BALANCING ACT: NEW JERSEY WALKS A LINE BETWEEN THE PROS AND CONS OF ATTORNEY SOLICITATION OF CLIENTS

INTRODUCTION

No aspect of attorney ethics has been more fiercely debated than client solicitation.[1] Many lawyers oppose solicitation, deeming it beneath their professional dignity.[2] These opponents argue that the practice of law is a "profession,"[3] not a competitive business.[4] Moreo-

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[1] *See* Dorothy Virginia Kibler, Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the* Zauderer *Decision*, 65 N.C. L. REV. 170, 170 (1986). There is contention between attorneys who believe that solicitation is inherently wrong and those who tread near the boundaries set in commercial speech cases. *See id.* at 186-87; *see also infra* notes 2-17 and accompanying text (discussing the advantages and disadvantages of client solicitation); *infra* note 15 (defining commercial speech). This debate will continue because the number of attorneys in the United States is increasing, which, in turn, stimulates solicitation. *See* Scott R. Bickford & Paula Hamilton Lee, *Restricting Lawyers' Solicitation of Victims*, BRIEF, Fall 1995, at 26 (noting that in the United States there will be one million attorneys by the year 2000, or one out of every 267 people).

[2] *See* Melissa George, Note, *Let Sleeping Plaintiffs Lie: Restricting Attorneys' Rights to Make Direct-Mail Solicitation*, 22 J. LEGAL PROF. 251, 251 (1998).

[3] *See* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). A profession "refers to a group . . . pursuing a learned art as a common calling in the spirit of public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose." *Id.* A professional subordinates private gain and self-interest to the public good or interests of clients. *See* STEVEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 11 (5th ed. 1998).

[4] *See* Max J. Luther III, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A. J. 554, 554 (1958). Promoting professionalism among bar members is advanced as a reason for regulating solicitation. *See* Kristina N. Bailey, Note, *"Rainmaking" and D.C. Rule of Professional Conduct 7.1: The In-Person Solicitation of Clients*, 9 GEO. J. LEGAL ETHICS 1335, 1349 (1996). The basic notion of competition, inherent in the concept of trades and occupations, is absent from the meaning of a "profession." *See* Luther, *supra*, at 554. Historically, legal practice was not competitive except, of course, between opposing lawyers. *See id.*

Today, an attorney's motivation in soliciting clients is probably rooted in attracting business that would otherwise go elsewhere for legal services. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 787 (1986). Thus, unduly broad solicitation rules raise anti-trust concerns because they are viewed as anti-competitive. *See id.*

As competition in the legal marketplace has increased, so has the emphasis on marketing one's legal services. *See* Bailey, *supra*, at 1342-43. Thus, despite the tradi-

ver, opponents readily expound the evils associated with client solicitation, such as intrusiveness, misrepresentation, overreaching, intimidation, and fabricated evidence.[5]

Further, solicitation presents the real danger that a needy prospective client will retain the first lawyer that he encounters instead of searching out an advocate qualified and experienced enough to handle the case.[6] Opponents also claim that certain forms of solicitation may trample upon the privacy rights[7] of potential clients.[8] Re-

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tional prohibitions, lawyers are engaging in client solicitation. *See id.* at 1343. No member of the community is safe from the business generation tactics of the modern attorney. *See id.* Attorneys are always busy trying to find new clients. *See id.*

In fact, lawyers are instructed by general marketing strategies to make small talk with a potential client and then to ask directly for the individual's legal business. *See id.* at 1344. These marketing materials also suggest that an attorney identify target clients and then stage coincidental meetings. *See id.* Not surprisingly, marketing materials do not pay significant attention to the ethical issues associated with modern solicitation and contend that the American Bar Association's (ABA) ethical directives apply only to lawyers who solicit clients at mass disaster scenes or on television. *See id.* at 1343.

[5] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978); Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 321 (1986). Other evils associated with solicitation are overcharging, fraud, bribery, undue influence, underrepresentation, and exploitative or indelicate forms of client contact. *See Ohralik*, 436 U.S. at 462; Rhode, *supra*, at 319-21. *See, e.g.*, *In re* Pajerowski, 156 N.J. 509, 520, 522, 721 A.2d 922, 998, 999 (1998) (per curiam) (citing fabricating false medical claims as an evil).

[6] *See* Eric S. Roth, Note, *Confronting Solicitation of Mass Disaster Victims*, 2 GEO. J. LEGAL ETHICS 967, 979 (1989).

[7] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.26, at 757 (4th ed. 1991). The phrase "right of privacy" has many meanings. *See id.* In pertinent part, the right of privacy "encompasses a freedom from intrusion by others into privately owned areas as well as freedom from disclosures of information about an individual's private life." *Id.* Relevant torts concerning the invasion of property include unreasonable intrusion and public disclosure of private facts. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 854-63 (5th ed. 1984).

The United States Constitution does not expressly grant a right to privacy. *See* Judith Beth Prowda, *Report: A Lawyer's Ramble Down the Information Superhighway: Privacy and Security of Data*, 64 FORDHAM L. REV. 738, 738 (1995). The United States Supreme Court has based the general right of privacy on the

> First Amendment's freedoms of expression and association, the Fourth Amendment's protection of persons, places, papers, and effects against unreasonable searches and seizure, the Fifth Amendment's privilege against self-incrimination and requirement of due process, penumbras of the Bill of Rights and the Ninth Amendment, and the Fourteenth Amendment's guarantee of ordered liberty.

Id. at 738-39 (citing Roe v. Wade, 410 U.S. 113, 152-53 (1973); Stanley v. Georgia, 394 U.S. 557, 564-66 (1969); Katz v. United States, 389 U.S. 347, 350-53 (1967); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); *Griswold*, 381 U.S. at 488-91 (Goldberg, J., concurring); Mapp v. Ohio, 367 U.S. 643, 656-57 (1961); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-63 (1958); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Boyd v. United States, 116 U.S.

gardless of the true impact of solicitation, it is undeniable that these alleged evils have caused irreparable harm to the public's perception of the legal profession.[9]

Proponents insist that certain types of solicitation produce benefits for both the general population and the legal community.[10] Solicitation, they argue, is an effective way to disseminate information about legal services to the public.[11] With increasingly complex regulations and statutes, a lay person may not be aware of his legal rights.[12] Moreover, solicitation causes competition among attorneys, which, in turn, has the ability to improve the substance of legal work

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616, 627-30 (1886)).

[8] *See* WOLFRAM, *supra* note 4, at 787; Roth, *supra* note 6, at 979. Solicitation has the potential to invade privacy, for example, whenever a prospective client opens a letter or answers the phone. *See* Elizabeth D. Whitaker & David S. Coale, *Professional Image and Lawyer Advertising*, 28 TEX. TECH L. REV. 801, 818 (1997).

[9] *See* Bailey, *supra* note 4, at 1350. Not surprisingly, approximately 45% of persons receiving written solicitations after an accident or disaster had a negative reaction to the correspondence. *See* George, *supra* note 2, at 251.

Furthermore, it is apparent from the wealth of lawyer jokes that the public condemns the solicitation methods used by some attorneys. *See, e.g.*, THE RODENT, EXPLAINING THE INEXPLICABLE: THE RODENT'S GUIDE TO LAWYERS 119 (1995). One author refers to personal injury attorneys as "parachute attorneys:"

> The Parachute Attorney specializes in huge disasters such as explosions at chemical plants, airplane and train crashes, floods, earthquakes, fires, and other events creating an abundance of victims/clients. The Parachute Attorney strikes while the iron is hot (i.e., the bodies are still warm) by traveling to the site of the disaster, feigning sympathy for the victims and their survivors, and then hitting them with sales pitches.

Id. See generally Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405 (1999) (positing historical, psychological, social, and cultural bases for the public antipathy toward attorneys and proposing that the legal profession's efforts are unlikely to counteract that sentiment).

[10] *See* Salvatore Villani, Note, *The New York Lawyer's Code of Professional Responsibility Should Be Amended with Respect to Attorney Solicitation of Clients As Proposed By the House of Delegates of the New York State Bar Association*, 72 ST. JOHN'S L. REV. 227, 235 (1998); Bailey, *supra* note 4, at 1351; *see also infra* notes 11-17 and accompanying text (describing some of these benefits).

[11] *See* Bailey, *supra* note 4, at 1351. Interestingly, 70% of the populace does not seek legal assistance because they mistakenly believe that "fees are unaffordable or because they have no way to select an attorney other than making a random choice from the 'yellow pages' of the telephone directory." Kibler, *supra* note 1, at 188.

[12] *See* Bailey, *supra* note 4, at 1351. The ban on solicitation originated when the law was simple enough that citizens were cognizant of the necessity for legal counsel. *See id.* Today, however, when a person is injured, he might sign an inadequate release offered by an insurance adjuster. *See* WOLFRAM, *supra* note 4, at 787. Also, a person under arrest might talk to law enforcement without knowledge of the advantages of legal counsel. *See id.* The legal market is inefficient when the consumer is not cognizant of his need for legal services. *See* Bailey, *supra* note 4, at 1351.

and reduce legal fees.[13] Advocates also assert that state-enforced prohibitions of solicitation may violate their protected First Amendment[14] rights to free speech about lawful services,[15] group association,[16] and freedom of expression.[17]

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[13] *See* Villani, *supra* note 10, at 235. With more lawyers competing for clients, potential clients are able to select their attorney based on quality. *See id.* In addition, lawyers must reduce their fees in a competitive solicitation market to compete for clients. *See id.*

[14] *See* U.S. CONST. amend. I. The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[15] *See* U.S. CONST. amend. I, *supra* note 14. An attorney might argue that his solicitation was a form of free speech; however, courts might classify this conduct as commercial speech, which does not enjoy the same First Amendment protections. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). Commercial speech is "'expression related solely to the economic interests of the speaker and its audience.'" Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993) (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980)). For the evolvement of cases dealing with commercial speech, see *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that commercial speech is not protected speech); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (holding that commercial speech is entitled to some First Amendment protection); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that commercial speech is protected speech, but some types of commercial speech regulation are permissible); *Central Hudson*, 447 U.S. at 566 (1980) (expounding a four-part test used to determine whether commercial speech is protected); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504-08 (1996) (invalidating a blanket ban on truthful, nonmisleading advertising).

[16] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958). The United States Supreme Court recognized a general right of association in *NAACP v. Alabama*. *See id.* The Court explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *Id.* The Supreme Court grounded its decision in the term "liberty" found within the Fourteenth Amendment's Due Process Clause, which embraces free speech. *See id.* The Justices found that it is immaterial whether the ideas sought to be furthered by the association concern economic, cultural, religious, or political matters. *See id.*

Since *NAACP v. Alabama*, the Court has considered three distinct aspects of the right to associate. *See* NOWAK & ROTUNDA, *supra* note 7, § 16.41, at 1063. First, persons may associate to attain goals that are not connected to a fundamental right. *See id.* Next, the "freedom to associate is protected by the concept of liberty in the due process clauses and as an implicit part of the Bill of Rights guarantees; this right is connected to the fundamental right to privacy." *Id.* Finally, the Supreme Court has acknowledged a right to associate in order to engage in activities that are expressly guaranteed by the First Amendment. *See id. See, e.g., In re* Primus, 436 U.S. 412, 421 (1978) (asserting that a lawyer's activity is constitutionally protected as association).

[17] *See, e.g., Primus*, 436 U.S. at 421 (contending that a lawyer's activity is expression that is constitutionally protected). Although the First Amendment guarantees the freedom of expression, certain categories of expression are not afforded First Amendment protection because they "are considered to be of less social value be-

The New Jersey Supreme Court, in promulgating prohibitions of solicitation, has wrestled with the difficult task of balancing these competing interests regarding solicitation.[18] Prohibitions must allow those attorneys who depend on client solicitation to find work in today's competitive legal market.[19] They must provide adequate guidance to attorneys as to what forms of solicitation are prohibited.[20] Further, these prohibitions cannot interfere with a lawyer's First Amendment rights to group association, freedom of expression, and freedom to speak truthfully about legal rights and services.[21] Still, the court cannot allow attorney solicitation to violate the lay person's privacy rights.[22]

This Note considers whether the New Jersey Supreme Court has successfully balanced these competing interests. Part I of this Note reviews the history of attorney solicitation of clients and the prohibitions thereof. It traces the United States Supreme Court case law that has shaped New Jersey law with regard to attorney solicitation of clients. Next, Part II addresses the New Jersey rule pertaining to prohibitions of client solicitation. Part III surveys three recent New Jersey Supreme Court decisions that have interpreted this rule. Finally, Part IV examines how effectively the supreme court has balanced the competing interests associated with attorney solicitation of clients.

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cause they infringe upon other rights." Andrew Spett, Comment, *A Pig in the Parlor: An Examination of Legislation Directed at Obscenity and Indecency on the Internet*, 26 GOLDEN GATE U. L. REV. 599, 602-03 (1996) (citing Roth v. United States, 354 U.S. 476, 484 (1957)). Further, in *United States v. O'Brien*, the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations of First Amendment freedoms." 391 U.S. 367, 376 (1968). The *O'Brien* Court articulated a four-part test used to determine whether a governmental regulation may incidentally infringe upon the freedom of expression. *See id.* at 377. The elements of the test include whether the governmental regulation is within the government's constitutional power, advances an important or substantial governmental interest, "is unrelated to the suppression of free expression," and the restriction is not greater than is necessary to further that interest. *Id.*

[18] *See infra* Part IV (addressing the attempt of the New Jersey Supreme Court to balance these interests).

[19] *See supra* note 4 and accompanying text (discussing the legal market's competitive nature).

[20] *See In re* Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 155 N.J. 357, 377, 379-80, 715 A.2d 216, 226-27 (1998) (per curiam) (O'Hern, J., concurring in part and dissenting in part) (stating that discipline should not be imposed because the attorneys did not have proper notice of the type of conduct prohibited by an ethical directive) [hereinafter *In re* TEAMLAW].

[21] *See supra* notes 14-17 and accompanying text (discussing First Amendment concerns implicated by restricting attorney solicitation of clients).

[22] *See supra* notes 7-8 and accompanying text (discussing privacy concerns implicated by permitting attorney solicitation of clients).

I

A. *History of Prohibitions of Client Solicitation*

Since ancient times,[23] attorneys have engaged in various methods of solicitation.[24] Traditionally, lawyers, by their own efforts or through the use of runners,[25] have actively sought clients in person.[26] Attorneys have also instituted targeted mail campaigns and personal telephone calls to generate business.[27] More recently, lawyers have turned to e-mail to solicit clients.[28]

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[23] *See* Louise L. Hill, *Solicitation By Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 370 (1990). In Greece, by the sixth century, B.C., a litigant, who did not have friends or family to escort or assist him at trial, was allowed to be helped by outsiders. *See id.* at 370-71. This was known as the privilege of intervention. *See id.* at 371. In time, this privilege was abused and the intervenor became known as a "'sycophant,' an individual who voluntarily undertook the prosecution of a matter, being motivated by money, prestige, or political advantage." *Id.* Under the Roman system, the intervenor was known as a calumniator. *See id.* at 372-73.

[24] *See id.* at 370. Solicitation is defined as "[a]sking; enticing; urgent request . . . . Any action which the relation of the parties justifies in construing into a serious request." BLACK'S LAW DICTIONARY 1392 (6th ed. 1990). It occurs when a lawyer makes a "personal appeal directed toward a prospective client." Hill, *supra* note 23, at 388. The term solicitation is broadly defined and has been interpreted by the courts to encompass myriad practices. *See* Luther, *supra* note 4, at 554; *See also infra* notes 25-28 and accompanying text (citing in-person, telephone, mail, and e-mail as possible forms of solicitation). In fact, "[t]he methods of solicitation are as various as are the possible routes to the source of persons with legal troubles." WOLFRAM, *supra* note 4, at 786.

Contrary to what some may believe, plaintiffs' attorneys are not the only ones to engage in solicitation. *See* George, *supra* note 2, at 259. Defense attorneys also actively solicit clients. *See id.*

[25] *See* BLACK'S LAW DICTIONARY 1333 (6th ed. 1990). A runner is a "[p]erson who solicits business for [an] attorney from accident victims." *Id.*

[26] *See* WOLFRAM, *supra* note 4, at 785-86. One notable example of in-person solicitation occurred after a deadly fire in the Dupont Plaza Hotel, located in San Juan, Puerto Rico. *See* Roth, *supra* note 6, at 973. Lawyers from the United States went to the disaster site and hospitals in Puerto Rico and directly approached the victims and their families in order to gain legal employment. *See id.*

[27] *See* George, *supra* note 2, at 259-61; Christopher R. Lavoie, Note, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413, 428 (1997). One memorable example of mail solicitation occurred after the 1988 Shell Oil explosion in Louisiana. *See* Bickford & Lee, *supra* note 1, at 28. Defense counsel for Shell Oil mailed a settlement offer to nearby residents. *See id.*; *see also infra* note 96 (noting a form of mail solicitation used by the airline industry in response to aircraft disasters).

The United States Supreme Court has not addressed telephone solicitation, but bans on this form of solicitation have been enacted. *See* Whitaker & Coale, *supra* note 8, at 818. Telephone solicitation has been equated with in-person solicitation rather than targeted mailings. *See* Lavoie, *supra*, at 428.

[28] *See* J.T. Westermeier & Leonard T. Nuara, *Ethical Issues for Lawyers on the Internet and the World Wide Web*, 525 PLI/Pat 163, 179-81 (1998). The use of mass e-mail

The history of prohibitions of solicitation closely tracks the development of the legal profession itself.[29] American prohibitions of client solicitation can be traced to medieval England.[30] These prohibitions were aimed at discouraging certain practices, such as barratry,[31] champerty,[32] and maintenance.[33] The United States legal community subsequently adopted British prohibitions of solicitation.[34]

American lawyers observed these prohibitions until the early nineteenth century, when they came to be regarded as undemocratic.[35] Thereafter, it became commonplace for prominent lawyers to engage in the solicitation of clients.[36] In 1908, however, the

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to prospective clients raises grave solicitation concerns. *See id.* at 180. This is because technology permits personal and quick communications with potential clients at virtually no cost to the attorney. *See id.* The concerns over e-mail stemmed from the "green card" incident. *See id.* In 1993, two immigration attorneys posted an advertisement to many internet news groups, which was mailed to 30,000 e-mail addresses and appeared in about 140 countries. *See id.*

[29] *See* Michael Hegarty, Note, *Constitutional Law — First Amendment Commercial Speech — Attorney Solicitation — In re* Von Wiegen, 34 U. KAN. L. REV. 191, 192 (1985). In fact, proscriptions against solicitation are rooted in Greek law. *See* Hill, *supra* note 23, at 370. Prohibitions on solicitations began in ancient Greece. *See* Hegarty, *supra*, at 192. The Greeks instituted prohibitions in order to prevent maintenance, to uphold the integrity of the justice system, to prevent vexatious and oppressive litigation, and to protect harassed litigants. *See id.*

[30] *See* Rhode, *supra* note 5, at 317. During this period of time, the tribunals of England were corrupted, and the legal profession disliked maintaining a financial interest in the outcome of lawsuits and arousing frivolous litigation. *See id.* at 317-18.

The English barristers, who were wealthy aristocrats, did not practice for monetary gain. *See* Bailey, *supra* note 4, at 1335; *see also* BLACK'S LAW DICTIONARY 151 (6th ed. 1990) (defining a barrister as "a counsellor learned in the law who has been admitted to plead at the bar, and who is engaged in conducting the trial or argument of causes"). Therefore, there was no reason for the barristers to compete with each other for clients. *See* Luther, *supra* note 4, at 554.

[31] *See* Rhode, *supra* note 5, at 317. Barratry is the offense of frequently stirring up and exciting quarrels or lawsuits. *See* BLACK'S LAW DICTIONARY 150 (6th ed. 1990).

[32] *See* Rhode, *supra* note 5, at 317. Champerty is a bargain between a party to a lawsuit and a stranger, whereby the stranger pursues the suit in return for a share of any judgment proceeds. *See* BLACK'S LAW DICTIONARY 231 (6th ed. 1990). This is a form of maintenance. *See id.*; *see also infra* note 33 and accompanying text (defining maintenance).

[33] *See* Rhode, *supra* note 5, at 317. Maintenance is the assistance of others to prosecute or defend a lawsuit without just cause. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 111 (1994).

[34] *See* Hegarty, *supra* note 29, at 193.

[35] *See* Edward Simpson Stoffregen, III, Comment, *Client Solicitation and the First Amendment: In re* Rapport *Characterized as Associational Freedom*, 19 J. LEGAL PROF. 351, 352 (1994). Several states repealed the prohibitions in order to open up the legal practice to all persons. *See id.*

[36] *See* Bailey, *supra* note 4, at 1335. Abraham Lincoln, as a practicing attorney, engaged in solicitation. *See* WOLFRAM, *supra* note 4, at 785-86. Furthermore, in the Dred Scott, the Peter Zenger, and the Aaron Burr cases, prominent attorneys, without the client's prior invitation, approached persons in legal difficulty and offered

American Bar Association (ABA)[37] enacted a Canon of Ethics[38] that, in part, reinstituted the prohibitions of solicitation.[39]

It is unclear why American sentiment shifted toward prohibiting solicitation once again.[40] One explanation is that "Victorian snobbery"[41] motivated attorneys to distinguish their profession from other trades by relying purely on their reputations to generate business.[42] An alternative explanation is that white, Anglo-Saxon Protestants sought to end competition from recent immigrants, whom they viewed as unworthy of practicing law.[43]

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their services. *See id.* at 786.

[37] *See* RHODE, *supra* note 33, at 46. The ABA was formed in Saratoga, N.Y. in 1878. *See id.* It commenced as an elite society with selective membership criteria and a myriad of legal and social reform policies. *See id.*

[38] *See id.* The ABA adopted 32 canons with little debate or controversy. *See id.* Most states adopted the canons through legislative or judicial enactment. *See id.* Other states treated the canons as authoritative guidelines in bar disciplinary and judicial actions. *See id.* The drafters of the canons were concerned about the commercialization of the profession and with the regulation of "ambulance chasers." *See id.*

The canons were modeled after an earlier Alabama Code that borrowed heavily from the works of George Sharswood, a judge from Pennsylvania, and David Hoffman, a law professor from Maryland. *See id.* at 45, 46. Sharswood's and Hoffman's treatises focused on ethics and etiquette, and their standards discouraged any self-promoting or dishonorable conduct that might reflect negatively on an attorney's public standing. *See id.* at 45.

[39] *See* Bailey, *supra* note 4, at 1335-36. The canon that prohibited solicitation stated that "[i]t is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations." CANONS OF PROFESSIONAL ETHICS Canon 27 (1967). The canon imposed a duty on each "member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred." CANONS OF PROFESSIONAL ETHICS Canon 28 (1967).

[40] *See* Bailey, *supra* note 4, at 1335 n.8 and accompanying text.

[41] *See* WOLFRAM, *supra* note 4, at 776. "Victorian snobbery" consisted of denigrating any profession that tainted itself by taking on the characteristics of a trade. *See id.*; *supra* notes 3-4 and accompanying text (defining a profession).

[42] *See* Bailey, *supra* note 4, at 1335.

[43] *See* Stoffregen, *supra* note 35, at 353. The contempt of competition in the legal profession may have stemmed from class, religious, and ethnic biases. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 50 (1976). The "[p]rohibitions on client solicitation helped to safeguard the profession's image by discouraging unseemly entrepreneurship among its lower echelons, particularly religious and ethnic minorities." Rhode, *supra* note 5, at 318.

The canon proscribing solicitation discriminated against personal injury attorneys, who were known as "ambulance chasers." *See* AUERBACH, *supra*, at 43. It also impeded lawyers who worked in highly competitive urban markets with transient clients. *See id.* Catholic and Jewish immigrant attorneys of "lower-class" origin were concentrated among these urban solo practitioners. *See id.* at 50. Ambulance chasers were also ridiculed because of their accents, "and their perseverance was denigrated as aggressiveness . . . ." *Id.*

Regardless of the reason, the ABA has continued to support prohibitions of solicitation.[44] In 1970, the ABA adopted the Model Code of Professional Responsibility, which continued to prohibit solicitation.[45] Thirteen years later, the ABA revised these prohibitions in the Model Rules of Professional Conduct (Model Rules).[46] These Model Rules were formulated primarily to provide guidance to attorneys, and violations of such directives do not give rise to civil liability.[47] Today, the prohibitions of solicitation can be found in Model Rule 7.3.[48]

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[44] *See* MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] Rule 7.3 (1998). *See infra* note 48 and accompanying text (expounding Model Rule 7.3). The initial version of the Model Rules of Professional Conduct (Model Rules) was enacted in 1983. *See* GILLERS, *supra* note 3, at 5.

[45] *See* GILLERS, *supra* note 3, at 4-5. Practitioners were dissatisfied with the Canon's vague standards, so the ABA formed a committee to draft the Model Code of Professional Responsibility (Model Code). *See* Bailey, *supra* note 4, at 1337. All states, in some form, quickly adopted the Model Code. *See* GILLERS, *supra* note 3, at 4. The prohibitions of solicitation are addressed in two parts of the Model Code. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE] DR 2-103 (1969); MODEL CODE DR 2-104 (1969). The Model Code stated that "[a] lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." MODEL CODE DR 2-103(A) (1969). Furthermore, the Model Code provided in relevant part that "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . ." MODEL CODE DR 2-104(A) (1969).

[46] *See* GILLERS, *supra* note 3, at 5. In 1977, the ABA appointed a commission, which became known as the Kutak Commission, to prepare these new rules. *See id.* At the beginning of 1998, more than 40 states had adopted some version of the Model Rules. *See id.* at 5. New Jersey became the first state to adopt the Model Rules in 1984. *See id.*

[47] *See* MODEL RULES Preamble, at 6 (1999).

[48] *See* MODEL RULES Rule 7.3 (1999). Model Rule 7.3 provides:

> (a) 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.
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> (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
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> (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
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> (2) the solicitation involves coercion, duress, or harassment.
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> (c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

Id.

B. United States Supreme Court Case Law

The United States Supreme Court invalidates, by its appellate jurisdiction, any ABA provisions as adopted by individual states that violate the United States Constitution, namely the First Amendment.[49] Federal constitutional interpretations made by the United States Supreme Court are binding on the New Jersey Supreme Court.[50]

In *NAACP v. Button*,[51] the Supreme Court considered First Amendment protection for client solicitation for the first time.[52] The *Button* Court distinguished between solicitation for pecuniary gain and solicitation as a type of political expression.[53] The *Button* Court afforded First Amendment protection to solicitation deemed to be political expression because such solicitation serves the public interest.[54] In *In re Primus*,[55] the United States Supreme Court applied *But-*

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[49] *See* Bailey, *supra* note 4, at 1338. The United States Constitution is the supreme law of the land, and the Supreme Court retains jurisdiction to determine the protections that the Constitution provides. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 180 (1803).

[50] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 344 (1816). State law is subordinate to federal law under the Supremacy Clause of the United States Constitution. *See id.*; U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

[51] 371 U.S. 415 (1963).

[52] *See* Stoffregen, *supra* note 35, at 353. United States Supreme Court attorney advertising cases must be considered in conjunction with solicitation cases. *See* Hill, *supra* note 23, at 388. Lawyer advertising is a communication that tells the public that an attorney is available to perform legal services. *See id.*

For the progression of cases dealing with attorney advertising, see *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (holding that a state cannot subject attorney advertising to blanket suppression, but can constitutionally place restrictions on attorney advertising if it is misleading, deceptive, or false); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (holding that, even if an advertisement is not misleading, a state may regulate advertisements if there is a substantial interest and the regulation is narrowly tailored to that interest); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (holding that lawyer advertising is afforded constitutional protection and that commercial speech that is not deceptive, false, or concerning unlawful activities may be restricted if a substantial governmental interest is present and only through modes that directly promote that interest); *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 110-11 (1990) (holding that a lawyer has a constitutional right to advertise himself as a specialist if the advertisement is not misleading).

[53] *See Button*, 371 U.S. at 443.

[54] *See id.* at 431. In *Button*, the NAACP sought a declaration that its method of soliciting clients was protected speech and, accordingly, that a Virginia statute that prohibited solicitation was unconstitutional. *See id.* at 428. The NAACP solicited cli-

ton and determined that a state could not prohibit in-person solicitation by an organization that relied on litigation as a means of political association and expression.[56]

Solicitation for pecuniary gain has not enjoyed the same First Amendment protections as political expression.[57] In *Ohralik v. Ohio State Bar Ass'n*,[58] the Justices upheld a blanket ban on in-person solicitation by lawyers for pecuniary gain.[59] The *Ohralik* Court explained that, in order for the ban to survive First Amendment scrutiny, the state must possess an important interest in avoiding harm to its citizens.[60] In *Ohralik*, the state's important interests included regulating commercial transactions and protecting consumers, maintaining standards of licensed professionals, and preventing vexatious conduct.[61]

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ents in public school desegregation matters by calling a meeting at which parents signed pre-printed forms that allowed the NAACP to represent them. *See id.* at 421. The Supreme Court determined that these activities were protected as expression and association under the First Amendment. *See id.* at 428-29.

[55] 436 U.S. 412 (1978).

[56] *See id.* at 426-27. In *In re Primus*, a cooperating lawyer with the American Civil Liberties Union (ACLU) sent a letter to a woman who had been sterilized as a condition of receiving public assistance. *See id.* at 414-16. The attorney informed this woman that the ACLU would provide free legal assistance to her. *See id.* at 416. The South Carolina Supreme Court found that the attorney violated two disciplinary rules and ordered a private reprimand. *See id.* at 418-19.

The United States Supreme Court reviewed the matter and held that solicitation by a non-profit organization implicates interests of political expression and association sufficient to justify First Amendment protection. *See id.* at 426-28. Furthermore, the Court distinguished *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), on the grounds that *Ohralik* involved in-person solicitation for monetary gain. *See Primus*, 436 U.S. at 434; *see also infra* notes 58-61 and accompanying text (discussing *Ohralik*).

[57] *See Primus*, 436 U.S. at 434.

[58] 436 U.S. 447 (1978).

[59] *See id.* at 453 n.9, 468. In *Ohralik*, an attorney solicited employment from two women who were injured in a car accident. *See id.* at 449-52. The Supreme Court of Ohio found that the attorney violated two disciplinary rules and that his conduct was not constitutionally protected. *See id.* at 453-54.

The United States Supreme Court upheld the state's blanket ban on in-person solicitation because the state demonstrated strong interests supporting the prohibition. *See id.* at 460, 467-68. The court reasoned that, short of a blanket prohibition, in-person solicitation of clients would be immune from regulation and oversight by the profession or state because it is essentially invisible. *See id.* at 466-67; *cf.* Edenfield v. Fane, 507 U.S. 761, 764 (1993) (holding that, although *Ohralik* is good law concerning lawyers, certified public accountants could not be categorically banned from in-person solicitation).

[60] *See Ohralik*, 436 U.S. at 459.

[61] *See id.* at 460-62. The court noted that states have a "'compelling' interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" *Id.* at 462.

Further, the Supreme Court has distinguished between in-person solicitation and targeted mailings.[62] In *Shapero v. Kentucky Bar Ass'n*,[63] the Court ruled that, under the First Amendment, a state may not categorically prohibit attorneys from soliciting clients by truthful, non-deceptive, targeted mail solicitation.[64] In the recent case *Florida Bar v. Went for It, Inc.*,[65] however, the United States Supreme Court upheld a rule enacted by the Florida Bar Association that barred lawyers from distributing targeted direct-mail solicitations to prospective clients within thirty days of a disaster or accident.[66] The *Went for It* case opened the door for states to craft restrictions on targeted mail-

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[62] *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475 (1988). In *Shapero*, the Justices observed that targeted mail solicitation did not carry with it the harms associated with in-person solicitation of clients, namely overreaching and undue influence. *See id.* at 475 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985)).

[63] 486 U.S. 466 (1988).

[64] *See id.* at 479. In 1985, a Kentucky lawyer applied to the Kentucky Attorneys Advertising Commission for approval of a writing that he wanted to send to prospective clients threatened by foreclosure proceedings. *See id.* at 469. The letter stated:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor [sic] to STOP and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.
>
> Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Id. (alteration in original). The Supreme Court held that, even though the state did not have a substantial interest in prohibiting this type of solicitation, there were less restrictive means by which a state could regulate the mailings. *See id.* at 477-79.

[65] 515 U.S. 618 (1995).

[66] *See id.* at 620-21. The Florida rule was enacted in response to a two-year study on the public's opinion of lawyers that indicated contempt for the legal profession. *See id.* at 620, 626-27. A Florida attorney and his wholly owned attorney referral service, who routinely sent out such solicitations, contested this rule. *See id.* at 621.

The *Went for It* Court applied the *Central Hudson* test in order to determine whether the Florida Bar Association could place a ban on attorney speech. *See id.* at 624-33 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)). In applying the test to the facts of the case, the Court found that the bar had a substantial interest in protecting the reputation of the legal profession and in protecting the privacy of potential clients. *See id.* at 625. Next, the Court found that the bar's interest in preventing such conduct advanced the government's interest in a material and direct manner. *See id.* at 625-27. Finally, the Court found that the Florida bar's rule was "reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing [were] a source of distress to Floridians, distress that . . . caused many of them to lose respect for the legal profession." *Id.* at 633. Thus, the Justices upheld the moratorium because the prongs in the *Central Hudson* test were met. *See id.* at 635.

ings, regardless of whether the solicitations are deceptive or misleading.[67]

II

A. *New Jersey Rules of Professional Conduct*

Attorneys who practice law in New Jersey must abide by the Rules of Professional Conduct (RPCs) adopted by the New Jersey Supreme Court.[68] These rules track the Model Rules promulgated by the ABA, yet in many respects go further than the ABA Model Rules in regulating attorney behavior.[69] Individual attorneys and law firms may be held accountable and disciplined for the transgression of these ethical directives.[70]

RPC 7.3 regulates solicitation by imposing certain limitations on unacceptable conduct.[71] Specifically, the rule provides that an attor-

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[67] *See* George, *supra* note 2, at 256-57.

[68] *See* N.J. CT. R. 1:20-1(a) (1998). Lawyers from other states must abide by the Rules of Professional Conduct (RPCs) when they practice law in New Jersey. *See id.*

The RPCs were adopted on July 12, 1984, and became effective on September 10, 1984. *See Rules of Professional Conduct*, N.J. L.J., July 19, 1984, at supp. 1. These rules replaced the Disciplinary Rules (DR), which had replaced the Canons of Professional Ethics in 1971. *See New Rules and Amendments*, N.J. L.J., July 15, 1971, at 1. RPC 7.1 through RPC 7.5 replaced DR 2-101 through DR 2-105 with minor changes. *See* N.J. CT. R. 1:14 cmt. (1998); *Rule Amendments*, N.J. L.J., Jan. 26, 1984, at 15.

[69] *See* N.J. RULES OF PROFESSIONAL CONDUCT [hereinafter N.J. RULES] Introduction (1998); Michael P. Ambrosio, *The "New" New Jersey Rules of Professional Conduct: Reordered Priorities for Public Accountability*, 11 SETON HALL LEGIS. J. 121, 149 (1987) (noting that RPC 7.3 is much more far-reaching than the corresponding Model Rule); *see also supra* note 48 (reproducing the text of Model Rule 7.3); *infra* note 71 (reproducing the text of RPC 7.3). The New Jersey Supreme Court revised and adopted the Model Rules, as advised by the Debevoise Committee, the supreme court committee on the RPCs. *See* N.J. RULES Introduction; *see also* NEW JERSEY SUPREME COURT COMMITTEE ON THE MODEL RULES OF PROFESSIONAL CONDUCT, REPORT (1983).

[70] *See* N.J. CT. R. 1:20-1(a) (1998); *see also In re* Jacoby & Meyers, 147 N.J. 374, 374 (1997) (holding for the first time in the United States that a law firm can be disciplined for a transgression of ethical directives); *see also* Rocco Cammarere, *1997-98 Supreme Court Term: Lawyering Issues Dominate*, N.J. LAW., Aug. 17, 1998, at 1.

In New Jersey, "[t]he primary purpose of discipline is to protect the public, and not to punish the attorney." *In re* Pajerowski, 156 N.J. 509, 521, 721 A.2d 992, 999 (1998) (per curiam) (citing *In re* Rutledge, 101 N.J. 493, 498, 502 A.2d 569, 572 (1986)).

[71] *See* N.J. RULES Rule 7.3 (1998). The rule provides:

> (a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).
>
> (b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional em-

ney may not solicit a client if he knows or reasonably should know that the client is unable to exercise reasonable judgment in employing a lawyer due to an impaired physical, emotional, or mental state.[72] In interpreting RPC 7.3, the New Jersey Supreme Court has applied an objective standard and, in the alternative, a knowledge standard that imposes a duty of inquiry upon the attorney.[73]

B. Enforcement of New Jersey Rule of Professional Conduct 7.3

In 1983, the New Jersey Supreme Court established the Office of Attorney Ethics (OAE), which has jurisdiction to investigate and prosecute all ethics matters, including violations of RPC 7.3.[74] Four years later, the court found it necessary to form a committee that dealt exclusively with solicitation and attorney advertising and, thus,

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ployment if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text; and

(ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, CN 037, Trenton, New Jersey 08625.

Id.

[72] *See id.*

[73] *See In re* Anis, 126 N.J. 448, 457, 599 A.2d 1265, 1270 (1992) (per curiam) (recognizing that an objective standard attaches to RPC 7.3(b)(1)); *In re* TEAMLAW, 155 N.J 357, 376, 715 A.2d 216, 225 (1998) (per curiam) (stating that, because attorney had actual knowledge, the objective standard need not be applied).

[74] *See* N.J. CT. R. 1:20-1(a) (1998); N.J. CT. R. 1:20-2(b)(3) (1998); N.J. CT. R. 1:20-2(b)(4) (1998); *Supreme Court Announces New Office of Attorney Ethics*, N.J. L.J., July 28, 1983, at 1.

created the Committee on Attorney Advertising (CAA).[75] Today, the CAA has exclusive jurisdiction to review any solicitation matter that the OAE chooses to prosecute.[76] The actions of the CAA may be appealed to the state's Disciplinary Review Board (DRB).[77] If the DRB recommends disbarment, its determination must be reviewed by the New Jersey Supreme Court.[78] The supreme court has the option to grant review to all other disciplinary decisions.[79]

III

The contours of RPC 7.3 and its enforcement have been worked out in case law. This Part explores three recent cases that have applied RPC 7.3 to sanction attorneys for overly aggressive solicitation of clients at times when the potential clients were physically, emotionally, or mentally vulnerable due to tragic accidents. An examination of the recent decisions reveals that the court has neglected to

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[75] *See In re* Felmeister & Isaacs, 104 N.J. 515, 548-51, 518 A.2d 188, 205-07 (1986) (deciding to create a permanent Committee on Attorney Advertising (CAA)); *see also* N.J. CT. R. 1:19A (1998); *Committee on Attorney Advertising Appointed*, N.J. L.J., Jan. 22, 1987, at 3.

[76] *See* N.J. CT. R. 1:19A-2(a) (1998). Prior to the creation of the CAA, the Advisory Committee on Professional Ethics had jurisdiction over and issued opinions regarding advertising questions. *See* Israel D. Dubin, *Index to the Opinions of the Advisory Committee on Professional Ethics, Committee on Attorney Advertising and Committee on the Unauthorized Practice of Law, in* PROFESSIONAL RESPONSIBILITY IN NEW JERSEY Index/1 (New Jersey Institute for Continuing Legal Education, 1998). The CAA has exclusive jurisdiction over matters concerning RPCs 7.1-7.5, with the exception of RPC 7.3(c)-(f). *See* N.J. CT. R. 1:19A-2(a) (1998). The CAA does not issue opinions sua sponte; rather, a written inquiry must be submitted pursuant to N.J. CT. R. 1:19A-3(a). *See* N.J. CT. R. 1:19A-3(a) (1998).

[77] *See* N.J. CT. R. 1:20-1(a) (1998); N.J. CT. R. 1:20-15(e) (1998). The Disciplinary Review Board (DRB) is made up of nine members including lawyers and members of the general public. *See* N.J. CT. R. 1:20-15(a) (1998). The DRB has the power to uphold, reverse, or remand the decision of the CAA. *See* N.J. CT. R. 1:20-15(e)(3) (1998).

[78] *See* N.J. CT. R. 1:20-16(a) (1998). Disbarment is permanent. *See* N.J. CT. R. 1:20-16(i) (1998).

[79] *See* N.J. CT. R. 1:20-16(b) (1998). Other forms of discipline include suspension from practice for a certain time period, monetary sanctions, and admonition. *See* N.J. CT. R. 1:20-11 (1998) (temporary suspension); N.J. CT. R. 1:20-15(f)(4) (1998) (public admonitions); N.J. CT. R. 1:20-15 (i) (1998) (temporary suspension); N.J. CT. R. 1:20-15(j) (1998) (sanctions). The type of discipline imposed on an attorney will depend on the circumstances and severity of the offense. *See In re* Riva, 157 N.J. 34, 41-42, 722 A.2d 933, 937 (1999) (per curiam) (citing *In re* Nigohosian, 88 N.J. 308, 315, 442 A.2d 1007, 1011 (1982) (per curiam)).

The OAE or individual attorney may file a timely petition for review of a disciplinary action by the supreme court. *See* N.J. CT. R. 1:20-16(b) (1998). The supreme court may also review a disciplinary action by the DRB sua sponte. *See id.*

define the actual knowledge standard of the rule and has inconsistently applied this standard.[80]

A. *In re* Anis

On December 21, 1988, Pan American Flight 103 exploded over Lockerbie, Scotland and killed all passengers on board.[81] The day after one victim's[82] remains were identified, an attorney, Magdy F. Anis, sent a solicitation letter to the victim's father, Peter Lowenstein.[83]

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[80] *See infra* notes 171-75 and accompanying text (discussing the concerns stemming from the court's failure to define the actual knowledge standard and its inconsistent application of this standard).

[81] *See In re* Anis, 126 N.J. 448, 452, 599 A.2d 1265, 1267 (1992) (per curiam); Lawrence A. Dubin, NAT'L L.J., May 11, 1992, at 15. On the holiday flight home, American passengers became the casualties of international terrorism. *See Anis*, 126 N.J. at 452, 599 A.2d at 1267. An explosive device placed on the plane in Germany was the likely cause of the disaster. *See* Dubin, *supra*, at 15.

[82] *See Anis*, 126 N.J. at 452, 599 A.2d at 1267. The remains identified were those of Alexander Lowenstein of Morristown, New Jersey. *See id.* He was a student at Syracuse University. *See id.* Many of the other victims were also college students. *See id.*

[83] *See id.* Alexander Lowenstein's remains were identified on January 3, 1989. *See id.* The letter sent to his father on January 4, 1989 stated:

> Dear Mr. Lowenstein:
> Initially, we would like to extend our deepest sympathy for the loss of your son, Mr. Alexander Lowenstein. We know that this must be a very traumatic experience for you, and we hope that you, along with your relatives and friends, can overcome this catastrophe which has not only affected your family but has disturbed the world.
> As you may realize, you have a legal cause of action against Pan American, among others, for wrongful death due to possible negligent security maintenance. If you intend to take any legal recourse, we urge you to consider to retain [sic] our firm to prosecute your case.
> Both my partner [Fady] and myself are experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants.
> We would also like to inform you that if you do decide to retain our services, you will not be charged for any attorneys fees unless we collect a settlement or verdict award for you.
> Before retaining any other attorney, it would be worth your while to contact us, since we will substantially reduce the customary one-third fee that most other attorneys routinely charge.
> Please call us to schedule an appointment at your earliest convenience. If you are unable to come to our office, please so advise us and we will have an attorney meet you at a location suitable to your needs.
> Very truly yours,
> (Mr.) Magdy F. Anis
> MFA/seb
> P.S. There is no consultation fee.

Id. at 452-53, 599 A.2d at 1267. The New Jersey Supreme Court opined that this letter could have only exacerbated the family's suffering. *See id.* at 453, 599 A.2d at 1267.

Lowenstein filed a complaint with the OAE on January 12, 1989, and alleged that Anis's solicitation violated RPC 7.3(b)(1).[84] The CAA reviewed the matter, found that Anis violated RPC 7.3(b)(1), and recommended a public reprimand.[85] The DRB, however, found that RPC 7.3(b)(1) had not been violated.[86]

On review, the New Jersey Supreme Court framed the issue as whether the First Amendment commercial speech protections permit attorneys to engage in conduct that offends common decency.[87] The *Anis* court acknowledged that the spectacle of attorneys who prey on disaster victims, as Anis did, clearly offends societal norms.[88]

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[84] *See id.*, 599 A.2d at 1267-68 The complaint alleged that Anis solicited a potential client when he "knew or should have known that the [prospective client's] physical, emotional, or mental state was such that the prospective client could not exercise reasonable judgment in employing a lawyer." *Id.*

An amended complaint charged that Anis engaged in misleading and false advertising in violation of RPC 7.1(a)(1). *See id.*, 599 A.2d at 1268. The CAA found that Anis's conduct violated RPC 7.3(a)(1) because he misrepresented his professional background to obtain employment. *See id.* at 453, 454, 599 A.2d at 1268. The DRB agreed, and the matter was reviewed by the New Jersey Supreme Court. *See id.* at 454-55, 599 A.2d at 1268-69. The court ruled that Anis should be publicly disciplined for violating RPC 7.1(a)(1). *See id.* at 461, 599 A.2d at 1272. The court reasoned that his letter falsely implied that he had experience in aircraft accident litigation and that he misrepresented attorney fees. *See id.* The court explained that Anis's letter stated that a typical lawyer's fee would be one-third, whereas N.J. CT. R. 1:21-7 provides for graduated fees. *See id.*

Anis's brother, Fady F. Anis, was also charged in the complaints. *See id.* at 453, 599 A.2d at 1267-68. The CAA found that Fady Anis violated both RPC 7.3(b)(1) and RPC 7.1(a)(1). *See id.* at 453, 454, 599 A.2d at 1268. The DRB disagreed and determined that no discipline was necessary. *See id.* at 454, 599 A.2d at 1268. The DRB recognized that Fady Anis was out of town when the letter was sent to Peter Lowenstein. *See id.* Accordingly, because the supreme court must only review a recommendation of disbarment, the charges brought against Fady Anis were not reviewed by the court. *See* N.J. CT. R. 1:20-16 (a)(1998).

[85] *See Anis*, 126 N.J. at 454, 599 A.2d at 1268.

[86] *See id.* at 455, 599 A.2d at 1268. The DRB reasoned that, because the letter was sent two weeks after the crash, it was questionable whether Anis would have known that the Lowenstein family "would be unable to exercise reasonable judgment with respect to retaining counsel." *Id.*

The DRB also dismissed a charge that the Anis brothers violated RPC 5.1(a). *See id.* at 454-55, 599 A.2d at 1268 (defining RPC 5.1(a) as "failure to make reasonable efforts to ensure that all members of a law firm conform to the [RPCs]").

[87] *See id.* at 452, 599 A.2d at 1267.

[88] *See id.* at 451, 599 A.2d at 1266. The court retold several horrific examples of solicitation that have contributed to calls for reform. *See id.* at 451-52, 599 A.2d 1266-67. The justices noted the poison gas leak that occurred at the Union Carbide chemical plant in Bhopal, India. *See id.* at 451, 599 A.2d at 1266 (citing Roth, *supra* note 6, at 972). The court recalled that American attorneys rushed to India in order to retain clients. *See id.* (citing Roth, *supra* note 6, at 972).

The court next recounted that, after a Northwest airplane crashed in Detroit, a man impersonating a priest attempted to comfort the victim's families. *See id.* He

The court recognized that in *Shapero* the United States Supreme Court held that a blanket ban on targeted direct-mail solicitation violates the First and Fourteenth Amendments.[89] The *Anis* court, however, found that *Shapero* left open a window of conduct that can be categorically banned.[90] The court indicated that the boundaries of that window are shaped by the common decency that should attend the ordinary affairs of mankind.[91] The court then reasoned that Anis's conduct fell within this window.[92] The court stressed, however, that attorneys still retain the right to distribute non-deceptive, truthful advertising about their services, so long as the attorney's conduct does not offend common decency.[93]

"'hugged crying mothers and talked with grieving fathers of God's rewards in the hereafter. He even sobbed along with dazed families . . . . Then he . . . pass[ed] out the business card of a Florida attorney . . . and repeatedly urge[d] them to call a lawyer.'" *Id.* (citations omitted).

The court recalled that after Pan American Flight 103 crashed, one victim's widow noted that she was solicitated by at least 30 attorneys within one day of the crash. *See id.* at 451, 599 A.2d at 1266-67.

The *Anis* court also cited an incident where a mother, whose son suffered brain damage from a car accident, received a letter that stated, "How much money would you like to get out of this case?" *See id.*, 599 A.2d at 1267. The court noted that the envelope contained a police report and the attorney's business card. *See id.* Moreover, the justices observed that this letter was one of three that she received from lawyers within two weeks of her child's accident. *See id.*

[89] *See id.* at 456, 599 A.2d at 1269. The First through Tenth Amendments comprise the Bill of Rights of the United States Constitution. *See* NOWAK & ROTUNDA, *supra* note 7, § 10.2, at 331; *see also supra* note 14 (setting forth the text of the First Amendment). The United States Supreme Court has adopted a theory of selective incorporation, whereby the Fourteenth Amendment makes certain provisions of the Bill of Rights, including the First Amendment, applicable to the states. *See* NOWAK & ROTUNDA, *supra* note 7, § 10.2, at 332. In relevant part, the Fourteenth Amendment states that

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[90] *See Anis*, 126 N.J. at 456, 599 A.2d at 1269.

[91] *See id.* The court explained that the profession is charged with certain responsibilities and that a high sense of honor must be imposed. *See id.* The court acknowledged that the days of the barrister were gone, but stressed that the practice of law should not be viewed "as akin to the sale of aluminum siding." *Id.* at 455, 599 A.2d at 1269. The justices, however, remarked that the court did not look down upon aluminum siding salespersons, but rather that the court expected much more from lawyers. *See id.*

[92] *See id.* at 456, 599 A.2d at 1269. The court noted that this speech is not protected because it is intrusive and universally condemned. *See id.*

[93] *See id.* at 459, 599 A.2d at 1271 (citing RPC 7.1). The justices suggested that attorney advertising may provide alternative routes of relief to lay persons who are

The justices proclaimed that Anis violated RPC 7.3(b)(1) when he solicited legal representation because he knew or should have known that the potential client could not use reasonable judgment in employing counsel.[94] In making this determination, the court explained that an objective standard attaches to the rule.[95] The court speculated that a reasonable attorney should realize that a solicitation received the day after delivery of a death notice would reach a person when he was unable to exercise reasonable judgment in selecting a lawyer.[96]

The majority refrained from defining exactly what constitutes an offense of common decency.[97] Instead, the supreme court referred

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not aware of their legal options. *See id.* The court surmised that even in mass disasters, general public notices in certain regions might fulfill that need without the intrusiveness of targeted solicitation. *See id.* (citing Linda S. Althoff, Comment, *Solicitation After an Air Disaster: The Status of Professional Rules and Constitutional Limits*, 54 J. AIR L. & COM. 501, 520 n.119 (1988)).

[94] *See id.* at 460, 599 A.2d at 1271. The court rejected Anis's argument that the restrictions placed by RPC 7.3(b)(1) on attorney advertising were unconstitutionally overbroad, because the overbreadth doctrine does not usually apply to commercial speech. *See id.* at 458, 599 A.2d at 1270.

[95] *See id.* at 457, 599 A.2d at 1270. The court insisted that experience solidifies such objective expectations. *See id.* Furthermore, the court suggested that, even if some recipients were not offended by such a communication, this does not rebut general expectations that the nature of such solicitation exacerbates the distress of victims or victims' families. *See id.* at 458, 599 A.2d at 1270. Moreover, the court urged that this standard relieves attorneys of the burden of deciding whether potential clients would be sensitive. *See id.*

[96] *See Anis*, 126 N.J. at 458, 599 A.2d at 1270. The court discerned that even plaintiffs' lawyers admit that individuals are vulnerable at such times. *See id.* at 457, 599 A.2d at 1270. The court noted that plaintiffs' attorneys criticize the "Alpert letter," a form of solicitation relied on by an airline's insurer, intended to dissuade survivors and victims' families from filing lawsuits. *See id.* (citing Roth, *supra* note 6, at 975-76). The court explained that plaintiffs' attorneys find that this letter takes advantage of persons when they are vulnerable and attempts to get these persons to settle for less than they might have recovered from a lawsuit. *See id.* (citing Roth, *supra* note 6, at 976-77).

[97] *See id.* at 460, 599 A.2d 1271. The court surmised that it may be more challenging in other cases to determine what constitutes "ethical propriety." *See id.* The court hypothesized: "Would a truthful solicitation letter sent fifteen or thirty days after a tragic loss reach people when they are no longer emotionally weak or vulnerable?" *Id.* The court replied that it could not answer that question with certainty because the court's assumptions in such matters are largely untested. *See id.* The court opined that there may be degrees of suffering or loss. *See id.* The justices explained that "common sense" told them that mildly injured survivors of a bus accident might not be as vulnerable as the Lockerbie families. *See id.*

The court also acknowledged that whatever lines are drawn may be economically disadvantageous to New Jersey attorneys in relation to unregulated attorneys from other jurisdictions. *See id.* The justices observed that the court could not, however, establish lawyer discipline at the lowest denominator of ethics. *See id.* The court mentioned that attorneys from other states are subject to the RPCs when they practice in New Jersey. *See id.*

this task to the CAA.[98] The court declared that, pending the CAA's investigation and in order to give lawyers guidance, it would not impose discipline for truthful solicitation mailings sent more than fourteen days after the disaster and loss had become known.[99]

Concurring, Justice Handler expressed concern with the majority's interpretation of RPC 7.3.[100] Justice Handler interpreted the focus of RPC 7.3 to rest principally on the lawyer's state of mind at the time of the solicitation and indirectly on the presumed mental or emotional condition of the recipient.[101] The justice urged that the court should not suggest that the crux of the misconduct proscribed under RPC 7.3 is a lack of decency.[102]

The concurring opinion acknowledged that commercial speech of lawyers may be restricted "only to advance a substantial governmental interest and only through means that directly advance that interest."[103] Justice Handler suggested that the state does not have an interest in preventing lawyers from engaging in solicitation that merely offends common decency.[104] Justice Handler proposed that a substantial interest might instead be couched in terms of protecting vulnerable persons from lawyers who try to solicit employment and

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[98] *See id.* The court suggested that the CAA might conduct an informational hearing during which comments would be elicited from the concerned public. *See id.*

[99] *See id.* The court qualified this determination by stating that the rule will only be applied absent case-specific indications to the attorney that the victim's family could not use reasonable judgment in selecting an attorney. *See id.*

[100] *See id.* at 462, 599 A.2d at 1272 (Handler, J., concurring).

[101] *See id.* at 462-63, 599 A.2d at 1272 (Handler, J., concurring). The concurrence noted that the comment to RPC 7.3 provides that the purpose of the rule is to avert social harms, such as overreaching and harassment, and that the conditions under which the solicitation is initiated should be contemplated in determining whether a violation has occurred. *See id.* at 462, 599 A.2d at 1272 (Handler, J., concurring).

[102] *See id.* at 464, 599 A.2d at 1273 (Handler, J., concurring). Justice Handler, however, did not read the majority's holding to suggest that common decency is a determinative factor in assessing a lawyer's conduct that implicates commercial speech. *See id.* at 463, 599 A.2d at 1273 (Handler, J., concurring). Instead, Justice Handler found that the majority's opinion centered on the need to protect potential clients from certain harmful behavior. *See id.*

[103] *Id.* at 464, 599 A.2d at 1273 (Handler, J., concurring).

[104] *See Anis*, 126 N.J. at 464, 599 A.2d at 1273 (Handler, J., concurring). Justice Handler noted that the United States Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985), and the New Jersey Supreme Court in *In re Felmeister & Isaacs*, 104 N.J. 515, 547-48, 518 A.2d 188, 204-05 (1986), rejected a dignity standard. *See Anis*, 126 N.J. at 464, 599 A.2d at 1273 (Handler, J., concurring). Justice Handler surmised that a rule that could be perceived to prohibit indecency lacks the clarity of purpose required to sustain the protections that commercial speech are afforded. *See id.*

the state's duty to protect the right of privacy of persons facing a tragedy.[105]

B. *In re* Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein (TEAMLAW); *In re* Oleckna; *In re* Meaden; *In re* Eisdorfer

On March 23, 1994, shortly before midnight, a gas line explosion devastated the Durham Woods apartment complex in Edison, New Jersey, displacing all of its 1,500 residents.[106] Many people lost all of their possessions.[107] The victims of the blast sought refuge at an

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[105] *See Anis*, 126 N.J. at 467, 599 A.2d at 1275 (Handler, J., concurring).

[106] *See In re* TEAMLAW, 155 N.J. 357, 361, 715 A.2d 216, 217 (1998) (per curiam). A transcontinental underground pipeline, located 500 feet from the Durham Woods Apartments, ruptured and exploded. *See* Jim O'Neill, *$12 Million Paid Out in Gas Pipe Explosion: Many Edison Tenants Settle Property Claims*, STAR-LEDGER (Newark, N.J.), Aug. 2, 1996, at 1 [hereinafter O'Neill, *$12 Million*]. The 10,000-mile-long pipeline, 36 inches in diameter, carried natural gas from Texas to New England. *See* Anthony A. Gallotto, *First Suits Are Filed in Disaster*, STAR-LEDGER (Newark, N.J.), Mar. 25, 1994, at 19; Jim O'Neill, *Edison Blast Payouts Top $50 Million: Texas Eastern Settles Lawsuits Even Before Liability Determined*, STAR-LEDGER (Newark, N.J.), Sept. 28, 1997, at 25 [hereinafter O'Neill, *Edison Blast*].

The natural gas erupted into intense flames, which caused additional fires in the complex. *See* O'Neill, *$12 Million*, *supra*, at 1. The blast shot an intense orange fireball hundreds of feet into the sky. *See* Anthony A. Gallotto, *Durham Woods Survivors Press for a Settlement: More Than 200 Claim Loss, Emotional Injury*, STAR-LEDGER (Newark, N.J.), Mar. 24, 1998, at 19 [hereinafter Gallotto, *Press for a Settlement*]. A pilot on a flight to LaGuardia Airport thought that someone had "nuked Newark." *See* Reginald Roberts et al., *Explosion Triggers Huge Fireball in Edison: Residents Flee into the Streets as Major Gas Pipeline Ruptures*, STAR-LEDGER (Newark, N.J.), Mar. 24, 1994, at 1. In fact, the flames were visible forty miles away, and the rumbling noise could be heard for miles. *See id.*

No criminal charges were filed, due to insufficient evidence of fault. *See Grand Jury Finds No Crimes Committed in Edison Blast*, RECORD (Hackensack, N.J.), July 27, 1996, at A3. New Jersey Attorney General Peter Verniero speculated that the pipeline may have been damaged in the 1960s when work on such pipelines was unregulated. *See id.*

The blast destroyed eight of the 63 buildings at the complex. *See TEAMLAW*, 155 N.J. at 361, 715 A.2d at 217. The blast also incinerated trees, cars, and playground equipment. *See* Gallotto, *Press for a Settlement*, *supra*, at 29. The fire was so hot that it melted the tires and chrome on some of the automobiles in the parking lot. *See* Roberts et al., *supra*, at 1. In fact, four years after the accident, "a thick stand of tall, charred trees" still remained at the complex. *See* Gallotto, *Press for a Settlement*, *supra*, at 19.

No one was killed directly by the blast. *See TEAMLAW*, 155 N.J. at 361, 715 A.2d at 217. More than 100 persons were injured, most suffering foot burns and minor cuts as they fled. *See* Gallotto, *Press for a Settlement*, *supra* at 29. A 32-year-old woman from a nearby apartment complex died of heart failure after she rushed to Durham Woods to see what had happened. *See* Anthony A. Gallotto & Jonathan Jaffe, *Lives Still Shaken by Edison Gas Blast 4 Years Later: Firm Says Settlement Could Top $57 Million*, STAR-LEDGER (Newark, N.J.), Mar. 22, 1998, at 23.

[107] *See TEAMLAW*, 155 N.J. at 361, 715 A.2d at 217. Residents lost personal items

emergency shelter established by the Red Cross in Edison High School, and they also sought refuge in local hotels.[108]

Several New Jersey attorneys approached the victims of the explosion as potential clients.[109] Kenneth S. Oleckna and his law firm, Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein (TEAMLAW), parked a mobile office, bearing firm advertisements, outside the Red Cross shelter.[110] Another attorney, Raymond Eisdorfer was invited into the Red Cross shelter by a friend and former client.[111] Eisdorfer spoke to a group of victims regarding their legal remedies and signed twenty-six retainer agreements.[112] Finally, an-

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such as favorite family photographs, antique furniture, and jewelry. *See* O'Neill, *$12 million*, *supra* note 106, at 1. Other victims of the blast lost all their computer records. *See* Jim O'Neill, *Edison Blast*, *supra* note 106, at 25. One man, who had spent years working toward a doctorate, lost all of his research. *See id.*

[108] *See TEAMLAW*, 155 N.J. at 361, 715 A.2d at 218. The cafeteria of Edison High School was converted into a dining area, and the gymnasium was turned into a living and sleeping area. *See id.* The atmosphere in the Red Cross shelter was described as chaotic with victims appearing distraught, scared, and disoriented. *See id.*

[109] *See id.*

[110] *See id.* at 365-66, 715 A.2d at 220. On March 24, 1994, Kenneth Oleckna, a partner in the law firm TEAMLAW, learned of the explosion at Durham Woods. *See id.* at 365, 715 A.2d at 220. The following day, Oleckna and TEAMLAW rented a recreational vehicle (RV) and parked it 100 feet from the Red Cross shelter. *See id.* By 9:00 p.m. Oleckna left because no one had called. *See id.*

On March 26, 1994, Oleckna returned to the mobile office after his firm received two calls from clients who were unable to visit the firm's principal office. *See id.* Oleckna taped several advertisements for his firm to the windows of his RV. *See id.* at 365-66, 715 A.2d at 220. Oleckna also brought with him toiletry kits supplied by his firm. *See id.* at 366, 715 A.2d at 220. He handed these kits out to clients with whom he met in the mobile office. *See id.* Before Oleckna left for the day, he left the remaining toiletry kits on a table in the shelter. *See id.* The kits did not indicate that they were supplied by TEAMLAW. *See id.*

The following day, Oleckna was contacted by the Edison Police Department, instructing him to remove the vehicle, or it would be towed. *See id.* Oleckna moved the RV to Durham Woods and parked it next to a trailer being used by insurance adjusters to take releases and pay residents. *See id.* Oleckna was again forced to move the mobile office, so he drove the vehicle home. *See id.*

On March 28, 1994, he drove the RV back to Durham Woods to handle numerous telephone inquiries that TEAMLAW received in response to the advertisement it placed in the Sunday newspapers. *See id.* Paralegals from the mobile office were dispatched to the client's apartments to take care of paperwork and to gather information. *See id.* On the following day, TEAMLAW returned the RV to the lessor. *See id.*

[111] *See id.* at 371, 15 A.2d at 222-23. On March 25, 1994, Raymond Eisdorfer learned of the blast from Raphael Londono, a close personal friend and former client, who resided in Durham Woods. *See id.* Londono invited Eisdorfer into the Red Cross shelter to speak to a small group of people concerning their legal remedies. *See id.*

[112] *See id.* at 371-72, 715 A.2d at 223. On March 25, 1994, Eisdorfer met with the group in the shelter. *See id.* at 371, 715 A.2d at 223. Some group members claimed that they knew Eisdorfer would handle their claims even before the meeting. *See id.*

other attorney, Charles E. Meaden solicited victims of the blast seeking shelter at the Red Roof Inn and sent follow-up letters to those with whom he met.[113]

After several articles reported that attorneys were "preying" upon the victims, the New Jersey Supreme Court ordered the CAA to investigate.[114] Four attorneys,[115] including Oleckna, Eisdorfer, and

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Other members of the group contended that they met with Eisdorfer to make a decision about their legal representation. *See id.*

The meeting lasted approximately an hour and a half. *See id.* The principal concern of the group was to obtain legal counsel before conversing with insurance company representatives. *See id.*

During the meeting, a Red Cross official asked Eisdorfer to leave because attorneys were not allowed in the shelter. *See id.* Londono objected and explained that he had asked Eisdorfer into the shelter to talk to the group. *See id.* The official replied that the group could not meet in the shelter and volunteered to provide transporation to another site for the group. *See id.* Eisdorfer agreed to leave, however, he remained in the shelter for an additional 30 minutes until a police officer asked him to leave. *See id.* at 371-72, 715 A.2d at 223.

By June 17, 1994, Eisdorfer represented 222 Durham Woods residents, almost none of whom he had represented before the explosion. *See id.* at 372, 715 A.2d at 223. Eisdorfer claimed that the clients were referred by members of the group with whom he met at the shelter. *See id.*

[113] *See id.* at 374-75, 715 A.2d at 224-25. On the day following the explosion, Charles Meaden drove to Edison to solicit clients. *See id.*, 715 A.2d at 224. While at a gas station, he introduced himself to Ariv Kahn as an attorney. *See id.* at 375, 715 A.2d at 224. Kahn then disclosed to Meaden that his girlfriend was a victim of the blast and that she was temporarily staying at the Red Roof Inn and might be interested in retaining counsel. *See id.* Meaden went with Kahn to the hotel. *See id.* Meaden presented Kahn's girlfriend with a retainer agreement and his card, but she made it clear that she was not interested in hiring Meaden. *See id.*

Meaden then went to the hotel lobby to make phone calls. *See id.* A man, who was visibly upset, sat down and talked to Meaden about the effect that the blast had on him and about his injured wife. *See id.*, 715 A.2d at 224-25; Thomas Zambito, *Lawyer Reprimanded for Conduct After Blast*, RECORD (Hackensack, N.J.), May 14, 1997, at A1 (stating that the man began to cry as he discussed the blast). Meaden gave the man his card and told the man that he may follow up with written correspondence. *See TEAMLAW*, 155 N.J. at 375, 715 A.2d at 225.

In total, Meaden spent several hours at the Red Roof Inn. *See id.* He distributed his card to four or five individuals and gathered a list of sixteen prospective clients. *See id.* On the following day, Meaden drafted a letter to be mailed to the people on his list. *See id.* The letters were sent on the sixth day after the blast. *See id.* These letters were intercepted by the Red Cross and handed over to the OAE. *See* Dana Coleman, *Solicitation Case; A Changing Rule?*, N.J. LAW., Mar. 23, 1998, at 1.

[114] *See TEAMLAW*, 155 N.J. at 361, 715 A.2d at 218.

[115] *See id.* at 361-62, 715 A.2d at 218. Included in this group of four was Samuel Convery, a former mayor of Edison, who met with potential clients at the shelter at the request of Indian community leaders. *See* Henry Gottlieb, *Pipeline Scorecard: Three Cleared, One Scolded*, N.J. L.J., May 19, 1997, at 4. Many of the victims of the Durham Woods explosion were of Indian descent. *See id.* Indian community leaders, who knew Convery, invited him to the Red Cross shelter. *See id.* At the shelter, one Indian leader distributed Convery's business cards. *See id.* Also, at the request of Indian leaders, Convery met with potential clients at the emergency shelter. *See*

Meaden, and the law firm TEAMLAW were subsequently charged with violating RPC 7.3(b)(1).[116] In addition, Meaden was charged with violating RPC 7.3(b)(4).[117] The CAA reprimanded Oleckna,[118] TEAMLAW,[119] and Eisdorfer[120] for violating RPC 7.3(b)(1) and suspended Meaden[121] for three months for violations of RPC 7.3(b)(1) and RPC 7.3(b)(4).[122]

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id.

The CAA dismissed the charges against Convery. *See TEAMLAW*, 155 N.J. at 362, 715 A.2d at 218. The CAA reasoned that, because there was no prior decisional law on the subject, there could be no finding of misconduct. *See* Gottlieb, *supra*, at 4. The DRB agreed with the CAA, and the OAE did not petition the New Jersey Supreme Court for review. *See TEAMLAW*, 155 N.J. at 362, 715 A.2d at 218.

[116] *See TEAMLAW*, 155 N.J. at 361-62, 715 A.2d at 218. At the time of solicitations, RPC 7.3(b)(1) provided:

> A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:
>
> (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer . . . .

Id. at 362, 715 A.2d at 218 (quoting N.J. RULES Rule 7.3(b)(1)).

[117] *See id.* at 361-62, 715 A.2d at 218. At the time of Meaden's solicitations and mailings, RPC 7.3(b)(4) provided:

> A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if: . . .
>
> (4) the communication involves direct contact with a prospective client concerning a specific event when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided that the letter:
>
> (i) bears the word "ADVERTISEMENT" . . . and
>
> (ii) contains the following notice . . . "Before making your choice of attorney, you should give this matter careful thought . . ."; and
>
> (iii) contains an additional notice [that if the letter is misleading, the recipient may report the attorney to the CAA].

Id. at 362, 715 A.2d at 218 (quoting N.J. RULES Rule 7.3(b)(4)) (alterations in original).

[118] *See id.* at 366, 715 A.2d at 220. The CAA decided that Oleckna violated RPC 7.3(b)(1) because he demonstrated an intent to target and initiate contact with victims when he parked a mobile office bearing advertisements for the firm near the emergency shelter. *See id.*

[119] *See id.* The CAA recommended that TEAMLAW also be held responsible because the firm made the decision to use a mobile office. *See id.*; *see also supra* note 70 (recognizing that a law firm can be held responsible for transgressing ethical rules).

[120] *See TEAMLAW*, 155 N.J. at 372, 715 A.2d at 223. Although the CAA found that Eisdorfer violated RPC 7.3(b)(1), it recommended that he be reprimanded instead of given a three-month suspension because of a paucity of prior decisional law. *See id.*

[121] *See id.* at 375, 715 A.2d at 225. With respect to Meaden, the CAA found that he violated RPC 7.3(b)(1) and RPC 7.3(b)(4) for approaching Kahn's girlfriend, by initiating contact with the visibly upset man, and for sending targeted, direct-mail

The DRB examined the matter and concluded that Meaden should be reprimanded, not suspended,[123] and that the charges against the remaining attorneys and TEAMLAW should be dismissed.[124] The OAE disagreed with the DRB's findings and petitioned the New Jersey Supreme Court for review.[125]

On February 3, 1998, the New Jersey Supreme Court granted the petition for review in order to determine whether the attorneys and the law firm violated the RPCs.[126] Prior to the court's analysis, the justices set forth RPC 7.3(b)(1) and RPC 7.3(b)(4) as they read at the time of the solicitations and mailings at issue.[127] The supreme court recognized that an objective standard attaches to RPC 7.3(b)(1).[128]

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solicitation letters. *See id.*

[122] *See id.* at 361-62, 715 A.2d at 218.

[123] *See id.* at 376, 715 A.2d at 225. With respect to Meaden, the DRB concluded that there was insufficient evidence that Meaden violated RPC 7.3(b)(1) through his contact with Kahn's girlfriend. *See id.* at 375, 715 A.2d at 225. The DRB reasoned that the rule itself and decisional law did not offer sufficient guidance regarding the limits of solicitation. *See id.* The DRB decided, however, that there was sufficient evidence to conclude that his encounter with the visibly upset man violated RPC 7.3(b)(1) and that his mailing violated RPC 7.3(b)(4). *See id.* at 375-76, 715 A.2d at 225. The two dissenting members of the DRB, however, found that his actions were not egregious enough to justify any discipline. *See id.* at 376, 715 A.2d at 225.

[124] *See id.* at 362, 715 A.2d at 218. With respect to Oleckna and TEAMLAW, the DRB distinguished *Anis* and noted that, in the present matter, the mere presence of advertisements on an RV could not suffice to make the victims feel overwhelmed, importuned, or pressured into engaging in an unwanted professional relationship. *See id.* at 366, 715 A.2d at 220 (citing *In re* Anis, 126 N.J. 448, 599 A.2d 1265 (1992) (per curiam)); *see also supra* notes 87-99 and accompanying text (discussing the majority opinion in *Anis*). Furthermore, the DRB maintained that there was no indication that Oleckna and TEAMLAW knew or should have known that the residents were so distressed that they were unable to exercise reasonable judgment in hiring an attorney. *TEAMLAW*, 155 N.J. at 366-67, 715 A.2d at 220. Three dissenting members of the DRB wanted to reprimand Oleckna and his firm on the ground that the advertisements on the mobile office were a type of solicitation. *See id.* at 367, 715 A.2d at 220. One of the dissenters suggested that the presence of a mobile office at an emergency shelter should be banned altogether. *See id.*

The DRB dismissed the charges against Eisdorfer. *See id.* at 372, 715 A.2d at 223. The DRB observed that Eisdorfer had been invited into the shelter. *See id.* Furthermore, Eisdorfer did not identify himself as a lawyer to the other victims in the shelter, and the noise level in the shelter was so high that other victims could not overhear his conversations. *See id.* The DRB did not consider his refusal to leave the shelter when asked as an aggravating factor because his client, Londono, and the remaining members of the group wanted him to stay. *See id.* The Board agreed with Eisdorfer that if he were disciplined for refusing to leave the Red Cross shelter the group's and his assembly rights would be violated. *See id.*; *see also supra* note 16 (discussing the First Amendment right to group association).

[125] *See TEAMLAW*, 155 N.J. at 362, 715 A.2d at 218.

[126] *See id.*

[127] *See id.*; *see also supra* notes 116, 117 (reproducing text of RPC 7.3(b)(1) and RPC 7.3(b)(4) prior to amendment). The *TEAMLAW* court noted that, pursuant to

1. *In re TEAMLAW; In re Oleckna*

The court analyzed the conduct of Oleckna and TEAMLAW together.[129] The justices found that both Oleckna and TEAMLAW violated RPC 7.3(b)(1) and imposed a reprimand.[130] Oleckna and TEAMLAW set forth several arguments in their defense.[131] These respondents contended that the fourteen-day temporal ban crafted in *Anis* did not apply because the Durham Woods victims lacked severe injuries.[132] The court, however, rejected this contention and deter-

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the ruling in *Anis*, the New Jersey Supreme Court adopted an amendment to RPC 7.3(b); however, the court noted that the amendment was not applicable to this matter because the amendment was adopted subsequent to these facts. *See TEAMLAW*, 155 N.J. at 363 n.1, 715 A.2d at 219 n.1; *see also supra* note 71 (reproducing text of RPC 7.3(b) subsequent to amendment); *supra* notes 97-99 and accompanying text (discussing the *Anis* court's decision to refer the rule-making process to the CAA).

[128] *See TEAMLAW*, 155 N.J. at 363, 715 A.2d at 219; *see also supra* notes 94-96 and accompanying text (discussing the objective standard that attaches to RPC 7.3(b)(1)).

[129] *See TEAMLAW*, 155 N.J. at 367, 715 A.2d at 220-21.

[130] *See id.* at 370-71, 715 A.2d at 222.

[131] *See id.* at 367-70, 715 A.2d at 221-22. The respondents argued that they offered a valuable legal service by providing the victims with information pertaining to their legal rights and remedies. *See id.* at 369, 715 A.2d at 222 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 458 (1978)). The justices acknowledged that victims and their families are often prey to insurance claims adjusters, who are eager to get cheap and quick settlements. *See id.* (citing *Ohralik*, 436 U.S. at 459 n.16). The court articulated, however, that a lawyer is not prohibited from providing information regarding legal rights and remedies to these individuals, but rather that a lawyer is prohibited from using that information as bait to obtain a retainer agreement. *See id.* (citing *Ohralik*, 436 U.S. at 458).

The court also disagreed with respondents' contention that they were engaged in activity protected by the First Amendment when they parked the RV, bearing firm advertisements, outside of the shelter. *See id.* The justices observed that ordinarily lawyers may not be punished for using printed advertisements that contain truthful and non-deceptive information to solicit business, even if the advertisement contains information concerning a specific legal problem. *See id.* at 369-70, 715 A.2d at 222 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985)). The court explained, however, that a "state may place 'reasonable restrictions on the time, place, and manner of advertising.'" *Id.* at 370, 715 A.2d at 222 (quoting Bates v. Arizona Bar, 433 U.S. 350, 384 (1977)).

The court observed that the placement of the RV with advertisements attached to it constituted conduct that consisted of both non-expressive and expressive elements. *See id.* The New Jersey Supreme Court recalled that in *United States v. O'Brien*, the United States Supreme Court held, "'[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'" *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)) (alteration in original).

[132] *See id.* at 367, 715 A.2d at 221.

mined that the fourteen-day ban applied to all post-accident or post-disaster solicitations.[133]

These respondents further argued that there was insufficient evidence that the victims were, in fact, emotionally traumatized and unable to make reasonable decisions about retaining counsel.[134] The court responded that the standard delineated in *Anis* was an objective one and that actual knowledge of the victim's emotional state is unnecessary.[135] The justices concluded that a reasonably prudent attorney should have known that the Durham Woods victims could not have exercised reasonable judgment concerning legal representation.[136]

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[133] *See id.* at 367-68, 715 A.2d at 221. In making this decision, the court rejected Oleckna's and TEAMLAW's attempt to distinguish the cases based on the severity of the victims' injuries. *See id.* at 367, 715 A.2d at 221 (citing Florida Bar v. Went for It, Inc., 515 U.S. 618, 632 (1995)). Respondents contended that the residents of Durham Woods had "suffered, for the most part, no physical injury and were faced 'merely' with dispossession and loss of all their earthly belongings." *Id.* Oleckna and TEAMLAW maintained that these victims could make clear and reasoned judgments regarding their legal representation. *See id.*

The court acknowledged that the Durham Woods disaster did not involve numerous deaths, as did *Anis*. *See id.* The court stated, however, that when there has been a disaster, it will not draw lines on the basis of severity of injury. *See id.* (citing *Went for It*, 515 U.S. at 633). The court posited that victims of the Durham Woods blast, fresh from losing their personal belongings, cars, and apartments, were not in a state of mind conducive to making sensible judgments about legal representation. *See id.* at 367-68, 715 A.2d at 221. Thus, the court decided that the 14-day ban crafted in *Anis* was applicable to all disaster (or post-accident) solicitations. *See id.* at 368, 715 A.2d at 221. The justices noted that there are no less burdensome alternatives to this 14-day proscription on direct, targeted solicitation. *See id.* (citing *Went for It*, 315 U.S. at 634). The court further noted that there were alternate channels for obtaining information regarding legal representation during the 14-day period following disasters. *See id.* (citing *Went for It*, 515 U.S. at 634).

[134] *See id.* Respondents argued that there was no evidence that the Durham Woods victims were emotionally traumatized and pointed out that many victims were eager to obtain the advice of counsel. *See id.* The court, however, insisted that proof of such harm was not necessary under the objective standard that the New Jersey Supreme Court attached to Rule 7.3 (b)(1) in *Anis*. *See id.* (citing *In re* Anis, 126 N.J. 448, 457, 599 A.2d 1265, 1270 (1992) (per curiam)).

[135] *See TEAMLAW*, 155 N.J. at 368, 715 A.2d at 221 (citing *Anis*, 126 N.J. at 457, 599 A.2d at 1270). The justices suggested that the respondents had proper notice of the objective standard and that their actions failed to comply with this standard. *See id.* at 369, 715 A.2d at 222; *see also supra* notes 94-96 and accompanying text (explaining the objective standard that attaches to RPC 7.3(b)(1)).

[136] *See TEAMLAW*, 155 N.J. at 368, 715 A.2d at 221. The court justified the objective standard on the basis that uninvited legal counsel may distress the solicited victim simply because of the attorney's obtrusiveness and invasion into the victim's privacy, even when other harm does not materialize. *See id.* (citing *Ohralik*, 436 U.S. at 465-66). Furthermore, the court remarked that the effectiveness of the state's effort to impede such harm to potential clients would be greatly diminished if the state, having proved a solicitation, were required to prove the additional element of an

2. *In re Meaden*

The New Jersey Supreme Court found that Meaden violated RPC 7.3(b)(1) and RPC 7.3(4).[137] The court identified two distinct actions taken by Meaden that constituted violations of RPC 7.3(b)(1).[138] First, the justices noted that Meaden went to the Red Roof Inn to initiate contact with a victim in order to gain professional employment.[139] The court stressed that, two days after the disaster, the victim was not able to exercise the reasonable judgment necessary to employ an attorney.[140]

Second, the court observed that Meaden violated RPC 7.3(b)(1) when he handed out a business card to a visibly distressed victim and told the victim that he would follow up with further written communication.[141] The court found that it was not necessary to apply the objective standard delineated in *Anis* because Meaden had actual knowledge of the victim's mental state.[142] Furthermore, the New Jersey Supreme Court found that the follow-up letter sent to that victim was not in compliance with the guidelines for solicitation letters

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actual injury. *See id.* (citing *Ohralik*, 436 U.S. at 466). The court recognized that frequently there is no witness besides the attorney and the victim whom he has solicited and that this makes it impossible, or at least difficult, to obtain proof of what actually happened. *See id.* (citing *Ohralik*, 436 U.S. at 466). Hence, the justices concluded that the absence of explicit findings or proof of injury or harm is immaterial. *See id.* (citing *Ohralik*, 436 U.S. at 468).

Furthermore, the court found that respondents' conduct reduced the practice of law to the "high-pressured pushing of legal services as a commodity onto susceptible and vulnerable customers, ill-equipped to protect their own interests." *Id.* at 368-69, 715 A.2d at 221. The justices proclaimed that New Jersey has a "'legitimate and important interest'" in preventing this type of vexatious conduct. *See id.* at 369, 715 A.2d at 221 (quoting *Ohralik*, 436 U.S. at 462). The justices criticized the DRB for asking whether the advertisements made the victims feel overwhelmed, importuned, or pressured into entering an unwanted professional relationship instead of applying the objective standard that attaches to RPC 7.3(b)(1). *See id.*, 715 A.2d at 221-22.

[137] *See id.* at 376, 715 A.2d at 225.

[138] *See id.*

[139] *See id.* Although the court agreed with the DRB's decision to discipline Meaden, the court found that Meaden also violated RPC 7.3(b)(1) through his contact with Khan's girlfriend. *See id.* The justices determined that, like all victims seeking shelter at the Red Roof Inn, Khan's girlfriend was not sufficiently able to exercise reasonable judgment in employing legal counsel. *See id.* The majority stated that the fact that Khan's girlfriend was mentally stable enough to refuse Meaden's offer of representation did not change the court's determination that RPC 7.3(b)(1) was violated. *See id.*

[140] *See id.*

[141] *See id.*

[142] *See TEAMLAW*, 155 N.J. at 376, 715 A.2d at 225. The court emphasized that Meaden knew that the victim was clearly distraught and was unable to use reasonable judgment in selecting a lawyer to represent him. *See id.*

found in RPC 7.3(b)(4).[143] The supreme court ruled that, because Meaden acknowledged his violations of RPC 7.3(b)(1) and RPC 7.3(b)(4), discipline was warranted in the form of a reprimand.[144]

3. *In re Eisdorfer*

The court ruled that Eisdorfer violated RPC 7.3(b)(1) and imposed a reprimand.[145] The justices remarked that, because Eisdorfer went to the Red Cross shelter with the intent to obtain employment, RPC 7.3(b)(1) applied to his actions, despite the fact that he was invited there.[146] The New Jersey Supreme Court focused on the location and timing of his meeting[147] and determined that Eisdorfer's conduct constituted contact with potential clients when he should

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[143] *See id.*

[144] *See id.* at 377, 715 A.2d at 225.

[145] *See id.* at 374, 715 A.2d at 224. The justices rejected Eisdorfer's argument that his and the group's association rights were violated. *See id.* at 373-74, 715 A.2d at 223-24. Further, the court labeled Eisdorfer's speech a proposed commercial transaction rather than highly protected political association or expression. *See id.*, 715 A.2d at 224 (citing *In re* Primus, 436 U.S. 412, 437-38 (1978)). The court recognized that collective action that is undertaken to obtain access to the courts is a fundamental right that is protected by the First Amendment. *See id.* at 373, 715 A.2d at 223-24 (citing *Primus*, 436 U.S. at 426; NAACP v. Button, 371 U.S. 415, 428-29 (1963)). The justices remarked, however, that the rulings in cases recognizing this fundamental right were premised on the fact that "'no monetary stakes [we]re involved, and so there [wa]s no danger that the attorney w[ould] desert or subvert the paramount interests of his client to enrich himself.'" *Id.* at 373, 714 A.2d at 224 (quoting *Button*, 371 U.S. at 443) (alterations in original). The New Jersey Supreme Court noted that the United States Supreme Court explicitly excepted from protected forms of group association situations in which the income of the attorney is contingent upon the sum recovered in a particular case. *See id.* (citing *Primus*, 436 U.S. at 436 n.30).

The court suggested that Eisdorfer's conduct bordered on the improper practice of running. *See id.* at 374, 715 A.2d at 224. The court pointed out that misconduct based on "running" continues to be a professional and public concern. *See id.* Although Londono was not compensated for setting up the group meeting with Eisdorfer, the court recognized that the close interaction between Londono and Eisdorfer sparked identical concerns to those that justify the court's proscription of "running." *See id.*

[146] *See id.* at 372, 715 A.2d at 223.

[147] *See id.* at 372-73, 715 A.2d at 223. The court commented that

> to conduct a legal seminar in the sleeping area of an emergency shelter a day after a massive explosion displacing hundreds is conduct that "provide[s] a one-sided presentation and [ ] encourage[s] speedy and perhaps uninformed decisionmaking [without] opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual."

Id. at 373, 715 A.2d at 223 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978)) (alterations in original).

have known that the victims could not use reasonable judgment in hiring an attorney.[148]

Concurring in part and dissenting in part, Justice O'Hern agreed that the actions of Oleckna, TEAMLAW, and Eisdorfer violated RPC 7.3(b)(1).[149] Still, the justice objected to the sanctions imposed by the majority because the New Jersey Supreme Court had not previously determined that the particular actions that these respondents took were in violation of the RPC.[150] Justice O'Hern explained that the court usually applies clarifications of professional responsibility law prospectively.[151]

Moreover, Justice O'Hern asserted that *Anis* was factually distinguishable because *Anis* concerned targeted, direct-mail solicitation.[152]

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[148] *See TEAMLAW*, 155 N.J. at 372, 715 A.2d at 223. The court noted that Eisdorfer did not call attention to the fact that he was an attorney to others in the shelter, nor did anyone outside the group meeting overhear what was going on. *See id.*

[149] *See id.* at 377, 715 A.2d at 225-26 (O'Hern, J., concurring in part and dissenting in part).

[150] *See id.*, 715 A.2d at 226 (O'Hern, J., concurring in part and dissenting in part). First, Justice O'Hern questioned how the majority could apply the principles of law announced in *Anis* to the matter, particularly when the DRB decided that the application of the RPCs to this case would be unfair, given the shortage of prior decisional law. *See id.* at 378, 715 A.2d at 226 (O'Hern, J., concurring in part and dissenting in part). Justice O'Hern referred to the DRB as one of the most respected ethical bodies and noted that the DRB was the body responsible for the imposition of discipline on attorneys. *See id.* The justice suggested that if the DRB failed to believe that the RPCs were adequately clear to impose discipline, it is the supreme court's responsibility to clear up the confusion and not to pretend that the subject matter was perfectly clear. *See id.*

[151] *See id.* at 379, 715 A.2d at 227 (O'Hern, J., concurring in part and dissenting in part) (citing *In re* Hinds, 90 N.J. 604, 630, 635-36, 449 A.2d 483, 497, 500 (1982) (finding that fairness requires prospective application of the court's interpretation of DR 7-107(d), because it was the first time that the court addressed the issue); *In re* Rachmiel, 90 N.J. 646, 660, 449 A.2d 505, 513 (1982) (stating that the prospective application was appropriate because the court's duty is to shape disciplinary rules, the object of which is to improve the legal profession and to protect the public, rather than to punish)).

[152] *See id.* at 378, 715 A.2d at 226 (O'Hern, J., concurring in part and dissenting in part). Justice O'Hern recalled that at the time that *Anis* was decided, the law was unsettled. *See id.* Justice O'Hern mentioned that when *Anis* was decided, the New Jersey Supreme Court speculated that the United States Supreme Court would permit a ban meant to prevent such an intrusion upon the dignity and privacy of individuals. *See id.* The opinion noted that the Supreme Court did permit restraints on targeted, direct-mail solicitation of disaster victims in *Went for It*. *See id.*; *see also supra* notes 65-67 and accompanying text (discussing Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995)). Justice O'Hern stated that the issue was decided in a five to four decision. *See TEAMLAW*, 155 N.J. at 378, 715 A.2d at 226 (O'Hern, J., concurring in part and dissenting in part). The justice remarked that New Jersey's own CAA at first refused to enact a rule that prohibited direct solicitation of disaster victims. *See id.* Justice O'Hern also observed that the current RPC 7.3, which was drafted by the supreme court, did not take effect until approximately five years after the *Anis* deci-

Justice O'Hern also noted that, despite the plea of the *Anis* court, the CAA had not promulgated guidelines that explain the regulations on written advertisements directed at vulnerable lay persons by lawyers.[153]

Based on notions of fairness, the justice contended that Oleckna, TEAMLAW, and Eisdorfer should not be disciplined.[154] Justice O'Hern's opinion noted that this was the first time the supreme court had clarified the *Anis* ruling.[155] The justice stressed that it is the court's responsibility to ensure that all attorneys are aware of the applicable RPC in advance when there is a conflict between the principles of professional responsibility and the First Amendment.[156]

C. *In re* Pajerowski

Patrick M. Pajerowski, in addition to many other objectionable activities,[157] employed the use of a runner to solicit business for him on several occasions.[158] Upon review, the CAA and Pajerowski exe-

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sion. *See id.*

[153] *See TEAMLAW*, 155 N.J. at 379, 715 A.2d at 226 (O'Hern, J., concurring in part and dissenting in part) (discussing *In re* Anis, 126 N.J. 448, 467, 599 A.2d 1265, 1274-75 (1992) (Handler, J., concurring)). Justice O'Hern recalled that Justice Handler wanted such a rule to identify and define the conditions under which attorney solicitations will increase personal suffering or infringe on personal privacy. *See id.* (discussing *Anis*, 126 N.J. at 467, 599 A.2d at 1274-75 (Handler, J., concurring)).

[154] *See id.* at 380, 715 A.2d at 227 (O'Hern, J., concurring in part and dissenting in part).

[155] *See id.*

[156] *See id.* Justice O'Hern cautioned that lawyers "who push the First Amendment envelope should not be the scapegoats for institutional shortcomings." *Id.*

[157] *See In re* Pajerowski, 156 N.J. 509, 511-13, 721 A.2d 992, 992-95 (1998) (per curiam). Upon review, the New Jersey Supreme Court grouped Pajerowski's conduct into four categories: the runner cases, the loan cases, the failure to communicate case, and the conflict of interest case. *See id.*; *see also infra* note 160 and accompanying text (discussing the other types of objectionable conduct).

[158] *See Pajerowski*, 156 N.J. at 511-13, 721 A.2d at 992-95. The New Jersey Supreme Court cited six specific instances in which Pajerowski employed a runner. *See id.* Most notably, on December 28, 1994, Kimberlee Bartree, John Bartree, Jr., and Chanel Churchwell were involved in a car accident. *See id.* at 511, 721 A.2d at 993. Shortly thereafter, Kenneth Burgess and an unidentified individual visited the Bartree and Churchwell residences in order to retain them as clients for Pajerowski. *See id.*

Burgess sent the Bartrees to an internist for treatment, even though the two were uninjured in the accident. *See id.* The intent of these referrals was to bolster their legal claims. *See id.* On February 2, 1995, Pajerowski informed Kimberlee that he would not represent her because the police report and investigation showed that she had caused the car accident. *See id.* Pajerowski continued, however, to represent John and Chanel, who filed suits against Kimberlee, without notifying them of possible conflicts of interest. *See id.*

cuted a stipulation[159] of facts and discipline in which Pajerowski admitted that he had transgressed several RPCs, including RPC 7.3(b).[160] The CAA recommended a three-year suspension.[161] A majority of the DRB disagreed with this discipline and instead voted to disbar Pajerowski.[162] The New Jersey Supreme Court reviewed this matter.[163]

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[159] *See* BLACK'S LAW DICTIONARY 1415 (6th ed. 1990). A stipulation is a "[v]oluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate [the] need for proof or to narrow [the] range of litigable issues." *Id.*

[160] *See Pajerowski*, 156 N.J. at 510, 721 A.2d at 992. In addition to violating RPC 7.3(b), Pajerowski admitted to violating the following:

> RPC 1.2(a) (failing to abide by client's decision); RPC 1.3 (failing to act with diligence); RPC 1.4(a) (failing to communicate); RPC 1.7(a), RPC 1.7(b), and RPC 1.7(c) (representing clients with conflicts of interest); RPC 1.8(e) (providing financial assistance to client); RPC 1.8(j) (acquiring proprietary interest in client's cause of action); RPC 1.9(a) (representing client with interest adverse to former client); RPC 5.3 (failing to properly supervise nonlawyer); RPC 5.4 (splitting fees with nonlawyer); RPC 5.5 (assisting in unauthorized practice of law); RPC 7.1(a) (providing misleading communication about lawyer's services); RPC 7.2(c) (giving value for recommending legal services); . . . RPC 7.3(d) (providing compensation for recommending lawyer's services); RPC 8.4(a) (violating Rules of Professional Conduct); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Id. The CAA decided not to disbar Pajerowski because, in New Jersey, no attorney had ever been disbarred solely for the use of a runner. *See* Michael Booth, *Ambulance-Chaser Disbarment a First for New Jersey*, N.J. L.J., Dec. 7, 1998, at 1.

[161] *See Pajerowski*, 156 N.J. at 510, 721 A.2d at 992.

[162] *See id.* The DRB agreed with the CAA that Pajerowski violated 18 RPCs, but disagreed on the appropriate discipline for the runner cases. *See id.* at 517, 721 A.2d at 996. The DRB found that Pajerowski took advantage of victims shortly after their accidents and disregarded their right to privacy. *See id.* The DRB found that Pajerowski succeeded in taking advantage of people when they were extraordinarily vulnerable. *See id.* The DRB stressed that Burgess's ambulance-chasing practices were repugnant and unsavory to the legal profession. *See id.* The DRB observed that Pajerowski's conduct contributed to the negative perception that the public associates with attorneys. *See id.*, 721 A.2d at 996-97.

Three members of the board dissented and voted for a three-year suspension. *See id.* at 518, 721 A.2d at 997. They found that Pajerowski "had not engaged in a continuous course of misconduct that demonstrate[d] an attitude wholly inconsistent with and indifferent to ethical standards . . . ." *Id.* at 517, 721 A.2d at 997. Nor did the dissenters find that he committed an offense that was so egregious, such as theft, embezzlement, or bribery, such that no other form of discipline but disbarment would be appropriate. *See id.* at 518, 721 A.2d at 997. The dissenters stressed Pajerowski's cooperation with disciplinary bodies, and his acknowledgment of his violations, in determining that suspension was appropriate. *See id.*

[163] *See id.* at 510, 721 A.2d at 992.

The supreme court took notice of the fact that no attorney had ever been disbarred solely for the use of a runner.[164] The court ruled, however, that Pajerowski's conduct violated RPC 7.3 and was so egregious that disbarment was appropriate.[165] Rather than applying the objective standard, the justices suggested that Pajerowski did not have knowledge, as required by the RPC, of whether the people he solicited were able to exercise reasonable judgment in employing an attorney.[166] The court reasoned that in many instances Pajerowski was unaware of the extent of the injuries of those being solicited by his

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[164] *See id.* at 518-20, 721 A.2d at 997-98. The court traced the history of runner cases in New Jersey. *See id.* The court noted that in *In re Frankel*, a personal injury lawyer employed a runner to solicit clients. *See id.* at 518, 721 A.2d at 997 (citing *In re* Frankel, 20 N.J. 588, 591, 120 A.2d 603, 604 (1956)). The justices pointed out that the *Frankel* court imposed a three-year suspension, rather than disbarment, because Frankel was the first lawyer to be prosecuted for the use of a runner. *See id.* (citing *Frankel*, 20 N.J. at 598-99, 120 A.2d at 608). The court also recalled *In re Introcaso*, in which the court imposed a three-year suspension on an attorney for the use of a runner. *See id.* at 519, 721 A.2d 997-98 (citing *In re* Introcaso, 26 N.J. 353, 361, 140 A.2d 70, 74 (1958)). The *Pajerowski* court noted that the *Introcaso* court's decision to impose a reprimand was based on the facts that the lawyer's conduct occurred before the *Frankel* decision and that the lawyer had an unblemished reputation. *See id.* (citing *Introcaso*, 26 N.J. at 361, 140 A.2d at 74).

Next, the justices distinguished *In re Bregg* from *Introcaso* and *Frankel*. *See id.*, 721 A.2d at 998 (citing *In re* Bregg, 61 N.J. 476, 478-79, 295 A.2d 360, 361 (1972) (per curiam)). The court noted that, in *Bregg*, the lawyer received only a three-month suspension because he lacked the type of hardened and studied disregard for ethical standards and the lack of candor that was present in *Frankel* and *Introcaso*. *See id.* (citing *Bregg*, 61 N.J. at 478-79, 295 A.2d at 361). The court next reviewed *In re Shaw*, in which the lawyer was disbarred for the use of a runner, among other conduct. *See id.* (citing *In re* Shaw, 88 N.J. 433, 437-40, 442, 443 A.2d 670, 671-74, 675 (1982) (per curiam)). Finally, the court noted that the recent *TEAMLAW* court condemned the use of a runner. *See id.* at 520, 721 A.2d at 998 (citing *TEAMLAW*, 155 N.J. 357, 374, 715 A.2d 216, 224 (1998)); *see also supra* note 145 (discussing the *TEAMLAW* court's opinion that Eisdorfer used a runner).

[165] *See Pajerowski*, 156 N.J. at 515, 522, 721 A.2d at 995, 999. The court also found that he violated RPC 5.3, RPC 7.1(a), RPC 8.4(a), and RPC 8.4(d) in conjunction with the runner cases. *See id.* at 515, 721 A.2d at 995. The justices acknowledged that there were several mitigating factors in this matter. *See id.* at 514, 721 A.2d at 995. The court noted that Pajerowski had no prior disciplinary record, cooperated with disciplinary authorities, recognized the impropriety of his actions, and was a recovering alcoholic. *See id.*

In disbarring Pajerowski for the use of a runner, the court stressed that an attorney who uses a runner should not automatically be disbarred, but, rather, that the court should consider the circumstances in each particular case. *See id.* at 521-22, 721 A.2d at 999. The court, however, maintained that Pajerowski's conduct was so egregious that it "'poison[ed] the well of justice'" and constituted "'grave misconduct that goes to the heart of the administration of justice.'" *Id.* at 522, 721 A.2d at 999 (quoting *In re* Verdiramo, 96 N.J. 183, 185, 186, 475 A.2d 45, 47 (1984) (per curiam)). Thus, the court ruled that disbarment was appropriate. *See id.*

[166] *See id.* at 515, 721 A.2d at 995. The court stated that in many instances, Pajerowski was unaware of the severity of the victim's injuries. *See id.*

runner and, therefore, could not have knowledge of their physical, mental, or emotional well-being.[167] The court warned that conduct similar to Pajerowski's is detrimental to justice.[168]

IV

The New Jersey Supreme Court in *Anis*, *TEAMLAW*, and *Pajerowski* emphatically cautioned lawyers that certain types of solicitation violate RPC 7.3(b) and will not be tolerated.[169] The court, in applying RPC 7.3(b)(1), however, did not strike the right balance of the competing interests raised by attorney solicitation of clients. Although in the recent solicitation cases the court condemned conduct that is unarguably reprehensible, the court's application of RPC 7.3(b) failed to provide guidelines as to the permissible methods of solicitation, an omission which is unfair to attorneys.[170]

First, the supreme court was inconsistent in its application of the knowledge standard articulated in RPC 7.3(b)(1). The court applied the objective standard of RPC 7.3(b)(1) to the conduct of Anis, Oleckna, TEAMLAW, and Eisdorfer, while applying the actual knowledge standard to Meaden and Pajerowski.[171] Therefore, the court has not provided lawyers with notice as to when the court will apply the actual knowledge standard and when the court will apply the objective standard to an attorney's conduct.

Further, the court neglected to define the actual knowledge standard of RPC 7.3(b)(1).[172] When the court applied the actual

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[167] *See id.* Pajerowski contended that he did not pre-authorize Burgess's actions. *See id.* The court disagreed and found that Pajerowski actually encouraged Burgess's conduct. *See id.* The justices revealed that the stipulation stated that, although Pajerowski was unaware of each solicitation, he had previously authorized Burgess's conduct and later ratified it by retaining clients and compensating Burgess. *See id.*

[168] *See id.* at 522, 721 A.2d at 999.

[169] *See In re* Anis, 126 N.J. 448, 460, 599 A.2d 1265, 1271 (1992) (per curiam); *TEAMLAW*, 155 N.J. at 370, 372, 377, 715 A.2d at 222, 223, 225; *Pajerowski*, 156 N.J. at 522, 721 A.2d at 999.

[170] *See TEAMLAW*, 155 N.J. at 377, 379-80, 715 A.2d at 226, 227 (O'Hern, J., concurring in part and dissenting in part) (stating that discipline should not be imposed because the attorneys did not have proper notice of the type of conduct that RPC 7.3(b)(1) prohibits).

[171] *See Anis*, 126 N.J. at 457, 599 A.2d at 1270 (applying the objective standard to Anis's conduct); *TEAMLAW*, 155 N.J. at 368, 372, 376, 715 A.2d at 221, 223, 225 (applying the objective standard to Oleckna's, TEAMLAW's, and Eisdorfer's conduct, but applying the actual knowledge standard to Meaden's conduct); *Pajerowski*, 156 N.J. at 515, 721 A.2d at 995 (applying the actual knowledge standard to Pajerowski's conduct).

[172] *See generally TEAMLAW*, 155 N.J. at 376, 715 A.2d at 225; *Pajerowski*, 156 N.J. at 515, 721 A.2d at 995. Conversely, the objective standard that is attached to RPC 7.3(b)(1) is defined by reasonableness. *See generally* MARC A. FRANKLIN & ROBERT L.

knowledge standard, it essentially imposed a duty of inquiry upon attorneys to determine their potential client's well-being before initiating a contact.[173] The court failed, however, to explain exactly what this duty entails.[174] It is unjust that an attorney can be penalized for a violation of RPC 7.3 when the court has not provided notice of what degree of inquiry is sufficient to determine a potential client's mental, physical, or emotional state.[175]

As Justice O'Hern noted in his concurrence in *TEAMLAW*, the New Jersey Supreme Court has not supplied the legal profession with guidance as to what the law is and how an ethical matter might be decided.[176] Surely, this type of decision-making does not assure lawyers that decisions concerning their conduct will not be made arbitrarily. Further, the recent applications of RPC 7.3(b)(1) have the potential to chill a lawyer's First Amendment rights to group association, freedom of expression, and freedom to speak truthfully about his services because a lawyer does not know what is expected of him.[177] This, in turn, undermines the objective of providing members of the public with information about legal services and their legal rights.[178] Because the solicitation restrictions implicate the First Amendment's expressive rights of both attorneys and clients, the void-for-vagueness doctrine requires that the court construe the rule narrowly in such a way that individuals are put on notice of what behavior is acceptable and that expressive rights are not unduly curtailed.[179] At the same time, this chilling effect protects the privacy

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RABIN, TORTS LAW AND ALTERNATIVES 40-48 (6th ed. 1996). Indeed, an introductory level torts class teaches first year law students what it means to be reasonably prudent, which is the objective standard in RPC 7.3(b)(1). *See id.*

[173] *See* Interview with Bernard K. Freamon, Esq., Counsel to Charles E. Meaden, in Newark, N.J. (Feb. 19, 1999). Professor Freamon is an expert on attorney ethics and teaches Professional Responsibility at Seton Hall University School of Law.

[174] *See id.*

[175] *See id.*

[176] *See TEAMLAW*, 155 N.J. at 377, 379-80, 715 A.2d at 226, 227 (O'Hern, J., concurring in part and dissenting in part) (stating that discipline should not be imposed because the attorneys did not have proper notice of the type of conduct that RPC 7.3(b)(1) prohibits).

[177] *See supra* notes 14-17 and accompanying text (discussing First Amendment concerns implicated by restricting attorney solicitation of clients).

[178] *See supra* notes 11-12 and accompanying text (discussing how solicitation is an effective way to disseminate information about legal services to the general public).

[179] *See* BLACK'S LAW DICTIONARY 1574 (6th ed. 1990) ("A law which is so obscure in its promulgation that a reasonable person could not determine from a reading what the law purports to command . . . is void as violative of due process . . . . Also, the First Amendment requires special clarity so that protected expression will not be . . . suppressed."); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-31 to 12-32, at 1033-37 (2d ed. 1988) (describing the chilling effect that vague laws have

rights of lay persons and guards against reputation damage to the profession caused by overly aggressive solicitation.[180]

Alternatively, the New Jersey State Legislature is attempting to balance the competing interests of solicitation by considering a bill that would make the hiring of a runner, or acting as a runner, a third-degree crime.[181] Interestingly, some states have already made certain forms of solicitation a felony.[182] Solicitation in Texas, for example, is punishable by imprisonment of up to ten years and a fine up to $10,000.[183] Perhaps New Jersey is not ready for such a harsh alternative to the RPCs, which do not give rise to civil liability let alone criminal liability.[184]

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on First Amendment expressive liberties).

[180] *See supra* note 9 and accompanying text (discussing the damage that solicitation has caused to the public's perception of the legal profession); *supra* notes 7-8 (discussing privacy concerns implicated by permitting attorney solicitation of clients.)

[181] *See* S. 1696, 208th Leg., 2d Sess. (N.J. 1998); A. 2930, 208th Leg., 2d Sess. (N.J. 1998). As of March 1999, the New Jersey State Legislature was considering a bill that would make the hiring of a runner, or acting as a runner, a third-degree crime. *See id.*

[182] *See, e.g.*, FLA. STAT. ANN. § 817.234 (9) (West 1994). In Florida,

> [i]t is unlawful for any attorney to solicit any business relating to the representation of persons injured in a motor vehicle accident for the purpose of filing a motor vehicle tort claim or a claim for personal injury protection benefits required by [§] 627.736. The solicitation by advertising of any business by an attorney relating to the representation of a person injured in a specific motor vehicle accident is prohibited by this section. Any attorney who violates the provisions of this subsection commits a felony of the third degree . . . .

Id.

[183] *See* TEX. PENAL CODE ANN. § 38.12(a)(1)-(6) (West 1994); TEX. PENAL CODE ANN. § 38.12(f) (West 1994); TEX. PENAL CODE ANN. § 12.34 (West 1994). In Texas,

> [a] person commits [a third degree felony] if, with the intent to obtain economic benefit the person:
>
> (1) knowingly institutes a suit or claim that the person has not been authorized to pursue;
>
> (2) solicits employment, either in person or by telephone, for himself or for another;
>
> (3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain legal representation from the prospective client;
>
> (4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;
>
> (5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or
>
> (6) accepts or agrees to accept money or anything of value to solicit employment.

TEX. PENAL CODE ANN. § 38.12(a)(1)-(6); *see also* TEX. PENAL CODE ANN. § 12.34 (West 1994) (stating the jail time and fines for a third degree felony).

[184] *See* N.J. CT. R. 1:20-7(a) (1998); Baxt v. Liloia, 155 N.J. 190, 197, 714 A.2d 271,

To their credit, both the New Jersey State Bar Association and the Red Cross have taken a proactive step in preventing unwanted solicitation while at the same time protecting the rights of accident victims to receive information about legal services and the potential legal remedies available to them.[185] These entities have created the Mass Disaster Response Program, which is the first of its kind in the nation.[186] This program provides disaster victims with free information concerning their legal rights and remedies at a disaster site.[187]

Fortunately, the use of this program has not yet been necessary, but its effectiveness is also unknown.[188] Ideally, though, this program may strike a fair balance between the victim's right to privacy and the legal profession's need to inform the public about the legal services available.[189] It may assure that victims will not be pressured or misled into signing away their rights if confronted by insurance agents seeking to settle claims in return for releases from liability.[190] It also may protect the emotionally vulnerable victims from the onslaught of eager attorneys seeking to have them sign retainer agreements.[191]

274-75 (1998) (stating that a violation of the RPCs does not give rise to a tort claim). In New Jersey, "[t]he primary purpose of discipline is to protect the public, and not to punish the attorney." *In re* Pajerowski, 156 N.J. 509, 521, 721 A.2d 992, 999 (1998) (per curiam) (citing *In re* Rutledge, 101 N.J. 493, 498, 502 A.2d 569, 572 (1986)).

[185] *See* Sharon A. Balsamo, *It's More Than a Paycheck, It's a Profession*, N.J. LAW., THE MAGAZINE, July-Aug. 1997, at 14-16 (discussing the Mass Disaster Response Program); *see also infra* notes 186-87 and accompanying text (discussing the Mass Disaster Response Program).

[186] *See* Balsamo, *supra* note 185, at 15.

[187] *See id.* at 15-16. The Mass Disaster Program was developed in response to the conduct of the attorneys after the Durham Woods explosion. *See id.* at 14-15. The New Jersey Bar Association maintains a network of volunteer lawyers who have undergone disaster training. *See id.* These volunteer attorneys sign a pledge not to accept remuneration as a result of any of the disaster-site assistance they may provide. *See id.* at 15. The initial training program was lead by the New Jersey State Bar Association, the Red Cross, and the Federal Emergency Management Agency. *See id.* Volunteer lawyers were trained in federal disaster operations and Red Cross procedures, and participated in role-playing situations. *See id.*

[188] *See* Telephone interview with Joseph A. Bottitta, President of the New Jersey State Bar Association, (Apr. 14, 1999).

[189] *See* Balsamo, *supra* note 185, at 14; *see also supra* notes 7-8 and accompanying text (discussing privacy concerns implicated by permitting attorney solicitation of clients); *supra* notes 11-12 and accompanying text (discussing the importance of disseminating legal information to lay persons).

[190] *See* Balsamo, *supra* note 185, at 15; *see also supra* notes 11-12 and accompanying text (discussing the importance of disseminating legal information to lay persons).

[191] *See* Balsamo, *supra* note 185, at 14; *see also supra* notes 5-6 and accompanying text (discussing the harms associated with solicitation).

Hopefully, this program will help to restore the public's faith in the integrity and professionalism of the New Jersey bar.[192]

CONCLUSION

The New Jersey Supreme Court is not striking an adequate balance of the competing interests raised by attorney solicitation of clients. The court's recent application of RPC 7.3(b)(1) has failed to provide the legal community with notice as to what types of solicitation are permissible. This lack of guidance, as discussed in Part IV, could result in preventing lay persons from learning about their legal rights and remedies at a time when they need to most.

Grace Najarian

[192] *See* Balsamo, *supra* note 185, at 16.