LOS ANGELES COUNTY BAR ASSOCIATION

PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 494

October 19, 1998
# TABLE OF CONTENTS

SUMMARY ................................................. 1

AUTHORITIES CITED ................................. 2

FACTS AND ISSUES PRESENTED .................. 3

DISCUSSION .............................................. 4

A. Are telephone calls offering to conduct in-house educational seminars (1) "solicitations" within the meaning of California Rules of Professional Conduct, Rule 1-400(B) and (2) subject to the prohibition of Rule 1-400(C)? ................. 4

1. Analysis of Applicable Rules of Professional Conduct ............................................. 4
   a. Rule 1-400(A) ........................................ 5
   b. Rule 1-400(B) ........................................ 6
   c. Rule 1-400(C) ........................................ 7
   d. Analysis of Rule 1-400 ............................. 7

2. The Cold Call as Proposed in the Inquiry is Not a Regulated Communication or Prohibited Solicitation Under Rule 1-400 and is Also Constitutionally Protected Speech .......... 10

3. Additional Constitutional Considerations ............. 12
   a. Constitutional Protection for Lectures and Seminars ................................. 12
   b. Constitutional Protection for Commercial Speech .................................. 16
   c. Constitutional Protection for Communications with Commercial and Noncommercial Elements .................................. 19

B. The Mailing of Bulletins or Briefs on Cases of Interest ......................... 20

1. Are Briefs or Bulletins Which Describe Important New Legal Cases Subject to the False, Deceptive and Misleading Regulations in Rule 1-400(D) and the Standards Adopted Under Rule 1-400(E)? ............. 21

2. Does Mailing of Bulletins or Briefs for Six Months Prior to "Cold" Calling a Potential Client Effect the Propriety of the "Cold" Calling About an Educational Seminar? .......... 24
SUMMARY

COMMUNICATIONS AND SOLICITATIONS: COLD CALLING FOR LEGAL SEMINAR AND MAILING OF NEWSLETTER

A telephone call\(^1\) by an attorney offering to conduct an in-house educational seminar on a topic of interest, or the mailing of bulletins or briefs by an attorney discussing legal decisions or laws, to a consumer of legal services with whom the attorney has no prior relationship is not a regulated communication or solicitation under California Rules of Professional Conduct, Rule 1-400, where the attorney does not communicate a message, or offer, concerning availability for professional employment in the practice of law. Communications or solicitations solely relating to the availability of seminars or educational programs, or the mailing of bulletins or briefs where there is no solicitation of business, are also constitutionally protected under the State Constitution and First Amendment as noncommercial speech. A communication may be constitutionally protected as noncommercial speech, even when a significant motivation for the communication is to obtain legal business.

Truthful and non-misleading communications or solicitations constituting commercial speech are also afforded significant constitutional protections and generally cannot be categorically banned except in rare circumstances, but may be subject to greater regulation as to time, place and manner. The dissemination of bulletins or briefs by mail concerning the availability for professional employment of a lawyer or law firm must conform to the regulations set forth in Rule 1-400(D) requiring that such communications or solicitations be truthful and non-deceptive and

\(^1\) This Opinion does not address the propriety of communications published on computer Internet systems or other forms of electronic communication.
may also be subject to time, place and manner restrictions promulgated pursuant to Rule 1-400(E) which do not unduly abridge fundamental constitutional rights of free expression.

AUTHORITIES CITED


Birbrower, Montalbano, Condon & Frank v. Superior Ct. [ESQ. Business Services, Inc.], (1977) 17 Cal.4th 119, 70 Cal.Rptr.2d 304, 949 p.2d 1

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028 (1989)


Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294 (1972)


In re Primus, 436 U.S. 412, 98 S.Ct. 1893 (1978)


In the Matter of Anderson (1997) WL 701350 (Cal. Bar Ct.)


Standing Committee on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)


U.S. v. Wunsch, 84 F.3d 1110 (9th Cir. 1995)


California Rules of Professional Conduct, Rule 1-400.

California Business & Professions Code Sections 6101-6106

California Business and Professions Code Sections 6157-6157.7

Los Angeles County Bar Association Formal Opinions:

   No. 404 (January 19, 1983);
   No. 445 (September 28, 1987);
   No. 487 (February 26, 1996)

California State Bar Formal Opinion No. 1995-142

FACTS AND ISSUES PRESENTED

The Committee has been asked for an opinion regarding the following:

   Attorney inquires whether his "cold" calling of a consumer of legal services regarding putting on an in-house educational seminar on a law-related topic would violate the California Rules of
Professional Conduct. Attorney states that no overture or solicitation regarding retention of attorney as counsel would be made at any time unless initiated by the legal consumer. Attorney indicates that he seeks to impress the potential client in hopes that the consumer will retain Attorney’s legal services and it appears that this is a significant motive of Attorney in conducting the seminar. Attorney further inquires if it makes any difference if he sent bulletins or briefs on important new cases of interest for six months prior to cold calling.

**DISCUSSION**

A. Are telephone calls offering to conduct in-house educational seminars (1) “solicitations” within the meaning of California Rules of Professional Conduct, Rule 1-400(B) and (2) subject to the prohibition of Rule 1-400(C)?

As discussed below, a telephone call of an attorney concerning a proposed in-house educational seminar is not a regulated communication or prohibited solicitation within the meaning of California Rules of Professional Conduct, Rule 1-400 where the attorney does not communicate a message or offer concerning availability for professional employment in the practice of law. Communications solely related to providing an educational seminar with no direct solicitation of business are also constitutionally protected speech. Truthful and non-misleading commercial speech is also constitutionally protected and generally cannot be categorically banned except in limited circumstances, usually involving dangers of overreaching or fraud and difficulties in regulating in a less restrictive fashion.

1. **Analysis of Applicable Rules of Professional Conduct**

Rule 1-400 and standards enacted by the Board of Governors

---

2 All rule references are to the Rules of Professional Conduct of the State Bar of California.
pursuant to Rule 1-400(E) regulate communications and solicitations by California attorneys.

(a) Rule 1-400(A)

For purposes of Rule 1-400, "communication" means:

any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name or other professional designation of such member or law firm; or

(2) Any stationary, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm or lawyers; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity."


There are three components in the definition of "communication" under Rule 1-400(A): (1) a message or offer, (2) concerning availability for professional employment, (3) directed to a former, present or prospective client. The examples given in Rule 1-400(A) evidence that what may be regarded as a message or
offer by an attorney under Rule 1-400 is intended to encompass a very broad array of activities. However, whether a message or offer is a regulated communication under Rule 1-400 depends on whether the subject of the message or offer concerns availability for professional employment in the practice of law and also whether it is directed to a past, current or prospective client.

(b) Rule 1-400(B)

Rule 1-400(B) defines "solicitation" as any communication:

(1) Concerning the availability for professional employment of a member or law firm in which a significant motive is pecuniary gain; and

(2) Which is

(a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication."

Thus, except for certain communications to represented parties, the definition of a "solicitation" under Rule 1-400 is limited to

---

3 There is some ambiguity as to whether the examples given in Rule 1-400(A) are simply examples of messages or offers (as interpreted by the Committee) or "communications" as defined in Rule 1-400(A). The Committee rejects the latter interpretation as contrary to common sense (e.g., plainly not every use of a firm letterhead, business card or professional designation concerns availability for professional employment). Rejection of this interpretation is also consistent with a Supplemental Memorandum of the California State Bar Office of Professional Standards sent to the California Supreme Court in response to certain concerns raised by the Court regarding this rule. After receiving this Supplemental Memorandum, the Court adopted the rule. This memorandum stated, in part, as follows:

As to the question regarding the proposed rule creating a ban on "communications" or "solicitations" not principally directed at attracting clients for pecuniary gain in contravention of Bell v. State Bar of California (1974), 10 Cal.3d 824 [112 Cal.Rptr. 527] and Jacoby v. State Bar of California (1977) 19 Cal.3d 359 [138 Cal.Rptr. 77], paragraph (A) defines a "communication" as a message concerning the availability for professional employment of a member or law firm.
"communications" concerning the availability for professional employment, in which a significant motive is pecuniary gain, delivered in person or by telephone.

(c) **Rule 1-400(C)**

Rule 1-400(C) provides that certain "solicitations" (as defined in Rule 1-400(B)) to parties with whom an attorney has no prior relationship are prohibited unless such solicitation is constitutionally protected. Specifically Rule 1-400(C) provides:

A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgement by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(Emphasis added).

(d) **Analysis of Rule 1-400**

The definition of "solicitation" in Rule 1-400(B) includes a two-prong threshold requirement in order for a communication to constitute a solicitation: (1) that the communication concern the "availability for professional employment" of a member or law firm.

---

4 The Committee notes that there is a question as to whether the regulation of solicitations by attorneys under California Rules of Professional Conduct 1-400(C) is void for vagueness. As previously stated by the Committee in its Opinions on former Rule 2-101(B), the predecessor rule to current Rule 1-400(C), which contained similar language: "This rule is very unsatisfactory because it gives no guidance as to what kinds of otherwise protected conduct are constitutionally protected." See, Los Angeles County Bar Ass'n Formal Opinion 404 (January 19, 1983); Los Angeles County Bar Ass'n Formal Opinion 446 (Dec. 7, 1987). Also see, U.S. v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1995); Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720 (1991); and Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99 (1972).
(2) in which a "significant motive is pecuniary gain."

Communications which do not contain both of these elements are not solicitations subject to the prohibition of 1-400(C).

Rule 1-400 does not define what is meant by "availability for professional employment" in Rule 1-400(A) and (B). However, as noted above, not every use of a firm letterhead, business card or other professional designation concerns availability to practice law directed to a former, current or prospective client. To construe any use of a firm name, professional designation or letterhead per se as a regulated communication concerning the availability for professional employment would subject such uses to regulation by the State Bar when used by lawyers in connection with expressions of opinions on issues of general concern having nothing to do with their legal practice. While the Rules of Professional Conduct and the State Bar Act do regulate some lawyer conduct outside of the practice of law (see, e.g., Bus. & Prof. Code §§ 6101-6106), a broad regulation of lawyer conduct and speech beyond the practice of law would abridge fundamental constitutional rights under the California Constitution and First and Fourteenth Amendments to the United States Constitution.

Moreover, not every legal activity of an attorney concerns the practice of law or an attorney-client relationship. See e.g., Los Angeles County Bar Association Formal Opinion 487 (February 26, 1996) (Communications of an attorney with a friend concerning a legal matter in which the attorney does not intend to be retained is not a communication concerning the availability for professional employment under Rule 1-400.) General teaching about the law has also never been included within the definition of practicing law. See, discussion of definition and meaning of the term "practice law" in Birbrower, Montalbano, Condon & Frank v. Superior Ct. [ESQ.
Business Services, Inc., (1997) 17 Cal.4th 119, 128, 70
Cal.Rptr.2d 304, 949 P.2d 1. Lawyers engage in numerous other
activities which may involve legal matters not pertaining to the
practice of law.

The First Amendment protects the freedom of expression of all
citizens, including lawyers who identify themselves as members of
the profession. Lawyers have a right to seek out public forums to
express their opinions and views. Moreover, education of the
public about the legal system, the judicial process and other forms
of dispute resolution and legal rights and services implicates
important societal interests. See, Jacoby v. State Bar, (1977) 19
Cal.3d 359, 368, 38 Cal.Rptr. 77, 562 P.2d 1326.

As discussed in more depth, infra, expressions of ideas or
opinions constituting noncommercial speech protected under the
First Amendment generally cannot be regulated, even if the
communication is false, deceptive or misleading or at odds with a
viewpoint held by a majority or vast majority. Both Ninth Circuit
and Supreme Court precedent place significant constitutional
constraints on the circumstances in which statements of opinion may
form the basis for attorney discipline. See, Standing Committee on
Discipline v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995)
("statements of opinion are protected by the First Amendment unless
they 'imply a false assertion of fact'"), quoting Milkovich v.
Lorain Journal Co., 497 U.S. 1, 19, 110 S.Ct. 2695, 2706 (1990);
accord In the Matter of Anderson, 1997 WL 701350 (Cal. Bar Ct.)
(citing Yagman), pet. rev. denied (February 18, 1998). The United
States Supreme Court and the California Supreme Court have
consistently held that the First Amendment protects not only the
right of the speaker to express his or her views, but also the
right of the public to hear the views of the speaker. This
societal interest runs to the heart of the First Amendment, a major purpose of which is to promote free discussion of governmental affairs, including the legal system. See, Bates v. State Bar of Arizona 433 U.S. 350, 376, 97 S.Ct.2691, 2705 (1977); Jacoby, supra, 19 Cal.3d at 368-69.

Significantly, one of the requisite elements in the definition of a solicitation under Rule 1-400(B) is a significant motive for pecuniary gain in a communication concerning the availability for professional employment. The element requiring a significant financial motivation is in accord with the United States Supreme Court's 1978 opinion in Primus where the Court held that the solicitation of prospective litigants by a nonprofit organization was constitutionally protected as noncommercial speech which the government may not regulate absent a compelling state interest and a regulation precisely drawn to further that interest. See In re Primus, 436 U.S. 412, 98 S.Ct. 1893 (1978).

It would be wrong to automatically assume that lawyers who identify themselves as members of the legal profession when making speeches or presentations to the public concerning legal issues always have significant motives for pecuniary gain. In addition, application of Rule 1-400(C) to any activity of an attorney practicing law for profit would prohibit lectures by lawyers at Law Day seminars, concurrent practice of law by law school professors and a vast array of public charitable and political activities of lawyers involving the legal system.

2. The Cold Call as Proposed in the Inquiry is Not a Regulated Communication or Prohibited Solicitation Under Rule 1-400 and is Also Constitutionally Protected Speech

The inquiring Attorney's proposed telephonic "cold" call (by definition to a person who is not the lawyer's former client or family member or with whom the lawyer has no prior professional
relationship) meets many of the elements of a prohibited solicitation within the meaning of Rules 1-400(B) and (C). However, while the inquiring Attorney's motive in calling concerning a proposed educational seminar is apparently to impress a potential client in the hope of obtaining employment, the content of the proposed telephone call as presented in the inquiry solely concerns an invitation to an educational legal seminar. Whether the cold call is a "solicitation" as defined under Rule 1-400(B) turns on both objective and subjective criteria. Objectively, a solicitation must as a threshold matter fall under the definition of a "communication" under Rule 1-400. A communication requires a message or offer of availability for professional employment directed to a former, present or prospective client. If the objective criteria required for a communication exist, the criteria for a solicitation must also exist. Included among the latter criteria is the subjective element that there be a significant motive for pecuniary gain.

It is the opinion of the Committee that Rule 1-400 should not be construed to encompass actions of attorneys solely based on motive. Thus a cold call solely limited to the subject of an educational seminar is not a regulated communication or solicitation under Rule 1-400(A) and (B) and therefore is also not subject to the prohibition of 1-400(C). As discussed further below, such a communication is also constitutionally protected speech. See, Belli v. State Bar, (1974) 10 Cal.3d 824, 112 Cal.Rptr. 527, 519 P.2d 575, Jacoby, supra, 19 Cal.3d at 367-71.

If in the course of the cold call Attorney makes any statements which may reasonably be interpreted as an attempt to be retained to provide legal services for pecuniary gain, the cold call may be a solicitation under 1-400(B) subject to prohibition
under 1-400(C) unless constitutionally protected. However, as discussed below, it is the opinion of the Committee that truthful and non-misleading commercial speech is also constitutionally protected from the categorical ban of Rule 1-400(C), but may be regulated as to content as provided in Rule 1-400(D), as well as time, place and manner under the standards adopted pursuant to Rule 1-400(E).

3. **Additional Constitutional Considerations**

Even if all the required elements for a solicitation defined under Rule 1-400 are established, Rule 1-400(C) excludes from its prohibition solicitations which are constitutionally protected. As discussed below, promotions or solicitations for lectures and educational seminars are near the core of protected speech. Speech with commercial and noncommercial elements may be constitutionally protected under the strictest standard of review. Commercial speech is also entitled to substantial constitutional protection and cannot be categorically banned, except in very limited circumstances.

a. **Constitutional Protection for Lectures and Seminars**

Communications or solicitations related to lectures and educational programs are generally constitutionally protected forms of free expression. See, *Belli*, supra, 10 Cal.3d at 840. Lectures and seminars are at the core of protected speech and are deserving of special constitutional deference. Id. The distinction between promotions for lectures and seminars and those for professional employment was recognized and explained by the California Supreme

---

5 California Business and Professions Code Sections 6157-6157.7 also regulates certain attorney advertising "directed generally to members of the public." This statute does not appear to apply to targeted mailings to specific persons. See, California State Bar Formal Opinion No. 1995-142.
Court in two cases decided over twenty years ago.

In *Belli v. State Bar of California*, decided in 1974, the California Supreme Court rejected a recommendation to discipline a lawyer for distributing brochures and other promotional materials for lectures, finding that they were constitutionally protected.\(^6\) The Court in *Belli* held that the State Bar may not abridge fundamental constitutional rights and that, when it seeks to discipline an attorney for a communication incident to protected speech, it must demonstrate that the communication or a part thereof was **principally directed** toward generating business, in addition to showing that the attorney intended by his communication to generate business for his law practice. See, *Belli*, *supra*, 19 Cal.3d at 833. The Court in *Belli* also held that certain self-laudatory communications sent by the attorney to the media were constitutionally protected because they were designed to increase business for a lecture series and educational seminars rather than to solicit clients. *Id.* at 829-31. The California Supreme Court also observed that the right to express opinions at lectures would be effectively frustrated and the constitutional protection reduced to a hollow shell if an attorney were deprived of the right to arrange speaking engagements. See, *Belli*, *supra*, 10 Cal.3d at 831.

In 1977, the California Supreme Court further clarified and narrowed the scope of regulation of lawyers' public speech in which a commercial motivation was implied. In *Jacoby, supra*, the California Supreme Court concluded that a noncommercial "communication is **not** 'primarily directed' toward solicitation

---

\(^6\) The Supreme Court held that only two items were proper subjects for discipline: (1) a liquor advertisement and (2) certain language in the seminar publicity which suggested that various celebrity former clients planned to attend and pay homage to Belli. (*Belli, supra*, 10 Cal.3d at p. 833.)
unless, viewed in its entirety, it serves no discernible purpose other than the attraction of clients. If a legitimate purpose appears on the face of a publication or in the motivation of the attorney, the publication must receive at least prima facie First Amendment protection." See Jacoby, supra, 19 Cal.3d 371. The Court in Jacoby further held that regulation of such communications must be necessary to further a compelling state interest which is not satisfied by generalized concerns with potential deception, fraud or misrepresentations or other potential evils. See Jacoby, supra, 19 Cal.3d at 377-80.

The Jacoby standard, which further refined Belli, has not been reversed, limited, explained or modified by the California Supreme Court. The Committee notes that both the California Supreme Court and the State Bar were aware of the controlling principles of Belli and Jacoby in drafting the language of rules 1-400(B) and (C). The United States Supreme Court has also not issued any lawyer advertising or solicitation opinions which distinguish, limit, or contradict the principles announced in Belli and refined in Jacoby. Therefore, Jacoby is still directly applicable and controlling in this matter.

The fact that a "significative motive" of the attorney in putting on an in-house educational seminar may be to get legal

---

7 The Jacoby opinion was also based on the California Constitution which provides, inter alia, "A law may not restrain or abridge liberty of speech or press".

8 While the United States Supreme Court has addressed the constitutionality of regulation of lawyer advertising and solicitation in a number of contexts, there are no cases concerning the constitutionality of regulations of communications or solicitations involving lectures or seminars in the jurisprudence of the United States Supreme Court. However, as discussed below, in cases decided subsequent to Jacoby, the United States Supreme Court has applied a totality of circumstance analysis for determining whether communications with commercial and noncommercial elements are treated as commercial or noncommercial speech and held that an economic motive is insufficient by itself to turn a communication into commercial speech.
business for financial gain, does not mean that an invitation to a seminar or the content of the seminar express that hoped for result. To survive constitutional review, Rule 1-400 must be read to proscribe improper conduct not improper motive. To read Rule 1-400 otherwise would be inviting serious infringement of fundamental societal rights.

Thus, even if the proposed cold calling of the inquiring attorney falls within the meaning of a solicitation in rule 1-400(B), it is within the core protection of the First Amendment exempted from prohibition by rule 1-400(C) under the facts given. Assuming the content of the attorney's telephone calls and conduct involves the provision of information, not solicitation of business, it appears to the Committee that attorney's telephonic communication is constitutionally protected under the strict scrutiny standard. Such communications may be restricted only upon demonstration of a compelling state interest under a regulation precisely tailored to serve that interest. *Primus, supra*, 436 U.S. at 432-433. However, any portion of the telephonic communication which discusses the member's availability for professional employment may be regulated or, in rare circumstances, prohibited as discussed further below.

If it is determined that certain types of public lectures by lawyers, or activities relating thereto, harm the public in circumstances where there is no direct solicitation of business, a specific regulation precisely tailored to serve a compelling state interest is needed to avoid invalidation under the First Amendment. Even where commercial speech is involved, a blanket ban must be narrowly drawn and directly and materially advance a substantial state interest to pass constitutional muster.
b. Constitutional Protection for Commercial Speech

Commercial speech is afforded a substantial, albeit more limited degree of constitutional protection, and may be categorically banned only in very limited circumstances. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 1508-10 (1996); City of Cincinnati v. Discovery Network, 507 U.S. 410, 419-423, 113 S.Ct. 1505, 1511-13 (1993); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 64-65, 103 S.Ct. 2875, 2879-80 (1983); Texans Against Censorship v. State Bar of Texas, 888 F.Supp. 1328, 1346-47 (E.D.Tex. 1995). Truthful and non-misleading attorney advertising and solicitations which are for the purpose of obtaining legal business that do not concern an unlawful activity are entitled to First Amendment protection under an intermediate level of scrutiny. 9 See Florida Bar v. Went For It, Inc., 115 S.Ct. 2371, 2375-76 (1995) (thirty day ban on targeted direct mail solicitation of accident victims upheld as satisfying three-prong Central Hudson test for restrictions on pure commercial speech); Ibenez v. Florida Dept. of Bus. & Pro. Regulation, 114 S.Ct. 2084 (1994) (attorney's truthful and non-misleading use of CPA and CPP designations in yellow pages, on her business cards and in other communications protected under First Amendment); Peel v. Attorney Reg. & Disciplinary Com'n, 110 S.Ct. 2281, 2283 (1990) (categorical ban on attorney holding himself out as certified legal specialist violates First Amendment); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916 (1988) (targeted direct mail solicitation held to be constitutionally protected commercial speech, which may be

---

9 The concurring and dissenting opinions in Discovery Network, supra, at 1518-25 and the multiple opinions in 44 Liquormart evidences disagreement in the Supreme Court regarding (a) whether regulation of "truthful" commercial speech should be under a lesser standard than noncommercial speech and (b) application of the intermediate scrutiny standard of Central Hudson.
restricted only in the service of a substantial government interest, and only through a means that directly advances that interest); *In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937 (1982) (announcement cards mailed to the general public may be restricted as reasonably necessary to prevent deception, but may not be absolutely prohibited); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977) (advertising by lawyers was a form of commercial speech entitled to First Amendment protection). *Also see Texans Against Censorship*, *supra*, at 1346 ("It is now beyond question that legal advertising or solicitation is a form of commercial speech entitled to protection under the First Amendment").

Notwithstanding constitutional protections for commercial speech, an in-person solicitation may be categorically banned based on overriding state concerns with "possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud", combined with "unique difficulties" with regulating an in-person solicitation short of an absolute ban because such a solicitation is "not visible or otherwise open to public scrutiny." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475, 108 S.Ct. 1916, 1922 (1988); *Zauderer v. Office of Disciplinary Counsel Supreme Court of Ohio*, 471 U.S. 626, 641, 105 S.Ct. 2265, 2277 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58, 464-66, 98 S.Ct. 1912, 1919-20, 1922-24 (1978). However, in its more recent opinions, the Supreme Court has clarified that blanket bans on solicitations or communications in a commercial context are suspect, except in very limited circumstances. *See Edenfield v. Fane*, 113 S.Ct. 1792 (1993).

Overturning a blanket ban on in-person or telephone solicitations by CPAs, the Supreme Court clarified that *Ohralik* was
a narrow ruling limited to unique facts involving situations inherently conducive to overreaching and other forms of misconduct. Id. at p. 1802. While distinguishing the training of accountants from attorneys, Edenfield also cited factors such as the sophistication of prospective clients, the existence of a business setting, an opportunity for rational decision making, incentives to act in a responsible manner (e.g. desire for repeat business or referrals) as factors militating against a broad rule restricting commercial speech. The Court also emphasized that regulation of commercial speech must serve a substantial state interest in a "direct and material way" in order to survive First Amendment scrutiny. Id. at p. 1801; Also see, Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 564-65, 100 S.Ct. 2343, 2350-51 (1980).

The degree to which commercial speech is constitutionally protected and the standard of review for regulations of commercial speech was recently explained by the Supreme Court in Florida Bar v. Went For It, Inc., 115 S.Ct. 2371 (1995). Commercial speech that concerns an unlawful activity or is misleading may be freely regulated. Id. at p. 2376. Regulation of other commercial speech must satisfy the test enunciated by the Court in Central Hudson: (i) the government must assert a substantial interest in support of its regulation; (ii) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest, and (iii) the regulation must be "narrowly drawn". Id. In upholding the Florida Bar's restriction, the Supreme Court distinguished the short time frame of the subject regulation from the broad ban on targeted direct mail solicitations invalidated in Shapero. Id. at p. 2378. The Supreme Court also emphasized that the narrowly tailored regulation prong of Central Hudson requires
only a "reasonable" fit between the legislature's ends and the means chosen to accomplish those ends as opposed to the "least restrictive means" test for noncommercial speech. Id. at p. 2380.

In 44 Liquormart, Inc. v. Rhode Island 116 S.Ct. 1495 (1996) the Supreme Court invalidated a ban on price restrictions on alcoholic beverages under the test enunciated in Central Hudson. The Supreme Court emphasized the need for "special care" in reviewing blanket bans on commercial speech "which rarely survive constitutional review and gave great weight to a fourth prong of the Central Hudson test (subsumed in the third) that the government regulation "is not more extensive than is necessary to serve that interest." Id. at 1506-10 and fn. 9. The Court renounced a prior opinion which permitted complete suppression of casino advertising as too deferential to the legislature in choosing suppression over a less speech restrictive policy.

c. Constitutional Protection for Communications with Commercial and Noncommercial Elements

Whether communications which contain commercial and noncommercial elements are treated as commercial or noncommercial speech appears to turn on the totality of the circumstances surrounding the communication.\(^{10}\) See, City of Cincinnati v. Discovery Network, 113 S.Ct. 1505, 1511-13 (1993); Bolger v. Youngs Drug Products Corp, 463 U.S. 60, 67-68; 103 S.Ct. 2280-81 (1983). It may also depend on whether pure speech is inextricably

---

\(^{10}\) While, the totality of circumstances analysis for delineating commercial and noncommercial speech currently espoused by the United States Supreme Court is different than the bright line test enunciated by the California Supreme Court in Jacoby, discussed supra, the Committee does not believe these cases undermine the vitality or persuasiveness of the Jacoby analysis. Jacoby's legitimate public purpose test and rejection of motivational scrutiny addresses lawyer advertising and communications in the context of lectures and seminars near the core of protected speech, an area which is not dealt with in the opinions of the United States Supreme Court.

In determining whether speech should be treated as commercial or noncommercial, the Supreme Court has emphasized the need for a careful examination "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." Discovery Network, supra, 113 S.Ct. at 1513 (quoting Bolger, 103 S.Ct. at 2880). In a recent decision of the Supreme Court with multiple concurring opinions, there is some indication that complete bans on commercial speech may be subject to stricter review and at least two justices expressed discomfort with the Central Hudson test as inadequate or expressly rejected it. See, 49 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996).

B. The Mailing of Bulletins or Briefs on Cases of Interest

The inquiring Attorney also asks whether the mailing of bulletins or briefs on what are described as important new cases of interest for a period of six months, prior to cold calling, effects
the propriety of the cold calling. While not specifically asked in
the inquiry, the Committee first addresses the propriety of the
mailing of the bulletins or briefs and the applicability of
regulations of communications and solicitations in Rule 1-400(D)
and (E).

1. Are Briefs or Bulletins Which Describe Important New
Legal Cases Subject to the False, Deceptive and
Misleading Regulations in Rule 1-400(D) and the Standards
Adopted Under Rule 1-400(E)?

The mailing of bulletins and briefs on general legal issues,
not relating to a particular matter, do not constitute
solicitations as defined under Rule 1-400(B) and (C).11 However,
communications as defined in Rule 1-400(A), while not prohibited,
are subject to regulation under Rule 1-400(D) and the standards
adopted under Rule 1-400(E). Rule 1-400(D) contains regulations
requiring that communications (or solicitations) as defined in Rule
1-400 must not contain any untrue statement or be false, deceptive
or misleading.12

As discussed, supra, the examples given in Rule 1-400(A) do

11 The only written communications which may be treated as solicitations are those made to
parties known to be represented by counsel in a matter which is a subject of the communication.
See California Rules of Professional Conduct, Rule 1-400(B)(2)(b). It is assumed that attorney
does not know that the recipients of his bulletins and briefs are represented by counsel with
respect to the subject matter of the mailing.

12 Rule 1-400(D) provides in material part: "(D) A communication or a solicitation (as
defined herein) shall not:

(1) Contain any untrue statement; or
(2) Contain any matter, or present or arrange any matter in a manner or format which
is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
(3) Omit to state any fact necessary to make the statements made, in light of
circumstances under which they are made, not misleading to the public; or
(4) Fail to indicate clearly, expressly, or by context, that it is a communication or
solicitation, as the case may be; or
(5) Be transmitted in any manner which involves intrusion, coercion, duress,
compulsion, intimidation, threats, or vexatious or harassing conduct . . ."
not constitute, *per se*, regulated communications under Rule 1-400 because designation of a lawyer's profession is not by itself a message or offer concerning availability for professional employment. Thus, the mailing of a newsletter or brief solely describing what may be important new cases of interest (or other information concerning the law or legal matters not concerning the attorney's availability for professional employment) is not a regulated communication even when an attorney's name or other professional designation is utilized. However, an accompanying message concerning an attorney's availability for professional employment (e.g., provision of a firm brochure describing an attorney or a firm's lawyers or practice) may bring the mailing within the definition of "communication" in Rule 1-400.

If an attorney's telephonic communication regarding a proposed seminar, or the mailing of bulletins or briefs, fall within the scope of Rule 1-400 (discussed, *supra*), which is not the case in the inquiry presented to the Committee, such communication must meet the requirements of subdivisions (1) through (5) of Rule 1-400(D) unless such communication is determined to be noncommercial speech.\(^{13}\) *See, e.g.*, Los Angeles County Bar Association Formal Opinion 486 (November 1995) (letterhead utilized by an attorney in his practice must not be misleading concerning the size or resources of attorney's firm or relationship with other law firms). Restrictions on communications or solicitations in Rule 1-400(D) include requirements that statements be true, not be presented in a false, deceptive or misleading manner, clearly state that it is a communication or solicitation as the case may be, and not involve

\(^{13}\) If the subject communications and mailings are determined to be noncommercial speech, the content regulations of 1-400(D) may not survive application of the strict scrutiny standard, which generally does not permit content based regulation of free speech.
intrusion, coercion, duress, compulsion, intimidation, threats or vexatious, or harassing conduct. See California Rules of Professional Conduct, Rule 1-400(D).

Additionally, if an attorney’s communication regarding a proposed seminar, or the mailing of bulletins or briefs, falls within Rule 1-400, such communication may need to conform to the Standards adopted by the State Bar pursuant to Rule 1-400(E). The Standards are used as presumptions in disciplinary proceedings effecting the burden of proof as defined in Evidence Code Sections 605 and 606. The Standards list communications which are presumed to violate Rule 1-400, which presumption may be rebutted.

With respect to sending bulletins and briefs on important new cases of interest, Standard 5 adopted pursuant to Rule 1-400(E) provides that:

A ‘communication,’ except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the words "Advertisement," "Newsletter" or words of similar import on the outside thereof.

Without identification as advertisements, newsletter or words of similar impact, written communications seeking professional employment for pecuniary gain are presumed to be in violation of Rule 1-400.

It must be emphasized that the Standards create presumptions
which may be rebutted. Additionally, overbroad Standards may not survive First Amendment scrutiny, particularly with respect to communications which fall within the core protection of the First Amendment and may only be very narrowly regulated to further a compelling state interest.

2. **Does Mailing of Bulletins or Briefs for Six Months Prior to "Cold" Calling a Potential Client Effect the Propriety of the "Cold" Calling About an Educational Seminar?**

The mailing of bulletins and briefs prior to cold calling about conducting an in-house seminar does not alter the foregoing analysis concerning the permissibility of the proposed cold calling of Attorney, except to the extent a prior professional relationship may be established. Were such a relationship established, it would remove subsequent telephonic communications regarding the seminar from prohibition under the prior professional relationship exception in Rule 1-400(C), in addition to (a) the constitutional exception and (b) the nonapplicability of the prohibition to communications not involving availability for professional employment for pecuniary gain.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts as are set forth in the inquiry submitted.