



The 45-Day “No-Solicitation” Rule in the Internet Age

By Marc S. Moller and Michael E. Kerman



Inappropriate solicitation of potential clients following an air carrier accident by lawyers hoping to secure a retainer has been a focus of attention of legislatures, government agencies, and professional bar associations for decades. The solicitation problem reached crisis proportions in the

late 1980s and led to efforts in the United States to insulate victims of air carrier accidents and their families from some solicitation by lawyers or “runners” seeking retainers to handle their claims. In response, the U.S. Congress enacted the Aviation Disaster Family Assistance Act of 1996, which prohibits any unsolicited communication with airline crash victims or their relatives for 30 days following an accident.¹ In 2000, Congress extended the period to 45 days.² This article will consider the 45-day rule as well as other principles and rules that place limits on solicitation. We focus in particular on the use of the Internet, which can be a powerful solicitation tool as well as a valuable information resource for victims who require representation. We conclude that the use of the Internet requires the attention of the profession to prevent abuse and promote the best use of this resource. Generally, however, the present limitations on solicitation are capable of providing an appropriate level of protection from unethical practices if lawyers and bar associations act to curb abuses and not simply frown upon inappropriate solicitation.

Most lawyers understand and observe well-recognized ethical and legal restraints in dealing with potential clients. Nevertheless, air crashes are front-page news, as is the publication of the passenger manifests, which makes tempting unsolicited direct contact with accident victims or their relatives. Air crash victims have been the object of unwanted invasions of privacy at a time when their privacy and contemplative quiet were critical. Some misleading and overly aggressive efforts to persuade victims or relatives to “sign up” have occurred when victims and relatives were vulnerable. These solicitations often were accompanied by false or

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overstated warnings that if victims and relatives failed to take action immediately, rights could be lost.

Overall, however, the 45-day “no-solicitation” rule has worked because lawyers generally understand that these violations will lead to sanctions. Lawyers who have violated the 45-day no-solicitation rule have paid fines, even in cases where the lawyers involved claimed not to have been aware of the restriction.³ There can be no doubt today that lawyers should expect vigorous enforcement of the 45-day no-solicitation rule.

In the aftermath of both the Colgan Flight 3407 crash at Buffalo, New York, in February 2009⁴ and the Comair Flight 5191 crash at Lexington, Kentucky, in August 2007, fines were meted out for violating the no-solicitation rule.⁵ In fact, the U.S. attorney in Lexington, Kentucky, publicly urged families of victims to report to federal authorities any unsolicited communication from lawyers seeking to represent them in damage suits following the Comair crash.⁶ The Kentucky Bar Association also acted, finding that several advertisements by lawyers seeking to represent families of Comair victims violated the state bar’s rules on legal advertising.⁷

The rule has given air crash victims some time to adjust to their unfortunately changed circumstances. While the rule has teeth, a lawyer can honor the 45-day bar rule and still reach a potential client through a proper intermediary because the family lawyer or the lawyer for the estate of an accident victim may be contacted. That lawyer may welcome advice from an experienced aviation accident lawyer and should be able to recognize who does or does not have the tools to help his client. Such communications, properly managed, should not violate the spirit of the rule.

There have been several restraints imposed by states on solicitation in personal injury and wrongful death situations that complement the 45-day bar in the aviation field.⁸ There are, of course, others imposed at the state level. Once the 45-day bar period expires, what is permissible? We consider other restrictions below.

Advertising

Until 1977, when the Supreme Court issued its decision in *Bates v. State Bar of Arizona*,⁹ for all intents and purposes, lawyers were not permitted to advertise to attract clients. Advertising—except in professional

journals—was considered unethical. Most state bar associations included similar prohibitions in their disciplinary rules.

John R. Bates and Van O'Steen challenged that principle. The State Bar of Arizona had a disciplinary rule that barred attorneys from advertising through newspapers, magazines, radio, or television. Bates and O'Steen, who had earned outstanding records as law students, decided to open their own legal clinic. Their business model was designed to charge low fees to people of modest means and build a high-volume practice. They had to attract as many clients as possible to be able to make a reasonable living and pay their bills. To build their practice, Bates and O'Steen knew that they would have to advertise their services and the low cost of those services, and that doing so would run afoul of the state bar's advertising prohibition. Their advertisements violated the disciplinary rule, which, predictably, provoked a lawsuit by the state bar.

Bates argued that any rule restricting advertising violated the Sherman Act because it was an unlawful restraint on competition and also was inconsistent with the First Amendment. Because it limited free speech, the rule was unconstitutional. The antitrust argument did not carry much weight in light of the *Parker v. Brown*¹⁰ doctrine, which exempts states from antitrust laws and excuses conduct that might otherwise be deemed a restraint on competition if there is a justifiable and legitimate state interest to be protected. State regulation of the conduct of the bar was held to be in the public interest and the disciplinary rules furthered that interest.

The First Amendment argument was more vexing. After analyzing the limits of First Amendment protection of commercial speech, the Supreme Court held that attorney advertising was permissible. That decision completely changed the way lawyers communicated with the public through the media to enhance their reputations and gain new clients.¹¹ Lawyer advertising was held to be protected commercial speech.

Commercial speech generally, and in the form of advertising in particular, however, enjoyed a measure of First Amendment protection long before *Bates*. The Supreme Court, in a long line of cases, held that so long as commercial speech is honest and not misleading, it serves a societal interest because it informs the public of the availability of services and promotes price competition. In other words, it promotes informed decision making.¹²

Advertising—even by lawyers—therefore, is protected commercial speech. Although the heart of the dispute framed in *Bates* was whether lawyer advertising could contain a reference to the price of services, the Supreme Court examined the lawyer advertising issue in a much broader context. *Bates* examined the potential for inherently misleading advertising,

the adverse effect on the administration of justice, the undesirable economic effects of advertising, the adverse effect of advertising on the quality of professional services, and the difficulties of enforcement. In the end, however, *Bates* held that any blanket suppression of advertising by lawyers would violate the First Amendment. To no one's surprise, the Supreme Court warned that advertising that is false or misleading is subject to restraint and added that some regulation of the substance of an advertisement by lawyers might be appropriate and constitutional.

Chief Justice Burger and Associate Justice Powell in their partial dissents argued that the decision would cause profound changes in the practice of law.¹³ They were right. *Bates* opened the door to lawyer advertising nationwide, provided only that an advertisement is not false or misleading.

Subsequent cases extended the concept of what is protected commercial speech. The Court's decision in *In re RMJ*¹⁴ opened the door to advertising specific fields of practice or expertise. Some jurisdictions, however, have rules that prohibit advertising a field of practice in which the attorney has neither experience nor competence.¹⁵

In *Zauderer v. Office of Disciplinary Counsel*,¹⁶ the Supreme Court held that a printed advertisement by a lawyer soliciting clients that may have sustained injury by a specific product, the Dalkon Shield, was protected commercial speech. The proliferation of advertisements for clients who may have experienced adverse effects from prescription drugs or other products are now commonplace. *Zauderer* merely opened the door further.

Thus, once the 45-day period has expired, the general rules will permit advertising so long as it is not false or misleading, subject to some fairly minimal filing and review requirements.

Direct Mail to Potential Clients

In *Shapiro v. Kentucky Bar Association*,¹⁷ the Supreme Court concluded that no state may categorically prohibit lawyers from soliciting business by sending truthful and nondeceptive letters to potential clients known to face specific types of legal problems. Then, in *Florida Bar v. Went For It, Inc.*,¹⁸ the Supreme Court concluded that the Florida State Bar could impose a 30-day restriction on direct-mail solicitation of a victim of an accident. First, the Supreme Court reasoned that its precedents leave no room for doubt that the protection of client privacy is a substantial state interest.¹⁹ Second, it noted that the restriction advances the state interest in protecting client privacy. The Court cited data that, as of June 1989, Florida lawyers were mailing 700,000 direct solicitations to potential clients annually. Polling by random sampling revealed that a large percentage of recipients thought the mailings were designed to take

undue advantage and that the mailings caused anger and annoyance. Almost 30 percent of recipients polled reported a lower regard for the profession as a result of receiving direct mail.²⁰

Relying on those data, the Supreme Court concluded (in a 5–4 decision) that “[t]he Bar’s rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians. . . .”²¹ Justice Kennedy’s dissent, in which Justices Stevens, Souter, and Ginsburg joined, argued that whatever the justification might be for a 30-day limitation, the decision undercut the free speech protection recognized in *Bates v. State Bar of Arizona*. Still more importantly, Justice Kennedy reasoned, the decision creates a potentially prejudicial imbalance. More sophisticated and well-informed or adverse parties might beat out victims in a race to investigate and obtain evidence.²²

After the *Went For It* case, the door to direct-mail solicitations of victims of air accidents, with few meaningful restrictions other than the 45-day rule, was wide open, although a few additional state-specific restrictions remain in effect. In New York, for example, sending unsolicited mail may be prohibited where capacity is an issue. An attorney may not send unsolicited mail to one he knows, or has reason to know, is by reason of age, mental condition, or other disability not likely to be able to make reasonable judgments about retaining a lawyer.²³

The Internet as Solicitation Device

Even though the 45-day rule is working today, there is no guarantee that it can solve the solicitation problem it was intended to address, particularly in the age of the Internet.

The Internet has become one of the most significant marketing tools for virtually all businesses, including lawyers and law firms. A modestly sophisticated “client,” friend, or advisor with minimal Internet skills can gain a quick education by typing relevant key words into a search engine, such as “crash at . . . [location] on . . . [date],” “air-crash,” or a lawyer’s name. Lawyers know this, of course, and most law firms have a finely tuned website that can be easily accessed by any interested party.

The inherent limitation with the Internet as a resource, of course, is verification of the accuracy of the representations made by lawyers who use it as a marketing tool. The information lawyers publish on their websites may be highly exaggerated—even untrue—thus complicating the task of distinguishing between lawyers with limited experience and those who have handled challenging commercial aviation accident cases. Freedom of speech does not prohibit exaggeration, and if the Internet has empowered potential clients, enabling them to exercise more control in making their lawyer engagement decisions, it

has exposed them to another powerful source of solicitation—one not affected by the 45-day rule. Thus, lawyers and bar associations should monitor Internet representations to ensure that they are honest and not misleading. Lawyers and clients should be encouraged to speak out in the face of misleading or overly aggressive solicitation-by-website.

Used wisely and with appropriate supplements, the Internet provides access to valuable information. By the time 45 days from the date of a crash have elapsed, some crash victims will have identified lawyers with experience in the field and will have some understanding of the more important issues that they will have to confront. Media will have reported preliminary theories of the cause of the air disaster. In short, the potential client pool is better informed, more knowledgeable about what questions to ask, and, therefore, better armed to make judgments about legal representation. Thus, the 45-day rule—as much as it may protect a victim from an assault by solicitation—provides a real opportunity for victims to be better informed about the lawyer selection process. While the Internet may provide an opportunity for obtaining important information, it also poses the risk of advertising that is free of government-enforced limits.

Providing information on an attorney’s Internet site, even discussions about clients’ rights and remedies, standing alone would probably be considered “commercial speech.”²⁴ As soon as a website implicitly or explicitly invites contact by the reader, however, it becomes advertising that would be subject to some regulation.²⁵ A website that discusses retainer agreements and terms of engagement will be deemed advertising, even if it does not constitute a solicitation.²⁶

Another concern that websites and the Internet pose for attorneys is whether publishing a website in one state to which people throughout the United States may have access puts the attorney at risk of being charged with the unauthorized practice of law in jurisdictions in which he or she is not admitted. Addressing this question by some disclaimer language or other statement on the web page identifying the state(s) in which the attorneys or members of a law firm are licensed to practice would offer a potential defense to an unauthorized practice of law allegation.²⁷

Direct Client In-Person Solicitation

Rule 7.3 of the American Bar Association’s Model Rules of Professional Conduct addressing “Direct Contact with Prospective Clients” is the standard governing direct in-person solicitation, although many jurisdictions have imposed local rules that are more restrictive.

Under Rule 7.3, a lawyer may not solicit a prospective client unless the client is a lawyer or has a close relationship with the lawyer. A lawyer may not solicit a prospective client where the client has made known his or her desire not to be solicited or the solicitation

involves coercion or harassment. Otherwise, written or electronic communications from a lawyer soliciting professional retention must include the words "Advertising Material." Lawyers are subject to sanctions, ranging from reprimand to suspension of their licenses to practice law if they solicit a potential new client in person, by telephone, or by some real-time electronic method, if the motive is a fee agreement or other financial gain.

There are essentially only three exceptions to such contact: (1) direct contact with clients with whom the lawyer has had a prior professional relationship; (2) direct contact with individuals with whom the lawyer has an established personal relationship; or (3) solicitation of clients for "political" purposes rather than pecuniary gain.

In *Obralik v. Ohio State Bar*,²⁸ the Supreme Court upheld the prohibition on unsolicited direct in-person client solicitation. An Ohio lawyer contacted the parents of one of the drivers injured in an automobile accident after hearing about the accident and learned that their 18-year-old daughter was injured. This generated a contingency fee agreement. He then approached another passenger at her home on the day she was released from the hospital and again secured a contingency fee agreement. After both women subsequently discharged the attorney, he succeeded in obtaining a portion of the driver's insurance proceeds in settlement. The clients filed complaints with the Ohio Bar Association. The disciplinary board of the Ohio Bar Association levied sanctions for the attorney's violation of its disciplinary rules. The Supreme Court of Ohio, which was obviously disturbed by the attorney's conduct, subsequently increased the penalty from a public reprimand to an indefinite suspension.

In its decision affirming the Ohio Supreme Court's ruling, the U.S. Supreme Court held: "[t]he solicitation of business by a lawyer through direct, in-person communication with a prospective client has long been viewed as inconsistent with the professional ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized bar for many years."²⁹

Significantly, *Obralik* did not prohibit an attorney from giving unsolicited advice, but rather from using unsolicited advice as bait to secure and accept employment.³⁰ Thus, it is the business transaction that flows from the unsolicited direct contact that is prohibited. The rule is that an attorney needs a legitimate invitation to get through the front door if he intends to solicit a potential client.

Telemarketing and "chat rooms" on the Internet sponsored by a law firm also may constitute a direct in-person solicitation. New York's DR2-103(A)(1) prohibits this kind of electronic direct contact, much as the ABA Model Rule 7.3 precludes direct telephone

solicitation. Like the telephone, "chat rooms" involve real-time contact by a lawyer with a potential client. At the very least, the fact that bar associations in Utah,³¹ Michigan,³² Philadelphia,³³ Arizona,³⁴ and California³⁵ have addressed the issue demonstrates the level of caution lawyers must exercise in using the broad range of opportunities for potential client contact the Internet offers.

Conclusion

No court has endorsed an "anything goes" approach to solicitation. Whatever the medium of communication with potential clients may be, the communications must be honest and not misleading. The 45-day "no-solicitation" rule has been reasonably effective largely because it has given victims and relatives time to deal with their immediate crisis and allows for a more deliberate and informed opportunity to select the attorney in whom they will place the responsibility of representation.

Even though clients are able to obtain information, they are still susceptible, once 45 days are over, to being misled by inaccurate representations from attorneys. The fear of negative repercussions associated with inappropriate solicitation tempers the impulse for attorneys to push beyond the outer limits of permissible solicitation. The challenge for courts and bar associations continues to be to balance commercial free speech rights with policies to protect victims. As technology continues to develop, the frontier of communications between attorneys and potential clients will extend to those outer limits. The principles applied to an in-person, mail, or telephone solicitation also apply to newer "virtual" solicitations, but, as the use of technological innovation for purposes of solicitation develops even further, the profession likely will need to respond with appropriate restraints without doing violence to the basic right of free commercial speech.

Endnotes

1. Aviation Disaster Family Assistance Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213 (codified at 49 U.S.C. § 1136 (2006)).

2. Pub. L. No. 106-181, § 401(a)(1), 114 Stat. 129 (codified at 49 U.S.C. § 1136(g)(2) (2006)).

3. Henry Gottlieb, *Lawyer Fined for Soliciting Families of Air-Crash Victims Within Banned Period*, LAW.COM, Sept. 3, 2009, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202433562898>.

4. Dan Herbeck, *Detroit Lawyer Fined for Illegally Contacting Flight 3407 Families*, BUFFALO NEWS, Aug. 21, 2010, available at <http://www.buffalonews.com/incoming/article31506.ece>.

5. *Anderson v. Kentucky Bar Ass'n*, 262 S.W.3d 636 (Ky. 2008).

6. Tom Loftus, *U.S. Attorney Warns Against Lawyer Solicitation*, COURIER-JOURNAL.COM, Aug. 31, 2006, <http://www.courier-journal.com/article/20070316/NEWS01/101240072/U-S-Attorney-warns-against-lawyer-solicitation>.

7. *Kentucky Bar Association Task Force on Comair Flight 5191 Presents Final Report to Board of Governors*, KY. BAR NEWS, Jan. 2008, at 3, available at http://www.kybar.org/documents/benchbar/2008/bb_0108_14.pdf.

8. E.g., New Jersey Rules of Professional Conduct Rule 7.3(b)(4); Colorado: C.R.S.A. § 12-5-115.5; New York: 22 N.Y. ADC 1200.8(g); Tennessee: Sup. Ct. Rules, Rule 8, RPC 7.3.

9. 433 U.S. 350 (1977).
10. 317 U.S. 341 (1943).
11. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (“Mindful of these concerns, we engage in ‘intermediate’ scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. *Id.* at 563–64. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be “narrowly drawn.” *Id.* at 564–65.”)
12. *Bates*, 433 U.S. at 364, 97 S. Ct. at 2699 (“And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 96 S. Ct. 1817, 1827 (1976) (“It is a matter of public interest that those [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”) (citing *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 904–06, 92 S. Ct. 204, 208–09, 30 L. Ed. 2d 175, 177–78 (1971) (Douglas, J., dissenting from denial of certiorari); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603–04, 87 S. Ct. 1224, 1242–43, 18 L. Ed. 2d 303, 324–25 (1967) (Harlan, J., concurring)).
13. *Bates*, 433 U.S. at 385, 389.
14. 455 U.S. 191 (1982).
15. *E.g.*, RULES REGULATING THE FLORIDA BAR 4-7.2(c)(4) (“Advertising Areas of Practice. A lawyer or law firm shall not advertise for legal employment in an area of practice in which the advertising lawyer or law firm does not currently practice law.”).
16. 471 U.S. 626 (1982).
17. 486 U.S. 466 (1988).
18. 515 U.S. 618 (1995).
19. *Id.* at 624 (citing *Edenfeld v. Fane*, 436 U.S. 412 (1978)).
20. *Id.* at 626–27.
21. *Id.* at 633.
22. *Id.* at 635–45.
23. N.Y. CODE OF PROF’L RESPONSIBILITY DR2-103A(2)(d).
24. *See, e.g.*, Ariz. Bar Ethics Op. 97-04, Computer Technology; Internet; Advertising and Solicitation; Confidentiality, *available at* <http://www.myazbar.org/ethics/opinionview.cfm?id=480>.
25. *See, e.g.*, State Bar of Cal. Standing Comm. on Prof’l Responsibility & Conduct Formal Op. No. 2001-155 (ruling that an attorney’s website constitutes an advertisement but is not a solicitation), *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=plmCMS3JFSM%3D&tabid=838>.
26. *Id.*
27. In Indiana, for example, courts can impose penalties on out-of-state lawyers for in-state advertising. *In re Murgatroyd*, 741 N.E. 2d 719 (Ind. 2001). In Florida, meanwhile, a court held that advertising in telephone books and on television and in newspapers with the implication that one is authorized to practice law in the state amounts to unauthorized practice of law warranting an injunction. The defendant in that case was a member of the New York bar only. *Fla. Bar v. Kaiser*, 397 So. 2d 1132 (Fla. 1981).
28. 436 U.S. 447, 454 (1978).
29. *Id.*
30. *Id.* at 458.
31. Utah State Bar Ethics Advisory Op. Comm., Advisory Op. 97-10 (1997).
32. Mich. Standing Comm. on Prof’l & Judicial Ethics Op. R.I-276 (1996).
33. Philadelphia Bar Ass’n Prof’l Guidelines Op. 98-6 (1998).
34. Ariz. Prof’l Conduct Op. No. 97-04 (1997).
35. Cal. State Bar Op. 2004-166 (2004).