Washington University Law Review

Volume 1978 | Issue 1

January 1978

Solicitation of Public and Private Litigation Under the First Amendment

Donald P. Simet
State University of New York, Buffalo

SOLICITATION OF PUBLIC AND PRIVATE LITIGATION UNDER THE FIRST AMENDMENT

DONALD P. SIMET*

The United States Supreme Court has recently agreed to hear two different cases concerning lawyer solicitation.[1] This action follows closely the Court's decision in *Bates v. State Bar*,[2] which recognized that attorneys have at least a limited right to advertise under the first amendment. The first of these cases, *In re Smith*,[3] raises the question of whether a non-profit organization, the American Civil Liberties Union (ACLU), contrary to South Carolina's Code of Professional Responsibility,[4] may solicit cases that involve substantial civil liberties questions when the organization seeks a fee for its legal services. The second case, *Ohio State Bar Association v. Ohralik*,[5] raises the issue of whether an individual attorney, contrary to Ohio's Code of Professional Responsibility,[6] may engage in in-person client solicitation in order to obtain a fee for his services. Because 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, there is a compelling need to examine the problems they raise.

After presenting the solicitation cases, the article will analyze the nearest precedents bearing on each. *In re Smith* will be examined in light

---

* Assistant Professor, School of Management, State University of New York at Buffalo. B.S., 1958, Canisius College; J.D., 1964, School of Law, State University of New York at Buffalo; Ph.D., 1974, University of Wisconsin.

1. Ohio State Bar Ass'n v. Ohralik, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976), *prob. juris. noted*, 434 U.S. 814 (1977); *In re* Smith, — S.C. —, 233 S.E.2d 301, *prob. juris. noted*, 434 U.S. 814 (1977). For a general discussion of attorneys' first amendment rights, including solicitation, see Note, *Attorneys' Rights Under the Code of Professional Responsibility: Free Speech, Right to Know, and Freedom of Association*, 1977 WASH. U.L.Q. 687.

2. 433 U.S. 350 (1977).

3. — S.C. —, 233 S.E.2d 301, *prob. juris. noted*, 434 U.S. 814 (1977).

4. SOUTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5)(a) & (c).

5. 48 Ohio St.2d 217, 357 N.E.2d 1097 (1976), *prob. juris. noted*, 434 U.S. 814 (1977).

6. OHIO CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A) and DR 2-104(A).

of *NAACP v. Button*,[7] which also involved solicitation by a non-profit organization of cases that raised substantial constitutional issues. The NAACP, however, is not an organization wholly devoted to litigation nor does it accept fees for its legal service. The in-person solicitation of clients by a private attorney seeking his own financial gain raises problems that parallel much of the Court's reasoning in the recent pharmacist and attorney advertising cases, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[8] and *Bates v. State Bar*.[9] The *Ohralik* case, therefore will be examined in light of these decisions and the special difficulties presented by in-person solicitation.

I. THE SOLICITATION CASES TO BE REVIEWED BY THE COURT

In re Smith[10] involved an alleged violation of a South Carolina Code of Professional Responsibility provision that permits an attorney to solicit clients on behalf of a non-profit organization

> only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the service 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 organizations do not include the rendition of legal service.
>
> (c) Such organization does not derive a financial benefit from the rendition of legal service by the lawyer.[11]

Ms. Smith, a member of the South Carolina Bar, acting upon the invitation of the South Carolina Council on Human Relations, arranged a meeting with several women who had been surgically sterilized. At the meeting she advised them that they could bring an action to recover damages from the physician who performed the operations. Soon thereafter Ms. Smith sent a letter to Mrs. Williams, one of the women who had attended the meeting, stating that the ACLU would like to bring such an action on Mrs. Williams' behalf. Apparently, Ms. Smith wanted Mrs. Williams to join in a class action filed in the name of Jane Doe and others similarly situated, which alleged that the sterilization operations violated

7. 371 U.S. 415 (1963).
8. 425 U.S. 748 (1976).
9. 433 U.S. 350 (1977).
10. — S.C. —, 233 S.E.2d 301, *prob. juris. noted*, 434 U.S. 814 (1977).
11. SOUTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5)(a) & (c), *quoted in In re* Smith, — S.C. at —, 233 S.E.2d at 304-05.

various constitutional guarantees and demanded that the physician concerned be enjoined and held liable for damages.[12]

The South Carolina Supreme Court upheld the constitutionality of the solicitation conditions imposed on non-profit organizations. The court examined the opinion of the disciplinary panel, which had originally heard the respondent's case, and concluded that the opinion correctly disposed of the issues raised on appeal.[13] The panel noted that, with the possible exception of *NAACP v. Button*,[14] the United States Supreme Court decisions upholding client solicitation by non-profit organizations involved organizations not primarily concerned with providing legal services.[15] The *Button* decision, moreover, "appears to characterize the NAACP as a political, rather than legal organization, and depicts litigation as an adjunct to the overriding political aims of the organization."[16] The ACLU, on the other hand, is a legal services organization which accepts attorney fees from its clients. The collection of these fees violated the prohibition against "deriving a financial benefit"[17] from any case solicited by a non-profit organization.

Ohio State Bar Association v. Ohralik[18] concerned an alleged violation of two disciplinary rules of Ohio's Code of Professional Responsibility:

> A lawyer shall not recommend employment . . . of himself . . . to a non-lawyer who has not sought his advice regarding employment of a lawyer [and]
>
> A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . .[19]

Mr. Ohralik, a member of the Ohio Bar, after learning that Carol McClintock and her passenger, Wanda Lou Holbert, were involved in an automobile accident, visited Carol at the hospital where she was being treated for injuries. There he discussed the merits of the potential legal claim arising out of the accident and obtained consent to represent her.

---

12. — S.C. at —, 233 S.E.2d at 302.
13. *Id.* at —, 233 S.E.2d at 302, 305-06.
14. 371 U.S. 415 (1963).
15. — S.C. at —, 233 S.E.2d at 305-06.
16. *Id.*
17. *See* note 11 *supra* and accompanying text.
18. 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976), *prob. juris. noted*, 434 U.S. 814 (1977).
19. OHIO CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A) and DR 2-104(A), *quoted in* Ohio State Bar Ass'n v. Ohralik, 48 Ohio St. 2d at 220, 357 N.E.2d at 1098-99.

Later the respondent visited Wanda Lou Holbert at her house, advised her that she had a substantial legal claim, and stated that he was prepared to represent her. Wanda orally agreed to retain him.[20] Subsequently, both Carol and Wanda Lou sought to disengage Ohralik.[21]

The Ohio State Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline alleging that Ohralik's conduct violated Ohio's Code of Professional Responsibility. At his hearing, the respondent produced a tape recording of his conversation with Wanda Lou Holbert which, he claimed, substantiated the existence of a binding service contract. Ohralik had concealed the recorder during the conversation. Although the tape demonstrated Wanda Lou's consent, it also confirmed the respondent's solicitation. The board therefore found Ohralik in violation of the Code.[22]

On appeal to the Ohio Supreme Court, the respondent claimed that the rules banning in-person solicitation deprived him of his free speech right protected by the first and fourteenth amendments of the Constitution. In a brief *per curiam* opinion, which did not explicitly discuss the constitutional issues, the court agreed that the disciplinary rules had been violated and indefinitely suspended Ohralik from the practice of law.[23]

II. SOLICITATION INVOLVING FEES BY A NON-PROFIT LEGAL ORGANIZATION: *NAACP v. BUTTON*

The facts in *NAACP v. Button*[24] are strikingly similar to those in *In re Smith*.[25] An NAACP branch invited one of its staff attorneys to a meeting of parents and children to explain the legal steps involved in desegregating a school system. Printed forms authorizing NAACP attorneys to represent litigants in such actions were made available to those persons willing to become plaintiffs.[26]

The Court considered only whether a Virginia statute prohibiting solicitation of clients violated the first amendment as applied to the states through the fourteenth amendment. The provision banned solicitation by

> an agent . . . *for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law*

20. 48 Ohio St. 2d at 217-18, 357 N.E.2d at 1097-98.
21. *Id.* at 219, 357 N.E.2d at 1098.
22. *Id.* at 218-19, 357 N.E.2d at 1098.
23. *Id.* at 220, 357 N.E.2d at 1099.
24. 371 U.S. 415 (1963).
25. — S.C. —, 233 S.E.2d 301, *prob. juris. noted*, 434 U.S. 814 (1977).
26. 371 U.S. at 421, 422 & n.6.

> *in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability . . . .*[27]

Justice Brennan's majority opinion initially rejected the assertion that solicitation was not protected by the first amendment. Litigation as employed by the NAACP, he reasoned, is a "means for achieving the lawful objectives of equality of treatment"[28] and "is thus a form of political expression."[29] Even if the NAACP's conduct was unprotected, however, Brennan concluded that the statute was overly broad:

> Standards of permissible statutory vagueness are strict in the area of free expression. . . . Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.[30]

Brennan also rejected Virginia's claim that the state's interest in regulating professional activity justified the broad ban on solicitation. Restrictions on free speech and assembly required a compelling state interest.[31] Moreover, to emphasize that the decision did not rest entirely on the overly broad scope of Virginia's ban, Brennan reiterated:

> We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. Nothing that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application of Chapter 33 to those activities. A fortiori, nothing in this record justifies the breadth and vagueness of the Virginia Supreme Court of Appeals' decree.[32]

As noted above, the *Smith* court distinguished *Button* as a case that involved solicitation by a political rather than legal organization. This distinction seems specious. It is difficult to maintain that the Court in

27. *Id.* at 424 n.7 (emphasis in original).
28. *Id.* at 429.
29. *Id.*
30. *Id.* at 432-33 (citations omitted).
31. *Id.* at 439.
32. *Id.* at 444.

Button did not regard litigation as a primary function of the NAACP. As Justice Brennan noted, the NAACP "devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes."[33]

Nevertheless, *Button* did not turn on the primary function of the organization being regulated (even if this could be unambiguously identified). Rather, the Court considered whether the NAACP's solicitation activities, regardless of their primary function, were protected speech. In deciding that issue, Justice Brennan held that litigation solicited by an organization or its agent in order to achieve lawful and, indeed, constitutional objectives is "a form of political expression."[34] *In re Smith*[35] concerns the same kind of litigation; the ACLU solicited a client in order to assert various constitutional guarantees which it believed were denied to her. To prohibit the ACLU from engaging in such activities would produce the same chilling effect on the assertion of legal and constitutional guarantees which the Court found objectionable in *Button*.

Under the *Button* analysis, it is also difficult to find any compelling state interest in the regulation of the ACLU's activities. The *Smith* court failed to explicitly identify such an interest. Furthermore, although the acceptance of a fee arguably distinguishes the activities of the ACLU from those of the NAACP in *Button*, the South Carolina Supreme Court's description of the use of these fees negates the distinction: The " 'fees go into its central fund and are used among other things to pay costs and salaries and expenses of staff attorneys.' "[36] If these fees are used to pay for the salaries of those who assert the constitutional rights of the clients solicited by the organization, they constitute a means of litigating lawful and constitutional objectives and are "thus a form of [protected] political expression."[37] Furthermore, as the opinion in *In re Smith* indicates, there is no disagreement over the objectives sought by the ACLU as a legal organization. " 'The evidence presented indicated that the ACLU has only entered cases in which substantial civil liberties questions are involved . . . .' "[38]

33. *Id.* at 419-20.
34. *Id.* at 429.
35. *In re* Smith, — S.C. —, 233 S.E.2d 301, *prob. juris. noted*, 434 U.S. 814 (1977).
36. *Id.* at —, 233 S.E.2d at 305.
37. NAACP v. Button, 371 U.S. at 429.
38. — S.C. at —, 233 S.E.2d at 303.

III. IN-PERSON SOLICITATION BY AN INDIVIDUAL ATTORNEY FOR HIS PRIVATE GAIN

The immediate predecessor to *Bates v. State Bar*[39] was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[40] decided by the Supreme Court in 1976. The issue in *Virginia Pharmacy* was whether a state statute banning the advertising of prescription drugs violated the first amendment. The action was brought by an individual consumer and two consumer organizations.

Justice Blackmun, writing for the majority, first rejected petitioner's argument that prescription price advertising constituted commercial speech which under *Valentine v. Chrestensen*[41] was not protected by the first amendment. The Court noted that the commercial speech doctrine had been greatly weakened by subsequent decisions[42] and thus applied the traditional balancing test to determine the advertisement's constitutionality.[43]

Substantial individual and societal interests weighed against the validity of the advertising ban. Clearly, the consumer has an interest in receiving price information, especially because the lack of such information falls hardest on "the poor, the sick, and particularly the aged."[44] Society in general also has an interest in the free flow of this information:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[45]

The effects of advertising on the pharmaceutical profession were insufficient to counterbalance these individual and societal interests. Justice Blackmun observed that providing prescription drugs does not involve a high degree of professional skill. Because about ninety-five percent of all prescriptions are filled from compounds prepared by

39. 433 U.S. 350 (1977).
40. 425 U.S. 748 (1976).
41. 316 U.S. 52 (1942).
42. 425 U.S. at 762. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).
43. 425 U.S. at 762-70.
44. *Id.* at 763.
45. *Id.* at 765.

pharmaceutical manufacturers, druggists could not claim that they frequently used their clinical skill in compounding drugs. Pharmacists must therefore exercise their professional skills by consulting with physicians as to what should be prescribed, monitoring the quantity and kinds of drugs consumed by regular customers, and insuring that the stocks used to fill prescriptions have retained their quality. This reduction in professional service diminished the justification for maintaining a high price level for prescription drugs through a ban on price advertising.[46]

Blackmun also argued that any decline in the level of professional service caused by lower prices could be effectively prevented by state regulation: "Surely any pharmacist guilty of professional dereliction . . . will promptly lose his license."[47] In addition, the advertising ban does not prevent "the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event."[48]

Finally, Blackmun rejected the argument that consumers lack the capacity to choose between professional and low priced service. As he states:

> [A]n alternative to this highly paternalistic approach . . . is to assume . . . that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the 'professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.[49]

In striking down Virginia's total ban on advertising prescription drugs,[50] Blackmun noted that time, place, and manner restrictions on advertising that "serve a significant governmental interest"[51] and "leave open . . . alternative channels for communication"[52] would remain permissible. False and misleading advertising would certainly be subject

46. *Id.* at 752, 766-68.
47. *Id.* at 768-69.
48. *Id.* at 769.
49. *Id.* at 770.
50. *Id.*
51. *Id.* at 771.
52. *Id.*

to control. In addition, transactions which are themselves illegal could not be advertised.[53] Finally, the Court noted that "the special problems of the electronic broadcast media are . . . not [involved] in this case."[54]

The reasoning that upheld advertising in *Virginia Pharmacy* also applies to in-person solicitation of clients by an attorney seeking financial gain. If the advertiser's interest in attracting clients is legitimate under the first amendment, so is the solicitor's interest in obtaining clients. If consumers, either individually or collectively, benefit from advertising information because they can make a more informed decision, they also benefit from an explanation of their legal rights by in-person solicitation. Indeed, while the advertiser and solicitor both have the same objective of attracting clients, the solicitor who reviews the merits of a particular claim with a potential client is, if anything, providing him with more information upon which to make an intelligent judgment.

Nevertheless, it can be argued that individual solicitation creates less price competition than mass advertising, and thus produces less consumer benefit. Mass advertising lowers prices through competition and the expectation of increased business. The consumer can easily compare published prices. Individual solicitation, on the other hand, does not reach a mass market at a reduced per unit cost. Rather, it places a premium on the consumer's knowledge of prices and his willingness to bargain. Although this knowledge may be enhanced by multiple solicitation, any concomitant price reduction would fall short of that produced by mass advertising.

It can also be argued that individual solicitation presents greater opportunities for "overreaching" by persistent attorneys. This fear, however, does not justify the imposition of a total ban. Extreme behavior such as overreaching is more properly controlled by specific regulation that places less severe burdens on constitutionally protected speech.

Although the factors favoring the free dissemination of service and price information in *Virginia Pharmacy* seem to apply with much the same force to in-person solicitation, we must consider whether there are special characteristics of the legal profession that outweigh the advantages of solicitation. *Bates v. State Bar*[55] specifically discussed the characteristics of the legal profession raised as justifications for limiting the dissemination of service and price information.

53. *Id.* at 771-72.
54. *Id.* at 773.
55. 433 U.S. 350 (1977).

Bates concerned the advertisement of attorney's fees charged for uncontested divorces, separations, adoptions, uncontested personal bankruptcies, and name changes. Under a disciplinary rule governing attorney ethics,[56] Arizona prohibited the advertising of legal services. Justice Blackmun again spoke for the Court. After setting forth the individual and societal interests that weighed so heavily in favor of advertising in *Virginia Pharmacy*,[57] Blackmun examined the characteristics of the legal profession offered to justify the advertising ban. First, the state bar argued that legal services involve work whose content and quality must be tailored to the individual case. It would be difficult, therefore, to inform clients accurately about needed services without examining their cases. Thus, advertising would be inherently misleading. Blackmun admitted that "many services performed by attorneys are indeed unique, [and] it is doubtful that any attorney would or could advertise fixed prices for services of that type."[58] Nevertheless, the services advertised in the instant case were routine ones, the "only services which lend themselves to advertising."[59] In addition, Blackmun noted that "[a]lthough the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself."[60]

Closely related to the nature of the work is the problem of informing the client about the level of skill required to perform it. Blackmun's answer is familiar: If clients are naive about the importance of obtaining a skilled performance, it is the duty of the bar, not the individual advertiser, to inform them of this. While advertising is not a perfect medium for conveying all relevant information, it is better that clients be given some information about the work which they can understand (the price of routine services) rather than none.[61]

The respondents also argued that advertising would adversely affect the quality of legal services rendered. Justice Blackmun replied that "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising."[62] He noted, however, that as practitioners

56. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101 (B), *adopted by* ARIZ. SUP. CT. R. 29 (a).
57. 433 U.S. at 363-66.
58. *Id.* at 372.
59. *Id.*
60. *Id.* at 374.
61. *Id.*
62. *Id.* at 378.

specialize more in the delivery of a limited number of routine services, the quality of these services may increase.

Respondents argued that two other characteristics of the legal profession supported the ban: the lawyer's orientation toward service and the profession's respected image. Conceivably, advertising and the emphasis on profit may impair a lawyer's orientation toward service to others. Blackmun dismissed this argument, noting that it rested on the "self-deception"[63] that lawyers must regard themselves as not involved in earning a livelihood in order to maintain a service orientation. He added: "rare is the client . . . who enlists the aid of an attorney with the expectation that his services will be rendered free of charge."[64] Regarding the community's image of the lawyer, Blackmun referred to "studies [which] reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services."[65]

The Arizona Bar Association further claimed that advertising would stir up litigation and create societal conflicts. Blackmun, however, was more impressed with the American Bar Association's estimate that " 'the middle 70% of our population is not being reached or served adequately by the legal profession.' "[66] Advertising might encourage these individuals to consult attorneys by reducing their fear concerning the cost of services and by informing them about who was offering the needed services.[67]

Despite the argument's failure in *Virginia Pharmacy*, respondents in *Bates* claimed that advertising would increase the cost of services, thus raising a barrier to entry into the profession which would result in a loss of competiton. Blackmun rejected this, citing studies of other professions and skilled occupations that showed advertising substantially reduced prices.[68] In addition, the entry barrier into the legal profession was not based on cost but rather on the time required to develop the contacts and

63. *Id.* at 368.

64. *Id.*

65. *Id.* at 370, (citing *Report of the ABA Special Committee on Availability of Legal Services*, in ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, REVISED HANDBOOK ON PREPAID LEGAL SERVICES 25 (1972)); ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES (1973).

66. 433 U.S. at 376.

67. *Id.*

68. *Id.* at 377 & n.34. Justice Blackmun conceded that the effect of advertising on the price of professional services had not yet been demonstrated. He noted, however, the favorable effect advertising had had on retail product prices. *See* J. CADY, RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS (1976); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. LAW & ECON. 337 (1972).

reputation needed to attract clients. Advertising, by lessening this barrier, would actually result in an increase in competition.[69]

Finally, respondents argued that if the ban were lifted the difficulty of policing abuses such as misleading advertising and distorted service or price claims would be great.[70] In response, Blackmun claimed that most lawyers could be trusted to "abide by their solemn oaths to uphold the integrity and honor of their profession."[71] The self-interest of these practitioners could be counted on "to assist in weeding out those few who abuse their trust."[72]

Many of the arguments weighing against advertising in the legal profession because of its peculiar characteristics actually favor in-person solicitation. Because legal services often must be tailored to the individual case, Justice Blackmun limited advertising to routine or, at least, specifically described services.[73] In-person consultation provided in the course of solicitation does not require such a limitation, because it allows an attorney to discuss the particular needs of a specific case. Permitting the advertisement of routine services, on the other hand, leaves the consumer uninformed as to many other services available to him.

It is unrealistic to expect the bar to bear the burden of informing clients about the importance of selecting an attorney with appropriate skills. In-person consultation, however, would at least afford the consumer an opportunity to inquire about and judge the attorney's competence. The fact that the prospective client should have this opportunity, of course, does *not* mean that the attorney should be permitted to make false or misleading claims about his skill.

Furthermore, Justice Blackmun's reply to the charge that advertising will affect the service orientation of the bar[74] applies with equal force to in-person solicitation. In both situations, the objection merely reveals the fact that attorneys ordinarily profit from their services. Similarly, Justice Blackmun's argument concerning the professional image of attorneys[75] applies as easily to in-person solicitation as to advertising. Either practice can reduce the prospective client's fears about the cost of services and can, thereby, decrease the number of individuals who forego needed legal assistance.

69. 433 U.S. at 377-78.
70. *Id.* at 379.
71. *Id.*
72. *Id.*
73. *See* notes 57-59 *supra* and accompanying text.
74. *See* notes 63-64 *supra* and accompanying text.
75. *See* note 65 *supra* and accompanying text.

Although solicitation does not appear to threaten the quality and selflessness of legal service any more than advertising does, its effect on another traditional characteristic of the profession, self-regulation, may be more troublesome. Advertising by its nature is highly visible, not only to consumers, but also to other members of the profession as well as to reviewing bar associations. Solicitation, on the other hand, is private; exposing its abuses depends more upon the perceptions of unsophisticated clients. Indeed, the Court's major reservations concerning advertising in *Bates* centered upon the problem of client deception. As Justice Blackmun stated:

> In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. . . . In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.[76]

If the problem is client deception, however, then it is this area of solicitation or advertising that should be regulated.

The Task Force on Lawyer Advertising in its recent report to the Board of Governors of the American Bar Association has recommended, as one of two alternatives, a proposal on solicitation that specifically addresses this problem:

> (A) A lawyer who has given unsolicited advice to a layperson . . . shall not accept employment resulting from that advice if:
>
> (1) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or deceptive . . . or
>
> (2) The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises or benefits, overpersuasion, overreaching, or vexatious or harassing conduct.[77]

The Task Force's proposal adds two dimensions. First, it clearly recognizes that clients should be free to enter into agreements to retain an attorney arising out of in-person solicitations. Second, it establishes

76. 433 U.S. at 384.

77. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-104 (Aug. 1977 Amendment, Proposal B), 46 U.S.L.W. 12 (Statutes Aug. 23, 1977).

certain guidelines for attorneys when giving unsolicited advice. Nevertheless, some of the language of the Task Force's proposal, such as the terms "overpersuasion" and "overreaching," are vague and may not put an attorney on notice as to what conduct is punishable. In this regard, we need to re-examine Justice Blackmun's rejection of the vagueness or overbreadth doctrines in "ordinary commercial" speech.[78]

In *Bates*, Blackmun argued that advertisers would not be inhibited by an overbroad prohibition because their self-interest was at stake. Furthermore, advertisers, as the providers of the service in question, could determine what information was truthful.[79] These arguments are not as persuasive when applied to solicitation. Although an attorney who gives unsolicited advice would have the same self-interest motivation, rather than being asked to judge the truthfulness of his speech, he is told to evaluate whether his advice is "overpersuasion" or "overreaching." Making this judgment does not depend upon facts known to the attorney but rather upon a knowledge of the client's particular susceptibility and the unguided judgments of those asked to try an attorney on such a charge.

Moreover, it is doubtful that a vague ban on "overreaching" would be an effective means of preventing only truly objectionable conduct. Nor is it clear that such a prohibition would be administered in a way that would reach clear abuses rather than merely conduct thought to lack good taste and professional decorum.

In addition, vague prohibitions tend to discriminate against certain segments of the bar. As Jerome Carlin has noted, the original ethical canons on solicitation and advertising grew out of a conception of law as practiced in small communities where the greater ease of knowing an attorney either personally or by his reputation presumably made advertising and solicitation unnecessary.[80] This conception hardly squares with the current practice of law in larger towns and cities. Nor does it take into account the structure of the bar in most metropolitan areas: whereas large firms enjoy the patronage of those clients who are most able to afford legal services, many small firms and solo practitioners are engaged in a highly competitive struggle to attract a limited number of clients whose ability to afford legal services is quite modest.[81] Studies by Carlin as well

78. Bates v. State Bar, 433 U.S. 350, 379-81 (1977).
79. *Id.*
80. J. CARLIN, LAWYERS ON THEIR OWN 155-67 (1962).
81. *Id.* at 206-11.

as Handler[82] support the view that these economic pressures have contributed substantially to past violations of the professional restrictions on solicitation. Moreover, bar members who enjoy a more elite and secure status and who are often called upon to judge such violations have not always been sympathetic to the plight of the small firm and the solo attorney.[83]

Vague prohibitions against solicitation, therefore, do not fall equally on all members of the bar. Instead, they create a trap for those who compete for the least lucrative segment of the legal market; a trap which is not only baited by practical necessity but which also is well concealed by the vagueness of its boundaries.

Finally, any assessment of the balance to be struck between protecting the free choice of the consumer and the free speech of an attorney in soliciting clients must take into account the precision of the instrument which attempts to strike this balance. Drafting clear regulations that will place attorneys on notice as to what conduct is permissible is a small price to pay to achieve a fair balance between the duties of an attorney and the rights of legal consumers. Although vagueness and overbreadth are judicial doctrines, they are first the product of imprecise and uninstructive draftsmanship.

IV. CONCLUSION

In re Smith[84] and *Ohio State Bar Association v. Ohralik*[85] raise two quite different problems for the Supreme Court: in-person solicitation by an attorney for his own profit and solicitation by a nonprofit legal organization which seeks attorney fees in litigation involving a substantial question of civil liberties. An analysis of the ACLU's right to engage in solicitation must consider the importance of the legal and constitutional freedoms which that organization seeks to voice. The acceptance of attorney fees in such litigation is merely a means of allowing such expression. Furthermore, the fact that the ACLU is a legal organization that advocates the legal and constitutional rights of citizens requires, rather than negates, the application of the Court's rationale in *NAACP v. Button*[86] to the kind of solicitation engaged in by the ACLU.

82. J. HANDLER, THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLESIZED CITY (1967).

83. J. CARLIN, *supra* note 80, at 173-84.

84. — S.C. —, 233 S.E.2d 301, *prob. juris. noted*, 434 U.S. 814 (1977).

85. 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976), *prob. juris. noted*, 434 U.S. 814 (1977).

86. 371 U.S. 415 (1963).

The solicitation of a suit between private litigants by an attorney, for his personal gain, does not raise the issue of freedom to express or litigate important civil and constitutional guarantees. A balancing test that requires only a reasonable governmental interest as a condition to the speech regulation is more appropriate. Even under this less stringent analysis, however, the reasoning in *Bates v. State Bar*[87] would seem to require the Court to invalidate the ban against in-person solicitation. Solicitation, like advertising, serves the interests of both the attorney who is legitimately seeking his own gain and the consuming public who can benefit from a detailed explanation of the merits of their specific cases. The state's interest in preserving the quality, selflessness, and esteemed image of legal services does not appear to be substantially greater in the case of solicitation than it is in advertising. The only interests that the state has in regulation are confined to the avoidance of consumer deception and the maintenance of voluntary consumer decisions. This interest can be served by drafting professional codes which will inform the attorney of permissible conduct. Such an approach would not injure the autonomy of consumer choice and, indeed, might give it specific protection. In balancing the interests of the attorney and the consumer in this area, the Court and the bar should take into account the vagueness of the instrument or language by which the state attempts to regulate "persuasion." Careful draftsmanship is a slight burden to bear, especially where freedom of speech and honorable, life-long careers are at stake.

87. 433 U.S. 350 (1977).