Personal Contact

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"In fine, let us consider the limitations of the vampire in general, and of this one in particular.

"All we have to go upon are traditions and superstitions. These do not at the first appear much, when the matter is one of life and death – nay of more than either life or death. Yet must we be satisfied; in the first place because we have to be – no other means is at our control – and secondly, because, after all, these things – tradition and superstition – are everything. . . .

He can see in the dark – no small power this, in a world which is one half shut from the light. Ah, but hear me through. He can do all these things, yet he is not free. Nay; he is even more prisoner than the slave of the galley, than the madman in his cell. He cannot go where he lists; he who is not of nature has yet to obey some of nature's laws – why we know not. He may not enter anywhere at the first, unless there be some one of the household who bid him to come; though afterwards he can come as he please."

DRACULA, Bram Stoker (Van Helsing explains the Count's powers and limitations) (Dover 2000) 205-06

I. Introduction: Personal Contact

As with Count Dracula, the lawyer must be invited to meet the fresh client on whom he feeds. The lawyer is permitted to solicit invitations at a distance by mail and media. He cannot badger the weak and infirm. He has free license with his families of blood and friends, of others of his profession, and of those previously marked by him as his clients. These families, this network, also encourage the fresh client to invite the lawyer. This encouragement must be done for love, not for money, as the lawyer must pay not even one pint of his fees to recommend him. He may and should volunteer for charity sake, for justice, as well. If no invitation is forthcoming from anyone else, the lawyer may not initiate personal contact.

Personal contact of those potential clients the lawyer does not know is a weakly surviving prohibition in legal solicitation ethics. The prohibition has no long standing historical basis or sense. This custom is no ancient practice but rather a product of American urbanity and other lesser attractive traits. Even as the rule was (with the rest of them) codified, articulation of its purpose was strained. Is this a rule to protect the weaker minded and the infirm or to stop the stirring of quarrels?

This note reviews current enforcement of Van Helsing's rule. Issues presented here are obviously those occasioned by the First Amendment and the *Central Hudson* "test."[1] I have used the perhaps infelicitous metaphor of Stoker's Count for lawyers to illustrate not that lawyers are evil blood fiends. Rather, the comparison is made to show that the evil rapacious seductive blood sucking lawyer is like the Count, a myth. There is neither plausible harm in the practice nor tailored remedy in the rule. Courts and scholars have recognized that the origin of the prohibition on personal contact is seamy. The historical argument, for me, has more force than the sometimes psycho-science and proof by survey techniques generated by contests through *Central Hudson*. The rule deserves no deference. The story

[1] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Cited throughout this note as *Central Hudson.*

of personal contract is instructive in the mythology of law, and how the fetters of these myths are so difficult to throw off. As Van Helsing says, "tradition and superstition – are everything."

II. THE ABA MODEL RULES

ABA Model Rule of Professional Conduct Rule ("MRPC") 7.3(a) Direct Contact with Prospective Clients is Van Helsing's Rule. (Both MRPC 7.2 and 7.3 are attached). Note that all of the licit victims recounted in the opening paragraph are here and the prohibition on uninvited personal, real-time, contact. Personal contact is forbidden because "[t]he situation is fraught with the possibility of undue influence, intimidation and over-reaching" "Comment [1] to MRPC 7.3. Of these sins, all have the possibility of occurrence regardless of the method of formation of the attorney-client relationship.

The Comments note that other forms are available to solicit, forms that have the virtue of being recorded. As to the latter (that there is no way to police secret sins), modern communication in real time too frequently does leave a damning record. Those the lawyer knows, the Comment offers are "far less" likely to suffer rapacious behavior. Here Van Helsing might disagree.

III. RECENT DECISIONS

In re Universal Building Products, 53 Bankr. Ct. 259 (Bank Ct. Del. 2010) was an action in which the bankruptcy court denied the application of the Unsecured Creditors' Committee to retain Arent Fox LLP and Elliot Greenleaf & Siedzikowski. The disqualification was occasioned by the firms' relationship with one Dr. Liu, a translator and, to some extent, a general advisor to Asian creditors as to the ways of Western collection methods. The creditors on the Committee vote as to selection of counsel. Dr. Liu solicited proxies of creditors to vote for the firms' retention with the expectation that he would be hired as translator. The firms had had no prior relationship with any of the creditors in this matter. Dr. Liu had had no relationship either. The firms facilitated (through pedestrian contact information) Dr. Liu's

personal contact with these previously unmet creditors. Ultimately, objecting debtors sought denial of the application to employ the firms because, through and with Dr. Liu, they had violated Rule 7.3 in using illicit personal contact.

The court notes that the rules prohibit the use of an intermediary to effect personal contact. Id. at 20. There is, in the opinion, a slight conflation between the personal contact rule and the prohibition on the use of paid solicitors, "runners" in Rule 7.2(b). (The story of runners and the history of the restriction on personal contact have an overlapping mythology. Runners are evil because they fetter the independence of the lawyer. The personal contact rule is born first of professional etiquette.) In this case, the court does not conclude that Dr. Liu was a runner; simply being a stalking horse, unpaid by the firm, is bad enough. (There is no discussion as to whether the mutuality of back scratching was a thing of value rendering Liu a runner.) The court found the firms and Dr. Liu were "acting in concert to cold-call creditors." Id. at 21.

The firms argued that the application of the rule to the solicitation of sophisticated clients is unconstitutional. The court cites *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), upholding the personal contact rule, protecting putative clients from the wiles of lawyers "trained in the art of persuasion." Id. at 464-466. In any case, the court notes these foreign creditors were not really sophisticated, unfamiliar with our bankruptcy law. The Court does not review other ethical rules that have had differing standards based on client sophistication. Scope limitations, fee agreements, at least, are reviewed differently with such clients.

The firms did attempt an argument in their defense, which never worked with Mom and Dad, let alone a somewhat irritated bankruptcy judge: all the cool kids are doing this. In the century or so of cases on this issue, a universal note is made that what was done, personal contact, was in the age, a common practice. Everyone using folks like Dr. Liu is not a defense. Bankruptcy law creates an overlay in this matter. Professional applications must disclose "connections," relationships that obviously are

thought not to produce conflicts of interest, for example, but would be of interest to one trying to determine whether there should be further disclosures. Fed. R. Bankr. P. 2014(a). The failure to disclose adequately the connection with Dr. Liu was also disqualifying. Now, in Delaware, Judge Walrath intends that this solicitation practice be disclosed and he has rules for it.

The sin in this case was uninvited real time personal contact. None of the many written communications were a violation. If the contact has been made with those who had a prior relationship with the solicitor, there would have been no violation. If the solicitor had contacted a lawyer, apparently equally adept at persuasion, there would be no violation as well.

In *Bennett v. Advanced Cable Contractors, Inc.*, 2012 U.S. Dist. LEXIS@3605 (N.D. GA.), the defendant sought sanctions against plaintiff's counsel for personal contact with potential opt-in plaintiffs with respect to pre-collective action certification. In class actions, courts may regulate the content of solicitations, but written communication is unimpeded by any ethical rule. See also A.B.A. F.O: 07-445 Contact by Counsel with Putative Members of a Class Prior to Class Certification. Noting a First Amendment concern and that the firm stopped the practice when asked and asked, in turn, the court for guidance, no sanction was imposed. Simply, those who opted-in based on the personal contact would be permitted to renew or to renege their previous choice.

I would note in both of these cases that disqualification from the representation is sought. This sin, however, is distinct from a conflict where a lawyer has a tactical advantage from a prior representation or is inhibited in performance because his interest may lie elsewhere than with his client. The harm, if any, occasioned by the personal contact rule must differ. The client of neither lawyer is harmed. There is a risk that a lawyer may dupe a potential client into hiring him, and, perhaps, stirring up an unjust quarrel. A court can, in some measure, regulate the rectitude of those who practice before it. Yet, even in a conflicts case, we see always the principle that the client presumptively should be entitled to the lawyer that they chose. The latter harms, duped retention and meritless quarrels, are

largely otherwise handled. The client can always fire the lawyer. Meritless quarrels are smacked by court rules and torts. Disqualification in support of an aesthetic on how lawyers should be seems somehow less justifiable.

In *In re Lembo*, 2011 R.I. LEXIS 138, the Supreme Court of Rhode Island imposed public censure on Lembo who facilitated his client's activity in obtaining of retainers from other employees in the underlying action for unpaid wages. While, of course, the client was not a runner, the court properly notes that inform MPRC 8.4 prohibits misconduct committed by the encouraged act of another. The sin here is subtle. Had the client merely told his co-employees that Mr. Lembo was a fine lawyer, give him a call, there would have been no sanction. That scenario is the licit one – reputation (the client's endorsement) producing an invitation (the new client contacts the lawyer). Lembo was unwilling to wait for the call, providing his enterprising client blank retainer agreements. I might also note that Lembo did not apparently argue the enforceability of the rule with the urgency of Arent Fox in *In re Universal Products*. Lembo may have been satisfied that he could live with public rebuke.

Disciplinary activity or opinions directly on the issue are limited, that is, cases devoid of runners. For the law on solicitation by seminar, see New Hampshire FO – 1992-93/11. The concern is the confusion by the attendee that he has become the speakers' client. And, of course, there is the risk of forbidden in person solicitation. In sum, no advice is given but please continue this valuable public service. <u>See also</u> South Carolina Opinion 00-09. Maryland Ethics Opinion 2004-29 frowns upon a lawyer's plan to set up a vendor style booth at a conference of sophisticated health care financial management types, the booth, staffed by lawyers. The lawyer argued the Dracula side: the client to be would first approach me. The Opinion fumes that the booth is to "entice" the contact but they cannot say the lawyer is definitely in error. The Opinion threatens action. But, in truth, Van Helsing's rule is not broken.

IV. OHRALIK AND CENTRAL HUDSON

All cite *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (unanimous as to judgment), the First Amendment test of Van Helsing's Rule. Personal contact was reserved in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). With a longer view, the start of the micro-management of solicitation with its First Amendment subtleties by the Supreme Court is apparent. When the issue is always the First Amendment (rather than the older freedom of contract or "conduct unbecoming"), resolution by the highest court seems inevitable. *Ohralik* says in person for profit solicitation is not protected speech "under circumstances likely to pose dangers that the State has a right to prevent." 436 U.S. at 449.

Ohralik himself was both horrible and cliché. He learns by chance at the post-office of an auto accident. He had a casual acquaintance with a victim, 18 year old Carol. Appalling conduct ensues including his visit to Carol, signing her up while she is in traction, his visit to Wanda Lou (the other victim), his secretly taping everything, his threats to the girls, the parents, his scare tactics. He was disbarred by the Supreme Court of Ohio. Before launching into the First Amendment jurisprudence of that age, Justice Powell intones his myth of the ancient nature of the prohibition; personal contact "has been proscribed by the organized Bar for many years." Id. at 454. His support, in real sum, was a cite to H. S. Drinker, Legal Ethics (Columbia University Press 1953). In fact, although canonized by the Bar in 1908, solicitation restrictions had been contested and disregarded since their inception. The Bar had banned solicitation but the bar practiced it.

Justice Powell throughout this opinion uses that device: the Bar. His career was devoted otherwise to a life of service to the Bar. A Bar should have an opportunity to intervene, to step in, to do good. Personal contact "may exert pressure" and "often demands . . . response, without . . . reflection." Id. at 457. Measured tones emanate from a measured man as should be expected from a man of the Bar.

He then describes what Ohralik is not: a civil rights lawyer. He is not under *Button*.[2] He is not helping the poor. He finally honestly notes that Drinker and *Bates* suggest that the matter might be one of etiquette not ethics. Id. at 460. But "true professionalism" is the goal. Id. at 470. The harms are three: overreaching, invading privacy, and a lawyer's judgment clouding over by the lure of filthy lucre. Id.

A lawyer may have conflicting thoughts when pecuniary gain chances before him. I would admit that such temptation exists but certainly not uniquely with personal contact. For the chance of invasion of privacy and high pressure sales and their pernicious effects, Justice Powell cites a Federal Trade Commission study on door-to-door salesman. The comparison now seems prim and quaint and totally wrong, sadly anticipating the weak "science" of the years to come.

Then, famously, he notes the bar's more vampiric skill. A lawyer can seduce with greater effect "trained in the art of persuasion" preying on the Renfields of the world: the unsophisticated, the injured, the distressed. (Renfield ate flies in the asylum in homage to the arrival of the Count.) Mr. Justice Powell thinks (for he had no proof) that personal solicitation results in bad blood more than half the time, well within the First Amendment tolerance of the age. The actuality of harm in a particular case is irrelevant; it is the "prophylaxis" that is important.

"Trained in the art of persuasion" has had legs. How does this dark art facilitate the evils with which Justice Powell is concerned? This skill does not raise our thirst for lucre. Are we more skilled in artifice to effectuate an invasion of privacy – perhaps, ala that door-to-door salesman? Justice Powell's concern is overreaching, the susceptibility of the weaker minded which seems to be everyone but lawyers. Is citation necessary for the proposition that legal skills touted in the phrase are rare in the profession? Many write briefs, a skill useless in these nefarious affairs. Fewer argue facts and law to the

[2] Barratry was the technique used for a half century to try to restrict personal contact solicitation in civil rights litigation. The Supreme Court essentially ended this practice, as evil malice was fundamental to a determination of barratry and a "case of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious." *NAACP v. Button*, 371 U.S. 415, 439 (1963).

living in person. Even some of these are found legally ineffective. Justice Powell's aphorism is a product of what he has seen and lived, watching the lofty flights of those before him in dazzling persuasion (which he himself, at least half the time, can resist).

Justice Marshall, in concurrence, with *Button* concerns, limits *Ohralik* to its horrendous facts. In counterbalance to Justice Powell's Bar, he weighs the negative economic effect of the blanket ban on the life of the small practice, a rule with a heavy anti-immigrant crust. He limits *Ohralik* to Ohralik. Time passes.

Mr. Falanga, Georgia attorney, had a deal with chiropractors, free legal service for leads. The leads led to cold calling clients. A chiropractor turned him in (which suggests another story). He challenged the application of the rule to him. *Falanga v. State Bar of Georgia*, 150 F.3d 1333 (11th Cir. 1998). *Central Hudson* (now twenty years old in 1998) requires a substantial state interest directly and materially advanced by a rule in reasonable proportion to the interest served. The Court had decided *Edenfield*, loosing those less persuasive certified public accountants from the shackles of no uninvited personal contact. But the 11th Circuit calls Falanga an "ambulance chaser."[3] And science is not required to know the state's interest (at least the interest of the State Bar of Georgia) in prevention of overreaching.

Nonetheless, the 11th Circuit employs the quasi-science of an "independently-conducted study" entitled, "Consumer Reactions to Legal Services Advertising in the State of Georgia." (How could the results not be bad?) The survey said personal contact (lumped in with advertising) is "unduly intrusive, destructive to the court system and deserving of regulation." I would offer that the actual science of this vox populi could not stand in any court today or, at least, would be well tested by experts that someone like Arent Fox might employ. Falanga, limited in means, did not litigate this issue with full vigor. In any case, Georgians may have many things thought deserving of regulation. How the court

[3] MRPC 7.2(b)(4) permits reciprocal referral arrangements between lawyers and a "nonlawyer professional" which might be a chiropractor (which is definitely another story). This Rule does not permit cold calling.

system is to be destroyed is unclear but probably by the glut of doubtful claims overwhelming justice. The phrase "unduly intrusive" suggests that Georgians are willing to accept their due of intrusion but they have limits. Replace, in the title of the survey, the word "Legal" with almost any trade or profession. The real problem is the decline, in the public view, of lawyer or anyone's morality; they are going to Hell in the hand-basket and advertising is a sign post on the road.

The 11th Circuit notes that proof of harm would necessarily be too tough as personal contact has been prohibited all these years. The American Bar Association supports the State Bar and many other states as well. A "common sense" reading of *Ohlarik* impels the conclusion that the harms are real and ameliorated by the remedy. The remedy, banning in-person solicitation, is within *Central Hudson* measures, as other forms of advertising and the previous list of licit contacts, provide ample alternatives. Justice Marshall's caution that *Ohlarik* should be confined appears to be unread. Falanga himself is no prince. In the hands of chiropractic post-trauma is more than a little like hanging in traction. No recognition exists in the opinion that the rule might be simply one of etiquette.

The rules on advertising vary greatly among the states, even in so-called Model Rules jurisdictions. This floridity of opinion about the proper limitations on solicitation by the Bar and the Supreme Courts of the States clutters the Federal Courts, the necessary arbiters of *Central Hudson*. See *Alexander v. Cahil*, 598 R.3d 212 (Fifth Cir. 2011). The arguments are florid as well. For over one hundred years, the law regulated solicitation to protect the damaged for a little while. Under *Central Hudson*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) approved Florida's 30-day contact ban for disasters. Since *Went For It*, we have had twenty years of state regulations that go beyond the broad template of the ABA Model Rules and, in turn, federal litigation quibbling about pop-up ads and domain names.

V. H. S. DRINKER

Falanga and judicial consideration post-*Ohlarik* has been unjustifiably bound by Justice Powell's pithy opinion. A claim that *Ohlarik* would pass a robustly litigated modern *Central Hudson* challenge seems unjustified. *Ohlarik* is decided on the basis of horrible attorney conduct, surmise about the effects of personal contact, and a reverence for the tradition of the rule and H. S. Drinker.

Informal Decision C-705, Bar Association Campaign against Solicitation has the American Bar Association Committee confessing that it has no "pamphlets" and the like for educating the public on the restrictions on lawyer solicitation "including ambulance chasing." The local bar that had asked for this form of assistance is somewhat curtly told to read H.S. Drinker, *Legal Ethics*. If they had no copy, the Committee fairly sneered that one would be in the public law library. The locals were told that they may submit their materials to the Committee to be checked for any ethical errors the locals might commit. This was November 19, 1963 and still an attorney is told to just read Drinker. So let us.

Canon 27 adopted in 1908 by the American Bar Association abhorred advertising, touting, and flaks. "[S]olicitation of business by … advertisements or by personal communications … not warranted by personal relations is unprofessional." Drinker at 215. What follows, reading faithful Drinker, is a portent of what has come. The rule against uninvited personal contact remained tainted but untouched as advertising grew with the culture. By Drinker's time, admiralty had weighed in for specialties. A Canon saluted the "Professional Card," the "Approved Law Lists" and the "Shingle." Woodenly, the Bar did ban the neon shingle. The futility of the exercise is a lesson for our day.

Our library's copy of Henry S. Drinker, Legal Ethics has the spinal cracks, the discoloration and dust that naturally comes with a book as old as I. Mr. Drinker of Philadelphia, Chair of the American Bar Association Ethics Committee under nine of the Association's presidents, authored the work at the behest of the William Nelson Cromwell Foundation to cultivate and educate in "ethics, honor and conduct." (FOREWORD) Drinker lectured as Sharswood did at the University of Pennsylvania. In the

Fifties, this book was probably everywhere lawyers were. With the endorsement of the American Bar Association, the book was largely given away.

Of the Bar as much as Justice Powell, Drinker wrote a now untouched book, modest, sincere and useful, with no certitude of rectitude. As to the rule prohibiting personal contact, he clearly expresses that the English view of "professional etiquette" never took hold in America. Sharswood, inspiration to American Ethics, says not a whit about solicitation of clients. Etiquette breaches, even so, were not disciplinary matters but matters of society, the society of the bar. All solicitation, personal or otherwise, by an attorney tainted him as "not pleasant to associate with on the terms of cordial intimacy characteristic of the relationship of lawyer." Id. at 211.

Drinker in 1953 says personal contact restrictions have new reasons in the new age, the reasons now doomed by a half a century of analysis. Personal contact commercializes the profession and stirs litigation. Personal contact tempts the lawyer to make "alluring assurances" and to take "extravagant" risks. Id. at 212. He notes an exception for indigents but not Unions. Id. at 219. Advertising, as a whole, presents a delicate balance for Drinker. He recognizes the competitive pressure from banks, accountants and all those that can take a lawyer's business but not subject to lawyers' ethics.

For Drinker, I am sure, the ban on personal contact was the easiest decision in his lengthy chapter parsing the don'ts of business cards, newspaper ads and telephone directories. Drinker supports the conclusion that any claim to professional veneration of the rule from time immemorial is false. The idea was new, hotly contested, singed on the fringes – as an ethical rule with licensing and fee collection ramifications. Drinker thought the ban was supported sufficiently by the Bar's surmise of the risk of harm rather than by evidence of harm happening. Drinker thought all solicitation lowered lawyers' reputations and stirred litigation. Drinker's conclusions are not evidence now; no need to cite him in a case of *Central Hudson*.

Drinker and all others must point to *H.H. Ingersoll v. Coal Creek Coal Company*, 117 Tenn. 263 (1906), a fight over attorneys' fees in the feeding ground of the Fratersville Mine Disaster of 1902, a horrific loss of life and property. Messers. Ingersoll and Clayton had a seven year associate, "young Chandler". He got a third of what he brought in. He hied to the "field of prospective litigation [and] found other lawyers there ahead of him." He made uninvited personal contact with bereaved and, with no fraud or guile, obtained contingency fee representation agreements. Breaking Van Helsing's Rule, he "met them there for the first time" and was a "stranger." Was this contact a violation of the oath, punishable by the loss of fees?

In 1906, the Supreme Court of Tennessee could find no reported decision anywhere or text suggesting that personal solicitation was a violation of the oath. A statute regulating "ambulance chasers" and their runners might be welcomed but there was none. Personal solicitation is not maintenance or barratry. The common law allows solicitation and there was "no law invalidating a lawyer's contract merely because he proposed it." The analysis of the court recognizes the competition of unregulated insurance adjusters with at least semi-informed "ambulance chasers."

Yet, young Chandler and his firm are denied their fees. (No judgment is made on disbarment as that was not before the court.) Misread as the decision supporting a ban on personal solicitation, *Ingersoll* reserves for a later time that judgment. The firm loses as:

> "We cannot agree that the practice of law has become a "business," instead of a "profession," and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitations, under the facts shown in this case."

--- The facts – "miserable victims of the disaster are dazed by terrible bereavement" are facts sufficient under current law for speech regulation. The facts do not support any broader reading of old *Ingersoll*. The opinion notes that "there is no precedent for refusing fees because of such conduct"…and "that it is high time such a precedent be set."

Is thirty days sufficient time to recover from the dazzlement of bereavement? All men but four, in a town of two hundred fifty souls, died in the Fratersville Mine disaster. Insurance adjusters and lawyers walked among the living. With *Central Hudson*, one must make fine cuts in the necessarily infinite cloth of human reaction to human contact. Litigation comes with the quest of the Bench and the Bar (and some legislators) to regulate solicitation. We have gone from wood to neon to radio to television to all the web addictions and to text. The questers have had to show a harm requiring "prophylaxis." Protection of the bereaved has that value and so too, perhaps, the use of runners.

VI RUNNERS

MRPC 7.2 Advertising covers runners, trading value for recommendations. Runners are not the flaks of the firm. See Comment [5] to MRPC 7.2. This Rule is tied with MRPC 5.4 Professional Independence of a Lawyer (a) prohibiting sharing "legal fees with a nonlawyer." Runners get a piece of the action, a pound of flesh. Regulation of the lawyer's use of runners is justified, ethically, on the general theory of professional independence. Runners are a tawdry version of partners who are not lawyers. Given the latitude of licit alternatives, better suited, power pointed, booth manning, cleaner and cheaper than some ill-dressed weasel weaving among the widows, the practice only vibrantly survives in some urban climes. While the Model Rules permit the full employment of a publicity engine, the flaks are still bound by the personal contact rule. Flaks, who are not runners, may not contact those that are forbidden to the lawyer. MRPC 5.3 Responsibilities Regarding Nonlawyer Assistants. The old thoughts on runners illuminate the old thoughts on personal contact.

In *Chreste v. Louisville Railway Company*, 167 Ky. 75 (1915), the railway sought to avoid paying Chreste (as part of a personal injury settlement) because his retention by the plaintiff was the product of personal contact by Chreste's "representative." The court finds the contract valid, not void for any reason of public policy. Searching (again) the history of jurisprudence, the court finds no decision

voiding the contract based upon lawyer solicitation. Wisely reading *Ingersoll*, the court limits that decisions scope.

> "In other words, the case is not authority for the position that contracts obtained by solicitation alone are contrary to public policy, but is authority for the position that contracts obtained by solicitation from persons, who, because of their great bereavement, are in no condition to consider their rights, are contrary to public policy."

The court condemns "ambulance chasing." In the parlance of the age this phrase was less metaphor than actual activity. Here there is no young Chandler among the bereaved. We will regulate for the public good solicitation accompanied by "fraud, misrepresentation, undue influence" as we void other contracts. Solicitation has not been sanctioned by the common law or by Kentucky's statutes. "It is difficult to perceive upon what theory [solicitation] can be said to be clearly injurious to the public good."

Soon, however, the runners were subject to legislation everywhere . (Chreste is later disbarred.) Statutes existed earlier in urban New York to clamp down on the practice by a misdemeanor and a forfeiture of office. See *In re Clark*, 184 N.Y. 222 (1906). Three years later, the Appellate Division, condemning the practice, gave runner user Shay a year suspension. The court was moved to mercy by the unfairness of visiting the death penalty on Shay while the practice had become so common. *In re Shay*, 118 N.Y.S. 14 (A.D. 1909). In 1928, Judge Lazansky launches his investigation into "ambulance chasing." *In re Petition of the Brooklyn Bar Ass'n.*, 227 N.Y.S. 666 (A.D. 1928). The runner is an evil sharer of legal fees, serving up weakened victims to the personal injury lawyers' bloodlust.

The history of runners does offer enrichment in contemplating the mythology of solicitation regulation. Runners for trades is an ancient urban and port practice, to greet new arrivals. When the Fratersville Mine exploded, lawyers did not need to search out those who knew the running game. Cities, the clatter and mayhem of modern life, brought more injury to more people who did not know a lawyer and the lawyer did not know them. In New York, the practice was banned circa 1875 and is still practiced. Runners among the injured and survivors is as bad as young Chandlers lurking there.

Substantially different, however, is Dr. Liu among the Asian creditors or the lawyer's booth at the doctor's fair.

VII CONCLUSION

Old ideas are the hardest to kill. Young Chandler, Ohlarik, Falanga are all bad actors; their dispositions, even of courts supreme, should be limited to their facts. I would rewrite the Model Rule to comply with any *Central Hudson* quibble.[4] This Twenty-First Century concern is incidental to the value in the destruction of the mythology of solicitation. Law is business, but with true virtues the businessman may not tout. We keep secrets and will not act in conflict. These promises are not devalued by the method of solicitation. A stake for the myth of lawyer as Dracula and another for *Ohlarik* and *Falanga*.

[4] **New Rule 7.3 Contact With Prospective Clients**

(a) A lawyer shall not solicit professional employment from a prospective client if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

Rule 7.2 Advertising

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

COMMENT

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

Rule 7.3 Direct Contact With Prospective Clients

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

(1) is a lawyer; or

(2) Has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

COMMENT

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.