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# YALE LAW & POLICY REVIEW

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## In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3

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### INTRODUCTION

In order to “pursue its goal of assuring the highest standards of professional competence and ethical conduct,”<sup>1</sup> the American Bar Association (ABA) publishes the *Model Rules of Professional Conduct*. These rules form the basis for the

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\* Yale Law School, J.D. expected 2011; Harvard University, A.B. 2006. I would like to thank Professor Robert Gordon for his valuable comments, my lead editor Fran Faircloth for her guidance and tolerance, and my fiancée Karima for all her love and support.

1. Model Rules of Prof'l Conduct preface (2000).

ethical requirements imposed by many state bars, as well as states' legal regulation of the profession.

However, while the *Model Rules* aspire to bring out the best in the profession, one rule in particular seems crafted to achieve the very opposite. Model Rule 7.3 regulates "direct contact with prospective clients," limiting solicitation by attorneys of persons known to be in need of legal counsel and prohibiting real-time solicitation altogether. The rule states, in relevant part,

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.<sup>2</sup>

Various state bars have imposed similar strictures with disciplinary consequences for violators. The rule also tracks many states' historical prohibitions on the practice of barratry.<sup>3</sup>

Model Rule 7.3 is the last vestige of the organized bar's antipathy towards lawyers' active solicitation of clients. The ABA justifies the rule as a protection of prospective clients from the "potential for abuse inherent in . . . [a situation] fraught with the possibility of undue influence, intimidation, and over-reaching."<sup>4</sup> This is only a recent development; for most of its history, the professional elite were primarily worried that solicitation would "stir up litigation" and transform the prestigious practice of the law into a base trade driven by the pursuit of wealth.<sup>5</sup> Such rationales have overtly regressive implications. The worry that solicitation would stir up litigation oftentimes masked an underlying fear that the poor and disempowered would utilize the legal system

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2. *Id.* R. 7.3(a). For the purpose of simplicity, I call the practices prohibited by sections (a) and (b) of Model Rule 7.3 "direct solicitation" throughout this Note. When I use the term "solicitation," I intend its usual connotation of any efforts to contact would-be clients in order to drum up business.

3. Barratry is defined as "Vexatious incitement to litigation, esp. by soliciting potential legal clients." BLACK'S LAW DICTIONARY 170 (9th ed. 2009); *see also* KERRY M. DIGGIN, 14 AM. JUR. 2D CHAMPERTY, MAINTENANCE, ETC. § 16 (2010) ("Barratry, or common barratry, was a crime at common law and has been defined as the offense of frequently exciting or stirring up suits and quarrels between others."). Some state barratry laws still appear to be particularly severe. *See, e.g.*, TEX. PENAL CODE ANN. § 38.12(a)(2) (West 2009) ("A person commits an offense if, with intent to obtain an economic benefit the person . . . solicits employment, either in person or by telephone, for himself or for another.").

4. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt.1 (2000).

5. *See infra* Part I.

to advance their own interests.<sup>6</sup> Furthermore, the notion that the practice of law should transcend pecuniary concerns is squarely the privilege of the most financially secure members of the profession.

In recent years, the bar's power to regulate the pursuit of clients has diminished. In *Bates v. State Bar of Arizona*,<sup>7</sup> the Supreme Court determined that the First Amendment extended some protection to attorney advertising, and the case law since then has, for the most part, expanded this sphere. Forced to retreat, the organized bar still holds sway over direct solicitation of prospective clients. The result is a senseless policy. Prospective clients lose access to useful information. Adversely situated third parties manipulate the uneducated. More established and elite elements of the bar enjoy an artificial advantage over newcomers and personal injury lawyers. The direct solicitation that does occur is dominated by poor-quality or unethical practitioners. Whether the result of some well-intentioned mistake or rent-seeking subterfuge, Model Rule 7.3 is not good policy. The prescription this Note sets forth is simple: Abolish the Rule and any other limitations on direct solicitation beyond those already regulating the formation of contracts.

This Note proceeds in four parts. In Part I, I briefly chronicle client solicitation by lawyers in United States history. Part I explains that the origins of the current ban arose not from a concern for protecting vulnerable clients but out of a fear that solicitation might stir up litigation and dishonor the profession. Part II then describes the liberalization of client solicitation since the 1970s. The Supreme Court has carved out several exceptions to the blanket ban on direct solicitation through reliance on its commercial speech jurisprudence. Part III critiques Model Rule 7.3. I argue first that the exceptions to the ban on direct solicitation may cause more harm than good, suggesting a possible ulterior motive for the rule. I then explain how the rule's alleged purpose—protecting vulnerable individuals from exploitation by unscrupulous lawyers—is better served with direct solicitation than without it. Part III also considers the information deficits and market asymmetries caused by the rule, as well as its effects within the legal profession. In Part IV, I reexamine the historical argument that solicitation is harmful because it stirs up litigation. I contend that this rationale can be reframed as an argument that litigation often arises at the expense of superior options, and direct solicitation creates incentives on the part of lawyers to avoid these better alternatives. However, despite this improved version of the argument, I still conclude that the needs of justice are better served with direct solicitation than without it. A brief Conclusion follows in which I suggest some means of attorney regulation that are superior to the blanket ban on direct solicitation.

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6. *See id.*

7. 433 U.S. 350 (1977).

## I. A BRIEF HISTORY OF SOLICITATION IN THE UNITED STATES

Solicitation of potential clients, particularly direct solicitation, has long been regarded as a discredit to the legal profession. The origins of this sentiment date back to medieval England and appear to have had two separate, yet related, rationales. First, the bar sought to avoid defiling itself with base economic motives. Lawyering was a form of public service, not a trade, and it constituted a breach of etiquette to behave otherwise.<sup>8</sup> English barristers, for example, traditionally wore black robes that included a small pocket in the back in which solicitors would surreptitiously place the barrister's fees since the lawyer, as a gentleman, should not be motivated by financial gain or even be aware of how much he was paid.<sup>9</sup>

Second, solicitation was believed to "stir up litigation," which was a crime in England since at least the fourteenth century.<sup>10</sup> Historical accounts differ as to the underlying reason behind this antipathy. Several accounts voice the worry of the time that involving third party legal representation would precipitate unjust outcomes in an imperfect system: The abler advocate might manipulate procedural niceties to triumph over the righteous claimant,<sup>11</sup> and apparently, the courts were particularly susceptible to corruption.<sup>12</sup> Others claim that litigation was simply viewed as an evil per se.<sup>13</sup> It is possible that both views are right: Though the justice system eventually purged many of the defects that precipitated the anti-litigation animus, perhaps sentiment failed to keep pace with reality, enabling opposition to client solicitation to persist despite the lack of an underlying rationale. And, as with the historical rationale against champerty,<sup>14</sup> some feared that allowing individuals to profit, rather than simply find justice,

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8. *Id.* at 371 ("Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on 'trade' as unseemly." (citing 5 H. DRINKER, *LEGAL ETHICS* 210-11 (1953))).

9. See William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War To Govern Client Development*, 37 *ARIZ. ST. L.J.* 255, 258 (2005).

10. See Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 *U. CHI. L. REV.* 674, 675 (1958).

11. See Max Radin, *Maintenance by Champerty*, 24 *CALIF. L. REV.* 48, 56 (1935).

12. See Comment, *supra* note 10, at 675.

13. See Note, *Advertising, Solicitation and the Profession's Duty To Make Legal Counsel Available*, 81 *YALE L.J.* 1181, 1188-89 (1972).

14. Though disagreement exists over the specific elements required to prove champerty, it has generally been understood as "an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim." *BLACK'S LAW DICTIONARY*, *supra* note 3, at 262.

from litigation meant that improper cases would find their way into the courts at a greater rate.<sup>15</sup>

Though limitations on barratry extend back to medieval England, the history of ethical limitations on lawyer solicitation of clients has a uniquely American story. The work of Roscoe Pound, the famed dean of Harvard Law School, provides a useful chronicle.<sup>16</sup> The colonial period's regime expressed deep-seated hostility to the idea of a professional bar; mid-seventeenth-century Virginia, for example, prohibited engaging in legal representation "for any kind of reward or profit directly or indirectly . . ." <sup>17</sup> The result was a black market of sorts for legal representation, where "the work that ought to have been in the hands of trained, responsible members of a profession fell of necessity into the hands of officers of the court, sharpers and pettifoggers."<sup>18</sup> These pettifoggers practiced a sort of "mercenary" lawyering, actively soliciting business, and were condemned by contemporaries such as John Adams for fomenting unnecessary lawsuits.<sup>19</sup> As in England, the animus stemmed once again from opposition to "stirring up litigation"<sup>20</sup> and the impropriety of turning the legal profession into a business. It appears that critics of solicitation soon began conflating these two distinct rationales, though, decrying the stirring up of litigation precisely *because* it reflected poorly on the profession.

By the nineteenth century, however, the pendulum had swung to the opposite extreme, with many states opening the practice of law to wider and wider segments of the population. Many states abolished educational requirements, and a few even opened up the legal profession to the entire voting population.<sup>21</sup> Dubbing this period the "era of decadence," Pound decries it for treating the practice of law not "as a profession, with requirements for admission such as public policy may prescribe, but as a mere private, money-making occupation."<sup>22</sup> Advertising and solicitation were open and commonplace. Attorneys, particularly young lawyers seeking to establish themselves, frequently advertised

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15. See Radin, *supra* note 11, at 72.

16. See ROSCOE POUND, *THE LAWYER: FROM ANTIQUITY TO MODERN TIMES* 98-111 (1953).

17. *Id.* at 138.

18. *Id.* at 142.

19. *Id.* at 143.

20. See *id.*

21. See *id.* at 231 ("After 1842 every citizen over twenty-one years of age in New Hampshire, every citizen of Maine after 1843, every resident of Wisconsin after 1849, every voter in Indiana after 1851, might practice law without more." (citations omitted)).

22. *Id.* at 232.

in handbills and newspapers.<sup>23</sup> Abraham Lincoln was known to have advertised in the 1830s and 1850s.<sup>24</sup> Even the Alabama Bar Association, in 1887, allowed for limited advertising, though it distinguished this from direct solicitation of particular individuals to become clients.<sup>25</sup> Pound's reaction to this period is as derisive as his condemnation of the colonial era: "The harm which this deprofessionalizing of the practice of law did to the law, to legal procedure, to the ethics of practice and to forensic conduct has outlived the era in which it took place and still presents problems to the promoters of more effective administration of justice."<sup>26</sup> Sadly, the former Harvard Law School dean provides no specifics on what this harm entailed.

Eventually, with the rise of bar associations in the late nineteenth century, attorneys became subject to increased professional requirements. Likely motivated by the economic pressures caused by the expansion of the profession,<sup>27</sup> the ABA and state bar associations pressured law schools to adopt new academic requirements, such as a high school education.<sup>28</sup> Such educational prerequisites favored native-born, Anglo-Saxon Protestant members of the bar and their similarly situated clients.<sup>29</sup> Yet it was not until 1908 that the ABA published its *Code of Professional Ethics*.<sup>30</sup> Spurred by a 1905 speech by President Theodore Roosevelt rebuking corporate attorneys for aiding their clients' illegality, ABA president Henry St. George Tucker demanded an inquiry into whether "the ethics of our profession rise to the high standards which its position of influence in the country demands."<sup>31</sup> The result was thirty-two ethical Canons that

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23. See, e.g., Hornsby, *supra* note 9, at 262 ("A story from the *Staunton (VA) Eagle* newspaper, which was published during much of the 1800s, indicates that a lawyer included an announcement for his services in 1809. A thirty-one-year-old lawyer, who went on to become a prosecutor and state senator, took out an ad announcing his office.").

24. See *id.*

25. See *id.* at 280.

26. POUND, *supra* note 16, at 232.

27. Between 1850 and the beginning of the twentieth century, the number of lawyers more than quintupled, from 22,000 to 114,000. Hornsby, *supra* note 9, at 280.

28. See ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 86-87 (2004).

29. At least one historian contends this favoritism was conscious and intentional. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 3 (1990); see also Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENG. L. REV. 251, 271 (2005) ("Harvard Law School[] strongly opposed the official licensing of a school that catered to Catholics and the working class.").

30. ABA, CANONS OF PROF'L ETHICS (1908).

31. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 40 (1976).

sought to guarantee that “the conduct and the motives of the members of [the] profession are such as to merit the approval of all just men.”<sup>32</sup>

However, though President Roosevelt’s address excoriated those lawyers who represented America’s ruling class, the 1908 Canons took aim at a different target: The legal profession’s most prominent leaders deplored those lawyers who, in their “eager quest for lucre,” subverted the practice’s noble, nonpecuniary interests<sup>33</sup>— in other words, the ambulance chasers. In developing the Canons, the ABA relied heavily upon George Sharswood’s *Essay on Professional Ethics*, which had been published over fifty years earlier.<sup>34</sup> Indeed, the introductory material to the 1908 Canons quotes Sharswood before any other source, including Chief Justice Edward G. Ryan of the Wisconsin Supreme Court or even Abraham Lincoln.<sup>35</sup> Yet by the twentieth century, Sharswood’s moralistic prescriptions were sorely antiquated. Sharswood denounced the “horde of pettifogging, barratrous, money-making lawyers” and recapitulated the distinction between professional legal practice and a base trade.<sup>36</sup> Eschewing the active pursuit of fame and fortune, Sharswood’s ethical archetype passively acquired business on the strength of his sterling reputation. Invoking these same principles, the ABA constructed Canon 27, which proscribed solicitation of business, both directly and indirectly (note the emphasis on honor and professionalism):

[T]rust . . . cannot be forced, but must be the outcome of character and conduct . . . [S]olicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is *unprofessional* . . . Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer’s positions, and all other like self-laudation defy the traditions, and *lower the tone of our high calling*, and are intolerable.<sup>37</sup>

Canon 28 likewise prohibited the related offense of stirring up litigation and closely mirrors rules against barratry. Once again, the emphasis is on honor and reputation over a concern for clients:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. *Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable* to hunt up defects in

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32. ABA, *supra* note 30, pmb1.

33. 29 A.B.A. REP. 601-02 (1906).

34. See AUERBACH, *supra* note 31, at 41; see also Hornsby, *supra* note 9, at 255.

35. See ABA, *supra* note 30, at 2.

36. AUERBACH, *supra* note 31, at 41-42.

37. ABA, *supra* note 30, Canon 27 (emphases added).

titles or other causes of action and inform thereof in order to be employed to bring suit, or to *breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients . . .*<sup>38</sup>

Some combination of selfish intent and elitist ignorance had fueled a regressive and anticompetitive restriction. Upholding such standards may have proved practicable in Sharswood's time, where "a young nineteenth-century attorney in a homogeneous small town, apprenticed to an established practitioner, known in his community, and without many competitors" could open up shop without serious economic risk, but "[i]t could hardly reassure his twentieth-century counterpart, the new-immigrant neophyte in a large city where restricted firms monopolized the most lucrative business and thousands of attorneys scrambled for a share of the remainder. . . . He either hustled or starved."<sup>39</sup> Contingent fees were similarly denounced by Sharswood and treated suspiciously in the Canons.<sup>40</sup> Such fees allegedly demeaned the practice of law by treating the profession as a business, though their limitation most harshly affected the poor, who otherwise lacked the finances to entice an attorney to take their cases.<sup>41</sup> Indeed, were the Canons' goal to protect vulnerable clients against unscrupulous lawyers, they should probably have favored contingent fees, since they align attorneys' interests with those of their clients.<sup>42</sup> Yet while the profession's views on contingent fees evolved over the past century, bar associations continued to direct antipathy toward advertisement and solicitation of all kinds.

Until the Supreme Court began carving out exceptions to direct solicitation in the 1970s, the states adhered to the Canons' prohibition on direct solicitation.<sup>43</sup> Of course, bar associations never categorically rejected the permissibility of soliciting clients, despite the strong language of the Canons. For example, it remained permissible for attorneys to advertise in bar directories and law lists,

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38. *Id.* Canon 28 (emphases added).

39. AUERBACH, *supra* note 31, at 42.

40. *See* ABA, *supra* note 30, Canon 13; AUERBACH, *supra* note 31, at 42-47.

41. *See, e.g.,* Samuel R. Gross, *We Could Pass a Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 342 (1998) (noting that without contingent fees, poor clients would be unable to afford legal representation in order to successfully prosecute a legitimate claim). Interestingly, contingent fees also serve a filtering function. Because a lawyer's prospects for payment are dependent on the client's probability of success, each lawyer has the incentive to accept meritorious cases and reject unmeritorious ones. *See id.* Ironically, then, the old bar's opposition to contingent fees may in some ways conflict with the "stirring up litigation" rationale underlying its antipathy toward direct solicitation.

42. *See* Comment, *supra* note 10, at 679.

43. *See* Hornsby, *supra* note 9, at 255 n.1.



which catered to corporate lawyers and their clients, but not on television or in print, which appealed to personal injury attorneys.<sup>44</sup> Nor was the Atlanta Bar Association accused of impropriety when, during the Great Depression, it hired a public relations firm to create stories of the negative repercussions of do-it-yourself lawyering that were then sent to businesses known to be in need of legal representation.<sup>45</sup> During the same period, the ABA also lauded the efforts of the “Liberty League,” which solicited suits against the National Labor Relations Board.<sup>46</sup>

While the powerful exempted themselves from the reach of the Canons, individuals and organizations representing America’s underclasses faced denunciations and sanctions for stirring up litigation. The NAACP, for example, was a frequent target of charges of barratry and solicitation of clients in breach of state ethics requirements.<sup>47</sup> Meanwhile, the courts that considered solicitation cases echoed the sentiments of previous eras, grounding the prohibition in inchoate professionalism values. Such courts employed harsh language, but not out of concern for protecting vulnerable clients. *People ex rel. Chicago Bar Ass’n v. Berezniak*<sup>48</sup> is demonstrative. Berezniak, an immigrant from Russia (the court was sure to note this fact), had advertised his services, to which the court gravely declared: “An attorney who stirs up or secures litigation . . . ought to be disbarred. Any conduct of an attorney at law that necessarily tends to *bring discredit upon his profession and upon the courts* is an abuse of the privilege secured to him by his license.”<sup>49</sup> Likewise, in *In re Greathouse*, though the court acknowledged that the defendant attorney had faithfully served his largely indigent clients to *their* satisfaction,<sup>50</sup> it lamented, “The practice of ‘ambulance chasing’ . . . lowers the tone of the profession. Lawyers who indulge in these practices . . . bring disrepute upon the administration of the law.”<sup>51</sup> Surprisingly, the *Greathouse* court even provides an explicitly anticompetitive rationale for the proscriptions against solicitation, lambasting lawyers who used advertising

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44. *See id.* at 284.

45. *See id.* at 264.

46. *See Note, supra* note 13, at 1188-89 n.62.

47. *See, e.g.,* ROBYN DUFF LADINO, *DESEGREGATING TEXAS SCHOOLS: EISENHOWER, SHIVERS, AND THE CRISIS AT MANSFIELD HIGH* 134 (1996); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, *LAW & HIST. REV.*, Jan. 15, 2002, at 97; *see also Note, supra* note 13, at 1189 (“[O]ne suspects that an unvoiced reason for the animus against stirring up litigation is the fear that some of the litigation stirred up will involve socially unpopular causes—such as suits attacking segregation or those brought by tenants against landlords or consumers against corporations.”).

48. 127 N.E. 36 (Ill. 1920).

49. *Id.* at 39 (emphasis added).

50. *In re Greathouse*, 248 N.W. 735, 736 (Minn. 1933).

51. *Id.* at 737 (quotations and citations omitted).

to invade “territory that geographically belongs to local attorneys. Such conduct violates the elementary standards of fair play.”<sup>52</sup> The court even condemned the increased competition for reducing attorneys’ fees.<sup>53</sup> Bar association regulations limited even the most innocuous forms of advertising; in 1963, for example, the ABA banned holiday cards that identified the sender as a law firm or an attorney in any way.<sup>54</sup>

Over the course of history, opponents of client solicitation have offered diverse rationales for prohibiting the practice. In the Middle Ages, many worried that solicitation would stir up unwanted litigation; the Progressive era focused on the importance of professionalism and vocational purity; and in the twentieth century, courts openly lamented that solicitation might foment competition and reduce the price of legal services. Notably, what appears to be missing from all of these accounts is a concern for the interests of prospective clients—a rationale that only became prominent late in the twentieth century.<sup>55</sup>

## II. MODERN LEGAL DEVELOPMENTS

It would be decades before the Supreme Court would finally extend some protection to attorney efforts to solicit clients. By the 1970s, the all-out ban on

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52. *Id.* at 740.

53. *See id.*

54. *See* Hornsby, *supra* note 9, at 264 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 309 (1963)).

55. *See infra* Part II. Cases from the twentieth century do exist in which the court expresses some concern for the wellbeing of prospective clients. *See, e.g.,* Hildebrand v. State Bar of Cal., 225 P.2d 508, 519 (Cal. 1950) (complaining that direct solicitation included “visits to homes and hospitals to procure retainers at unseemly hours, and when the injured person or the members of his family were in no mental condition to enter into contracts for the engagement of lawyer’s services” (quoting *In re Gondelman*, 233 N.Y.S. 343, 346 (N.Y. App. Div. 1929))). However, such cases often focus more heavily on the inherently unscrupulous nature of lawyers who would stoop to soliciting clients rather than the vulnerability of the prospective client. *See, e.g., id.* (complaining of “the use of photographs of checks of amounts of recoveries had, and newspaper clippings showing successes in court, for the purpose of procuring clients” (quoting *Gondelman*, 233 N.Y.S. at 346)); *Morris v. Pa. R.R. Co.*, 134 N.E.2d 21, 27 (Ill. 1950) (“[T]he [ambulance] chaser is basically dishonest when soliciting a client. He is interested primarily in getting a contract signed, thus virtually assuring himself of a one-third cut of any settlement figure or jury verdict. To get the contract the chaser often vastly exaggerates the worth of a claim, playing subtly on emotions of greed and avarice, assuring the injured person that his services will net a handsome figure. Actually, the chaser is well aware of the true value of a case, and in settlement negotiations will often agree to a figure little higher than the injured might have obtained by direct negotiation.” (quoting Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U. L. REV. 895, 904 (1953))).

solicitation of clients began to break down in light of new law firm models. Firms like Jacoby & Meyers in Los Angeles, founded in 1972 as a “legal clinic” rather than a traditional law firm, standardized fees and basic services in order to serve a lower-income clientele than traditional firms.<sup>56</sup> Despite historical antipathy toward treating legal practice as a “business,” such firms overtly embraced the notion that they ran like businesses.<sup>57</sup> Because these firms depended on high client volume to remain profitable, they especially stood to gain from advertising. As a result, firms began to violate the rules both openly<sup>58</sup> and through subterfuge.<sup>59</sup> Particularly after the Supreme Court’s recognition of First Amendment protection for commercial speech,<sup>60</sup> the climate was ripe for constitutional challenge. By the time the Court finally considered the constitutionality of solicitation restrictions in *Bates v. State Bar of Arizona*,<sup>61</sup> ten similar cases were pending in the judicial system.<sup>62</sup>

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56. See About Southern California Office, JACOBY & MEYERS LAW OFFICES, <http://www.jacobymeyers.com/southern-california-office.html> (last visited Jan. 12, 2011) [hereinafter JACOBY & MEYERS].

57. See *id.* (“[I]f law firms would implement the efficiencies of a well run business, they would be able to serve more clients at lower cost without sacrificing quality.”).

58. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354 (1976) (noting that “[b]ecause appellants set their prices so as to have a relatively low return on each case they handled, they depended on substantial volume,” and therefore advertised services and their associated fees in newspaper ads).

59. Jacoby & Meyers utilized press conferences and interviews to obtain free publicity for their firm and its unique business model. See JACOBY & MEYERS, *supra* note 56.

60. See *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976).

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

62. See Hornsby, *supra* note 9, at 264-65 n.44 (“[I]n addition to *Bates*, *Cairo v. State Bar of Wisconsin* (unreported) challenged Wisconsin’s rules, which were identical to the ABA Disciplinary Rules; *Consumer Union of United States v. ABA*, 470 F. Supp. 1055 (E.D. Va. 1979), involved a suit by the Consumer Union to obtain ABA review of a legal directory; *Consumers Union v. State Bar of Cal.* (unreported) challenged the California rules and alleged that consumers were unable to find lawyers at affordable fees; *Hirschkop v. Va. State Bar*, 604 F.2d 840 (4th Cir. 1979), challenged the Virginia rules and was stayed pending a decision in *Bates*; *Jacoby v. The State Bar of Cal.*, 562 P.2d 1326 (Cal. 1977), sought review of a disciplinary matter stemming from an open house of their legal clinic; *Marine v. State Bar of Wis.* (unreported) was a First Amendment challenge that resulted after the attorney was disciplined for advertising in several newspapers for his family law services; *Niles v. Lowe*, 407 F. Supp. 132 (D. Haw. 1976), resulted from a student newspaper running ads about lawyers who were giving free advice and consultation to students and faculty of a community college even though the lawyer had instructed the newspaper to avoid publicity and was unaware of the content of the ads before they ran; *Person v. Ass’n of the Bar of New York*, 554 F.2d 534 (2d Cir. 1977), involved a lawyer who sought to advertise in the yellow pages and in news-

In *Bates*, the Supreme Court considered and rejected each of the arguments advanced on behalf of a blanket ban on attorney advertising. The first rationale considered was professionalism, but this time, the state bar had clothed it in a veil of altruism: “Advertising is . . . said to erode the client’s trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client’s welfare is jeopardized.”<sup>63</sup> Rebutting this assertion with actual data, the majority noted that many citizens with valid claims who fail to obtain legal representation do so not because of some distrust due to lack of professionalism, but because of a lack of information about locating an attorney or the price of her services.<sup>64</sup> The Court also dismissed the age-old “stirring up litigation” argument, noting the obvious response that “we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.”<sup>65</sup> Indeed, the majority cited the ABA as claiming that the middle seventy percent of the population had inadequate access to proper legal representation.<sup>66</sup>

Interestingly, the state bar of Arizona had also grounded its prohibition on a concern for protecting clients from being defrauded by misleading advertisements—not the historical basis for the rule, but perhaps a more attractive one. The argument is as follows: Because legal services are too individualized to particular clients’ cases to allow for uniform comparison, and clients lack the training required to determine the precise legal services they require, any advertisement will prove inherently misleading.<sup>67</sup> The majority responded by contesting both the premise and the conclusion. First of all, some legal transactions (uncontested divorces, simple adoptions, and so forth) *do* allow for standardization, and the lawyers most likely to advertise price are those engaged in precisely such services.<sup>68</sup> Even if the information a lawyer provides through her advertisements is somehow incomplete, the Court reasoned, it is irrational to deprive a potential client of any information at all.<sup>69</sup> It would seem that complete ignorance is unlikely to enhance a client’s bargaining position or guarantee that he receive a fair price for competent representation.

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papers; *United States v. Am. Bar Ass’n*, 135 F. Supp 2d 28, 28 (D.D.C. 2001) was an antitrust action brought by the Department of Justice; and *Legal Ethics League v. N.C. State Bar*, 624 F.2d 1094 (4th Cir. 1980), was a challenge brought by a lawyer who had placed a classified ad in the *Charlotte News and Observer*.”).

63. *Bates*, 433 U.S. at 368.

64. *See id.* at 370.

65. *Id.* at 375-76.

66. *See id.* at 376.

67. *See id.* at 372.

68. *See id.* at 372-73.

69. *See id.* at 374.

It should be noted, of course, that even if the state bar was correct to disparage legal advertisements as misleading, the same reasoning is inapplicable to direct solicitation. Interpersonal solicitations, *particularly* those targeted at potential clients known to have suffered legitimate grievances, enable attorneys to tailor their advice to specific clients and evade one-size-fits-all lawyering altogether. Therefore, to the extent that their original analysis holds against mass advertising, it cuts in favor of direct solicitation.

*Bates* was the first in a series of cases over two decades that liberalized the profession's ethical strictures against client solicitation. The Supreme Court extended protection to non-misleading mailings pertaining to lawyer qualifications (such as admission to the Supreme Court Bar),<sup>70</sup> the use of "commercial illustrations" in legal advertising,<sup>71</sup> and even mail solicitations to potential clients.<sup>72</sup> Of its own accord, the ABA House of Delegates amended its Model Code of Professional Responsibility in 1978 to allow television advertising, which was regarded as more invasive than print advertising (perhaps not coincidentally, the Department of Justice a month later dropped an antitrust case it had been pursuing against the ABA).<sup>73</sup>

Reformers' steady success in the Supreme Court did not extend, however, to direct solicitation. In *Ohralik v. Ohio State Bar Ass'n*,<sup>74</sup> the Court unanimously refused to extend *Bates* to direct solicitation of clients. While acknowledging that the rule originated in values of professionalism,<sup>75</sup> both the state bar and the majority opinion shifted the focus almost entirely to shielding the client from deceptive or coercive influence. The bar cited three related justifications in defense of its disciplinary action, contending that the ban on solicitation would help "[1] serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, [2] to protect the privacy of individuals, and [3] to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest."<sup>76</sup> Of these, the Court placed greatest emphasis on the first, warning that "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."<sup>77</sup> The Court also gave some weight to

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70. See *In re R.M.J.*, 455 U.S. 191, 206 (1982).

71. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

72. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479 (1988).

73. See *Hornsby*, *supra* note 9, at 284-85.

74. 436 U.S. 447, 448-49 (1978). Justice Powell, himself a former President of the ABA, wrote the opinion.

75. See *id.* at 460.

76. *Id.* at 461.

77. *Id.* at 457.

concerns that uninvited solicitations might “distress” a potential client simply in virtue of their obtrusiveness.<sup>78</sup>

Notably, the Court confronted similar issues in *Edenfield v. Fane* but reached the opposite result.<sup>79</sup> There the Court refused to extend the reasoning of *Ohralik*, which sustained the prohibition on direct solicitation conducted by lawyers, to similar conduct by accountants. The majority reasoned that, though accountants are also skilled professionals, the training of a CPA “emphasizes independence and objectivity, not advocacy.”<sup>80</sup> Such logic concedes much to the opponents of *Ohralik*, effectively jettisoning two of *Ohralik*’s three rationales—respect for client privacy and perverse financial incentives. Those lacking in advocacy skills can intrude on potential clients’ privacy as much as those with training—perhaps even more so. Similarly, a professional accountant (or engineer, financial adviser, etc.) engaged in direct client solicitation seems no less likely to have her good judgment clouded by pecuniary interests than a professional attorney would simply because the latter enjoys greater skills of persuasion. At that point, all that is left is the Court’s concern for deterring lawyers from exerting undue influence on laypersons. Indeed, some commentators regard *Ohralik* as an aberration altogether: “[O]utside of *Ohralik* and a few cases from the 1980s that are now widely considered overruled, the Court has not sustained any other general ban on advertising under the commercial speech doctrine.”<sup>81</sup> In the end, perhaps all that can be done to distinguish *Ohralik* from *Edenfield* is to note that, in the fifteen years between the two cases, the Court’s composition had changed.<sup>82</sup>

In 1995, the Supreme Court decided *Florida Bar v. Went For It, Inc.*,<sup>83</sup> in which a divided Court upheld the state bar’s limitation on direct mail solicitations within thirty days of an accident or disaster. In reaching its decision, the Court deftly shifted between the “invasion of privacy” rationale that had been irrelevant to its decision in *Edenfield* and a concern for professionalism, which had proved unpersuasive in *Bates*: “[The Bar’s study] contains data—both statis-

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78. *See id.* at 465-66.

79. 507 U.S. 761 (1993).

80. *Id.* at 775.

81. Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 474 (2008); *see also* Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569, 579 (1998) (“[T]he difference in outcomes [in *Ohralik* and *Edenfield*] turned solely on broad generalizations about the professional attributes of lawyers and accountants.”).

82. The *Edenfield* Court included three Justices who had participated in deciding *Ohralik*: Chief Justice Rehnquist, and Justices Stevens and Blackmun. However, all had voted with the majority in *Ohralik*. *Compare Edenfield*, 507 U.S. at 762, with *Ohralik v. Ohio Bar Ass’n*, 436 U.S. 447, 447 (1978).

83. 515 U.S. 618 (1995).

tical and anecdotal-supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy *that reflects poorly upon the profession*.<sup>84</sup> Privacy concerns, the Court argued, distinguished the case from *Shapero*.<sup>85</sup> Yet only a few paragraphs later, the majority appears to backslide from this position and eschew the import of client privacy:

The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, . . . but with the demonstrable detrimental effects that such "offense" has on the profession it regulates.<sup>86</sup>

Unlike the historical origins of the regulation, *Florida Bar's* brand of "professionalism" was grounded more in public relations than gentlemanly values, but just like the original version, the focus was protecting the profession, not its consumers.<sup>87</sup> In any case, none of the various theories advanced against lawyer advertising and solicitation was grounded in empirical evidence, a fact some critics have used to indict these ethical strictures as nothing more than a rent-seeking masquerade.<sup>88</sup>

The ABA currently justifies Model Rule 7.3 on the same grounds upon which the *Ohralik* Court relied in its decision. In its commentary on the regulation, the ABA writes that "in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services . . . subject[s] the layperson to the private importuning of the trained advocate in a direct interpersonal encounter," which could result in a situation "fraught with the possibility of undue influence, intimidation, and over-reaching."<sup>89</sup> The ABA had conceded by the mid-nineties that, contrary to the majority opinion in *Florida Bar*, lawyer advertising had little to do with negative public perception of the profession, though state bar associations have continued to almost

84. *Id.* at 626.

85. *See id.* at 629.

86. *Id.* at 631.

87. *See* Barton, *supra* note 81, at 476-77 ("While it is true that *Ohralik* relied on two separate justifications (protecting privacy and potential to mislead), later cases had generally treated *Ohralik* as a high potential for deception case and not a privacy case. By contrast, *Went for It* includes no allegation that the advertising at issue was actually or even potentially false or misleading. Instead, the biggest problem seems to be the effect upon the public perception of lawyers.")

88. *See* Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 357 (1995).

89. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt.1 (2000).

universally favor increased restrictions on attorney advertising and direct solicitation.<sup>90</sup>

Thus, the rule we have today legitimates itself as a defense against attorney manipulation of vulnerable laypersons. As explained in Part I, this justification runs contrary to the origins of anti-solicitation rules in Anglo-American legal history. Even in fairly modern terms, however, the case law has often treated attorney manipulation as a secondary concern, instead relying on arguments ranging from respect for client privacy to the inherently misleading nature of attorney advertising to various versions of the professionalism rationale. Consequently, even if protecting prospective clients from deception plays a crucial role in justifying the current rule, its pedigree is limited.

### III. DIRECT SOLICITATION: THE FINAL RELIC

The legal profession no longer prohibits lawyers from indirectly soliciting clients through either mass advertisement or targeted<sup>91</sup> mailings. Nevertheless, even those who called for liberalization of the old system generally expressed reluctance at permitting direct solicitation.<sup>92</sup> I contend that this is a distinction without a difference. Not only do many of the same reasons for permitting indirect solicitation also hold true for direct solicitation, but allowing the one and not the other creates asymmetries that result in inefficiency and inequity.

This Part attacks the current ban on direct solicitation on several fronts. In the first Section, I critique the exceptions to Model Rule 7.3 as unwarranted and crafted to favor certain segments of the bar. Section B then analyzes client vulnerability and concludes that direct solicitation actually serves the needs of clients who might otherwise be susceptible to manipulation. In Section C, I proceed to some of Model Rule 7.3's asymmetric effects on lawyers' pursuit of clients. I argue that, in the absence of direct solicitation, prospective clients will often have insufficient information to properly assess the quality of lawyers, and a market failure results. Section D explains some of the ban's negative effects within the profession and explores the idea that Model Rule 7.3 enables rent-seeking.

#### A. *Critiquing the Exceptions*

Model Rule 7.3 provides three exceptions to its prohibition on direct solicitation. According to the ABA, a lawyer may directly solicit a third party if: (1) the solicited party is a lawyer; (2) the solicited party "has a family, close person-

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90. See Hornsby, *supra* note 9, at 289-90.

91. A targeted mailing might, for example, involve a letter sent by an attorney "to potential clients who have had a foreclosure suit filed against them." See Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 469 (1988).

92. See, e.g., Note, *supra* note 13, at 1199 (arguing that not only fraudulent solicitation but "improper" solicitation ought also to remain prohibited).



al, or prior professional relationship with the lawyer;” or (3) it is not the case that “a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”<sup>93</sup> Given that the ABA predicates Rule 7.3 on the potential client’s vulnerability, which *Ohralik* posited as arising from the lawyer’s “train[ing] in the art of persuasion,”<sup>94</sup> the first exception is natural. However, if Model Rule 7.3’s primary goal is preventing the manipulation of vulnerable laypersons, both the second and third exceptions appear oddly calculated to achieve this end.

At best, the exception for direct solicitation of personal contacts is unwarranted. Without explanation, Model Rule 7.3’s commentary proclaims, “There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship.”<sup>95</sup> Perhaps pangs of guilt from abusing the trust of a friend, relative, or close professional contact would deter a lawyer who has a preexisting relationship with his client, but while the *likelihood* of manipulation in the context of preexisting relationships might be lower, the *susceptibility* of a potential client to abuse in such circumstances would almost certainly be greater. Lawyers in such cases will have already gained the trust of the potential client, who is therefore less likely to be on guard against unfair dealing or as willing to shop around for a superior alternative.<sup>96</sup>

At its worst, though, the preexisting relationships exception may simply constitute a form of rent-seeking by more elite or better established attorneys. A corporate lawyer is more likely to have friends and family involved in the sorts of enterprises that require attorneys for day-to-day business. Those who occupy society’s lower rungs are the *least* likely to have an informal relationship with an attorney.<sup>97</sup> Members of the upper bar, because of the circles in which they travel (e.g., the country club, Ivy League school, nonprofit board of directors), are also better able to leverage their social contacts and professional relationships into steady business.<sup>98</sup> Even in the context of less prestigious segments of the profession, the exception favors established members of the bar over newcomers. Veteran attorneys may openly solicit their former clients while novices must

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93. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2000).

94. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 465 (1978).

95. MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt.3 (2000).

96. Perhaps also underlying this exception is the belief that lawyers with preexisting relationships with their clients are less likely to deal unfairly or suffer from ineptitude. If so, it is entirely unclear whether such a belief is justifiable. Even “shysters” develop relationships—indeed, some clients may *prefer* the services of a less-than-scrupulous attorney!

97. Though it is quite possible that the poor are more likely to have *formal* interactions with lawyers than are middle class citizens. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1976).

98. See *id.* at 378.

rely on a reputation they have not yet earned or general advertisements they may be unable to afford.

Perhaps this exception, rather than presuming a working relationship that involves a stronger foundation for trust, is instead grounded in social expectations. In circumstances in which a family member or former client is in need of legal assistance, social mores and natural human sentiment may make it nearly impossible for an attorney to fail to offer her services (at a reasonable fee, of course). At least to the extent that client vulnerability is the actual basis for the prohibition, this rationale cannot justify the exception on its own. After all, an attorney's fear of social awkwardness or commitment to remedying injustice renders potential clients no less vulnerable to manipulation.

Model Rule 7.3's third exception, which allows lawyers to directly solicit clients for reasons other than pecuniary gain, also seems ill-suited to protect clients from manipulation. It is questionable whether a public interest lawyer zealously committed to the justice of her cause is less likely to strong-arm a potential client than the run-of-the-mill solo practitioner looking to make a living for himself. For example, public interest firms seeking to advance certain transcendent values may exert soft pressure on potential clients, effectively "guilting" them into accepting legal representation; even a client who is satisfied with his family lawyer may be loath to reject representation from an ACLU lawyer promising to advance the cause of civil liberties. Moreover, once an attorney-client relationship has been established, the for-profit lawyer's interests may prove better aligned with his client's than those of the public interest lawyer. Because the former is paid by his client—or, in the case of contingent fees, has a direct stake in his client's success—he has a vested interest in serving the client's needs.<sup>99</sup> Public interest firms, particularly those committed to an impact litigation agenda, may have a more global perspective that could conflict with the needs of a particular client—for example, forgoing a novel argument on appeal in one case so as to use it in another case with better prospects of success.<sup>100</sup> Likewise, a pro bono attorney may seek press attention for his case or for himself—an incentive that often diverges with the needs of the client, who may best be served through quick and quiet settlement.<sup>101</sup> In some cases, free legal clinics with no ulterior motives may even worsen client outcomes.<sup>102</sup> Economic interests may lack moral content, but they can be effective motivators.

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99. See, e.g., Note, *supra* note 13, at 1187-88.

100. See CYNDI BANKS, *CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE* 110 (2d ed. 2009).

101. See Louise L. Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 *GEO. J. LEGAL ETHICS* 393, 417 (1991).

102. See D. James Greiner & Cassandra Wolos Pattanayak, *What Difference Representation? Offers, Actual Use, and the Need for Randomization*, 121 *YALE L.J.* (forthcoming 2011) (describing how the provision of free legal services by a Harvard Law School clinic was found not to improve success rates while simultaneously delaying resolution of valid claims).

*B. Client Vulnerability*

Critics are correct that attorneys who directly solicit clients are likely to focus on those they know to be in need of legal representation and that such individuals are vulnerable. That is precisely why the potential clients need legal representation. In many cases, quick and decisive action is necessary in order to apprise an individual of her rights, contact witnesses, or preserve crucial evidence for trial.<sup>103</sup> By the time an aggrieved party gets around to obtaining a lawyer, the window for action on many of these matters may already have closed—particularly when sophisticated adversaries may already be acting.<sup>104</sup> Many people, particularly the less well-educated, may not even be aware that they have a viable legal claim or are at risk of liability. Direct solicitation notifies potential clients of these rights and interests, even when the individual ultimately decides not to hire the soliciting attorney. Such preliminary contacts may even apprise potential clients of the correct questions to ask and qualities to look for if they ultimately do decide to retain legal counsel. Viewing a general advertisement on television or in a newspaper may mitigate this education deficit, but because such information is sporadic and general, it is less likely to be useful when an individual becomes involved in an actual legal matter.

These problems are exacerbated because no restriction exists for direct contacts from parties whose interests may diverge from the potential client's. Nothing prevents contacts from insurance companies, opposing counsel, or private investigators, all of whom are free to gather evidence or make settlement offers.<sup>105</sup> Indeed, some insurance companies actively exploit this loophole, and “advertise they can resolve accident claims the quickest, and they will visit clients within 24 hours of an incident to attempt to gain a settlement.”<sup>106</sup> The lawyers for these insurance companies generally enjoy more prestige and influence within the bar than do the personal injury attorneys who are barred from directly soliciting clients.

Additionally, Model Rule 7.3 applies to all clients, regardless of the seriousness of their cases. This belies the fundamental premise of the rule: that lawyers will direct their solicitations toward individuals who “feel overwhelmed by the circumstances giving rise to the need for legal services.”<sup>107</sup> The Supreme Court considered a similar point in *Florida Bar*,<sup>108</sup> holding that a thirty-day ban on

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103. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting).

104. See *infra* discussion concerning contacts from adverse parties and insurance companies.

105. See *id.*

106. See Stephanie Francis Ward, *Ohio Won't Block Letters to Accident Victims*, 5 No. 37 A.B.A. J. E-REPORT 3 (2006).

107. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt.1 (2000).

108. 515 U.S. at 632-33.

direct mailings to aggrieved individuals was not overinclusive for First Amendment purposes, but there the majority grounded its decision more in a concern for the profession and client privacy than attorney overreaching. It failed to consider, however, why a person in need of legal counsel in some minor matter would require blanket protection from all direct attorney contacts, regardless of her state of mind.

### C. *Alternatives to Direct Solicitation*

Direct solicitation is certainly capable of abuse by unethical attorneys, but that is hardly the end of the story. Adverse selection may bias perceptions: Because the only lawyers who currently engage in direct solicitation do so in violation of ethical strictures and at the risk of sanction, it should come as no surprise that unscrupulous lawyers abuse the practice disproportionately.<sup>109</sup> Yet even assuming that direct solicitation suffers from imperfections, the alternative is not an ideal system in which competent lawyers passively await business from perfectly informed clients. Lawyers will still seek clients even if ethical restrictions place limits on their ability to do so. A proper evaluation of the wisdom of permitting direct solicitation thus requires a comparison with the alternative options that exist.

#### 1. Mass Advertising

Subsequent to *Bates*, the obvious alternative for lawyers who wish to attract clients is mass advertising. True, the wealthier and better-educated segments of society probably do not rely on park bench ads when choosing legal representation, but neither would they be likely to respond to direct solicitation. The lower and middle classes, however, have fewer options in evaluating lawyer quality and may respond to those few informational cues they receive, even if the cues are as imperfect as a commercial they see on television. The ban on direct solicitation, therefore, pushes these more vulnerable groups to depend more heavily on general advertisements, and pushes the lawyers who serve this clientele to utilize such ads more aggressively.

The legal system's asymmetrical preferencing of mass advertisement over direct solicitation yields several harms. The first consequence is minor, though relevant. Mass solicitations, because they cannot be targeted as direct solicitations, primarily reach people who do not demand legal services. This scattershot approach can prove vexing, particularly to the countless advertising recipients whose time is wasted by the ads. Moreover, mass advertising also translates into wasteful overhead costs for the lawyers who must rely on such advertising. In response, lawyers have exhibited ingenuity in finding more effective ways to advertise their services without technically violating Model Rule 7.3. For exam-

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109. See Comment, *supra* note 10, at 679. Consider this a variant of the old slogan: "If guns are outlawed, only outlaws will have guns."

ple, because of its high correlation with litigation, “mesothelioma” currently stands as the keyword for which web search advertising space is most expensive.<sup>110</sup> The shift Model Rule 7.3 effectuates from direct solicitation to additional mass advertising is almost certainly suboptimal.

In one respect, the ban on direct solicitation probably incentivizes excessive advertising. Yet there is also reason to believe that some lawyers advertise insufficiently. The profession has traditionally derided lawyers who advertise as “shysters” and regarded them with suspicion. This is due in part to the tradition surrounding the role of the lawyer as gentleman. Chief Justice Warren Burger, a particularly virulent critic of the Court’s decision to extend First Amendment protection to attorney advertising in *Bates*, as well as a decent bellwether for the traditionalist’s perspective, wrote of attorney advertising that “[a]part from a handful of ‘ambulance chasers,’ only the shysters went further than sending a business card to a potential client or joining the right clubs.”<sup>111</sup> Even after *Bates* and the reformation of the Model Rules, the stereotype has stuck, discouraging quality attorneys from tarnishing their reputations through advertising. This forms a vicious cycle, as competent practitioners eschew advertising, thereby reifying the stereotype they seek to avoid.

Direct solicitation sidesteps this perverse outcome whereby only lawyers of the lowest quality tend to advertise and, therefore, are the only lawyers to whom individuals with limited information resources have access. Although most, if not all, of the negative associations applicable to advertising exist for direct solicitation as well, lawyers who employ direct solicitation can do so discretely. A lawyer who purchases a cheesy television commercial risks forever branding herself in the eyes of the public and the profession. Particularly in light of the Internet’s ability to memorialize long-regretted indiscretions, lawyer advertising may often have permanent career implications.<sup>112</sup> This is not so in the case of direct solicitations. The lawyer who directly solicits his clients circumscribes the effects on his reputation. The solicitation may influence the impression of the client and those close to him, but their eventual assessment of the attorney will

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110. See Mike Peters, *Mesothelioma: The Usual Paid Searches Don’t Apply*, BKV BLOG (June 2008), <http://my.bkv.com/blog/comments/mesothelioma-the-most-expensive-keyword/>.

111. Warren E. Burger, *Too Many Lawyers, Too Many Suits*, N.Y. TIMES, May 12, 1991, at A1 (book review).

112. Admittedly, public access to general advertisements better encourages honest representations than direct solicitations, which, because of their bilateral nature, may be denied more plausibly after the fact. Cf. ROBERT FELDMAN, *THE LIAR IN YOUR LIFE: THE WAY TO TRUTHFUL RELATIONSHIPS* 232 (2009) (“The Deterrent Hypothesis holds that Internet users, aware of the digital record their interaction generates, will be less likely to lie. The record and the possibility that it could be checked later for accuracy will make people be more truthful than they’d be in a casual, face-to-face interaction, which generally involves no permanent documentation.”).

primarily depend on the quality of the legal services provided. Effective advocates who seek to expand their clientele without diminishing their stature within the profession may, therefore, be willing to resort to direct solicitation, even in cases in which they are unwilling to advertise. Consequently, good lawyers would be able to develop their practice while solicited clients would choose from a more promising pool of legal advocates than they might have if they were completely reliant on attorney advertising.

Encouraging mass advertisement facilitates one final harm to the administration of justice: It asymmetrically favors larger legal practices that serve a high-volume client base. Solo practitioners generally lack the economies of scale necessary to exploit broad-based advertising. Advertising may prove inefficient even for many larger firms, particularly those who serve smaller clienteles because their practice requires focusing greater attention on individual cases. On the other hand, legal service providers who specialize in routine work for a less affluent consumer base depend on volume to remain profitable, since margins received from individual cases are small. For such firms, advertising makes sense.<sup>113</sup> Therefore, the ABA's preference for advertising over direct solicitation favors high-volume practices in two ways. On the demand end, advertising provides a competitive advantage to existing firms, who already possess the economies of scale to engage in advertising, in attracting clients. On the supply end, it adds incentives—through increased business—to form firms centered around the high-volume model.

Standardized, high-volume practices fill a crucial niche in the provision of legal services, particularly to low-income clients,<sup>114</sup> but their comparative advantage is generally limited to routine matters whose risk to the client is relatively minor.<sup>115</sup> The high-volume model is not best equipped to handle complex cases requiring individualized attention or serious matters where minor errors could have major repercussions.<sup>116</sup> Moreover, the incentives of a high-volume practice may not align optimally with those of the client. *Ceteris paribus*, a law firm will prefer to settle ten cases for \$10,000 each to settling one case for \$90,000. A smaller practice cannot expect the constant stream of clients a high-volume firm enjoys. Accordingly, whereas the former must cautiously maximize the value to be obtained from every single client, the latter may benefit from rushing cases prematurely to settlement. Considering that persons of low income

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113. See Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1102 (1983).

114. See Note, *supra* note 13, at 1204-05 (arguing that advertising, by encouraging efficient economies of scale and standardization, lowers prices and increases access to legal services); see also *supra* Part II for a discussion of the advantages of large-scale "legal clinics."

115. See Hazard, Pearce & Stempel, *supra* note 113, at 1091.

116. See *id.* at 1103.

and education are the most likely to patronize high-volume law firms, such perverse incentives encourage the unequal administration of justice across society.

## 2. Unsolicited Attorney Hiring

In the absence of direct solicitation, individuals who elect not to hire an attorney who advertises must rely on their own research when selecting a lawyer. Unfortunately, unless the client has a prior professional relationship with the attorney or knows someone who does, she has little basis upon which to assess the attorney's proficiency. Because of their superior professional contacts, this is a problem unlikely to afflict society's elite.<sup>117</sup> Others seeking legal representation, however, suffer from an information deficit. With no ability on the part of consumers to evaluate the quality of legal services before their purchase, the result is a classic case of market failure: No guarantee exists that parties will enter into mutually beneficial transactions.<sup>118</sup> This information deficit can also lead to some strange economic outcomes. For example, unable to judge a lawyer's talents directly, consumers may instead utilize cognitive alternatives, such as associating higher prices with a superior product.<sup>119</sup> It is not uncommon for criminal defendants, for example, to prefer to retain counsel of an inferior quality to the public defender on the assumption that free representation is probably inferior representation.<sup>120</sup>

Moreover, one of the central condemnations of direct solicitation—that it pressures potential clients into employing an attorney before shopping around—holds even stronger in the case of unsolicited attorney hiring. The commentary to Model Rule 7.3 argues, “The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately.”<sup>121</sup> Yet the ABA remains unconcerned for the individual who has committed herself to seeking legal

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117. It might be argued that, because of greater interaction with the legal system and the education provided by legal aid services, the poor may be better situated in finding an attorney than a blue-collar member of the middle class. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1976).

118. *See generally* WALTER J. WESSELS, *ECONOMICS* 381-95 (4th ed. 2006).

119. The result is an upward-sloping demand curve. *See* ALAIN ANDERTON, *ECONOMICS* 68 (3d ed. 2006).

120. *Cf.* Richard A. Posner & Albert Yoon, *What Judges Think of the Quality of Legal Representation*, 63 *STAN. L. REV.* 317, 320 (2011) (finding that judges rate the quality of representation provided by public defenders to be superior to that provided by retained counsel or court-appointed counsel).

121. *MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt.1* (2000).

counsel, who has contacted a lawyer, and who has traveled to his offices to speak to him in person. Such surroundings are hardly conducive to effective comparison-shopping.

Indeed, what the commentary to Model Rule 7.3 ignores is the possibility of competition in direct solicitation. In many—maybe even most—cases, if one attorney knows of a prospective client who needs legal representation, more will learn as well. Despite the ABA's exhortations to the contrary, direct solicitation is unlikely to match every client to a single unscrupulous lawyer, who then fraudulently and coercively foists an inferior and costly service on the unsuspecting client. Rather, in cases sufficiently lucrative to merit direct solicitation, several lawyers will likely compete over the client. The result of such competition would be to drive down price and provide incentive to verify the quality of the service being offered. Competitors would have every incentive to catalogue and expose the malfeasance of their unethical or incompetent rivals, driving them out of the market. Client-initiated contacts are less likely to reap these market efficiencies, especially since attorneys in such cases are unlikely to know which other attorneys, if any, the client is contemplating hiring.

#### D. *Unfairness to Lawyers*

While the ABA's Model Rules of Professional Conduct rightly prioritize the interests of the client, Model Rule 7.3 provides inequitable treatment to attorneys as well. A veteran attorney with a well-established reputation may passively wait for clients to come through her door, but unless she already possesses prestigious social connections, the newcomer cannot rely on word-of-mouth to stimulate business. At that point, two likely options present themselves: either advertise or avoid solo practice.

Advertising is the less likely of these two options for the obvious reason that a new attorney probably lacks the initial capital needed to conduct an extensive advertising campaign. Even assuming that advertising were an economically viable option, it might not necessarily prove fruitful. Commercial advertisements—particularly those intended to grab the audience's attention—frequently emphasize huge cash settlements.<sup>122</sup> Though individuals with meritorious claims may respond, such promises are well known in the profession to attract frivolous suits from litigious malcontents and dishonest plaintiffs seeking easy money.<sup>123</sup> Large law firms have the resources to quickly identify

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122. See, e.g., attorneylarryhparker, *Headline (1986) - Attorney Larry H. Parker TV Commercial*, YOUTUBE (Aug. 14, 2009), <http://www.youtube.com/watch?v=zMnVmT8bRSE> (showcasing a recent \$2.1 million settlement as the highlight of the ad); LegalAdFan, *"I Am the Hammer, They Are the Nails" - Lowell Stanley*, YOUTUBE (Feb. 22, 2008), <http://www.youtube.com/watch?v=62xreSr25uI> (advertising a firm whose phone number is "459-CASH").

123. For this fact, I rely on my father's brief personal experience with legal advertising.



and filter out the frivolous claims, but a solo practitioner may lack the means to do so.

Alternatively, a new attorney seeking to establish a reputation will seek employment in a group practice of some kind and come under the tutelage of more experienced attorneys. Such a decision is not necessarily an imprudent one; historically, those who studied law apprenticed themselves to a veteran and oftentimes took over the practice after the latter's retirement.<sup>124</sup> Yet there is reason to believe that Model Rule 7.3 artificially inflates the demand for this sort of experience to a suboptimal level. By encouraging young attorneys to begin their practice working in an institution like a law firm, fewer competitive pressures exist in the legal market to keep costs low and quality of service high. Were direct solicitation permitted, inexperienced attorneys could compete through lower prices and a greater guarantee of attention to minor cases than competitors could promise. Meanwhile, because such a system is a "buyer's market" for the labor of inexperienced attorneys, the more senior lawyers hiring new attorneys need not pay the latter the same level of compensation they otherwise would, whether that compensation takes the form of a higher salary or more meaningful work.

Though the impact of Model Rule 7.3 on the market for young lawyers may not be its severest cost to society, it does suspiciously seem to advance the interests of the more established members of the bar. In fact, some very surprising organizations have championed continued prohibition of direct client solicitation in recent years. The Washington Legal Foundation, a public interest firm whose goal is to "strengthen America's free enterprise system" through implementation of "free market principles," advocates for blanket bans on all in-person or targeted solicitations, regardless of time frame.<sup>125</sup> In *Florida Bar*, the plaintiffs' bar submitted an amicus brief contending that advertising taints the jury pool, which diminishes plaintiff success rates and dampens damage awards.<sup>126</sup> More recently, in a debate in Ohio over whether to permit targeted mail solicitations of recent accident victims, the Ohio Academy of Trial Lawyers supported a ban on similar grounds.<sup>127</sup>

Of course, anecdote and assertion—rather than data and reason—generally bolster claims that solicitations tarnish the reputation of the profession, so as to

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124. See, e.g., STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 29 (2006) ("Lawyers were initially trained by the apprentice method by which young lawyers studied and practiced under the tutelage of a more experienced lawyer.").

125. *WLF Mission*, WASH. LEGAL FOUND., <http://www.wlf.org/org/mission.asp> (last visited Apr. 14, 2011); Memorandum from Wash. Legal Found. to Michael Colodner, Esq., N.Y. Office of Court Admin. 3 (Sept. 12, 2006), available at [http://www.wlf.org/Upload/091206Inre\\_proposedNYrules.pdf](http://www.wlf.org/Upload/091206Inre_proposedNYrules.pdf).

126. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 639 (1995).

127. See Ward, *supra* note 106.

undermine the wheels of justice.<sup>128</sup> Such a perspective is inherently elitist; prospective clients themselves often work in businesses that advertise to attract customers.<sup>129</sup> Although English barristers cannot actively solicit business for themselves, they have long suffered from the same poor reputation as their American counterparts.<sup>130</sup> Even if the hypothesized jury pool tainting effect had some basis in reality, it seems that any of the reputational harms imposed by direct solicitation would be negligible in light of the tacky and downright embarrassing legal advertisements that already exist.<sup>131</sup> If anything, by allowing lawyers to focus their attention on prospective clients, direct solicitation would seem to quarantine such shady practitioners from general view. Professional organizations such as trial lawyers' groups generally represent the more senior and experienced members of the bar.<sup>132</sup> One wonders, then, if their efforts to curtail client solicitation are simply an attempt to guarantee themselves a bigger slice of the pie—even if it shrinks for everyone else.<sup>133</sup> One Ohio attorney noted that if lawyers who engage in direct solicitation “want to make a fool of themselves in front of the victim, we all have to suffer the consequences as a profession.”<sup>134</sup> Notably, that attorney defends insurance companies for a living. No ethical rule bars him from contacting accident victims on behalf of his client.

#### IV. STIRRING UP LITIGATION REVISITED

In Part III, I argued that the ABA's rationale of banning direct solicitation in order to protect vulnerable clients is unwarranted. Indeed, it may even be a smokescreen for advancing the private interests of the upper bar. Ironically, one of the rule's historical bases—the idea that solicitation stirs up unwanted litiga-

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128. Cf. Snyder, *supra* note 88 (positing that the arguments against advertising and solicitation are almost never supported with empirical data, which suggests that such arguments actually serve ulterior motives). Snyder also claims that consumers respond positively to advertisements, *id.* at 386, but, ironically, fails to provide any data in support of this claim.

129. See Comment, *supra* note 10, at 681.

130. See *id.*; see also WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2 (“The first thing we do, let's kill all the lawyers.”).

131. See, e.g., Michael Gallagher, *Take My Wife Please... (Local Commercial)*, YOUTUBE (Dec. 4, 2007), [http://www.youtube.com/watch?v=8QjnoW4d\\_Io&feature=related](http://www.youtube.com/watch?v=8QjnoW4d_Io&feature=related) (“I decided to hire Michael Gallagher as my attorney, and I ruined my husband's New Year.”); Steven Miller, *Tackiest Lawyer Ad... Ever*, YOUTUBE (Dec. 13, 2008), <http://www.youtube.com/watch?v=y1Qk6QPzuIc> (“If you and your spouse hate each other like poison and want to get out of the hellhole you call a marriage, you've come to the right place.”).

132. See AUERBACH, *supra* note 31, at 42.

133. See Hornsby, *supra* note 9, at 292-93.

134. See Ward, *supra* note 106.

tion—may be stronger than either its original proponents articulated or its critics give it credit for. In this Part, I look to resuscitate the “stirring up litigation” rationale. However, while I contend that this reformulation is superior to other defenses of Model Rule 7.3, I still conclude that society is better served through abandonment of the prohibition on direct solicitation.

#### A. *Litigation as Social Failure*

Modern scholarship generally dismisses the claim that solicitation “stirs up litigation” as antiquated and in opposition to the values of our system of justice.<sup>135</sup> Essentially, such scholars contend that this view is an indictment of the legal system as a whole. Insofar as we believe rights ought to be vindicated, they argue, we ought to encourage injured parties to bring valid claims to court.<sup>136</sup>

This undersells the point. The claim is not that litigation is never the *best* choice, but rather, it is never a *perfect* choice. Invoking the legal system has its costs. Though economic costs associated with litigation are significant (economists have estimated that the United States tort system alone costs 2.3% of GDP—two and a half times the world average<sup>137</sup>), in some ways, these may be less significant than the social costs involved. Resorting to litigation acknowledges that civility and cooperation have broken down. Some scholarship has concluded that much of the time, plaintiffs seek personal vindication that they have been wronged rather than financial remuneration. Sometimes the tort system is the only way to satisfy this psychological desire, but it can be counter-therapeutic as well. Litigation involves lengthy delays, an imperfect commoditization of injuries, and, perhaps worst of all, rarely provides plaintiffs with opportunities to deal with defendants face-to-face in order to “acknowledge losses and responsibilities, settle their differences, and bring closure to the case.”<sup>138</sup> Life in a litigious society may have implications for American culture, fomenting atomization and a tendency on the part of defendants to minimize

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135. See Note, *supra* note 13, at 1188 (“The medieval notion that litigation is evil per se has, however, been widely rejected, and it is now recognized that litigation often serves vital social functions.”).

136. See Radin, *supra* note 11, at 72 (“If it is well-founded, if a wrong has been done or an obligation unfulfilled . . . a law suit ought to be considered proper and commendable.”); Comment, *supra* note 10, at 676-77 (“[I]f individual rights be emphasized and the theory be adopted that the function of the Courts is to enforce *all* valid claims, then stirring up litigation must be considered a desirable activity.”).

137. John Kerr, Louis B. Kimmelman & William R. Squires, III, *United States, in ECONOMIC CONSEQUENCES OF LITIGATION WORLDWIDE* 407 (Charles Platto ed., 1998).

138. Edie Greene, “*Can We Talk?*” *Therapeutic Jurisprudence, Restorative Justice, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES* 240 (Brian H. Bornstein et al. eds., 2008).

their liability rather than do justice to the plaintiff. In this sense, every lawsuit—even the successful vindication of a valid claim—is a tragedy of sorts.

Nor is the passive suffering the only viable alternative to litigation in resolving disagreements. Members of common communities often resolve their disputes through basic norms of neighborliness and informal mechanisms, and in comparison to litigation, such methods often prove to be more efficient and satisfying for the parties involved.<sup>139</sup> Other, more formal, varieties of alternative dispute resolution have become increasingly popular in recent years as well.<sup>140</sup> These often provide many advantages over litigation. The parties typically enjoy a more active role in the process than they would in a courtroom; proceedings are often confidential, protecting the parties' privacy and reputations; and the more active involvement of a neutral third party may help to alleviate some of the stubbornness fostered by a more adversarial process.<sup>141</sup>

In some cases, it may be better to avoid a dispute altogether. Historically, some courts were especially wary of lawyers who were seen as encouraging spouses to divorce in order to create business for themselves.<sup>142</sup> In *Ohralik*, the Court seemed influenced by the fact that an attorney encouraged an injured party to sue a family friend in order to access insurance money.<sup>143</sup> On these issues, the lawyer's incentives may diverge from her client's. Where the latter seeks only to maximize her financial gains, an attorney who litigates her case on a contingent fee basis may provide the best mechanism for serving her end. But where a client seeks recognition, vindication, apology, or some other abstract resolution, these goals may not comport with the lawyer's interests. In particular, the lawyer engaged in direct solicitation is unlikely to seek out clients who desire these remedies; rather, as Model Rule 7.3 expresses, such solicitations will typically be motivated by "pecuniary gain."<sup>144</sup>

### B. *Optimizing Litigation*

Stirring up litigation may impose serious costs, but do those costs outweigh the benefits? There is reason to believe they do not. Moreover, it is possible that

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139. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (discussing the preference of residents of Shasta County for informal methods of dispute resolution over the legal system).

140. See Marshall J. Breger, *Should an Attorney Be Required To Advise a Client of ADR Options?*, 13 *Geo. J. Legal Ethics* 427, 428-29 (2000).

141. See Patrick J. Martell, *The Net and Beyond: Dispute Resolution for the High Tech Company*, in ALI-ABA'S PRACTICE CHECKLIST MANUAL ON ALTERNATIVE DISPUTE RESOLUTION 195 (Am. Law Inst. & Am. Bar Ass'n Comm. on Continuing Prof'l Educ. eds., 2002).

142. See *People ex rel. Chicago Bar Ass'n v. Berezniak*, 127 N.E. 36, 37-39 (Ill. 1920).

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

144. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2000).

whatever added litigation direct solicitation foments would, on balance, be for the good of society.

While superior dispute resolution mechanisms may exist, there is little reason to believe discouraging direct solicitation will somehow avail injured parties of these options. Professor Ellickson's Shasta County ranchers<sup>145</sup> may employ background norms to resolve their disagreements, but theirs is a close-knit and homogeneous community. As society becomes more urbanized and impersonal, parties may lack the basic connections necessary to agree on basic principles of fairness.<sup>146</sup> A client who is unaware of his legal rights without direct solicitation is unlikely to pursue private arbitration or mediation independently—though, if legal counsel for the opposing party or his insurance company contacts him first, that may be where he ultimately ends up. Clients who would have sought legal representation even without being solicited would still have to transact with a lawyer whose financial incentives may favor litigation over superior alternatives. In any case, receiving legal counsel—through direct solicitation or otherwise—may better apprise clients of these options; indeed, some have argued that the *Model Rules of Professional Conduct* effectively require that attorneys advise clients of the possibility of alternate dispute resolution.<sup>147</sup>

Even disregarding the viability of alternatives, there is a question as to whether a just legal system should err on the side of too much or too little litigation. Over-litigation poses certain social costs and inefficiencies. However, under-litigation of disputes, insofar as it endorses the acceptance of unredressed rights, is arguably more than a social cost—it is an injustice. Moreover, even if there exists too much litigation on a social level, certain disfavored groups, such as the “not-quite-poor” and the “unknowledgeable,”<sup>148</sup> may litigate insufficiently. Accordingly, a society that favors under-litigating abets not only individual injustices, but systemic injustice as well. Ultimately, it is an *a posteriori* question whether the additional litigation stirred up by direct solicitation would be salutary, and it is almost certainly unverifiable. But in such cases, caution is appropriate.

## CONCLUSION

The current prohibition on direct solicitation serves the interests of a favored elite. Veteran practitioners arrogate legal business to themselves at the expense of their less-established competitors. Wealthy claimants leverage their social connections to hire skilled attorneys, while the uneducated who seek legal representation are left to hope for the best. The vulnerable are protected from

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145. See ELLICKSON, *supra* note 139 and accompanying text.

146. See *id.* at 282.

147. See Breger, *supra* note 137, at 433-36.

148. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376-77 (1976).

those who seek to advise and represent them, but not from third parties with divergent interests.

If the ABA's opposition to direct solicitation arises from a genuine concern for preventing exploitation by dishonest attorneys, there are better options. Instead of imposing a uniform ban on direct solicitation, a better option might be for states to regulate deceitful conduct more directly. States could mandate a cooling off period in which clients would retain a right of cancellation over any binding fee agreement into which they have entered.<sup>149</sup> The legal system could better inform litigants of their right to dismiss counsel and hire a new attorney. Courts could apply more searching scrutiny when reviewing fee agreements that arose from direct solicitations. Indeed, many mechanisms already exist to guarantee faithful representation of—and equitable dealing with—the client.

The Supreme Court's general trend toward liberalizing solicitation has been a positive one, but the issue extends beyond the First Amendment. As a matter of sound policy and the equal administration of justice, the ban on direct solicitation should be lifted.

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149. See Note, *supra* note 13, at 1200.