

1994

Client Outreach 101: Solicitation of Elderly Clients by Seminar under the Model Rules of Professional Conduct

Nina Keilin

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Nina Keilin, *Client Outreach 101: Solicitation of Elderly Clients by Seminar under the Model Rules of Professional Conduct*, 62 Fordham L. Rev. 1547 (1994).

Available at: <https://ir.lawnet.fordham.edu/flr/vol62/iss5/23>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CLIENT OUTREACH 101: SOLICITATION OF ELDERLY CLIENTS BY SEMINAR UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT

NINA KEILIN

INTRODUCTION

When feisty Clara Peller asked the immortal question "Where's the beef?"¹ she showed us that she was one older person who could not be taken in by slick hucksterism. But even a brief survey of news reports indicates that many elderly² regularly fail to exercise the same healthy degree of skepticism in their daily transactions. Instead, despite attempts at government regulation and educational efforts by consumer groups and the media, a disconcertingly large number fall victim each year to swindles and consumer fraud, in which they lose hundreds or thousands of dollars at a time.³ Given the apparent vulnerability of the elderly to high-pressure salesmanship, conscientious attorneys might want to monitor their behavior with the elderly in order to avoid overreaching in their promotional efforts. This consideration has special significance for elder-law attorneys who utilize a particular form of client contact—the educational seminar.

In order to tap into the expanding customer base of elderly clients, elder-law attorneys frequently sponsor free or low-cost educational seminars⁴ on topics that might interest the elderly, such as wills and trusts or

1. The late Clara Peller enjoyed her "15 minutes of fame" in 1984 as the star of a wildly popular series of commercials for Wendy's restaurants. The diminutive retired beautician, then in her early eighties, was seen driving up to various fast-food establishments, gruffly demanding "Where's the beef?" when presented with puny burgers. The slogan was even adopted by former Vice President Walter Mondale in his presidential campaign that year. See Richard Harrington, *Clara Peller: A Stake in the Beef*, Wash. Post, Mar. 28, 1984, at B1.

2. For convenience, this Note follows the tradition of defining "elderly" as over the age of 65. One reason this definition gained wide usage is that it represents the age at which most people become eligible for many government benefits. Since helping the elderly obtain these benefits forms a large part of the practice of elder law, it makes some sense to define elderly this way. See generally Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 *Hastings L.J.* 683, 683-87 (1991) (discussing the tradition). Recent legislation introduced in Congress would stiffen penalties for fraud perpetrated on older Americans. The legislation defines older Americans as over the age of 55. See *Senate Bill Targets Scams Directed at Consumers Over 55*, *Antitrust & Trade Reg. Rep. (BNA)* No. 1624, at 128 (July 22, 1993).

3. See *infra* notes 18-40 and accompanying text. A notable real-life exception, seen recently on *60 Minutes*, is an older woman nicknamed "Grambo," who is deployed by the State of Arizona to investigate consumer problems of the elderly. In the news report, Grambo conducts "sting" operations on auto mechanics and hearing-aid salesmen. See *60 Minutes: Swindle* (CBS television broadcast, Jan. 2, 1994).

4. There appears to be no way even to estimate how many lawyers use seminars. The use of seminars is considered an important business-development tool, however. See Celia Paul, *How Top Rainmakers Achieve Success*, N.Y.L.J., Sept. 21, 1992, at S1; see also

entitlement programs.⁵ Generally, a seminar is a useful service that allows lay people to obtain information about their legal rights, and it can provide a fair representation of the attorney's abilities.⁶ But if, as the evidence suggests, the elderly really are more susceptible to persuasive salesmanship, the use of seminars with this group is potentially misleading or coercive—even when employed by a well-meaning practitioner.

Unfortunately, the American Bar Association Model Rules of Professional Conduct ("Model Rules" or "Rules") offer little guidance for the attorney who wishes to conduct a promotional seminar. The Model Rules draw a distinction between advertising and in-person solicitation, addressing them with separate rules.⁷ The seminar, however, is a curious hybrid of advertising and in-person solicitation as well as a pure educational effort not explicitly addressed by the Rules.⁸ The current Rules are ambiguous enough that an attorney could arguably face sanctions⁹ simply for conducting a seminar.

Donna Greene, *Lawyers Can Protect Assets of the Aged*, N.Y. Times, June 23, 1991, § 12 (Westchester County), at 3 (mentioning seminars for the elderly).

5. A complete exploration of the practice of elder law is beyond the scope of this Note. In general, while the elderly may require general legal services not specific to age, such as divorce representation or services in connection with purchasing or selling property, the specialty of elder law responds to the unique needs of the elderly related to their age and financial circumstances.

The lion's share of work clusters around distribution or retention of assets, including wills, trusts, and related tax consequences, and maximizing eligibility for government benefits. Lawyers are also needed to plan for incapacity by helping the elderly draw up powers of attorney, health-care directives, and living wills. See generally Robert Abrams & Vincent J. Russo, *The Phenomenon, Scope and Practice of Elder Law*, N.Y. St. B.J., Dec. 1991, at 32 (describing specialty and noting expansion); Fawn Fitter, *Elder Law Comes Into Its Own as a Specialty*, Boston Bus. J., Apr. 9, 1993, at 16 (same).

6. See Greene, *supra* note 4, at 3.

7. Advertising is addressed by Rule 7.2, which reads, in pertinent part: "Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication." Model Rules of Professional Conduct Rule 7.2(a) (1992). In-person solicitation is addressed by Rule 7.3, which reads, in pertinent part: "A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." Model Rules, *supra*, Rule 7.3(a) (1992).

8. It is not clear why the seminar, a medium of great persuasive power, has received so little attention, while conduct that appears to be much less harmful is hotly debated—for example, the publication of specialty certifications. See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990). An informal ethics opinion of the Michigan State Bar Association is apparently the only attempt to apply Rule 7.3 to solicitation by seminar. See *infra* notes 238-46 and accompanying text. The likeliest explanation is that seminars simply got lost in the shuffle of the confusing history of advertising and solicitation regulations. See *infra* notes 83-224 and accompanying text.

9. This Note recognizes that the Model Rules have no legal authority. Each state adopts its own official standards of professional conduct for attorneys, however, usually based on model codes and rules promulgated by the American Bar Association. The majority of states have currently adopted a version of the Model Rules. See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model*

A per se ban on seminars for the elderly would be an easy way to prevent overreaching but is not necessarily the most appropriate method. This approach could subject the elderly to stereotyping¹⁰ and invites constitutional challenges by attorneys who wish to conduct seminars. Further, while a ban would prevent abuses, it would also prevent information from reaching people who need and want it. The question, then, is how to structure the rules to prevent abuses without resorting to outmoded paternalism or free-speech violations. A more moderate approach would employ consumer-protection principles to set requirements for attorney-client interactions. An analysis of consumer problems of the elderly provides a useful model for a coherent scheme of attorney solicitation by seminar.

This Note assesses the ethical consequences of solicitation of the elderly by seminar under the ABA Model Rules of Professional Conduct and argues that the current Rules do too little to protect the elderly, and indeed all consumers, from misleading presentations. Part I provides information on the elderly, their utilization of legal services, and the factors that indicate a need for special protections for this group. Part II traces the history of the ethics rules regarding advertising and solicitation in general, and as they have been applied to seminars. Part III considers difficulties in applying the current Model Rules to seminars and proposes a new Model Rule that would eliminate ambiguities and reconcile the competing needs of attorneys and clients. This Note concludes that the Rules should explicitly address the status of seminars so that attorneys will have clear guidance in planning seminars. Further, the special needs of the elderly justify prophylactic rules to prevent misleading seminar presentations that might not be necessary or appropriate in other contexts. These rules can be structured as rational consumer protection provisions that neither restrict opportunities for attorneys to solicit business nor curtail consumers' access to information. In fact, they will also protect all consumers.

Rules of Professional Conduct § AP4:107 (2d ed. 1990 & Supp. 1993) (noting that 35 states and the District of Columbia have adopted the Model Rules).

10. Such stereotyping is forbidden in the employment arena, for example, by the Age Discrimination in Employment Act of 1967 ("ADEA"), Pub. L. No. 90-202, 88 Stat. 74 (codified as amended at 29 U.S.C. §§ 621-34 (1988 & Supp. IV 1992)), which prohibits employment decisions based on "stigmatizing stereotypes" about age and ability. See *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."). The ADEA, however, is a remedial act designed to aid a disenfranchised group. Any other provisions designed to help the elderly might also be considered remedial. See Statement of John J. Pickering, Chairman, ABA Commission on Legal Problems of the Elderly (submitted to the Senate Special Committee on Aging) (concerning consumer fraud and the elderly), Sept. 24, 1992 (on file with *Fordham Law Review*) ("[T]he ABA has long been concerned with equal access to justice for the disenfranchised, the elderly and the disabled, those members of our society who are generally least able to protect their own rights."); see also Frolik & Barnes, *supra* note 2, at 712-15 (discussing ways to reconcile protectionist policies with antidiscrimination policies).

I. AN OVERVIEW OF THE ELDERLY POPULATION

Regulations on attorney advertising must be narrowly tailored to withstand First Amendment scrutiny, and drafters must assert a sufficient state interest as the basis for any restriction imposed.¹¹ A regulation resting on sentimental paternalism cannot survive constitutional scrutiny. Therefore, this Part analyzes the problems of the elderly as both consumers in general and as consumers of legal services in particular to provide the necessary justification for the proposed Model Rule.

The first section focuses on high-pressure sales tactics and other forms of deceptive in-person¹² selling to the elderly—both one-on-one and at seminars. An examination of these extreme forms of persuasion—some of which involve criminal activity—indicates both the magnitude of the problem and specific practices that cause harm, including how attorney seminars can capitalize on these factors.¹³ The second section shows how certain demographic factors explain the high incidence of vulnerability to the practices described in the first section. Taken together, this supports the validity of state intervention.

A. *Consumer Fraud and the Elderly: The Nature of the Game*

The sheer size of the elderly population is the first indicator that this group deserves concern. The elderly comprise a large segment of the population; there are more than thirty-one million persons over the age of sixty-five in the United States.¹⁴ Advances in medical care have ex-

11. See *Edenfield v. Fane*, 113 S. Ct. 1792, 1797-99 (1993).

12. Marketers also target the elderly by telephone with "boiler room" phone sales. Although these pitches do not involve face-to-face contact, the sellers utilize the same forms of psychological manipulation that in-person sellers use. Sometimes the telemarketers offer worthless securities or travel bargains. See Robert F. Service, *Eluding Swindlers: A Little Vigilance Can Help Elderly Foil Investment Scams*, Chi. Trib., Aug. 13, 1993, at N1. Telemarketers may use deceptive names that make them sound like reputable charities or political groups. See *Don't Trust Those "Official" Come-ons that Hit Mailbox*, Seattle Times, Jan. 31, 1993, at K2. The most common telemarketing scam today appears to be the phony contest, which requires the "winner" to make large payments to "claim" prizes. Typically announcements arrive in the mail, and the recipient must call a number to "claim" the "prize." He or she is then persuaded to release a credit card number to pay the fee, which may be several hundred dollars or even thousands. See *Mail-Originated Scam, Preying on the Elderly, the Gullible*, Sacramento Bee, Sept. 27, 1993 at C1; Don Bauder, *Telemarketing Fraud Targeted by Lawmakers, Law Enforcers*, San Diego Union-Trib., Mar. 28, 1993, at I1. A caller might be told he won a power boat; instead of the cabin cruiser he envisions, he receives an inflatable raft with a tiny motor. See *Something Fishy*, Consumer Rep., Mar. 1994, at 211. The Model Rules apply the same prohibition to telephone contact and in-person contact. See Model Rules, *supra* note 7, Rule 7.3.

13. The misconduct discussed here is of the kind that the Supreme Court sought to restrict in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the case that forms the basis for the present prohibition of in-person solicitation. See *infra* notes 172-84 and accompanying text.

14. See Bureau of the Census, U.S. Dep't of Commerce, 1990 Census of Population, General Population Characteristics, United States 17 (1992).

tended life expectancy, so the elderly sector is also growing rapidly;¹⁵ hence the development and expansion of the specialty of elder law.¹⁶ Approximately 40 percent have middle or upper incomes, which place them in the group likely to be targeted by elder law attorneys.¹⁷

Of course, the majority of the elderly is not affected by consumer fraud or swindles, nor indeed is the majority of the general population.¹⁸ Nevertheless, when one considers all victims of this type of conduct, a large proportion of such victims are elderly—at least sixty percent.¹⁹ Moreover, law enforcement authorities state that many victims are embarrassed to come forward about fraud crimes, so the actual incidence of fraud may be fifty to ninety percent higher than reported.²⁰

The variety of reprehensible behavior in the consumer arena knows no limit, except perhaps for the imaginations of the perpetrators. Three typical swindles recur most frequently with the elderly:²¹ the old-time pocketbook switch,²² the bank-examiner swindle,²³ and home repair fraud.²⁴

15. See Mortimer J. Goodstein, *The Essence of Elder Law*, N.Y. St. B.J., Sept./Oct. 1993, at 10 ("In 1900, seniors were 3% of the total national census (3.1 million); in 1988 the elderly numbered 12.4% of the population (30.4 million). Projections for the year 2030 indicate that there will be over 66 million elders—almost 25% of the American population.") (citing 1990 Report of Joyce T. Berry, U.S. Commissioner on Aging). Some of the increase in the relative size of the aging population also results from lower current birth rates, so that younger age groups form a smaller proportion of the total population. See Frolik & Barnes, *supra* note 2, at 690.

16. See Fitter, *supra* note 5, at 16.

17. See Robert C. Atchley, *Social Forces and Aging: An Introduction to Social Gerontology* 33 (5th ed. 1988) (chart indicating distribution of incomes as of 1984, created by the U.S. Senate Special Committee on Aging). The elderly poor also have problems in obtaining legal advice, but these individuals are not likely to be targeted by typical elder-law attorneys and are beyond the scope of this Note.

18. FBI statistics break down crimes by age of victim, but they tally fraud in a category known as "other assaults," which includes several crimes, so it is impossible to come up with an actual number of elderly victims. See Monroe Friedman, *Confidence Swindles of Older Consumers*, 26 J. Consumer Aff. 20, 23 (1992).

19. Evidence must be extrapolated from reports from individual states or metropolitan law enforcement authorities. See *id.* at 22-23. For example, at one time, the Los Angeles and San Francisco police departments reported that 90 percent of the bunco victims in those cities were over 65, and California reported that 70 percent of health quackery victims in that state were over 65. See Robert J. Smith, *Crime Against the Elderly: Implications for Policy-Makers and Practitioners* 10-11 (1979); see also New York State Division of Criminal Justice Services, *Crime & the Elderly: 1989 Report* 53 (1990) ("While data support is lacking for the assertion that elderly people are victimized by fraud much more frequently than younger people, other data suggest strongly that the circumstances of many individual older people make the group of them a good potential-victim pool for fraud, as a whole.").

20. See Friedman, *supra* note 18, at 41.

21. See *id.* at 27.

22. See *id.* Movie fans may remember that a version of the pocketbook switch, also known as the pigeon-drop, was depicted in the opening scenes of the hit film "The Sting." See *The Sting* (Universal 1973). In this scam, a perpetrator claims to have found a large sum of money and offers to split it with the victim and another stranger, a confederate who pretends not to know the first swindler. Somehow the victim is persuaded to hold the money "for a few days" and to withdraw money from the bank and add it to the pile to show "good faith." The swindler combines the two batches of money and gives an

The elderly are also exploited in the sale of funeral packages,²⁵ health care,²⁶ and leisure activities.²⁷ In some of the worst cases, sinister caretakers insinuate themselves into the lives of their charges and obtain control of assets by undue influence.²⁸

Attorneys also take advantage of the elderly. For example, attorneys may become involved in caretaker schemes by drawing up the papers that give a caretaker access to client funds.²⁹ In cases like these, it probably should have been apparent to the attorney that something was improper in the relationship between the elderly person and the caretaker.³⁰ Unscrupulous attorneys also draft wills in which they appear as benefi-

envelope to the victim, who finds later that the envelope has been switched and the envelope he has is filled with newspaper. See Friedman, *supra* note 18, at 27.

23. This swindle is a variation on the pocketbook switch. Con artists pose as bank officials or police officers and ask a victim to help them catch a bank teller who has supposedly embezzled money from the mark's account. They ask the victim to withdraw money from his account and turn it over to the investigator. Of course, the hapless victim, who was eager to help, never sees the money—or the investigator—again. See Friedman, *supra* note 18, at 27-28.

24. Typically, a contractor visits the home, offering an inexpensive service—such as air-conditioning inspection or furnace cleaning—as a loss-leader. After a sales pitch, the unwary homeowner agrees to purchase replacement equipment at inflated prices. See *id.* at 28. This conduct is not always a crime; it is “not illegal to charge outrageous prices.” Hiawatha Bray, *A Real Steal: Con Artists Set Their Sights on Senior Citizens*, Chi. Trib., Apr. 20, 1993, at C1.

25. See Smith, *supra* note 19, at 11; Elizabeth Elmore, *Consumer Fraud and the Elderly*, in David Lester, *The Elderly Victim of Crime* 34 (1981).

26. See Elmore, *supra* note 25, at 32-33. Deceptive hearing-aid sales practices are still prevalent despite longstanding federal regulation. See Karl Vick, *Senate Panel Hears Hearing Aid Scams*, St. Petersburg Times, Sept. 16, 1993, at 1A (reporting investigation by the American Association of Retired Persons); *60 Minutes*, *supra* note 3.

27. The classic example is the coercive sale of extended contracts for dance lessons. See Craig Pittman, *Dances Confront Scams on Elderly*, St. Petersburg Times, Aug. 20, 1993, at NP1 (detailing senior center's plan to sponsor dances as an alternative to expensive studios). There are a number of reported cases involving dance lessons. See, e.g., *Bennett v. Bailey*, 597 S.W.2d 532 (Tex. 1980). In this astonishing case, the plaintiff, a widow of undisclosed age, purchased more than \$29,000 worth of dance lessons from flattering young male instructors. Upon her refusal to “upgrade” to a \$49,000 contract or to add a \$9,000 contract, the “affections” of these instructors were withdrawn; one instructor stepped on plaintiff's toe, disabling her for eleven weeks. Surprisingly, she returned to the studio to resume her lessons. The same instructor twirled plaintiff in the air, and she sustained two broken ribs. Plaintiff received treble damages.

28. See Lynn Paquin, *Galt Puts Spotlight on Abuse of Elderly*, Sacramento Bee, July 22, 1993, at N1. (noting program to recruit utility workers and mail carriers to be on the alert for a sudden change in habits, such as unpaid bills, that indicates that a caretaker may have improperly gained access to funds); see also Lori Baker, *Seminars Aim to Stop Con Artists: Sun Cities Called Prime Fraud Spot*, Ariz. Republic/Phoenix Gazette, July 16, 1993, at 1 (reporting case in which a caregiver demanded that a client pay her \$5 every time she needed help getting out of her wheelchair to go to the bathroom and another case in which two men set up a drug laboratory in a widow's garage).

29. See, e.g., Gerard O'Neill, *Care Worker Charged With Bilking Woman, 91*, Boston Globe, Nov. 22, 1992, at 1 (questioning role of attorney in drawing up documents that allowed caretaker to obtain \$30,000).

30. See *id.*

ciaries³¹ or may "churn"³² client accounts for extra fees for services of dubious necessity.³³

Most relevant to the present inquiry is the appearance of a mushrooming number of businesses that target the elderly for some of the same services elder-law attorneys provide. Typically, attorneys are peripherally involved in carrying out these businesses; often these companies operate by making sales at seminars.³⁴ The basic setup of these schemes is as follows: Some of the companies use names that create confusion with reputable senior-citizens' organizations or social-welfare agencies.³⁵ The sellers, who are not attorneys, stir up the attendees' fears of high taxes or the high cost and extreme inconvenience of probate proceedings.³⁶ This information is misleading in many cases, because, for example, probate is not expensive or lengthy in every state.³⁷ The speakers then describe how living trusts can help the attendees' heirs avoid all the difficulties of probate.³⁸ The sellers then contract with the elderly clients to set up living trusts, take down financial information, and draw up the documents.³⁹ Later, attorneys at another site quickly review and complete the documents without consulting with the clients, sometimes making numerous errors.⁴⁰ Finally, the sellers often do not advise the clients of various legal rights, such as state laws that give them three days to rescind the contracts.⁴¹

As part of an ongoing national effort, state attorneys general are investigating and prosecuting cases involving these companies under state

31. Most states prohibit bequests to attorney drafters by common law or statute. *See, e.g., In re Putnam's Will*, 177 N.E. 399 (N.Y. 1931) (stating New York rule that a bequest to a drafting attorney raises a presumption of undue influence); Eric Bailey & Davan Maharaj, *Lawyers' Gift Limit Bill Okd*, L.A. Times, Feb. 26, 1993, at B1 (pointing out that at least 36 states prohibit bequests to attorney drafters by statute). Yet the practice has not been totally eradicated. For example, in Orange County, California, last year, one attorney allegedly stood to receive millions of dollars from current clients' estates and had received money from estates in the past, despite a long-standing California Supreme Court holding that restricted bequests to attorney-drafters. In the aftermath of the discovery, state probate investigators found other attorneys who engaged in this practice. This incident prompted the California legislature to pass a law forbidding bequests to attorney drafters. *See id.*

32. In the securities industry, churning is the practice of a broker's authorizing excessive trades in a client's account in order to generate commissions. This practice is considered a violation of federal securities law. *See Black's Law Dictionary* 242 (6th ed. 1990).

33. *See Bailey & Maharaj, supra* note 31, at B1 (discussing attorneys who drain client accounts by charging conservator fees). Some elderly clients may also visit attorneys frequently out of loneliness, asking for minor changes in their wills.

34. *See Lori A. Stiegel et al., On Guard Against Living Trusts Scams*, Elder L.F., May/June 1993, at 1.

35. *See id.* at 6.

36. *See Lori A. Stiegel et al., Scams in the Marketing and Sale of Living Trusts: A New Fraud for the 1990s*, 26 Clearinghouse Rev. 609, 610 (1992).

37. *See id.*

38. *See id.*

39. *See id.* at 611.

40. *See id.* at 610.

41. *See id.*

consumer-protection acts and also unifying to educate consumers.⁴² Discipline for the attorneys involved is another matter, however. State consumer protection acts usually exempt professionals, such as physicians and lawyers, from their operation.⁴³ Some state bars have disciplined the attorneys involved under their respective state professional ethics codes for aiding nonlawyers in the unauthorized practice of law.⁴⁴ It is unlikely that ethics rules regarding solicitation, advertising, and misleading communications could apply, however, because the attorneys themselves did not do the selling, nor were they using the company salesmen as their agents to gain clients.⁴⁵ It is easy to imagine, however, how an attorney-conducted seminar could raise the concerns implicated by the rules on solicitation and advertising.

For example, the presentation may overstate the need for a particular service by playing on the attendees' fears of depleting their assets and falling into poverty.⁴⁶ If the attorney can present the seminar in conjunction with a retirees' group or other organization, it may lend a misleading appearance of the group's endorsement, especially if the group initiates the speaking engagement.⁴⁷ The force of the attorney's personality may create an unwarranted impression of competence.⁴⁸ Or worse, the attorney may be using sexual attractiveness or personal charisma to win clients.⁴⁹ The length of the seminar and the fact that it is free or low cost may also induce a feeling of indebtedness to the attorney. It seems clear that many elderly consumers would be susceptible to seminar salesmanship. It remains to find out why.

42. See Stiegel et al., *supra* note 34, at 1, 6.

43. See Stephen Gardner & Albert N. Sheldon, *See Dick and Jane Sue: A Primer on State Consumer Protection Laws*, 739 A.L.I.-A.B.A. Course of Study 253, 261 (1992).

44. See Stiegel et al., *supra* note 34, at 6.

45. Employing an agent to recruit clients would be a violation of Rule 7.2(c), which states: "A lawyer shall not give anything of value to a person for recommending the lawyer's services." Model Rules, *supra* note 7, Rule 7.2(c).

46. See, e.g., *supra* notes 36-38 and accompanying text (describing technique of selling living trusts by overstating expenses of probate).

47. See *supra* text accompanying note 35. One article advises attorneys to rent a room at a university, charity headquarters, or hospital to give the impression of another organization's endorsement. See Jay G. Foonberg, *How a Nonlawyer Can Plan and Execute Firm Seminars as a Means of Getting and Keeping Clients*, Law Prac. Mgmt., Jan./Feb. 1993, at 40 (the article envisions lawyer presentations but tells how non-lawyer staff can help the attorney save time by organizing the seminar). Creating an appearance of a group's endorsement would violate Model Rule 7.1, which prohibits misleading communications. See Model Rules, *supra* note 7, Rule 7.1.

48. The Supreme Court has consistently reiterated the notion that attorneys' training in advocacy makes regulation of in-person attorney solicitation constitutional. See *Edenfield v. Fane*, 113 S. Ct. 1972, 1802-03 (1993).

49. When asked whether his youth was a barrier to working with elder-law clients, one attorney stated that men were sometimes doubtful, but that "he was a hit with the ladies at the seminars." See Linda Lynwander, *Advising the Elderly on Health Costs*, N.Y. Times, June 24, 1990, § 12 (New Jersey), at 3. While this attorney appears to be taking only unwitting advantage of attractiveness, this remark uncomfortably recalls the behavior of the unscrupulous dance instructors. See *supra* note 27.

B. *The Demographics of Isolation: Why the Elderly Are More Likely to Be Guileless Consumers*

Despite medical advances, the elderly do suffer higher rates than the population at large from chronic diseases and other conditions that diminish mental and physical capacity.⁵⁰ For this reason, one might expect experts to ascribe the vulnerability of the elderly to consumer fraud to reduced abilities, particularly mental abilities. This is not the case, though. In fact, the very people who are most likely to be victimized are in the younger group of elderly,⁵¹ who are most active and mentally engaged and defy traditional stereotypes of the elderly.⁵²

Instead, the most significant factors cited are social in nature: Despite a fair measure of financial security, many of the middle-class elderly lack certain kinds of experience expected of property owners and others of similar means. As a result, many of the middle-class elderly are, in essence, disenfranchised by a lack of information and support that could help them make better decisions; other demographics make the elderly more available to those who would take advantage of them. Finally, swindlers are simply very skillful at exercising this advantage.⁵³

One relevant factor is the difference in male and female life expectancy. Women outnumber men by a wide margin in the elderly population, a margin that increases sharply with age.⁵⁴ Many of these women have had less experience with financial affairs.⁵⁵ Their lack of experience may disadvantage them in their dealings with lawyers and others.

The living arrangements of the elderly place them at a further disadvantage. Many of the elderly are widowed and therefore live alone.⁵⁶ A fair number also live at some distance from children and other relatives.⁵⁷ Living alone has two untoward consequences for these people. First, those who live alone may crave social contact, making it likelier that they will respond to a friendly sales pitch.⁵⁸ Second, the person who

50. See Frolik & Barnes, *supra* note 2, at 683-4.

51. See Friedman, *supra* note 18, at 23.

52. See Robert C. Atchley, *Social Forces and Aging: An Introduction to Social Gerontology* 285 (6th ed. 1991). Loss of physical capacity may have some effect, however, in relation to the social factors detailed here. See *infra* note 64 and accompanying text.

53. See Elmore, *supra* note 25, at 32-33 (1981) (listing isolation, loneliness, and lack of family support as relevant factors); Friedman, *supra* note 18, at 23.

54. Women outnumber men by about a 5 to 4 ratio in the 65- to 69-year-old age group; the margin increases steadily to almost 2 to 1 in the 80 to 84 year old group and to about 2½ to 1 in the over-85 group. See Bureau of the Census, *supra* note 14, at 17.

55. See, e.g., Baker, *supra* note 28, at 1 (reporting numerous cases of vulnerability among widows whose spouses previously took care of family finances); Paquin, *supra* note 28, at N1 (same). Of course, today's generation of young working women is less likely to suffer this disability in later life.

56. About 12 percent of men over 65 live alone and about one third of women. See Frolik & Barnes, *supra* note 2, at 701. While this is not a majority, it is a large enough number to cause concern.

57. See *id.* at 703.

58. See Bill Coats, *When Others Aren't Around*, St. Petersburg Times, Aug. 9, 1993, at 1; Elmore, *supra* note 25, at 32-33.

lives alone has no one to consult with before entering into a questionable transaction. The person fortunate enough to survive into old age in the company of a spouse can be thrust suddenly into single status by sudden illness or death of a spouse. In these cases, whatever disadvantage is encountered because of living alone may be exacerbated by overwhelming grief or fear of impoverishment, which may cloud the surviving spouse's judgment.⁵⁹ Funeral directors can prey on clients in this state and sell them high-priced funeral services.⁶⁰ Elder-law attorneys must be conscious of similar possibilities in counseling a client whose spouse is suddenly incapacitated and who faces high long-term-care expenses.

Experts also say that simple availability contributes to the victimization of the elderly. The elderly have had a lifetime to accumulate assets, so they make better targets for swindlers.⁶¹ Their easy availability is enhanced when they cluster in retirement communities—these communities attract legions of those who wish to perpetrate frauds.⁶² This tendency may be more apparent in states such as California, Florida, and Arizona, which have higher concentrations of retirees because of their pleasant climates.⁶³

Physical incapacity has some effect, in that it may make a person fearful of questioning a salesperson, or it may diminish the elderly person's ability to investigate a seller's actions, particularly when the person lives alone and the sellers work in teams.⁶⁴

Finally, studies of sales techniques provide insight into how people respond to manipulative behavior.⁶⁵ No one—of any age—is immune to

59. See Elmore, *supra* note 25, at 33.

60. See *id.* at 33. The Federal Trade Commission enacted regulations to reduce deceptive selling in the funeral industry in the 1980s. See Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule*, 7 J. L. & Pol. 1, 4 (1990).

61. See Elmore, *supra* note 25, at 33.

62. See Davan Maharaj, *O.C. Retirement Centers Are Swindlers' Paradise*, L.A. Times, Nov. 3, 1991, at A1 (depicting Leisure World, an Orange County, California, retirement community, as "besieged" by the unscrupulous and quoting Orange County Superior Court Judge James A. Jackman, "I sometimes think of Leisure World as a pool of small fish with the sharks feeding and circling around the perimeters."). Ironically, however, congregating in retirement communities can offer protection to the elderly. Retirement village social workers distribute flyers and counsel residents to be wary of scams. See Paquin, *supra* note 28, at N1. Single residents in a retirement community will also be able to discuss problems with their neighbors, and their neighbors may watch out for their well-being. See *id.*

63. See Bureau of the Census, U.S. Dep't of Commerce, 1990, *Census of Population and Housing, Summary Population and Housing Characteristics, United States 1-2* (1992) (table of population by age and state).

64. Some people with impaired mobility may be afraid to question a salesperson, or they may be unable to. Monroe Friedman describes how home repair salespeople often work in teams. One member talks to the older person on the first floor of the home while the confederate conducts "inspections" upstairs. The older person with impaired mobility is unable to follow the inspector upstairs and check on his activities. See Friedman, *supra* note 18, at 23, 33-35; Telephone Interview with Monroe Friedman (Jan. 17, 1994).

65. See Harry M. Brittenham et al., Project, *The Direct Selling Industry: An Empirical Study*, 16 UCLA L. Rev. 885 (1969). The Supreme Court referred to this project in

these tactics.⁶⁶ A typical response is to give in to a sales pitch just to get rid of the salesperson.⁶⁷ In addition, salespeople take advantage of buyers' loneliness⁶⁸ and feed on people's fears.⁶⁹ Sales professionals are skillful at making the most of a buyer's uncertainties, utilizing prepared scripts to counter standard objections.⁷⁰

Unfortunately, the seminar format allows an attorney to employ some or all of the sales techniques listed above.⁷¹ Seminars may gain additional power as a sales tool because the elderly are relatively uninformed about attorneys and the law, despite outreach by social service organizations and senior citizens' groups. For example, many elderly people fail to seek legal counsel because they are unaware that an attorney can help them with some typical problems, such as failure to obtain a medical insurance reimbursement.⁷² Other prospective clients avoid attorneys because they fear high fees.⁷³ Finally, many of those who are aware that they need a lawyer and are willing to pay for legal services still find it difficult to choose an attorney.⁷⁴ The middle-class elderly may have had little experience dealing with lawyers⁷⁵ so they may not have a personal attorney. Word-of-mouth recommendation, favored as an alternative source of information, may be unavailable because friends and family

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464-65 n.23 (1978), when it considered whether to allow restrictions on in-person solicitation by attorneys.

66. Any reader can likely recall being persuaded by a salesperson to buy an unflattering dress or badly fitting shoes, for example. Sometimes we do this because we are too polite to say no or feel guilty about taking up the salesperson's time. Or we may be too embarrassed to say we can't afford something, so we buy it anyway. The elderly victim may even be aware that something is amiss while a swindle is going on but feel "powerless" to stop it. Some experts, however, say that the social mores of the time when today's elderly grew up give them one extra disadvantage: it makes them more willing to trust people. This is often echoed by victims of scams. See Bray, *supra* note 24; Katherine Shaver, *The Perpetrate, Not Investigate*, St. Petersburg Times, July 10, 1993, at 2; Gene Thorpe, *Helpline*, Atlanta Const., Oct. 11, 1993, at E11.

67. See Brittenham et al., *supra* note 65, at 895-925 (noting numerous techniques, including "getting inside the door" and making a "nuisance" of oneself); Friedman, *supra* note 18, at 33-35 (describing a range of techniques from "friendly persuasion" to "intimidation").

68. See *supra* note 58 and accompanying text.

69. See Brittenham et al., *supra* note 65, at 902-06 (noting encyclopedia sales technique of preying on father's fear of children being uneducated).

70. See *id.*

71. See *supra* notes 46-49 and accompanying text.

72. See Wayne Moore, *Improving the Delivery of Legal Services for the Elderly: A Comprehensive Approach*, 41 Emory L.J. 805, 811 (1992); see also Nancy Coleman, *The Delivery of Legal Assistance to the Elderly in the United States*, in *An Aging World: Dilemmas and Challenges for Law and Social Policy* 463, 464 (John M. Eekelaar & David Pearl eds. 1989).

73. See Russell G. Pearce et al., Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 Yale L.J., 122, 132-35 (1980).

74. See *id.* Providing accurate information about attorney abilities is probably the most difficult problem the bar faces in this area. See Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. Davis L. Rev. 283, 287-89 (1992).

75. See Barlow F. Christensen, *Bringing Lawyers and Clients Together* 8-9 (1968).

also have limited experience with lawyers.⁷⁶

Other information sources, such as bar association referral services, provide callers with lists of names but in most cases do not provide consumers with the price and quality information they need to make wise choices.⁷⁷ A consumer who wishes to evaluate the listed attorneys personally, with in-office consultations, may face high costs or, at the least, inconvenience.⁷⁸ In light of this fact, a free seminar stands out as an attractive alternative source of information and gives the attorney an advantage.

In addition, even if more or better information were available about attorneys, it is doubtful that the bar could rely on it to counterbalance overreaching at seminar presentations. For example, widespread dissemination of information about consumer fraud⁷⁹ fails to reach every consumer and therefore does not come close to eradicating it. It thus seems necessary to require attorneys to counter the disadvantage themselves by conducting seminars in an ethical manner.

When it comes to misconduct involving lawyers, some bar associations have stepped forward to undo the damage. For example, after a recent scandal in Orange County, California, involving an attorney beneficiary of a will he had drafted,⁸⁰ the local bar association enlisted attorneys to conduct seminars at local retirement communities.⁸¹ These attorneys pledged not to accept any fees or clients from the audiences.⁸²

Nevertheless, many attorneys wish to conduct elder-law seminars for the primary purpose of attracting clients. The Model Rules of Professional Conduct should provide attorneys with the guidance they need to conduct seminars ethically.

76. See *id.* at 9. Wayne Moore points out that 89% of the elderly who actually use lawyers obtain them as a result of word-of-mouth recommendation. See Moore, *supra* note 72, at 826. This is reconcilable with the idea that the elderly have difficulty obtaining lawyers by word-of-mouth recommendation. Even if a great percentage of people who do obtain legal advice learn of their attorney through word of mouth, a large group of those who fail to use attorneys could still be underserved because they have no access to such recommendations.

77. See Moore, *supra* note 72, at 826-27; Morton, *supra* note 72, at 287-89.

78. See Pearce et al., *supra* note 73, at 150.

79. Workers at retirement communities pass out flyers warning of the latest scams. See Paquin, *supra* note 28, at N1; see also Baker, *supra* note 28, at 1. Police departments pass on information to news organizations, which report scams heavily in newspapers and on television as a service to the audience. For example, in 1993, United States newspapers featured 18 articles on bank examiner scams and the elderly, 39 articles on home repair fraud and the elderly, and 96 articles on telemarketing fraud and the elderly. Search of LEXIS, News library, Papers file (April 8, 1994). Consumer fraud reporting is now a ratings-boosting staple of local TV news reporting and network TV newsmagazine programs.

80. See *supra* note 30.

81. See Davan Maharaj, *Lawyers to Aid Elderly in Public Service Bid*, L.A. Times, Apr. 14, 1991, at B1.

82. See *id.*

II. SEMINARS UNDER THE CURRENT MODEL RULES OF PROFESSIONAL CONDUCT

In order to decide how to structure rules for seminar presentations, it is necessary to review the development of the Model Rules of Professional Conduct regarding advertising and solicitation. The first part of this section explores the early history of the legal profession, when lawyers were largely restricted from advertising and soliciting. The second part examines how the formal rules changed after the Supreme Court acknowledged constitutional protection for attorney advertising. This background is instructive because current rules and recent court decisions retain vestiges of abandoned rules and traditions.

A. *The Prohibition of Publicity*

Wide use of seminars as a promotional tool is a relatively recent development, dating back only to 1977, when the Supreme Court struck down state restrictions on attorney advertising.⁸³ Earlier, public speaking by attorneys was restricted if it encompassed any intent to garner business, or even if business would result incidentally.⁸⁴ This restriction derived from a general prohibition of advertising and solicitation.

Prohibitions of advertising and solicitation have a long history.⁸⁵ For centuries, solicitation was prohibited as a crime, a tradition stemming from ancient perceptions of lawsuits as evil.⁸⁶ The profession did not formally ban advertising, however. A ban would have been unnecessary because the fraternal brotherhood of attorneys who trained at the English Inns of Court and early American attorneys who had studied in England believed advertising was unseemly and refrained from it.⁸⁷

In the United States of the nineteenth century, the legal profession expanded a great deal.⁸⁸ Many attorneys, including Abraham Lincoln, utilized advertising to build their practices.⁸⁹ Much of the expansion came from an influx of immigrants, however, and lawyering was no longer an elite bastion of the upper class.⁹⁰ Concerned with a lowering of status because of the invasion of "undesirables," bar leaders banded to-

83. See Fred S. Steingold, *How to Use Seminars to Attract Clients*, Legal Econ., Mar./Apr. 1985, at 64, 66.

84. See *infra* notes 89-129 and accompanying text.

85. A full understanding of the rules on advertising and solicitation requires an inquiry into the history of the legal profession before the first Canons of Professional Responsibility and is beyond the scope of this Note. For an overview, see Louise L. Hill, *Solicitation by Lawyers: Piercing the First Amendment Veil*, 42 Me. L. Rev. 369, 370-388 (1991).

86. See *id.* at 374.

87. See *id.* at 376-78.

88. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 40-41 (1976).

89. See Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084, 1085 (1983).

90. See Auerbach, *supra* note 88, at 40-41.

gether to stave off a further erosion in status.⁹¹ This movement culminated in the adoption of the first ABA Canons of Ethics, in 1908.⁹² The states quickly adopted the Canons, and they remained in effect with various amendments for a number of years.⁹³ The Canons included a general prohibition on advertising and publicity in Canon 27.⁹⁴ Canon 28 prohibited solicitation, "directly or through agents," for "stirring up litigation."⁹⁵

Ironically, attorneys were never prohibited from undertaking certain forms of so-called "soft-sell," or indirect, solicitation, such as joining the country club or becoming active in civic affairs to make useful contacts.⁹⁶

91. *See id.* at 40-41.

92. *See* Henry S. Drinker, *Legal Ethics* 24-25 (1953).

93. *See* Hill, *supra* note 85, at 382.

94. The original text of Canon 27 reads:

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. 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.

ABA Canons of Professional Ethics Canon 27 (1908).

95. The original text of Canon 28 reads:

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 titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, 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, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. . .

Canons of Ethics, *supra* note 94, Canon 28 (1908).

This is an early formal prohibition of "ambulance chasing." The two roots of this prohibition are apparent from the language of this Canon. The first part implies that stirring up litigation is simply an evil itself. Language in the last few sentences refers to the evil of "influencing the criminal, the sick and injured, the ignorant or others . . ."—in other words, overreaching with people without bargaining power.

96. Such behavior was actually encouraged. *See, e.g.*, *New Lawyers Comm.*, Section

In fact, this method of client outreach was employed most effectively by the very attorneys who would be likeliest to scorn advertising.⁹⁷ Commentators portrayed this double standard as an elitist restriction aimed at excluding smaller-firm attorneys from the profession,⁹⁸ and history lends credence to this criticism.⁹⁹ Henry Drinker, a leading authority on legal ethics of the mid-twentieth century,¹⁰⁰ dismissed these objections in his noted treatise.¹⁰¹ Essentially, Drinker reiterated traditional notions of professionalism and duty: "Where publicity is the normal byproduct of able and effective service, whether of a professional or non-professional character, this is a kind of 'advertisement' which is entirely right and proper."¹⁰² He distinguished this mode of promotion from any effort to seek by "artificial stimulus the publicity normally resulting from what [the attorney] does."¹⁰³

Although speaking at seminars could be considered "soft sell," as it

of General Practice, ABA, *How to Find the Courthouse: A Primer for the General Practice of Law for Law Students and Graduates* 40 (1978) ("[T]he sole practitioner [should] be highly visible in the community; he or she must be a joiner, and travel in as many circles as possible. The more exposure the lawyer has to the public, the more people he will be able to meet; if he impresses them with his legal abilities, he is surely to obtain business from some of them."); Harold P. Seligson, *Building a Practice* 6 (rev. 1955) ("Seek to take part in group activities. . . . If you are an effective speaker these are precious opportunities for winning clients."). One early author imposes a quaint aura of virtuousness on this process, however. See Julius H. Cohen, *The Law: Business or Profession?* 198 (1924) (advising new practitioners to serve on legislative committees and the like but to do so unselfishly: "[The young lawyer must] put his ideals above his profit. He must entirely and at once dismiss from his mind the thought that such association will bring business. It will not. It will beget *confidence* . . .").

97. See Christensen *supra* note 75, at 24-27 (discussing competitive advantages enjoyed by traditional large firms before restrictions on advertising were lifted).

98. See Drinker, *supra* note 92, at 218.

One of the most frequent objections to Canon 27 is that it interferes only with the little fellows, precluding them from making themselves known to prospective clients by advertising and solicitation, while the big ones not only are constantly in the public eye, but by means of their membership in clubs and their prominent participation in Community Chests and in the management of hospitals, colleges, etc., are enabled to meet and become intimate with the leaders in business as potential clients.

Id.

Justice Marshall reiterated this contention in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 475 (1978) (Marshall, J., concurring). Any restriction on seminars will affect elder-law attorneys, who largely operate in small firms or solo practices. See, e.g., Wendy Bourland, *Business Booms for Practice of 'Elder Law'*, *Business Dateline*, *Miami Rev.*, Apr. 2, 1993, at A10 (reporting predominance of small-firm practitioners of elder law in South Florida).

99. See *supra* notes 90-93 and accompanying text.

100. Drinker was chairman of the Standing Committee on Professional Ethics and Grievances of the American Bar Association. See Drinker, *supra* note 92, at iii (title page).

101. See *id.* at 218.

102. *Id.*

103. *Id.*

fulfills a civic duty to educate the public about the law,¹⁰⁴ the rulemakers did not see it that way.¹⁰⁵ In a 1928 addition to the Canons, Canon 40, rulemakers allowed lawyers to provide information to the public, by answering reader inquiries in a newspaper column.¹⁰⁶ The basic rule of Canon 27 continued to control, however; thus the second clause of Canon 40 forbade giving individualized advice or accepting employment arising out of such activities.¹⁰⁷

Drinker disapproved of even this relatively narrow area of permissiveness regarding attorney contacts with the public. He cautioned attorneys to be wary lest their participation cause them to run afoul of other rules. For example, he suggested that writing a newspaper column might easily drift into improper advertisement; further, the attorney risked giving legal advice without proper background information and fostering the unauthorized practice of law by the publisher of the column.¹⁰⁸

Drinker conceded that, by analogy, Canon 40 *might* permit an attorney to appear on a radio or television broadcast to answer audience questions¹⁰⁹ but pointed out that the same risks of violating other Canons applied.¹¹⁰ Although a seminar might be analogous to a newspaper column or television broadcast, it is actually a more direct form of solicitation, because of the in-person contact involved. Therefore, while Drinker never addressed the subject, it is likely he would have disapproved of the seminar as an "artificial stimulus" of business or publicity.¹¹¹

Courts evaluating attorney conduct under state versions of these Canons¹¹² scrutinized a lawyer's publicity to ascertain whether the attorney had sought the exposure. In some cases, merely acquiescing to the appearance of one's name in the newspaper could earn sanctions.

104. The Model Code of Professional Responsibility calls for lawyers to participate in such educational efforts. EC 2-1 of the Model Code states:

The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Model Code of Professional Responsibility EC 2-1 (1969).

105. The Canons did not call upon attorneys to educate the public. *See Drinker, supra* note 92, at app. C 309-25, for the text of the Canons in effect at that time.

106. Canon 40 reads: "A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights." Canons of Ethics, *supra* note 94, Canon 40 (1928).

107. *See id.*

108. *See Drinker, supra* note 92, at 263.

109. *See id.* at 264.

110. *See id.*

111. *Id.* at 218.

112. Courts evaluated lawyers' conduct under the authority of whatever version of the Canons was adopted by that particular state. *See supra* note 9.

In 1951, in *In re L.R.*,¹¹³ a New Jersey attorney was suspended from practice for one month for, among other things, getting his name in the paper.¹¹⁴ An article in the local newspaper discussed the attorney's birthday, his many accomplishments despite his young age, and his successful law practice/real estate/insurance business.¹¹⁵ Since there was evidence that the attorney had paid the newspaper to print the article, the court found that he had violated Canon 27's prohibition on self-laudation.¹¹⁶ Similarly, in *In re Connelly*,¹¹⁷ twelve years later, a New York court upheld the censure of law firm members who had "cooperated in the preparation, and acquiesced in the publication of [a Life magazine] article entitled 'Behind the Scenes Tour of Today's Legal Labyrinths[.]'"¹¹⁸

In the same year, in *Florida ex rel the Florida Bar v. Nichols*,¹¹⁹ the state bar had disciplined an attorney who was quoted in a local newspaper report about his new office building.¹²⁰ The attorney had proudly commented that he could not have constructed the building if not for his successful law practice.¹²¹ The bar association also had disciplined the attorney for lecturing to other lawyers on trial strategies at events organized by the bar association.¹²² Here, however, the court reversed both penalties.¹²³ Although a vigorous dissent argued that the attorney should have refused to cooperate with the newspaper, the court held that the attorney had only responded to the reporter's questions and had not sought the publicity.¹²⁴ The court also found the trial-strategy lectures permissible on the same grounds—that the organizations in question had sought him out. The court also found admirable his efforts to educate other members of the profession.¹²⁵

Efforts to educate the *public*, by contrast, met with either of two approaches during this time period, depending on whether the attorney could earn fees from the potential clients. In *NAACP v. Button*,¹²⁶ attorneys had addressed groups of NAACP members to advise them of their legal rights in matters concerning racial segregation.¹²⁷ The Virginia Supreme Court of Appeals had held that the activities violated state laws

113. 81 A.2d 725 (N.J. 1951) (per curiam).

114. *See id.*

115. *See id.*

116. *See id.* at 726.

117. 240 N.Y.S.2d 126 (App. Div. 1963).

118. *See id.* at 128.

119. 151 So. 2d 257 (Fla. 1963)

120. *See id.* at 259.

121. *See id.*

122. *See id.* at 261.

123. *See id.* at 262.

124. *See id.* at 260.

125. *See id.*

126. 371 U.S. 415 (1963).

127. *See id.* at 420.

on solicitation.¹²⁸ The original discipline by the bar was apparently part of a movement to use anti-solicitation rules to stymie unpopular civil rights litigation.¹²⁹ Implicitly recognizing the motivation behind the targeting of these attorneys,¹³⁰ who did not stand to earn fees from the litigation,¹³¹ the United States Supreme Court reversed, holding that the First Amendment freedoms of association and expression of the attorneys and clients were paramount.¹³²

By contrast, the ABA stated that seminars for potential fee-paying clients were prohibited publicity. In a 1965 ethics opinion,¹³³ the ABA Committee on Ethics and Professional Responsibility considered whether an attorney could conduct seminars for potential fee-paying clients in employment-related civil rights cases.¹³⁴ The opinion found that this type of seminar would be improper under the Canons.¹³⁵ In another opinion,¹³⁶ in the same year, the ABA Committee approved prohibition of attorney participation in seminars unless the seminars had the primary purpose of educating the public on legal matters.¹³⁷

The ABA promulgated the Model Code of Professional Responsibility ("Model Code") in 1969, because the Canons began to seem inadequate.¹³⁸ The Code, however, retained much of the Canons' approach to attorney solicitation and advertising, particularly the restriction on indirect solicitation.¹³⁹ Therefore, it is not surprising that the ABA reaffirmed the approach of its 1969 opinion two years later, this time in an informal opinion concerning a television broadcast about wills and trusts.¹⁴⁰ These general prohibitions would not stand much longer, how-

128. *See id.* at 425-26.

129. *See id.* at 429-30 & n.12 (noting similar movements in other civil rights contexts).

130. *See id.* at 430.

131. *See id.* at 420.

132. *See id.* at 428-29.

133. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 809 (1965) (attorney seminars for clients and possible clients).

134. *See id.*

135. *See id.*

136. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 840 (1965) (legal seminars—rules for attorney participation).

137. *See id.*

138. *See* Hill, *supra* note 85, at 382 & n.92 (noting that bar leaders criticized the Canons as not distinguishing between inspirational and prescriptive provisions).

139. *Compare* Canons of Ethics, *supra* note 94, Canon 40 ("A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.") *with* Model Code, *supra* note 104, DR 2-104(A)(2) ("A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.") *and* DR 2-104(A)(4) ("Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.").

140. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1179 (1971) (lawyer participation in television series on estate planning).

ever, as a new era of First Amendment jurisprudence began.

B. *Constitutional Protection for Attorney Speech*

An evolving, expansive view of the First Amendment that applied it to the states permitted new constitutional protections for attorney speech.¹⁴¹ Eventually, attorney advertising was protected under the doctrine that protected commercial speech. At first, in the 1940s, the Supreme Court formally denied First Amendment protection to commercial speech: In *Valentine v. Chrestensen*,¹⁴² a promoter docked a submarine in New York City and sought to publicize tours of the vessel.¹⁴³ A city ordinance forbade distribution of commercial handbills but allowed distribution of protest handbills.¹⁴⁴ In an effort to get around the ordinance, Chrestensen distributed promotional handbills that contained a message protesting the city policy on the reverse side, and he was restrained by the police.¹⁴⁵ Ignoring the protest component of Chrestensen's communication, the Supreme Court upheld the city's actions and flatly stated that the "Constitution imposes no . . . restraint on government as respects purely commercial advertising."¹⁴⁶

Attorneys' commercial speech eventually gained protection in other contexts, however. Some courts began to invoke the free speech-political association rationale of *NAACP v. Button*¹⁴⁷ to protect attorney communications of a commercial nature. A 1974 case on seminars, involving the well-known attorney Melvin Belli,¹⁴⁸ is instructive.

In addition to his career as a trial attorney, Belli developed a successful career on the lecture circuit, speaking on "topics ranging from law and legal reform to religion, astrology, and J. Edgar Hoover."¹⁴⁹ Belli also conducted events called "Belli Seminars," a series of panel discussions on the law.¹⁵⁰ Belli received "handsome stipends" for these events and retained an agent to book his appearances.¹⁵¹ Since the materials used to promote the seminars referred to Belli's notable achievements in his law practice, the California State Bar sought to discipline Belli under Rule 2, the anti-solicitation rule of the states' Rules of Professional Conduct, based on the Model Code.¹⁵²

141. See Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747, 759-61 (1993).

142. 316 U.S. 52 (1942).

143. See *id.* at 53.

144. See *id.* at 53 n.1.

145. See *id.* at 53.

146. *Id.* at 54.

147. 371 U.S. 415 (1963).

148. See *Belli v. State Bar*, 519 P.2d 575 (Cal. 1974).

149. See *id.* at 578.

150. See *id.*

151. See *id.*

152. See *id.* at 577-78. (noting that Rule 2 stated "[A] member of the State Bar shall not solicit professional employment by advertisement or otherwise." Also pertinent was the part of the Rule that prohibited "Using a newspaper, magazine, radio, television,

The California Supreme Court distinguished Belli's activities from those of the tour operator in *Valentine v. Chrestensen*,¹⁵³ saying that Belli "sought to discuss serious and oftentimes controversial issues of public significance."¹⁵⁴ The court held that because the flyers at issue were primarily directed at promoting Belli's seminars and not his law practice, it was a constitutionally impermissible infringement on Belli's free speech rights to forbid the use of the flyers.¹⁵⁵ The court also held that an incidental motive to increase business for Belli's law practice did not permit the State Bar to regulate the conduct.¹⁵⁶ Only a communication "*principally directed* toward this end" could be restricted.¹⁵⁷ This language suggests that the court's holding might have been different if Belli had engaged in more direct solicitation: for example, had he discussed tort litigation—a specialty of his—before a group of accident victims. The case nonetheless represents a shift in thinking about attorney speech in that the court used First Amendment language in addition to carrying out the traditional scrutiny of the attorney's intent to garner legal business.

When the United States Supreme Court considered commercial speech again, two years after the *Belli* case, it took a similar approach. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁵⁸ the Court struck down as unconstitutional a state statute forbidding all price advertising of pharmaceuticals.¹⁵⁹ Here the Court expressly overruled the holding of *Valentine v. Chrestensen*¹⁶⁰ and acknowledged the importance to the public of receiving knowledge about personal business transactions, pointing out that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."¹⁶¹

The Court articulated a caveat, however, that gives commercial speech a second-class status. In a footnote, Justice Blackmun pointed out that

books, circulars, pamphlets, or any medium of communication, whether or not for compensation, to advertise the name of the lawyer or his law firm or the fact that he is a member of the State Bar or the bar of any jurisdiction; [although] nothing herein shall be deemed to prevent the publication in a customary and appropriate manner of articles, books, treatises or other writing." *Id.* at 578 n.1 (quoting California rules).

153. 316 U.S. 52 (1942).

154. *Belli*, 519 P.2d at 580.

155. *See id.* at 581.

156. *See id.*

157. *Id.* The court's assessment of the relative value of the messages is perhaps a bit unfair to Mr. Chrestensen. What's more, we cannot be so sure that Mr. Belli's primary motivations were not related to increasing his law practice.

158. 425 U.S. 748 (1976).

159. *See id.* at 770.

160. *See id.* at 762 ("Our question is whether speech which does 'no more than propose a commercial transaction' lacks all protection. Our answer is that it [does] not.") (citations omitted).

161. *Id.* at 763. The Court also noted the public interest in "the free flow of commercial information" in a free-market economy. *Id.* at 764.

“[t]here are commonsense differences between speech that does ‘no more than propose a commercial transaction’” and other varieties of speech.¹⁶² He added that it would be permissible for states to require disclaimers and warnings and other means to prevent deception.¹⁶³ The Supreme Court has affirmed this approach in later decisions, and even narrowed it, making it somewhat easier for a state to restrict commercial speech than other kinds of speech.¹⁶⁴

Nevertheless, *Virginia Pharmacy* opened the door to attorney First Amendment challenges of advertising restrictions. Eventually one of these cases reached the Supreme Court. *Bates v. State Bar*¹⁶⁵ ushered in a sweeping change in the view of attorney advertising. In *Bates*, lawyers operated a legal clinic in which they handled only “routine matters,” such as uncontested divorces and simple personal bankruptcies, advertising “legal services at very reasonable fees.”¹⁶⁶ The Arizona rules then in effect prohibited this type of promotion.¹⁶⁷

In a lengthy opinion that rejected virtually all the traditional arguments against attorney advertising,¹⁶⁸ the Supreme Court stated that “the conclusion that Arizona’s disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from [*Virginia Pharmacy*]. The disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance.”¹⁶⁹ The Court expressly reserved the question of whether states could prohibit in-person solicitation.¹⁷⁰ But after *Bates*, states could no longer ban attorney advertising altogether. Instead, states could draft only rules that would prevent false or misleading statements or that would satisfy other important state interests.¹⁷¹

The next year, 1978, the Supreme Court decided two companion cases that further defined the parameters of permissible attorney solicitation.

162. *See id.* at 771-72 n.24.

163. *See id.*

164. In the first case, the Supreme Court set up a four-part test for evaluating commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980). In the next case, the Court held that restrictions on advertising of casino gambling to residents of Puerto Rico satisfied the *Central Hudson* test. This included the fourth part, that the restriction was found to be no more restrictive than necessary. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340-43 (1986). Most recently, the Court held that the “least-restrictive means” test need not be satisfied in a regulation of commercial speech. *See Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 479-80 (1989).

165. 433 U.S. 350 (1977).

166. *See id.* at 354.

167. *See id.* at 356.

168. The objections offered were that advertising had an adverse effect on professionalism, that it was inherently misleading, that it would stir up litigation, and that it would have undesirable economic effects. *See id.* at 367-81. Further, attorneys argued that the rules were overbroad. *See id.* at 380-81.

169. *Id.* at 365.

170. *See id.* at 384.

171. *See id.* at 383-84.

The first, *Ohralik v. Ohio State Bar Ass'n*,¹⁷² addressed in-person solicitation. The Court's opinion invoked the traditional distaste for "ambulance chasing." Ohralik, an Ohio attorney, learned about an auto accident from an acquaintance.¹⁷³ He visited one party, an 18-year-old girl, in the hospital, where she was in traction, and obtained her consent for contingency-fee representation.¹⁷⁴ By various subterfuges, including the use of a hidden tape recorder, he also gained access to the passenger in the car, another 18-year-old girl, and signed her as a client as well. Eventually, a fee dispute with the first client brought Ohralik's conduct to light.¹⁷⁵ The Supreme Court of Ohio imposed indefinite suspension for violations of state anti-solicitation rules.¹⁷⁶

The United States Supreme Court upheld the Ohio Supreme Court's ruling, rejecting Ohralik's constitutional claim that his solicitation was indistinguishable from the advertisements permitted by *Bates*.¹⁷⁷ While recognizing that "the original motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation,"¹⁷⁸ the Court nonetheless asserted a continuing state interest in "maintaining high standards among licensed professionals."¹⁷⁹ More important, the Court took a strong stand on the dangers of overreaching with vulnerable clients, articulating several perils inherent in personal solicitation of individuals: the attorney, who is trained in the art of persuasion, could more easily exert undue influence; the client might be pressured to make a quick decision without the opportunity to consult with others; and the state would find it difficult to police such contacts.¹⁸⁰ The difficulty of preventing these dangers in any way other than a ban merited a prophylactic rule¹⁸¹ prohibiting "in-person solicitation, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."¹⁸²

The Court rejected Ohralik's argument that the rule was applied unfairly to him, because the state could not prove actual harm to the clients.¹⁸³ Without examining whether the clients were harmed, the Court instead stated that because the ban was a prophylactic one, the state need not prove actual harm—just that the solicitation took place.¹⁸⁴

172. 436 U.S. 447 (1978).

173. *See id.* at 449.

174. *See id.* at 449-50.

175. *See id.* at 451-52.

176. *See id.* at 453-54. The anti-solicitation rules in question were rules against recommending oneself and providing unsolicited advice. *See id.* at 453 n.9.

177. *See id.* at 455.

178. *Id.* at 460.

179. *Id.*

180. *See id.* at 464-66.

181. *See id.* at 462.

182. *See id.* at 445.

183. *See id.* at 462-64.

184. *See id.*

On the same day, the Court decided *In re Primus*,¹⁸⁵ a case that is reminiscent of *NAACP v. Button*.¹⁸⁶ In *Primus*, an ACLU attorney addressed a group of female welfare recipients who had undergone forced sterilization by the state to advise them of their potential civil rights claims.¹⁸⁷ The Supreme Court of South Carolina ignored the attorney's conduct in addressing the group and instead focused on a letter the attorney had sent to one of the women in the audience, holding that it constituted impermissible solicitation.¹⁸⁸ The U.S. Supreme Court reversed.¹⁸⁹ The Court held that the letter did not constitute prohibited in-person solicitation, but instead constituted permissible conduct flowing from the associational freedoms enunciated in *NAACP v. Button*.¹⁹⁰

In reaffirming the holding of *NAACP v. Button*, the Court emphasized two factors that would be decisive in determining where to draw the line between impermissible in-person solicitation and protected political action. In *Primus*, the lawyer came to address the women in response to a request from a social welfare organization, and she also stood to earn no fees from the litigation.¹⁹¹

But the impact of the two decisions is not clear. Indeed, in a dissenting opinion in *Primus*, Justice Rehnquist suggested that the middle ground between the "ambulance chasing" in *Ohralik* and the political action in *Primus* would be muddy, and he predicted that "the next lawyer in *Ohralik's* shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of 'political association' to assure that insurance companies do not take unfair advantage of policyholders."¹⁹² Rehnquist therefore proposed a standard that focused not on the motivation of the lawyers but on the nature of their conduct.¹⁹³

Justice Marshall also predicted that these holdings would cause confusion.¹⁹⁴ Where Rehnquist remained favorably disposed toward advertising restrictions, however, Marshall advocated the lifting of regulations that might "obstruct the distribution of legal services to all those in need of them."¹⁹⁵

In the wake of these decisions, the ABA revised the Model Code to

185. 436 U.S. 412 (1978).

186. 371 U.S. 415 (1963).

187. See *Primus*, 436 U.S. at 422.

188. See *id.*

189. See *id.* at 426-32.

190. See *id.* at 426-32. In dicta the Court suggested that under a literal reading of the rules then in effect, the attorney could have been disciplined for the group solicitation as well. The Court indicated that it would not approve such a restriction because the same associational freedoms were implicated. See *id.* at 433.

191. See *id.* at 415.

192. *Id.* at 442 (Rehnquist, J., dissenting).

193. See *id.* at 443.

194. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468-69 (1978) (Marshall, J., concurring).

195. *Id.* at 469.

remove certain unconstitutional restrictions.¹⁹⁶ As a substitute, rule drafters attempted to create unassailable bright-line rules to prevent misleading communications.¹⁹⁷ Most notably, the drafters compiled a list of information permissible in advertisements.¹⁹⁸ Several challenges to such lists and other provisions reached the Supreme Court, and in all cases the

196. See Hill, *supra* note 85, at 384 & n.94.

197. See *id.*

198. The Model Code list read as follows. The current version of the Model Code retains the same language.

DR 2-101 Publicity

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

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

- (1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
- (2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
- (3) Date and place of birth;
- (4) Date and place of admission to the bar of state and federal courts;
- (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
- (6) Public or quasi-public offices;
- (7) Military service;
- (8) Legal authorships;
- (9) Legal teaching positions;
- (10) Memberships, offices, and committee assignments, in bar associations;
- (11) Membership and offices in legal fraternities and legal societies;
- (12) Technical and professional licenses;
- (13) Memberships in scientific, technical and professional associations and societies;
- (14) Foreign language ability;
- (15) Names and addresses of bank references;
- (16) With their written consent, names of clients regularly represented;
- (17) Prepaid or group legal services programs in which the lawyer participates;
- (18) Whether credit cards or other credit arrangements are accepted;
- (19) Office and telephone answering service hours;
- (20) Fee for an initial consultation;
- (21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
- (22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
- (23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in

Court held for the attorneys.¹⁹⁹

The most relevant holding in this line of cases was in *Shapero v. Kentucky Bar Ass'n.*²⁰⁰ *Shapero* removed direct mail from the prohibited category of solicitation and established it as permissible advertising.²⁰¹ While acknowledging that these mailings might intrude on vulnerable targets, the Supreme Court found that direct mail did not raise the dangers present in *Ohralik*, where the harm resulted from strong in-person persuasion—the recipient of direct mail contact can simply discard the letter.²⁰² This distinction sharpens the Court's focus on face-to-face contact as the main danger of solicitation, rather than the mere act of approaching people who have a specific legal problem.²⁰³

In addition to rewriting the Model Code, the ABA issued a new opinion on seminars. Informal Opinion 1489,²⁰⁴ issued in 1982, is only grudgingly permissive about seminars, however: "Programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for the particular lawyer."²⁰⁵

print size equivalent to the largest print used in setting forth the fee information;

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting for the fee information;

(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

Model Code, *supra* note 104, DR 2-101 (A)-(B) (1980).

199. See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990) (permitting attorney's advertisement to include his certification by National Board of Trial Advocacy because it was a bona fide organization, even though it was not recognized by the state for certification of specialties); *In re R. M. J.*, 455 U.S. 191 (1982) (permitting attorney advertisements to use language deviating from bright-line state rule); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (permitting picture of IUD in advertisement for Dalkon Shield plaintiffs, because not inherently misleading, but sustaining reprimand for other violations of misleading nature regarding fees).

200. 486 U.S. 466 (1988).

201. See *id.* at 475-78.

202. See *id.* at 475-76.

203. See *id.* at 479 ("The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and nondeceptive letter, no matter how big its type and how much it speculates can never 'shou[t] at the recipient' or 'gras[p] him by the lapels,' . . . as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching.") (alterations in original) (citations omitted).

204. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1489 (1982) (lawyers' seminars).

205. See *id.*

This opinion is poorly reasoned, as it does not address the hybrid nature of the seminar by referring to the principles set forth in *Bates*, *Ohralik*, and *Primus*, but instead simply restates the traditional prohibitions on seeking publicity, in the same language of the ABA's previous opinion on seminars.²⁰⁶ Also, the rule would be difficult to enforce. How would a disciplinary body measure the attorney's motivation?

The Model Code and its interpretations are less relevant now than they were in 1982, however, because the majority of states have adopted some version of the Model Rules,²⁰⁷ first promulgated in 1983.²⁰⁸ The ABA adopted the Model Rules in response to criticism that the structure of the Model Code was too complicated and confusing.²⁰⁹ The Model Rules are much simpler in form.²¹⁰ In terms of lawyer advertising and solicitation, Rules 7.2 and 7.3 are most important. Rule 7.2 is essentially the codification of the Supreme Court's holdings in *Bates* and its progeny, while Rule 7.3 is the codification of *Ohralik*.²¹¹

The Model Rules removed the Model Code's language about accepting employment resulting from public speaking and writing, but the legislative history does not explain why this language was deleted.²¹² It is impossible, therefore, to be sure what the ABA intended with regard to seminars beyond the guidance provided by its last opinion on seminars, issued the year before.

Whatever the ABA had in mind about seminars and publicity in 1983, however, it is clear that no one enforces reticence in self-promotion today. Lawyers boldly seek publicity for their activities (or at least acquiesce to it) without censure.²¹³ Practice-development gurus advise

206. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1179 (1971) (lawyer participation in television series on estate planning).

207. See *supra* note 9.

208. See Hill, *supra* note 85, at 385.

209. See *id.*

210. See *id.*

211. See *id.* at 386-87. There is no rule concerning solicitation through political activity, because it is not considered impermissible solicitation under *In re Primus*. See *In re Primus*, 436 U.S. 412, 434 (1978).

Model Rule 7.3, however, includes a special provision for solicitation of members of prepaid legal plans. Model Rule 7.3(d) states:

Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Model Rules, *supra* note 7, Rule 7.3(d). This creates a limited separate category of permissible solicitation of fee-paid work with members of an association.

212. See ABA Center for Professional Responsibility, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* 182-88 (1987).

213. Best-selling novelist/attorney Scott Turow freely publicizes his books on national tours without the kind of censure the state attempted in *Belli v. State Bar*, 519 P.2d 575 (Cal. 1974), see *supra* notes 148-57 and accompanying text. See Matthew Gilbert, *Scott Turow: His Word Is Law*, Boston Globe, June 15, 1993, at 53. And unlike the attorneys

attorneys to use seminars to promote their services,²¹⁴ and attorneys follow their advice gratefully.²¹⁵ The case of elder-law seminars deserves reexamination, however, given that some attorneys seem to be unaware of the potential for abuse of the seminar format.²¹⁶

The most recent Supreme Court pronouncement on professional solicitation indicates that the Court would be willing to approve regulation of elder-law seminars and even any seminars for individual, noncorporate clients. Only last year, the Supreme Court reaffirmed the holding of *Ohralik*, in a case involving accountants, not attorneys. In *Edenfield v. Fane*,²¹⁷ an accountant who wished to solicit business clients challenged a Florida accounting regulation in federal court.²¹⁸ The regulation in question, mirroring Model Rule 7.3, prohibited in-person solicitation.²¹⁹ The district court enjoined enforcement of the restriction, and the Eleventh Circuit affirmed.²²⁰ Citing *Ohralik*, the State of Florida asserted that its regulation was constitutional.²²¹

The Supreme Court affirmed the Eleventh Circuit and distinguished *Ohralik* on two grounds, stating that "the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation."²²² First, because the accountant sought to solicit sophisticated corporate clients, the Court found no danger of overreaching, because these clients were "far less susceptible to manipulation than the young accident victim in *Ohralik*."²²³ Second, the Court also pointed out that unlike attorneys, accountants were not trained in the art of persuasion; therefore, their solicitation efforts did not present a danger of high pressure or undue influence.²²⁴

This decision demonstrates the Supreme Court's continuing willingness to view in-person attorney solicitation in a special light, amenable to relatively tight restrictions under certain circumstances. Therefore, the Court might view the contact of persuasive attorneys with elderly clients

in *In re Connelly*, 240 N.Y.S.2d 126 (App. Div. 1963), see *supra* notes 117-18 and accompanying text, the giant law firm of Skadden, Arps, Slate, Meagher & Flom cooperated in the preparation of a recent book-length profile of the firm without earning any disciplinary action. See John Taylor, *The Grand Acquisitor*, N.Y. Times, Jan. 16, 1994, § 7 (Book Review), at 26.

214. See Steingold, *supra* note 83, at 64-65.

215. See Paul, *supra* note 4, at S1.

216. See, e.g., Foonberg, *supra* note 47, at 40 (giving advice to create an impression of endorsement by another organization when conducting seminars).

217. 113 S. Ct. 1792 (1993).

218. See *id.* at 1797.

219. Compare *id.* at 1796 ("[A CPA] shall not by any direct, in person, uninvited solicitation solicit any engagement to perform public accounting services . . .") (citing former Fla. Admin. Code Ann. r. 21A-24-002(2)(c) (1992)) with Model Rule 7.3, *supra* note 7.

220. See *Edenfield*, 113 S. Ct. at 1797.

221. See *id.* at 1802.

222. *Id.*

223. *Id.* at 1803.

224. See *id.* at 1802-03.

as a dangerous mixture and uphold a ban on attorneys' accepting clients from elder-law seminars.

III. THE MODEL RULES: INADEQUATE GUIDANCE

States may discipline attorneys who conduct misleading or coercive seminars under existing rules that restrict such advertising.²²⁵ But the wait-and-see approach does nothing to prevent misconduct. This section analyzes different ways to do so. The first part discusses two approaches to applying Model Rule 7.3 to seminars through both literal and liberal interpretations; the second part proposes a new rule that would work better in providing guidelines for attorneys who wish to conduct seminars.

A. *Problems in Dealing with Seminars Under the Current Model Rules*

Because attorney seminars are hybrids of advertising and in-person contact, it is difficult even to decide which Rule should be applied to them. An attorney seminar cannot be considered ordinary advertising, as covered by Rule 7.2, because it involves in-person contact. Rule 7.2 permits only print or broadcast communication.²²⁶ Further, under *In re Primus*,²²⁷ an attorney cannot claim the protection of political association if he or she intends to earn fees from seminar attendees.²²⁸ The applicable Rule, then, must be Rule 7.3, because the Rule covers in-person solicitation for pecuniary gain.

1. A Literal Reading

A literal reading of Model Rule 7.3 seems to call for a ban on seminars. The pertinent part of the rule reads: "A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."²²⁹

Applying the rule line by line: The lawyer is soliciting professional employment through in-person contact. The lawyer's pecuniary gain is likely to be a significant motive for holding the seminar. The lawyer probably has no prior professional or family relationship with the potential clients. And, finally, the rule does not expressly restrict its applicability to one-on-one solicitation. A court could discipline even a well-meaning attorney for giving a seminar, because Rule 7.3 is a prophylactic

225. See *supra* note 9.

226. See Model Rules, *supra* note 7, Rule 7.2.

227. 436 U.S. 412 (1978).

228. See *supra* note 191 and accompanying text.

229. Model Rules, *supra* note 7, Rule 7.3(a).

rule that does not depend on intent to mislead or coerce.²³⁰ This literal reading of the rule as applied to seminars, however, ignores the rule's origin in the holding of *Ohralik v. Ohio State Bar Ass'n*,²³¹ which holds that "a State . . . may discipline a lawyer for soliciting clients in person, for pecuniary gain, *under circumstances likely to pose dangers that the State has a right to prevent.*"²³²

When applied to a type of solicitation different from the ambulance chasing in *Ohralik*, then, the broad language of Rule 7.3 really requires a careful analysis of all the factors mentioned in *Ohralik*—the vulnerability of the audience and the persuasiveness of the attorney as well as any mitigating factors²³³—to see whether the type of solicitation is "likely to pose dangers." In the case of elder-law seminars, which contain an educational component and are held in public, one can make a number of arguments for and against the constitutionality of a ban.

Many of the elderly may be vulnerable to overreaching by attorneys,²³⁴ but perhaps less so than the client in *Ohralik*, who was immobilized after a significant trauma. Persons attending seminars, by contrast, have to travel to reach the seminar site, so they are presumably also mobile enough to leave. Thus, they are not a captive audience in the way the *Ohralik* patient was. This factor weighs against a ban.

Ohralik also permits state regulations to prevent intrusive solicitation.²³⁵ The solicitation in *Ohralik* represents the attorney's first contact with the client,²³⁶ and it was considered intrusive by the Court. With a seminar, however, an initial contact by flyer or advertisement draws the potential client to attend. Thus, a seminar does not present the same danger of intrusive solicitation as was present in *Ohralik*.

The final concerns of the Supreme Court in *Ohralik* relate to the in-person nature of the solicitation: the forcefulness of the presentation, the absence of opportunity to consult with others before accepting represen-

230. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978).

231. See Hill, *supra* note 85, at 385.

232. *Ohralik*, 436 U.S. at 449 (emphasis added). Some states have adopted ethics rules based on this language. For example, the New Jersey Rules of Professional Conduct expressly expand on Rule 7.3 to prohibit solicitation of vulnerable people. See New Jersey Rules of Professional Conduct Governing the Ethics of the Legal Profession in New Jersey RPC 7.3(b) (1990), in ABA Comm'n on Advertising, Provisions of State Codes of Professional Responsibility Governing Lawyer Advertising and Solicitation 2-3/NJ91 (2d ed. 1990 & Supp. 1991).

The New Jersey Supreme Court recently applied RPC 7.3(b) to solicitation by mail. See *In re Anis*, 599, A.2d 1265, 1270 (1992). The court upheld discipline of an attorney who had mailed letters to families of victims of the Lockerbie airplane crash shortly after the tragedy. See *id.* at 1267. Even though direct-mail attorney advertising is permitted by *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 473 (1988), the New Jersey court held that because the mailing was so intrusive under the circumstances, it could be prohibited under RPC 7.3. See *Anis*, 599 A.2d at 1270.

233. See *Ohralik*, 436 U.S. at 463-64.

234. See *supra* notes 29-33 and accompanying text.

235. See *Ohralik*, 436 U.S. at 466.

236. See *id.* at 450.

tation, and the lack of any reliable method for the bar to monitor the contacts.²³⁷

Despite being a public gathering, the seminar poses these same risks. Although the seminar is open to all, only interested parties are likely to attend. Disciplinary officials will not easily be able to attend many seminars; thus attorneys can stage misleading or coercive presentations with little fear of observation by disinterested parties. There is likely no safety in numbers for the audience, because virtually all the attendees are prospective clients who may be similarly disadvantaged by a lack of information. If all of the attendees are charmed by the presentation, comparing notes after the program will be of little value to them. These factors, therefore, weigh in favor of a ban.

In the final balancing, however, one probably cannot justify a total ban on elder-law seminars based on a literal reading of Rule 7.3: seminars offer an undeniably valuable educational message; there is some associational freedom involved; the persons attending are not as vulnerable as the *Ohralik* patient; and the members of the audience want to attend the seminar. These favorable factors probably outweigh the unfavorable ones relating to the bar's inability to police the presentations.

2. A Liberal Reading

An alternative approach would be to allow seminars but to impose procedures that are consistent with permitted restrictions on advertising. A recent ethics opinion from the Michigan State Bar Association attempts to create such a structure to supplement Rule 7.3.²³⁸ According to the opinion, a law firm wished to conduct seminars to reach potential plaintiffs who had lost money investing with a local brokerage firm.²³⁹ Some of the investors were elderly.²⁴⁰ The attorneys asked whether such seminars would be proper under Rule 7.3.²⁴¹

The opinion construes the rule to allow seminars, but, struggling to impose some structure, grasps at other sources for guidance. The opinion cautions that there must be a cooling-off period after a seminar and prohibits attorneys from giving individual advice at the seminars.²⁴² The opinion writers thus dealt with the ambiguity by reading in one protective measure—the prohibition on giving individual advice—from a disciplinary rule that is no longer in effect.²⁴³ They also supply another—the

237. See *id.* at 457.

238. See Joanna S. Abramson, *Client Solicitation Via Seminar Ok'd*, Mich. Law. Wkly., Apr. 29, 1991, at 1.

239. See *id.*

240. See *id.*

241. See *id.*

242. See *id.*

243. The suggestion of giving no individual advice recalls DR 2-104(4) of the Model Code, which states: "Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not . . . undertake to give individual advice." Model Code, *supra* note 104, DR 2-104. It also recalls

cooling-off period—from general consumer-protection law.²⁴⁴ The suggestion of a cooling-off period is problematic, however, because the opinion does not state how long the cooling-off period should last or how it should operate.²⁴⁵

The opinion writers recognized that *Ohralik* was controlling,²⁴⁶ but they did not undertake a detailed analysis of all the factors mentioned by the Supreme Court. The writers probably should have done so, however, because some of the potential clients were elderly, although they were not elder-law clients. Despite its weaknesses, this opinion seems to take the correct approach. It recognizes that seminars are a valuable contribution to the public interest and seeks merely to impose some structure that could reduce the risks of overreaching. A new rule that expressly provides the necessary structure would be helpful.

B. *A Third Option: A Proposed Model Rule*

This section proposes an addition to the Model Rules to create a satisfactory structure for attorney seminars. The first part discusses general policy considerations and constitutionality. The second part proposes the new Rule and explains it in detail.

1. Background on Advertising Rules

Any proposed new rule for attorney solicitation faces criticism from those who seek to lift even the restrictions that currently remain in place. These commentators echo many of the free-market theories that preceded the lifting of attorney advertising restrictions.

Early supporters of attorney advertising focused on the needs of the middle-class consumer, who found it difficult to obtain legal services.²⁴⁷ One commentator optimistically opined that attorney advertising would usher in a great wave of information that would eliminate the disadvantages the middle class encountered in hiring attorneys.²⁴⁸ According to this theory, free enterprise would increase competition, lower attorney fees, and ultimately increase access to lawyers.²⁴⁹ The market would eliminate the dangers of misleading advertisements because competition would drive out any attorney who tried such tactics.²⁵⁰ Opponents of regulation also favored freedom to advertise because regulations had an

Canon 40 of the Canons of Professional Ethics. See Canons of Ethics, *supra* note 94, Canon 40.

244. Cooling-off periods are common in consumer protection law. See Gardner & Sheldon, *supra* note 43, at 261 (1992); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. Pa. L. Rev. 45, 113 (1985).

245. See Abramson, *supra* note 238, at 1.

246. See *id.*

247. See Christensen, *supra* note 75, at 8-9.

248. See *id.* at 14.

249. See *id.* at 14-15.

250. See *id.* at 15-16.

unfair effect on small-firm attorneys.²⁵¹

The Supreme Court essentially affirmed the market approach in *Bates v. State Bar*,²⁵² rejecting traditional reasons for banning attorney advertisement.²⁵³ But the Court also said that states had room to set rules for different types of consumers in different situations.²⁵⁴ Other commentators have expanded on this approach, supporting a free-market analysis but pointing out how different markets should be treated differently.²⁵⁵ The Supreme Court has also reaffirmed this approach, most recently in *Edenfield v. Fane*,²⁵⁶ in which the Court compared accountant solicitation with attorney solicitation.²⁵⁷

The elderly population seems to be just such an individual market. Seventeen years after *Bates*, we now have a chance to see whether the free market has operated as predicted. In the case of the elderly, a bonanza of information has simply not materialized, and the elderly remain relatively uninformed about lawyers.²⁵⁸ One reason offered is that perhaps a true free market has never operated because the organized bar maintains some traditional restraints on the release of useful information, such as ratings of attorneys.²⁵⁹ Another explanation might be that the free market is indeed operating—to the disadvantage of the elderly. Perhaps relatively few attorneys view the elderly as a lucrative market, and as a consequence there has not been enough competition in this field to produce widespread dissemination of information.²⁶⁰

The extra vulnerability of some members of the elderly to high-pressure selling²⁶¹ indicates that it would be unwise to unleash unregulated attorney seminars on this segment of the public. Therefore, protection of the elderly would seem to be a sufficient state interest to justify regulation.

As for the form such regulations should take, many state and federal consumer-protection regulations, requiring disclosure statements and restricting misleading communications—are now in place to reduce the impact of the very same sales practices outlined in Part I of this Note.²⁶² Such regulations offer a prototype for a new Model Rule for attorney

251. See *supra* notes 98-103 and accompanying text.

252. 433 U.S. 350 (1977).

253. See *id.* at 367-79.

254. See *id.* at 383-84.

255. See Hazard et al., *supra* note 89, at 1089-94.

256. 113 S. Ct. 1792 (1993).

257. See *id.* at 1802-03.

258. See *supra* notes 72-78 and accompanying text.

259. See Morton, *supra* note 74, at 287-89.

260. See e.g., Allyson L. Moore, *Demographics Driving the Rise of Elder Law*, N.J.L.J., July 18, 1991, at 1 (quoting a practitioner on the income-earning potential of elder-law attorneys: "I'm not saying that you can't make a good living [from elder law], but you won't be in the million-dollar-a-year club.").

261. See *supra* notes 19-42 and accompanying text.

262. See generally Gardner & Sheldon, *supra* note 43 (background on consumer-protection laws).

solicitation. Adherence to this Rule, as detailed below, need not be onerous. In fact, the Rule should easily be able to satisfy constitutional requirements. First, instead of being a prophylactic ban, the Rule requires attorneys to take affirmative actions that keep consumers more informed. Requiring disclosure statements and the like is entirely consistent with well-settled law involving commercial transactions²⁶³ and with existing law on attorney advertising. For example, the Supreme Court permitted states to require attorney disclosure statements in *Zauderer v. Office of Disciplinary Council*.²⁶⁴ More to the point, the Supreme Court has recognized the similarities between attorney solicitation and face-to-face selling.²⁶⁵ Since the Court found a greater potential for abuse in attorney solicitation,²⁶⁶ the Court would surely approve attorney solicitation rules modeled on, for example, federal regulations of direct selling of consumer products.²⁶⁷

Finally, voluntary disclosure statements are now commonplace in the medical community.²⁶⁸ Admittedly, physicians obtain signed informed consent documents to safeguard themselves from malpractice actions.²⁶⁹ Nevertheless, the act of informing the patient does protect the patient. Similarly, attorneys should be willing to make disclosures to their clients and take other affirmative steps to avoid the potential for overreaching. Increasing openness and honesty in the attorney-client relationship advances the purposes of the rules of professional conduct.

2. A Proposed Model Rule

The proposed Rule incorporates various disclosure requirements in order to provide more information to consumers. Second, the proposed Rule takes a firm stance against the types of misleading and coercive salesmanship that are so effective with the elderly²⁷⁰ and offers a method to deter such behavior.

PROPOSED MODEL RULE 7.3A DIRECT CONTACT WITH PROSPECTIVE CLIENTS AT SEMINARS, CONFERENCES, AND OTHER PUBLIC GATHERINGS

(a) A lawyer may speak publicly on legal topics. If a lawyer addresses such speeches to prospective clients known or assumed to need particular legal services, the communication shall be considered advertising

263. See *id.* at 261; see also Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 673 (1977) (predicting constitutionality of consumer regulations before their introduction).

264. 471 U.S. 626 (1985).

265. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 & n.23 (1978).

266. See *id.*

267. See *id.*

268. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 189-91 (5th ed. 1984).

269. See *id.*

270. See *supra* part I.

subject to the requirements of Rule 7.1. A lawyer may accept employment resulting from such presentations, subject to the additional requirements below.

(b) If the circumstances of the prospective clients indicate a lack of sophistication about legal services, the lawyer shall distribute a written disclosure statement during such presentations, which statement shall include the following:

(1) a statement that the presentation is an advertisement for the attorney's services or those of the attorney's firm;

(2) a short written summary of the contents of the presentation; and

(3) a statement that the potential client may want to consult another attorney.

(c) An attorney may organize a presentation in conjunction with another organization. In such cases, the disclosure statement required by paragraph (b) shall include a disclaimer of any affiliation with or endorsement by such organization.

(d) A lawyer may meet individually with attendees at any time after such presentation. The client shall have three business days to rescind, without penalty, any representation agreement entered into as a result of any seminar or other live presentation. A lawyer shall present the client with a written disclosure of this right prior to entering into any representation agreement.

(e) A videotape recording of a representative presentation shall be kept as long as the lawyer uses such presentations, along with a record of when and where such presentations are given.

COMMENT

It is an important goal of the legal profession to educate members of the public about legal services. Nevertheless, a live presentation by a trained advocate may present dangers of overreaching with an audience consisting of unsophisticated or inexperienced prospective clients. The requirements of paragraphs (b), (c), and (d) of this Rule are designed to counter these dangers by alerting the participants to the true nature of the transaction, the pros and cons of any services offered, and the participants' various legal rights. The requirements of paragraph (e) of this Rule are designed to facilitate enforcement of this Rule. The Rule does not require that presentations be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Proposed Rule 7.3A creates a separate category for seminars and other live public communications, recognizing the hybrid nature of the seminar presentation. Paragraph (a) clearly establishes that a seminar is advertising, not impermissible solicitation. At the same time, the rule reminds attorneys that the seminar format carries some of the dangers of overreaching that exist in any in-person contact.

Paragraphs (b), (c), and (d) are designed to fill gaps in information among the elderly and indeed all consumers. Handing out a short writ-

ten summary of proposed legal services would allow consumers to take home the paper and reflect on the transaction. The other required disclosures would encourage such reflection.

Paragraphs (b), (c), and (d) of the Rule would apply only to unsophisticated or inexperienced consumers. Although it appears that under *Edenfield v. Fane*,²⁷¹ the Supreme Court's most recent pronouncement on professional solicitation, a state could permit provisions such as these to apply to solicitation of all types of potential clients,²⁷² there is no need to protect corporate clients, who have experience with attorneys.

Of course, disclosures on paper would probably not be totally effective in counterbalancing high-pressure sales techniques, which cannot be policed efficiently. Paragraph (e), therefore, requires the attorney to keep a videotape record of representative seminar presentations to solve the problem of policing articulated by the Supreme Court in *Ohralik* and *Edenfield*. The requirements of this paragraph are based on the requirements of a parallel provision in Model Rule 7.2²⁷³ regarding printed and broadcast communications. This provision holds out the spectre of possible disciplinary enforcement. When making the recordings, the attorneys would consider their mannerisms and their scripts carefully. The potential for disciplinary action would, it is hoped, deter their varying their actual performance from the recorded version.

Finally, the proposed Rule requires a cooling-off period. The Michigan State Bar Association, in a recent ethics opinion about seminars and Rule 7.3,²⁷⁴ suggested that attorneys allow a cooling-off period after seminars before meeting individually with clients but did not establish procedures for doing so.²⁷⁵ Instead, this Rule requires attorneys to inform clients in writing of their privilege to sever an attorney-client relationship. It allows a three-day rescission period, which is the typical period allowed in many consumer transactions.²⁷⁶

Some commentators might criticize these proposals as costly and unjustified. Professor Fred McChesney, for example, criticizes federal regulations of funeral sales²⁷⁷ and door-to-door sales²⁷⁸ as unjustified by empirical evidence of need, and points out that they increase consumer costs.²⁷⁹ Supporters of disclosure and similar consumer protections, however, recognize that such rules are imperfect and may increase over-

271. 113 S. Ct. 1792 (1993).

272. *See id.* at 1802-03. The Court acknowledged that the "sophisticated and experienced business executives" sought as clients by the accountant would not easily be swayed by the accountant's pitch. Nevertheless, the Court suggested that it would approve regulation of attorney selling even to these corporate clients, because of attorney "training in the art of persuasion." *See id.*

273. *See* Model Rules, *supra* note 7, Rule 7.2.

274. *See supra* notes 238-46 and accompanying text.

275. *See id.*

276. *See* Gardner & Sheldon, *supra* note 43, at 261.

277. *See* McChesney, *supra* note 60, at 4.

278. *See* McChesney, *supra* note 244, at 64, 112.

279. *See* McChesney, *supra* note 60, at 10.

all costs slightly. Regulations are imposed *despite* this knowledge, as a policy decision, to level the playing field for consumers.²⁸⁰ Ironically, even Professor McChesney supports cooling-off periods in the regulation of attorney solicitation.²⁸¹

Compliance with these Rules should not be costly, either. Attorneys likely already print and distribute business cards or brochures at seminars. Including the elements required in this Rule would be relatively easy. Even the making of a videotape recording should be well within the means of small-firm attorneys now that home video cameras are commonplace.

Of course, amending the Rules as described here would not eliminate every problem relating to getting the members of the public the information they want about attorneys. The organized bar may want to consider other changes that would help consumers. For example, the bar may want to do more to encourage or even require attorney involvement in programs to provide consumers with more information about attorneys and the law. One study shows that telephone hotlines, staffed by private attorneys on a rotating basis, can increase services to a wider segment of the public at low cost.²⁸² A related program could be increasing distribution of legal publications for consumers²⁸³ and reforming fee structures to reduce the difficulty of comparing attorneys.²⁸⁴ Finally, some commentators suggest that the bar should undertake to reveal negative information about attorneys who are being disciplined²⁸⁵ and create formal specialty certifications—as in the medical profession—to provide an objective measure of ability that consumers understand.²⁸⁶

The need for other reforms is not a reason to delay or avoid changes such as those proposed in this Note, however. Such changes could help consumers and improve public perceptions of the bar.

280. See Pitofsky, *supra* note 263, at 669 (“Market failure in the dissemination of product information and the ineffectiveness of possible alternative systems for ensuring truthful and relevant advertising indicate that some form of government regulation of the advertising process is warranted.”); *id.* at 671 (“[P]rotection of consumers against advertising fraud should not be a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data which in turn will facilitate an effective and reliable competitive market process.”).

281. See McChesney, *supra* note 244, at 113.

282. See Moore, *supra* note 72, at 823-25.

283. See Coleman, *supra* note 72, at 469 (recommending community education for the elderly, including pamphlets, videotapes, handbooks, senior fairs, telephone advice lines, law day programs and lectures).

284. See *e.g.*, Deborah L. Rhode, *Solicitation*, 36 J. Legal Educ. 317, 330 (1986) (suggesting “graduated fee formulas that bear some relationship to the services performed and risks assumed”).

285. See, *e.g.*, Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and Disclosure Advertising: Towards a New Ethos*, 72 N.C. L. Rev. 351, 352 (proposing mandatory disclosure of attorney misconduct to improve public confidence in the bar).

286. See Coleman, *supra* note 72, at 475.

CONCLUSION

The elderly are disadvantaged in consumer transactions and in their dealings with attorneys. Many attorneys wish to solicit these clients by seminar, but such seminars do pose a danger of overreaching by attorneys. Attorneys should be encouraged to conduct seminars to alleviate gaps in information. The Model Rules should provide guidance for these attorneys to prevent them from misleading or coercing their audiences. Therefore, the rules governing attorney behavior should be amended with this in mind. The changes should be supplemented by voluntary efforts of the bar to find new ways to open up legal services to the elderly and all consumers. These changes would aid the public and enhance the image of the bar.

