Teichner's conduct could have been substantiated by the contingent-fee contracts he obtained and by his aggressive solicitation.

The separate discussion of the Laurel and Decatur incidents makes the *Teichner* opinion difficult to follow. Rather than a continual analysis throughout the decision, the emphasis in the court's reasoning is on the Laurel incident, and the remainder of the opinion focuses on the fact situations.⁹⁷ Although the discussion of the incidents was separated, it does not automatically follow that they are distinct. This separation poses the question of whether the Decatur conduct is truly distinguishable from the Laurel conduct for the purpose of analysis.

In the Decatur incident, Teichner's conduct was distinguished correctly from the conduct in *Primus* and incorrectly from that in the Laurel incident. There were no associational rights involved in the Decatur incidents and Teichner's conduct could not be justified by claiming a first amendment right to disseminate information.⁹⁸ Furthermore, the justification⁹⁹ for the use of the contingent fee in the Laurel incidents was faulty. The court artificially distinguished the Laurel incidents from the Decatur incidents. The substantial contingent fee involved in both situations should have been considered as an aggravating factor as Teichner, *not* the Reverend or the community, was the beneficiary of the contingent fee. Since the behavior in Laurel was virtually identical to that in Decatur, it should have been treated similarly.

Additionally, the *Teichner* court went beyond the reasoning of *Primus* in an attempt to fit within, and to further clarify, the substantially undefined middle ground of first amendment protection.¹⁰⁰ The court did not articulate a clear distinction between pecuniary interests and associational interests; rather it apparently recognized a hazy area of protection for attorneys who stand to realize some pecuniary gain by their relationship with a community group or association. Indeed, the effect of the court's decision in *Teichner* is to dilute the impact of both *Primus* and *Ohralik*.

95. 75 Ill. 2d at 107, 387 N.E.2d at 272.

96. *In re Krasner*, 32 Ill. 2d 121, 127, 204 N.E.2d 10, 13 (1965).

97. The court's reason for declining analysis of the Decatur incidents is unclear. Perhaps the Laurel and Decatur incidents were too similar for the court to distinguish effectively.

98. In-person solicitation has been distinguished from informative activities. See note 32 *supra*.

99. See text accompanying notes 43-47 *supra*.

100. 75 Ill. 2d at 117, 387 N.E.2d at 277 (Ryan, J., specially concurring).

The need for a middle ground between these two cases was assessed accurately by the court,¹⁰¹ but the facts presented should not have been misused in order to establish it. Teichner's conduct did not fall into that middle ground, because a predominantly pecuniary concern was involved.¹⁰² Thus, the decision would have been more properly decided solely on the basis of *Ohralik*.

Finally, it is perplexing that the *Teichner* court decided the case in this manner, instead of using the guidelines established by *Primus* and *Ohralik*. One viable explanation is that the court felt that the five-year suspension recommended by the Hearing Board was too harsh.¹⁰³ Thus, the court may have created artificial distinctions in an effort to mitigate the effect of Teichner's conduct. By analogizing the case to *Ohralik* and *Primus* and thereby establishing a middle ground of protection, the court was able to effect and justify the reduced sanction. The validity and desirability of this approach is questionable.

SUGGESTIONS

Refinement of the court's standard in determining protected solicitation is imperative.¹⁰⁴ Since associational values and pecuniary interests are the major distinctions between *Primus* and *Ohralik*, one possible solution is to apply association as the sole determinative factor. An association that operated on a contingent fee basis, however, would present problems. Nevertheless, this is more acceptable than the *Teichner* result. It seems logical that even with a financial interest there would be less opportunity for abuse by an association, which by definition involves more than one person, than by an individual.¹⁰⁵

An additional alternative is offered in Justice Ryan's concurring opinion in *Teichner*.¹⁰⁶ Since solicitation triggers first amendment concerns, further deviations from the existing limitations should be defined by the United States Supreme Court. This would provide the needed clarification of the protection standards. If this clarification does not occur, uncertainties caused by the various jurisdictions' inconsistent interpretations will go unresolved. Indeed, as other jurisdictions establish a middle ground of protection in solicitation cases, *Teichner* should not be given significant consideration. In

101. *Id.* at 103, 387 N.E.2d at 271.

102. *Id.*

103. The Hearing Board recommended that Teichner be suspended from practicing law for five years. This was reduced by the Review Board which recommended a three-year suspension. (*In re Teichner*, No. 74-DH-18 (Hearing Bd. of Attorney Disciplinary Sys. Oct. 15, 1976), modified, No. 74-DH-18. Review Board of Attorney Disciplinary Sys. June 24, 1977.)

104. This need will become more evident in future cases in which there is an authentic middle ground of political or associational values coupled with a financial interest.

105. Even if the motive were pecuniary, it would be more difficult to persuade all of the members of an association to act improperly than it would be to persuade an individual.

106. 75 Ill. 2d at 116, 387 N.E.2d at 277 (Ryan, J., specially concurring).

order to prevent the perpetuation of this dilemma, it is urged that further action be taken by the judiciary and by the legislature,¹⁰⁷ first to reaffirm the need for solicitation rules, and then to align Illinois law with the *Primus* and *Ohralik* guidelines.

CONCLUSION

The United States Supreme Court has yet to clarify the standard for conduct falling between that involved in the *Primus* and *Ohralik* cases. In *re Teichner*, one of the first cases to interpret *Primus* and *Ohralik*, the Illinois Supreme Court established such a middle ground of protection for attorney solicitation cases. This decision will allow virtually any case to fit within the middle ground of protection. Its application will require merely an allegation that the solicitation was intended to assure that no one would be deprived of legal information. The reasoning in the case is not sound. It is likely that subsequent cases will seek to clarify this decision, as *Teichner* has made it more difficult to identify, and therefore to control, solicitation. Following *Teichner*, Illinois law in this area may be inconsistent with that of jurisdictions which may interpret the *Ohralik* and *Primus* distinctions more narrowly. The Illinois Supreme Court's decision deviated from the guidelines established by the United States Supreme Court, and now a refinement of solicitation rules by the courts, legislatures, and bar associations is necessary to prevent attorney solicitation rules from becoming meaningless.

Lisa A. Schwartz

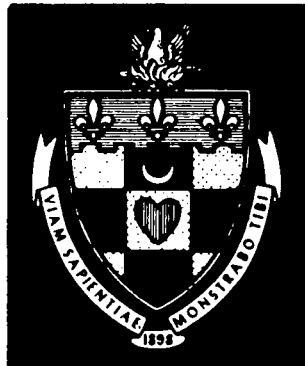
107. In order to clarify the role of solicitation, the courts, legislatures and bar associations will have to reevaluate their perception of solicitation. A determination must be made as to whether the rules against solicitation should be maintained and therefore enforced or, alternatively, eliminated.

Some forms of solicitation are permissible. Friends can refer clients without compensation and can encourage others to hire a specific attorney. See *Chreste v. Commonwealth*, 171 Ky. 77, 98, 186 S.W. 919, 926 (1916); *Solicitation*, *supra* note 13, at 107. Rules prohibiting solicitation are not necessarily inherently good. There are problems with the existing rules, other than their lack of specificity. They are often marred with inconsistencies. Memberships at country clubs and dinners with potential clients are methods used to gain clients. These are permitted forms of solicitation and the "business expenses" deduction indicates governmental approval of such solicitation. See *In re Cohn*, 10 Ill. 2d 186, 196, 139 N.E.2d 301, 306 (1956) (Bristow, J., specially concurring); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1957-58). It is argued that the rules tend to concentrate the business in the hands of a few and have the effect of preventing new attorneys from getting established. *Id.* at 681-82. However, the trend is to clearly define permissibility standards, not to abandon the solicitation rules. This is true in Illinois where there has been a traditionally lenient attitude towards solicitation. See Comment, *Ambulance Chasing in Illinois: A Success Story*, 1957 U. ILL. L.F. 309.

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