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Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility

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ADVERTISING AND SOLICITATION BY LAWYERS:  
A PROPOSED REDRAFT OF CANON 2 OF THE 
CODE OF PROFESSIONAL RESPONSIBILITY  

By Monroe H. Freedman*

Rules of legal ethics are, broadly speaking, of two kinds. Rules of the first kind relate to the integrity of the system of administering justice and are designed to insure that the system will function effectively and fairly. Those rules include such matters as full access to the legal system, the competence and independence of counsel, preservation of clients' confidences, and zealous representation within the bounds of the law. Rules of the second kind are those that are concerned less with the integrity of the system and more with the conduct of lawyers as members of a guild or trade association. Such rules, which are principally anticompetitive, include maintenance of minimum fees and restrictions on advertising and solicitation.

Canon 2 of the Code of Professional Responsibility contains provisions relating both to the integrity of the system and to restrictions on competition. The thesis of this article is that the guild, or anticompetitive, provisions of Canon 2 have perverted the more fundamental provisions of that Canon, those concerned with the integrity of the system. Accordingly, a proposed redraft is submitted for consideration.

The "axiomatic norm" that serves as the headnote to Canon


A number of members serving on those committees have contributed significantly to this article (although they do not all agree with it). They include: Gladys Kessler and S. White Rhyne (both of the Legal Ethics Committee of the District of Columbia Bar), and Stanley A. Kaplan, Richard L. Rykoff, Alan Schefflin, Carl M. Selinger, and Russell B. Stevenson (all of the Subcommittee on Professional Responsibility of the Society of American Law Teachers).

2 is: A Lawyer Should Assist the Legal Profession in Fulfiling its Duty to Make Legal Counsel Available. The Ethical Considerations [EC's] and the footnotes to Canon 2 explain the crucial relationship of that Canon to the integrity of the administration of justice. Members of society "have need for more than a system of law; they have need for a system of law which functions, and that means they have need for lawyers." However, legal problems "may not be self-revealing and often are not timely noticed." The need for legal services by members of the public is met, therefore, "only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel." Quoting Justice Lewis F. Powell, Jr. (then President of the American Bar Association), the Code notes that when people are denied their day in court because ignorance has prevented them from obtaining counsel, there is a denial of the fundamental right to equal justice under law. Thus, a "basic tenet" of the professional responsibility of lawyers is that "every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."

The scope of our failure to achieve equal justice under law, in the rudimentary sense of providing access to legal services, is illustrated by an American Bar Association special committee estimate that effective access to legal services is being denied to at least 70 percent of our population, which amounts to as many as 140,000,000 people. Other responsible authorities suggest that the correct figure is substantially higher. Moreover, as recognized in the Code of Professional Responsibility, a principal cause of the under-use of available legal services is ignorance on the part of members of the public regarding the need, availability, and cost of legal services. Furthermore, the Code recognizes that institutional advertising has been employed for decades, but

2. Cheatham, The Lawyers Role and Surroundings, 25 Rocky Mt. L. Rev. 405 (1953), as quoted in ABA Code, Canon 2 n.1.
3. ABA Code, EC 2-2.
4. Id. EC 2-1.
5. Id. Canon 2 n.3.
6. Id. EC 1-1.
7. ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, A Primer of Prepaid Legal Services 7 (P. Murphy ed. 1974).
9. See ABA Code, EC 2-1, -2, -6, -7; id. Canon 2 nn.1-7, 17.
10. Id. Canon 2 nn.4-7.
such efforts obviously have proved inadequate to cope with the problem.

A dramatic illustration of the relationship between under-use of legal services and ignorance on the part of members of the public is provided in a study undertaken by James G. Frierson, who is both an attorney and an Associate Professor of Business Administration at East Tennessee State University. Professor Frierson first determined what the charge would be in Johnson City, Tennessee, to have a lawyer (1) draw a simple will for a husband, or (2) read and give advice on a two-page consumer installment contract, or (3) discuss a potential legal problem and give some general advice, without any research, spending about 30 minutes with the client. He then determined what middle-class people in the same city expected to have to pay for those services. Frierson discovered that middle-class consumers overestimated lawyers’ fees by 91 percent for the drawing of a simple will, 340 percent for reading and giving advice on a two page installment sales contract, and 123 percent for 30 minutes of consultation and general advice.\(^{11}\)

Professor Frierson also found that 75 percent of his sample had not seen a lawyer on any personal matter within the previous 5 years; that 75 percent had no will, although a substantial number were married with children; and that 75 percent had signed an installment sales contract in the previous 5 years.\(^{12}\) On the basis of his survey, Frierson concluded that average middle-class consumers do not use the services of a lawyer “primarily because of their grossly inflated expectations of lawyers’ charges.”\(^{13}\)

Frierson’s study, of course, serves only to confirm what has been known by the profession and recognized in the Code of Professional Responsibility. As previously mentioned, the headnote to Canon 2 is that A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available. The difficulty arises from the fact that the first five Disciplinary Rules [DR’s] under Canon 2 are devoted not to assuring adequate information about the availability and cost of legal services but, rather, to restricting the communication of relevant information by proscribing advertising and solicitation by lawyers. Thus, DR 2-101 forbids a lawyer to use any means of commercial publicity;

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12. Id.
DR 2-102 imposes narrow limitations on the use of such things as professional cards, letterheads, and telephone directory listings; DR 2-103 forbids a lawyer to recommend that a non-lawyer retain the lawyer's services if the non-lawyer has not initiated the contact by seeking legal advice; DR 2-104 says that a lawyer who has given unsolicited legal advice to a member of the public shall not accept employment resulting from that advice; and DR 2-105 forbids a lawyer to indicate that he or she specializes in a particular area of the law.14

Those are the provisions, of course, that have effectively blocked any real efforts to provide relevant and necessary information to members of the public and have thereby made a mockery of the overriding professional obligation to provide access to the legal system. It is increasingly being recognized, however, that the prohibitions against advertising and solicitation are not only unwise as a matter of public policy, but, as the following suggests, they are also of dubious validity under both the antitrust laws and the Constitution.

In the antitrust area, the Supreme Court recently decided in Goldfarb v. Virginia State Bar15 that the publication and enforcement by bar associations of minimum fee schedules violate the Sherman Act. The principal issue in Goldfarb was whether the practice of law, as a "learned profession," is outside the scope of the Sherman Act, which is concerned with "trade or commerce." The Supreme Court held that the sale of a service for money is "commerce," and went on to observe that, "[i]t is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect . . . ."16 The Court also noted that, "[i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce."17

The Goldfarb opinion was written by Chief Justice Burger and there was, remarkably, not a single dissent.18 In addition, the

14. In each of those instances, arbitrary exceptions are provided, e.g., self-laudatory advertising can be purchased in a number of publications approved by the American Bar Association, a lawyer may solicit employment among friends, relatives, and former clients, and specialists in patents, trademarks, and admiralty law may so designate themselves.
15. 95 S. Ct. 2904 (1975).
16. Id. at 2013. But see text accompanying note 20 infra.
17. Id. at 2014.
18. Justice Powell, who had been president of the Virginia State Bar, did not participate.

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Antitrust Division of the Department of Justice has adopted the position that a proscription of advertising and solicitation by lawyers also violates the Sherman Act.\textsuperscript{19}

I believe, however, that the \textit{Goldfarb} decision is neither the most appropriate nor the most reliable basis for attacking the proscriptions against advertising and solicitation. First, it is not at all clear that the Supreme Court will extend \textit{Goldfarb} that far. In a footnote to the opinion, the Court said:\textsuperscript{20}

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which orginated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

That paragraph is, of course, pregnant with miscarriage.

Apart from the possibility that the Court may decline to extend \textit{Goldfarb} to reach advertising and solicitation, Congress could amend the Sherman Act to exclude the legal profession, or to exclude particular practices, such as the restrictions on advertising and solicitation. Of even greater importance, moreover, is the fact that every state legislature appears to have the power to nullify the Sherman Act in that same way. Indeed, one of the arguments in \textit{Goldfarb} was that fee-setting by the bar associations had been sanctioned by the State of Virginia and that the practice was, therefore, immune from attack under the “state action” exception to the Sherman Act.\textsuperscript{21} The Supreme Court found, however, that there was no Virginia statute requiring fee-setting but, rather, that state law simply did not refer to fees, leaving regulation of the profession to the Virginia Supreme Court. Further, although the state supreme court’s ethical codes mentioned advisory fee schedules, they did not direct the bar associations to adopt them nor did they require the type of price

floor that resulted from the bar associations’ activities.\textsuperscript{22}

Significantly, however, the United States Supreme Court recognized that the states have “broad power” to regulate the practice of professions. The Court also held that “in some instances the State may decide that ‘forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.’”\textsuperscript{23} The Court added that, “[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’”\textsuperscript{24} Thus, in deciding that certain forms of anticompetitive conduct by attorneys can fall within the reach of the Sherman Act, “we intend no diminution of the authority of the State to regulate its professions.”\textsuperscript{25} Therefore, the ultimate impact of the Goldfarb decision is, potentially, a very limited one, since the Court did not foreclose the states from nullifying the effect of the Sherman Act on the legal profession.

Antitrust policies are not, in any event, the most appropriate concerns in assessing advertising and solicitation by attorneys. As indicated at the outset, the Ethical Considerations dealing with access to the legal system are rooted in the fundamental right of equal justice under law. In addition, the right of lawyers to communicate with potential clients, and the rights of members of the public to be informed by those communications, are protected by a variety of constitutional rights, including freedom of speech, the right to petition for redress of grievances, freedom of association, and the right to due process of law. Indeed, the Supreme Court has already held in a series of cases of major importance that rules of professional ethics, including those relating to advertising and solicitation, must give way to constitutional rights.

The first case in that series was \textit{NAACP v. Button},\textsuperscript{26} which considered solicitation of clients in the context of efforts of the NAACP to recruit plaintiffs for school desegregation cases. The NAACP called a series of meetings inviting not only its members and poor people, but all members of the community. At those


\textsuperscript{24} Id.

\textsuperscript{25} Id.

\textsuperscript{26} 371 U.S. 415 (1963).
Lawyers' Advertising

meetings, the organization's paid staff attorneys took the platform to urge those present to authorize the lawyers to sue in their behalf.27 The NAACP maintained the ensuing litigation by defraying all expenses, regardless of the financial means of a particular plaintiff.

Virginia contended that the NAACP's activities constituted improper solicitation under a state statute and fell within the traditional state power to regulate professional conduct. The Supreme Court held, however, that "the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment . . . upon protected freedoms of expression." [Footnote omitted.]28 The Court concluded:29

Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.

Subsequently, in Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,30 the Supreme Court considered the question of solicitation in a case in which a union's legal services plan resulted in channeling all or substantially all of the railroad workers' personal injury claims, on a private fee basis, to lawyers selected by the union and touted in its literature and at meetings. The Court again upheld the solicitation on constitutional grounds, despite the objection of the two dissenting Justices that by giving constitutional protection to the solicitation of personal injury claims, the Court "relegates the practice of law to the level of a commercial enterprise," "degrades the profession," and "contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct."31

In United Mine Workers v. Illinois State Bar Association,32

27. The Court has recognized the critical importance of solicitation to effective litigation in noting that proscription of solicitation in Button would have "seriously crippled" the efforts of the NAACP. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967).
29. Id. at 438-39.
31. Id. at 9 (Clark & Harlan, JJ., dissenting).
the Supreme Court dealt with the argument that Button should be limited to litigation involving major political issues and should not be extended to personal injury cases. The Court held that:

The litigation in question is, of course, not bound up with political matters of acute social moment, as in Button, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. “Great secular causes, with small ones are guarded . . . .”

Finally, in United Transportation Union v. State Bar of Michigan the Court reversed a state injunction designed, in Justice Harlan’s words, “to fend against ‘ambulance chasing.’” In that case a union paid investigators to keep track of accidents, to visit injured members, (taking contingent fee contracts with them), and to urge the members to engage named private attorneys who were selected by the union and who had agreed to charge a fee set by prior agreement with the union. The investigators were also paid by the union for any time and expenses incurred in transporting potential clients to the designated lawyers’ offices to enter retainer agreements.

In approving that arrangement, the Court reiterated that “collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” What is important to bear in mind, however, is that: (1) the attorneys in question were not in-house counsel for the union, but were private practitioners; (2) the attorneys earned substantial fees; (3) the cases were not “public interest” cases in the restricted sense, but were ordinary personal injury cases; and (4) the attorneys were retained as a result of the activities of “Investigators,” paid by the union, whose job it was to ascertain where accidents had occurred, to visit the victims as promptly as possible, to “tout” the particular lawyers and, if necessary, to take the victim to the lawyers’ office to get a contingent fee contract signed.

33. Id. at 223, quoting Thomas v. Collins, 323 U.S. 516, 531 (1945).
34. 401 U.S. 576 (1971).
35. Id. at 597 (Harlan, J. concurring in part, dissenting in part).
36. Id. at 585.
37. The only question not decided by the Court was whether the investigators could properly have been paid directly by the lawyers. The dissenting Justices would have disapproved it, while the majority simply did not reach that issue, on the ground that it was not in the record before them. It is difficult, however, to see why a significant distinction should turn upon who pays the investigator. A person unsophisticated about the need
It might be suggested that the three union cases involved group legal services, with the solicitation restricted to members of the union. Although there are references in those cases to rights of association, other language in the opinions is much broader. The Court noted in United Mine Workers that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political."38 Similarly, the first amendment does not protect speech and assembly only in the context of unions or other membership associations. Further, the people who were solicited in the Button case were not limited to members of the NAACP.

On the same day that Goldfarb was decided, the Supreme Court handed down an opinion in Bigelow v. Virginia,39 a case which has not attracted as much attention as Goldfarb in connection with advertising and solicitation by lawyers, but which is of far more significance. In Bigelow, the defendant was convicted of violating a provision of the Virginia anti-abortion statute by publishing an advertisement offering to make low-cost arrangements for legal abortions in New York. The importance of the Bigelow case to the issue of advertising by lawyers is emphasized by the similarity between arguments typically made in support of the anti-advertising provisions of the Code and the arguments made by the Virginia Supreme Court in affirming Bigelow's conviction. That court held that the advertisement "'clearly exceeded an informational status' and 'constituted an active offer to perform a service, rather than a passive statement of fact.'"40 In rejecting Bigelow's first amendment claim, the Virginia court said that a "'commercial advertisement . . . may be constitutionally prohibited by the state,'" particularly "'where, as here, the advertising relates to the medical-health field,'"41 i.e., a professional area in which the state's regulatory power presumably would be at its maximum. In addition, the court noted that the purpose of the statute was to insure that pregnant women in Virginia, making decisions with respect to abortions, did so "'without the commercial advertisement pressure usually incidental to the sale of

for and the availability of legal services, needs that information regardless of whether he or she is a member of a union and regardless of who pays the informant.

39. 95 S. Ct. 2222 (1975).
Those of course, are precisely the kinds of arguments that are made in support of regulations against advertising by lawyers.

Significantly, in striking down the Virginia statute on first amendment grounds, the Supreme Court relied on *Button* for the proposition that a state cannot foreclose the exercise of constitutional rights simply by labeling the speech “solicitation” or “commercial advertising.” In the course of reaching that conclusion, the Court severely restricted, if it did not overrule, *Valentine v. Chrestensen*, which had suggested that commercial advertising was not fully protected by the first amendment.

Finally, the Court made a strong bridge between the protected advertising in *Bigelow* and advertising by lawyers, by stressing the fact that the *Bigelow* advertisement contained information about legal issues:

> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia . . . Also, the activity advertised pertained to constitutional interests. [Citation omitted.] Thus, in this case, appellant’s First Amendment interests coincide with the constitutional interests of the general public.

Thus, the *Bigelow* advertisement was given first amendment protection expressly because it was directed to a “diverse audience” (not just the membership of an association), conveying information to those with a “general curiosity about, or genuine interest in . . . the law . . . and its development . . . .” Presumably, that same language would be descriptive of any advertisements offering legal services. Moreover, the reference in the *Bigelow* advertisement to the fact that abortions are legal in New York was made only in passing. Certainly the communication of legal information (“Abortions are legal in New York”) was quite

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44. 316 U.S. 52 (1942).
46. Id. at 2233.
47. Id.
limited, and there was no explicit suggestion of the desirability of law reform. In the same sense, therefore, any advertisement relating to the availability of legal services would convey information of "potential interest and value" to people having a "general curiosity" about the law, its development, or law reform.

It seems abundantly clear, therefore, that the present provisions of the Code of Professional Responsibility, forbidding advertising and solicitation by lawyers, are constitutionally invalid. Accordingly, it is appropriate, if not urgent, that we undertake the task of redrafting Canon 2.

In an earlier effort to that end, I circulated a draft of proposed amendments to the members of the Legal Ethics Committee of the District of Columbia Bar and the Subcommittee of Professional Responsibility of the Society of American Law Teachers.\textsuperscript{48} Circulation of that draft resulted in a number of very thoughtful comments, many of which have been incorporated into the proposal set forth at the end of this article. It should be noted, however, that not all of the commentators will be entirely satisfied with the present draft.

One concern that has been expressed is that advertising by lawyers may prove to be "undignified" in some instances. Although that viewpoint may be characterized as a squeamish one, I confess that I share it. The appearance of justice, though not as important as the substance of it, is nonetheless a matter of legitimate concern. If lawyers conduct themselves in an undignified way, the law itself may, to that extent, lose the appearance of dignity. On the other hand, I find it impossible to draft a disciplinary standard that would forbid lack of dignity and yet withstand constitutional attack. In reversing a conviction in a rather extreme case of undignified expression, Justice Harlan observed that "one man's vulgarity is another's lyric."\textsuperscript{49} "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," and standards like "undignified" or "in good taste" clearly cannot meet that test.

Although it would not be feasible to draft a Disciplinary Rule forbidding lawyers to be undignified, the structure of the Code does permit the expression of aspirational guides in the Ethical Considerations. Accordingly, the draft proposed here does urge in

\textsuperscript{48} The text of that draft appears in 173 N.Y.L.J. 102, May 28, 1975, at 1, cols. 1-2.
\textsuperscript{49} Cohen v. California, 403 U.S. 15, 25 (1971). The contested language was "Fuck the Draft."
the Ethical Considerations that "lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice."

Since the earlier proposed redraft of Canon 2 would have imposed no prohibition on advertising and solicitation other than to forbid false and misleading representations, comments also expressed concern with a variety of offensive kinds of conduct that might result. For example, police officers might hand out lawyers' cards at the scenes of accidents.51 Accident victims, strapped into stretchers, might be importuned by hospital orderlies to retain particular lawyers. Lawyers or their representatives might interrupt funeral services to solicit probate work. People might be solicited through unwanted telephone calls or visits at home. And so on.

Those concerns are legitimate, and an effort should be made to deal with them. That effort, however, should not consist of prohibitions on communications by rules that are broader than necessary to serve the legitimate governmental purpose. As the Supreme Court observed in Shelton v. Tucker:52

In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Certainly it is not necessary to impose a broad ban on advertising and solicitation by lawyers in order to deal with such cases as the hospital orderly or the police officer. For example, if it is inappropriate for an orderly to solicit legal business (or, indeed, to speak to a patient at all, other than as required by the performance of hospital duties) the hospitals can, and presumably do, issue appropriate directives to their employees. It would seem entirely appropriate, therefore, to discipline a lawyer who knowingly induced a breach of such an obligation by an orderly or by a police officer or any other employee. Similarly, a lawyer could be disci-

51. Interestingly, one member of the Subcommittee on Professional Responsibility, objecting to individual advertising, suggested as a desirable alternative that police officers might be required to distribute institutional advertising about legal services at accident scenes.
plined for soliciting business in a cemetery or any place else where business activity may be generally forbidden.

The appropriate approach to dealing with such cases, as well as with those cases involving harassing telephone calls or unwelcome visits to homes, is suggested in four Supreme Court decisions involving closely analogous situations. The first case is Martin v. Struthers.53 There the Court invalidated a city ordinance that made it unlawful for any person distributing handbills, circulars, or other advertising matter, to ring a doorbell or otherwise summon a householder to the door. The Court recognized a legitimate governmental interest in such a prohibition since "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later."54 The Court held, however, that the right of freedom of speech and press embraces not only the right to distribute literature, but also necessarily protects the right to receive it.55 Moreover, the city could have used a less drastic means to achieve its end, and one that would not have impinged upon those first amendment rights:56

The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

That is, the ordinance "substitute[d] the judgment of the community for the judgment of the individual householder," subjecting the distributor to criminal punishment for annoying another person "even though the recipient of the literature . . . is in fact glad to receive it."57 The Court noted, however, that its holding did not prevent the city from punishing those who call at a home "in defiance of the previously expressed will of the occupant . . . ."58

Martin v. Struthers appeared to be severely limited in the subsequent decision of the Supreme Court in Breard v.

53. 319 U.S. 141 (1943).
54. Id. at 144.
55. Id. at 143.
56. Id. at 147.
57. Id. at 144.
58. Id. at 148.
Alexandria, a decision written by Justice Reed, who had dissented in Martin. In Breard the ordinance restricting door-to-door solicitation was directed against those who failed to obtain the prior consent of the owners of the residences solicited. Thus the legislative standard in Breard did not meet the test established in Martin, because the Court in Martin would have required an "explicit command from the owners to stay away." In dealing with the first amendment aspect of the case, however, Justice Reed distinguished Martin v. Struthers expressly on the ground that that case had involved the distribution of leaflets advertising a religious meeting, whereas the defendant in Breard had been selling magazines. The selling, Justice Reed said, "brings into the transaction a commercial feature." Emphasizing that point, he noted that the Court in Martin had directed attention to the fact that the ordinance there had not been aimed "solely at commercial advertising." Thus, insofar as Breard appeared to represent a retreat from the Court's position in Martin v. Struthers, it was based expressly upon the notion that "commercial speech" is not entitled to full constitutional protection. As indicated in the discussion above, that idea has recently been decisively rejected by the Supreme Court in Bigelow v. Virginia.

Even before the rejection of Valentine v. Chrestensen in Bigelow, a standard similar to that approved in Breard was unanimously struck down by the Court. The case of Lamont v. Postmaster General involved a federal statute which permitted the Post Office to hold "communist political propaganda" arriving from abroad, unless the addressee requested delivery. The Supreme Court invalidated that statute on the ground that it abridged the addressees' first amendment rights by burdening the exercise of those rights with an affirmative obligation on the part of the addressee. By contrast, in Rowan v. Post Office the Supreme Court upheld a statute which did not interpose the Postmaster General between the sender and the addressee but, rather, established a procedure whereby the householder could reject certain mailings in advance. Chief Justice Burger, writing

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62. Id.
63. See text accompanying notes 39-47 supra.
64. See text accompanying notes 44 & 45 supra.
65. 381 U.S. 301 (1965).
for a unanimous Court, quoted with approval from Martin v. Struthers in holding that the freedom to distribute information to every citizen can only be limited if the power to prevent a distributor from calling at the home is left with the individual homeowner. On that authority the statute in Rowan was upheld because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." Thus, in Lamont and Rowan, Breard was ignored and the rule of Martin v. Struthers was applied.

The proposed redraft takes its cue from those decisions. A community, or professional, judgment is not substituted for that of the individual citizen with respect to whether solicitation is desirable. Rather, a lawyer would be subject to professional discipline for soliciting a potential client only after that person has given the lawyer notice that he or she does not want to receive communications from the lawyer.

In sum, then, the proposed redraft of Canon 2 would (1) eliminate the general proscription against advertising and solicitation, but would (2) urge lawyers to advertise in a dignified manner, (3) forbid lawyers to solicit in ways that would violate valid laws or regulations, or that would involve the breach of a contractual or other legal obligation of the person through whom the lawyer seeks to communicate (e.g., a hospital attendant or police officer), and (4) further forbid lawyers to solicit anyone who has made it clear that he or she would prefer to be left alone. That approach, it is submitted, is pursuant to the need to assure access to legal services by providing adequate information to the public, and is consistent with the requirements of the first amendment.

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67. Id. at 737.
68. Adoption of the redraft of Canon 2 as proposed in this article would make it unnecessary to amend the present DR 2-103(D). That section permits a lawyer to cooperate "in a dignified manner" with the legal service activities (including advertising) of approved legal assistance offices and some prepaid legal service plans. (Debate has focused in substantial part on the desirability of "open" as opposed to "closed" panels. See Dunne, Prepaid Legal Services Have Arrived, 4 Hofstra L. Rev. 1, 22 (1975).) Since DR 2-103(D) is principally concerned with stating an exception to the ban on advertising and solicitation, that section would be unnecessary if the ban were lifted, as is here proposed.

DR 2-103(D) also includes a proviso that the lawyer's independent professional judgment must be exercised on behalf of the client "without interference or control by any organization or other person." That issue, however, is fully covered in Canon 5, which relates to conflicts of interest. See ABA Code, DR 5-107(B); id. EC 5-23, -24; id. Canon 5 n.27. See also id. EC 5-1, -21; id. Canon 5 n.25.
Proposed Amendments to Canon 2

CANON 2—A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE

Ethical Considerations

EC 2-1. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of [acceptable] competent legal counsel whose fees they can afford. Hence, important functions of the legal profession are to educate [laymen] members of the public to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC 2-2. The legal profession should assist [laymen] members of the public to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers [acting under proper auspices] should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. [Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.]

EC 2-3. Whether a lawyer acts properly in volunteering advice to a [layman] member of the public to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist [laymen] members of the public in recognizing legal problems. The advice is proper [only if] whenever it is motivated in whole or in part by a desire to protect one who does not recognize that he or she may have legal problems or who is ignorant of his or her legal rights or obligations. [Hence, the advice is improper if motivated by a desire to obtain

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69. Brackets indicate proposed deletions from the existing text of the Code, while italics indicate proposed additions.
personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.]

EC 2-4. [Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.] The purpose of encouraging lawyers to volunteer advice to members of the public is to fulfill the duty to make legal counsel available by informing members of the public of their legal rights and of the availability of effective legal assistance. Accordingly, lawyers should scrupulously avoid making any false or misleading statements to members of the public regarding their rights or regarding the ability of lawyers in general or of particular lawyers to provide effective assistance.

EC 2-5. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for [laymen] members of the public should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer: Generally

EC 2-6. Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he or she had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable [laymen] members of the public to make intelligent
choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many [laymen] members of the public have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. In addition, many people feel uncertain about whether lawyers are interested in helping them, and about the possible expense of preliminary interviews, and they are therefore reluctant to approach lawyers to seek legal counsel.

EC 2-8. [Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.] Because of changed conditions, lack of knowledge about the availability of lawyers, and the reluctance of many people to seek needed legal assistance, people are, as a practical matter, being denied effective legal assistance. In order to inform people of the availability of counsel, increase the likelihood of intelligent selection of attorneys by members of the public, and eliminate misunderstanding about fees, lawyers should freely provide information about their availability to accept particular kinds of cases, their experience in handling such cases, and their fees.

Selection of a Lawyer: Professional Notices and Listings

EC 2-9. The traditional ban against advertising by lawyers[, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-
imposed controls over, rather than by unlimited, advertising.] has had the practical effect of causing many people to forfeit legitimate rights because of ignorance of those rights. In addition, that ban has fostered the unfortunate impression that lawyers are uninterested in assisting in the redress of grievances of any but the most wealthy and sophisticated members of our society. Thus, distrust of lawyers has become common, and public confidence in our legal system has been impaired.

EC 2-10. [Methods of advertising that are subject to the objections stated above should be and are prohibited. However,] The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer [while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.] and such additional information that is accurate and that might assist a potential client in making an informed choice of an attorney. Care should be taken, however, to avoid creating unrealistic expectations in particular cases. In addition, lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice.

EC 2-11. The name under which a lawyer conducts his or her practice may be a factor in the selection process. The use of a trade name or an assumed name should be avoided if it could mislead [laymen] members of the public concerning the identity, responsibility, and status of those practicing thereunder. [Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.] For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.
EC 2-12. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his or her name to remain in the name of the firm if he or she actively continues to practice law as a member thereof. Otherwise, [his] the lawyer's name should be removed from the firm name, and he or she should not be identified as a past or present member of the firm; and [he] the lawyer should not [hold himself] be held out as being a practicing lawyer.

EC 2-13. In order to avoid the possibility of misleading persons with whom he or she deals, a lawyer should be scrupulous in the representation of his or her professional status. [He] A lawyer should not hold himself or herself out as being a partner or associate of a law firm if he or she is not one in fact, and thus should not hold himself or herself out as a partner or associate if he or she only shares offices with another lawyer.

[EC 2-14. In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability, other than in historically expected fields of admiralty, trademark, and patent law.]

[EC 2-15. The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.]

Disciplinary Rules

DR 2-101. A lawyer shall not knowingly make any representation about his or her ability, background, or experience, or that of the lawyer's partner or associate, that is false or misleading, and that might reasonably be expected to induce reliance by a member of the public.

DR 2-102. A lawyer shall not knowingly give a client or poten-

70. For the current version of the Disciplinary Rules under Canon 2, see Appendix.
potential client a false or misleading impression of the state of the law, such as by overstating the likelihood that a particular outcome will result from litigation, or by stating what is merely the lawyer's opinion about the law as if it were a conclusively established rule of law.

DR 2-103. A lawyer shall not solicit or advertise to potential clients in any way that would violate a valid law or regulation, or a contractual or other legal obligation of the person through whom the lawyer seeks to communicate.

DR 2-104. A lawyer shall not solicit a potential client who has given the lawyer adequate notice that he or she does not want to receive communications from the lawyer.

DR 2-105. A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners. A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.  

71. Proposed DR 2-105 is derived substantially from ABA Code, DR 2-102(C), (D).
APPENDIX

DISCIPLINARY RULES

DR 2-101  Publicity in General.
(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, “public communication” includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102(A)(6), directed to a member or beneficiary of such organization.

(C) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

DR 2-102  Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification but may not be published in periodicals, magazines, newspapers, or other media.

(2) A brief professional announcement card stating new or changed associations or ad-
addresses, change of firm name, or similar matters pertaining to the
professional office of a lawyer or law firm, which may be mailed to
lawyers, clients, former clients, personal friends, and relatives. It
shall not state biographical data except to the extent reasonably
necessary to identify the lawyer or to explain the change in his
association, but it may state the immediate past position of the
lawyer. It may give the names and dates of predecessor firms in
a continuing line of succession. It shall not state the nature of the
practice except as permitted under DR 2-105.

(3) A sign on or near the door of the
office and in the building directory identifying the law office.
The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying
him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated “Of Counsel” on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm’s office is located; but the listing may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers. The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than “Attorneys” or “Lawyers,” except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105 (A)(4); date and place of birth; date and place of admission to
the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR 2-103 Recommendation of Professional Employment.

(A) 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.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that:
(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may,
if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR 2-104 Suggestion of Need of Legal Services.

(A) 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, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103 (D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

DR 2-105 Limitation of Practice.

(A) A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as permitted under DR 2-102(A)(6) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patent," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation
“Trademarks,” “Trademark Attorney,” or “Trademark Lawyer,” or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty,” or “Admiralty Lawyer,” or any combination of those terms, on his letterhead and office sign.

(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

(4) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

8. Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

2. The division is made in proportion to the services performed and responsibility assumed by each.

3. The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.
DR 2-108  Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR 2-109  Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR 2-110  Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary
Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.