Chasing cases

Under California's Liberty of Speech Clause, lawyers should be free to chase cases by any means necessary and the only restraint should be their post-facto liability for not being truthful

By William McGrane and Mitchell Chyette

Despite a general softening of attitudes towards lawyer advertising, many states, including California, continue to draw a bright line distinction between solicitation involving personal contact and the various less intrusive means by which lawyers chase cases. So long as they speak truthfully, lawyers can do the latter, but – truthful or not – doing the former can get you disciplined, even disbarred. And that overhanging threat to one's licensure is chilling, to say the least.

Unrecognized in all this is the fact that the relevant California Rule of Professional Conduct, i.e., Rule 1-400(C), on its face expressly recognizes that its effectuality is limited by the California Constitution. And that, unlike the United States Constitution, the California Constitution has been well recognized by the California Supreme Court as flatly forbidding any and all prior restraints on any commercial speech, treating commercial speech as having equal dignity with all other protected (truthful) speech.

Meaning, California lawyers should be free to chase cases by any means necessary – including in person or over the telephone – and the only restraint they truly operate under is their post-facto liability for not being truthful.

Put another way – and unlike their brethren in less laissez-faire jurisdictions – California lawyers should not be lawfully subject to any prior restraint on their full range of free speech rights that prevents them from selling their services to prospective clients in any truthful manner they choose.

Equal dignity to commercial speech

The California Constitution gives equal dignity to commercial speech: "Solicitation by an attorney of professional employment is speech…" (*In re Arnoff* (1978) 22 Cal.3d 740, 746.) Rule 1-400 of the California Rules of Professional Conduct regulates all forms of communications by lawyers seeking employment, but one form of communication – soliciting – gets special treatment.

"Soliciting" is communication "delivered in person or by telephone." (Rule 1-400(B).)[1] Soliciting is absolutely forbidden regardless of the truthfulness of the message *unless* (i) it is to a family member or prior professional relationship or (ii) it is protected by the Federal or State Constitution. (Rule 1-400(C).)

This rule is a prior restraint on speech. Nevertheless, in *Ohralik v. Ohio State Bar Ass'n* (1978) 436 U.S. 447, the U.S. Supreme Court ruled that the prohibition of lawyer soliciting did not violate the First Amendment of the Federal Constitution. *Ohralik*'s holding was based, in part, on the concept that commercial speech deserves less protection than non-commercial speech.[2]

The California Constitution, on the other hand, "is an independent document and its constitutional protections are separate from and not dependent upon the Federal Constitution." (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 341.) Article I, section 2 of the California Constitution (the Liberty of Speech Clause) states:

> (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

In 2000, in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 (*Gerawan I*), and again in 2013, in *Beeman*, 58 Cal.4th at 341, the California Supreme Court stated that "the Liberty of Speech Clause is "broader" and "greater" than the First Amendment.

One of the ways the Liberty of Speech Clause is broader and greater than the First Amendment is that the Liberty of Speech Clause puts commercial speech on a par with any other sort of speech. In *Gerawan I* the California Supreme Court held that a plum marketing program, to which all plum growers had to contribute, violated the Liberty of Speech Clause even though it did *not* violate the First Amendment because the Liberty of Speech Clause's protection of commercial speech was greater than the protection afforded by the First Amendment.

The Court delved into the history of the Liberty of Speech Clause, showing that the original intent was to protect commercial speech with the same degree of freedom as other forms of speech. According to the Court, in 1849, the time of the first California Constitution, the prevailing cultural paradigm was Jacksonian democracy, animated by "ideas of equality and open opportunity" (*Gerawan I*, 24 Cal.4th at 495), and "liberal, market-oriented, economic individualism." (*Id.*) American legislatures and courts kept commercial speech free from regulation (expect for goods and services that were outright illegal); the doctrine of caveat emptor prevailed. "What such individualism presupposed, and produced, was wide and unrestrained speech about economic matters generally, including, obviously, commercial affairs." (*Ibid.*) That year witnessed a "rush of humanity" to the Golden State. "These men – for they were largely men – were 'essentially individualistic, greedy, and acquisitive gold-seekers.' It was such who framed the original California Constitution, including article I's free speech clause." (*Ibid.*)

This spirit did not change with the adoption of the 1879 California Constitution: Jacksonian democracy was still the cultural norm; "American legislatures continued to keep commercial speech free from regulation by statute, except as to products and services that were unlawful in the jurisdiction in question." (*Gerawan I*, 24 Cal.4th at 495-96. See also *Beeman* (2013) 58 Cal.4th at 342.) Thus, where the Liberty of Speech Clause states "every person may freely speak…on *all subjects,* that includes commercial subjects. (*Gerawan I*, 24 Cal.4th at 493 ("Whereas the First Amendment does not embrace all subjects, article I does indeed do so, in *ipsissimis verbis*: 'Every person may freely speak, write and publish his or her sentiments on all subjects . . . .'").)

Content-based regulations

Content-based regulations are subject to strict scrutiny. Under First Amendment analysis, content-based restrictions on speech are divided into two categories: commercial or non-commercial. Non-commercial "[c]ontent-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests – the so-called "strict scrutiny" test. (*Reed v. Town of Gilbert*, __ U.S. __, 2015 U.S. LEXIS 4061, *14 (June 18, 2015).) Justice Thomas, writing for the majority, did not distinguish commercial from non-commercial speech. Justice Breyer's concurring opinions noted, however, that the decision should not be construed to eliminate the distinction. (*Reed*, *supra*, at *36 (Breyer, J. concurring).) Justice Kagan would have reached the same result applying an intermediate scrutiny test. (*Id.* at *46). (See also *Williams-Yulee v. Fla. Bar*, __ U.S. __, 135 S. Ct. 1656 (April 29, 2015) (Limits on campaign fundraising by judges upheld under the strict-scrutiny test).)

As for *commercial* speech, in 1942, in *Valentine v. Chrestensen*, (1942) 316 U.S. 52, the U.S. Supreme Court ruled that commercial speech was not entitled to First Amendment protection at all, stating that this had long been the rule. That only changed in 1976 with the decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748. Today, "commercial speech" by lawyers that is neither misleading nor concerned with an unlawful activity "may be regulated if the government satisfies a

test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn" (*Went for It*, 515 U.S. at 623-624) – the so-called "intermediate scrutiny" test.

Under the Liberty of Speech Clause, in general, content-based restrictions are also judged under the strict scrutiny test.[3] Since *Beeman* (in 2013) the California Supreme Court has not had occasion to decide what degree of scrutiny applies to content-based prior restraints on truthful commercial speech. Previously, in *Leoni v. State Bar* (1985) 39 Cal.3d 609, 621, in analyzing a misleading lawyer advertisement, the Court referred to the distinction between commercial and noncommercial speech and suggested, in a footnote, that the Liberty of Speech Clause test would be the same as the First Amendment test.[4] In *Gerawan I*, however, the Court cautioned against relying on decisions where "[the Liberty of Speech Clause] and commercial speech were not considered on their own terms . . . but only, for example, through the distorting lens of the U.S. Supreme Court's commercial speech/ noncommercial speech dichotomy in First Amendment jurisprudence." (*Gerawan I*, 24 Cal.4th at 497, n.6.) *Leoni* was one of the decisions called out for this criticism.

If the Liberty of Speech Clause indeed draws no distinction between prior restraints on commercial and noncommercial speech, it stands to reason that the same level of scrutiny should be applied to each – strict scrutiny.

But even if a lesser standard were to be applied to truthful commercial speech, given the distinctive historical underpinnings of the Liberty of Speech Clause, the test ought to be stricter than a loosely applied intermediate scrutiny test.

Gerawan I was followed by *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 (*Gerawan II*). The Court applied a deferential version of the intermediate scrutiny test, reasoning that the government's regulation needs to be narrowly drawn but need not be the narrowest possible regulation. The same approach was taken in *Beeman*. But these cases did not address prior restraints on truthful speech. They concerned the issue of compelled speech – that is, regulations that require that the commercial entity either include additional information in the selling of its product (*Beeman*), or contribute to a marketing campaign (*Gerawan II*).

Prior restraints of truthful speech are different. They "are the most serious and the least tolerable infringement on [free speech] rights." (*Neb. Press Ass'n v. Stuart* (1976) 427 U.S. 539, 559; see also *CBS v. Davis*, 510 U.S. (1994) 1315, 1317 ("prior restraints are particularly disfavored.").) If an intermediate scrutiny test is to be applied at all, the government interest ought to be directly served by the regulation, and it ought to be the narrowest reasonable form of regulation to serve that purpose without automatic deference to the state's chosen means of regulation.

Rule 1-400(C) is a content-based restriction

Rule 1-400(C) is a content-based restriction, not a time, place and manner regulation. The government can regulate the time, place and manner (TPM) of speech. TPM restrictions are given intermediate scrutiny under both the Liberty of Speech Clause and the First Amendment. (See *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, 456, citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791; *Fashion Valley Mall*, *supra*; *McCullen v. Coakley* (2014) __ U.S. __, 134 S. Ct. 2518, 2529.) While it might appear that a restraint on soliciting merely affects the time and manner of legal marketing, when TPM restrictions are content restrictions in disguise, the courts will treat them accordingly. Just this year, in *Reed v. Town of Gilbert* __ U.S. __, 2015 U.S. LEXIS 4061, *14 (June 18, 2015), the U.S. Supreme Court held that a regulation on the size and placement of signs was *not* a TPM regulation, but a content restriction because it distinguished between signs giving directions ("this way to the church") and other signs. "Government regulation of speech is content based," according to the Court, "if a law applies to particular speech because of the topic discussed or the idea or message expressed."

> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys, [Citation omitted.] Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

(*Id.* at *15 (internal quotation marks omitted.)

In *Valle Del Sol Inc. v. Whiting* (9th Cir. 2013). 709 F.3d 808, the Ninth Circuit addressed an Arizona law that forbade day laborers from soliciting work on the streets. The State of Arizona argued that this was merely a TPM restriction meant to alleviate street congestion. The Ninth Circuit pierced through the argument: "On their face, the day labor provisions target one type of speech – day labor solicitation that impedes traffic – but say nothing about other types of roadside solicitation and nonsolicitation speech. They are therefore classic examples of content-based restrictions." (*Id.* at 819.)

In *Fashion Valley Mall, LLC v. National Labor Relations Bd*. (2007) 42 Cal.4th 850, the California Supreme Court rejected a shopping mall rule that required people to obtain a permit for expressive activities, but which refused permits to people advocating a boycott of any of the stores in the mall. The Court held that this violated

the Liberty of Speech Clause even though it was not protected under the First Amendment.[5] While the shopping center could designate a place for *all* speech-related activities as a TPM restriction, a requirement that turned on the content of the message was given strict scrutiny.

Soliciting is protected speech for all professions *except lawyers*. In 1993, in *Edenfield v. Fane* (1993) 507 U.S. 761, the U.S. Supreme Court held that anti-soliciting regulations for CPAs violated the First Amendment.[6] The reasoning in that decision would have applied equally to any other profession – except the Court did not go so far as to overrule *Ohralik*. "*Ohralik*'s holding was narrow and depended upon certain 'unique features of in-person solicitation by lawyers' that were present in the circumstances of that case." (*Edenfield*, 507 U.S. at 774.) If everyone, *except lawyers*, can solicit business in-person or by phone, restrictions on lawyer soliciting are necessarily based on the content of the message being delivered by the lawyers. Rule 1-400(C) is therefore a content-based restriction.

Is a ban on truthful lawyer soliciting justifiable?

Can a ban on truthful lawyer soliciting be justified under the Liberty of Speech Clause? The California Supreme Court has not considered whether or to what extent truthful lawyer soliciting is entitled to protection under the Liberty of Speech Clause. The First Amendment allows prior restraints on lawyer soliciting as a vestige of its refusal to recognize commercial speech as worthy of any protection at all. The California Supreme Court is not so bound in applying the Liberty of Speech Clause. What arguments could be mustered to justify this prior restraint on speech?

At the outset, recognize that in-person and telephone contact from a lawyer can serve an important purpose: it can bring to people's attention rights they may have been unaware of. (*Ohralik*, 436 U.S. at 458.) It does this more effectively than, say, mailings because the lawyer has the individual's attention at the time. For example, in *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, when the representative plaintiff in a class action was disqualified, the plaintiff's attorney was allowed to send letters to the potential class members. It would have been far more efficient if the plaintiff were allowed to telephone the potential members.

One justification for the prior restraint on soliciting is that it is a necessary prophylactic measure to avoid misrepresentation. The argument goes: we must ban *all* soliciting to avoid fraudulent soliciting. It is sad statement on current affairs that anti-soliciting bans that were first justified as unseemly for such a noble profession (*Ohralik*, 436 U.S. at 460-61) are now justified as a way to prevent fraud.

None of the cases that mention this state interest provide any empirical proof that this is a common problem. In *Florida Bar v. Went for It* (1995) 515 U.S. 618, 623-624, the U.S. Supreme Court stated, "mere speculation or conjecture" is not enough to meet the government's burden. "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (*Id*. at 625-26.) All the more so if strict scrutiny is applied to a prior restraint.

This justification has been unavailing in other circumstances. In *Schaumburg v. Citizens for Better Env't* (1980) 444 U.S. 620, for instance, the U.S. Supreme Court rejected a rule that limited door-to-door soliciting. "The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." (*Id.* at 636-637.)

Misrepresentation by lawyers is already banned in *all* communications under Rule 1-400(D). Why then should the government ban all solicitation for the sake of preventing a few outliers from otherwise violating their duties? There is no reason to suppose that misrepresentation is more common in lawyer soliciting than in other forms of communication, or that the frequency of misrepresentation would change by allowing soliciting, or that lawyer soliciting will lead to more numerous or more harmful misrepresentations than protected soliciting produces in other professions.

The argument also proves too much. As the Court explained in *Edenfield*, "[w]ere we to read *Ohralik* [as supporting prophylactic restraints], the protection afforded commercial speech would be reduced almost to nothing; comprehensive bans on certain categories of commercial speech would be permitted as a matter of course." (*Edenfield*, 507 U.S. at 777.)

Another justification for prior restraint on solicitation by lawyers is the "unique features of in-person solicitation by lawyers" noted above in *Edenfield* 507 U.S. at 774. The concern is that lawyers have special persuasive skills that can be used to take advantage of people at their most vulnerable. "The overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes." (*Ohralik*, 436 U.S. at 465-66.)

As above, there seems to be no empirical support for this concern. Indeed, in *Went for It* the Florida Bar did not even make this argument. (*Went for It*, 515 U.S. at 625, n.1.) And this justification could be used to support all sorts of prior restraints: Should charities be barred from asking Lottery winners for a contribution because it would be obtrusive or because the winners are vulnerable?

In *Went for It*, the Florida Bar went for a different slant on the above arguments: anti-soliciting rules were justified, according to the Florida Bar, by the deleterious effect that soliciting has on the public perception of the legal industry. In other words, whether effective or not, the practice strikes others as sleazy. The rule at issue banned communications to accident victims within 30 days of their

accident. The U.S. Supreme Court was persuaded by a poll showing that lawyer mailings to accident victims was "universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families." (*Went for It*, 515 U.S. at 625.) The Court held that public perception of the legal profession and protecting the public against such revulsion were legitimate state interests. (*Went for It*, 515 U.S. at 631.) This argument also suffers from the problem that it could justify all sorts of restrictions.

These concerns seem, at best, to be directed to personal injury trial lawyers. Outside that realm, under more prosaic circumstances, a phone call from a lawyer can hardly be said to be an invasion of privacy or to invoke "unique" powers of persuasion at a time of vulnerability or to be sleazy. A businessman who receives a call from a lawyer about a new tax loophole is emotionally and intellectually capable of saying "no thanks," to check with other lawyers, or to check with family and friends, before signing up. Why ban tax lawyers from telling a potential client about a new tax loophole when CPAs are allowed to do so?

Under any of these justifications, there are less restrictive means than a total ban on all soliciting that could take care of the concerns. A rule like the one in *Went for It*, prohibiting solicitation from accident victims within 30 days of an accident, would address the vulnerability and invasion of privacy concerns as well as the sleaze factor. Bus. & Prof. Code section 6152 already specifies places where runners and cappers cannot approach potential clients.[7] In *Speaks v. Kruse* (5th Cir. 2006) 445 F.3d 396, 398, a chiropractor argued that problems with telephone soliciting could be addressed by logging and recording any telephone contacts. Some soliciting might justifiably be restricted, but perhaps the restrictions can be tailored to the specific problems, allowing the rest of the legal profession to do what every other professional is allowed to do – talk to people potentially in need of their services.

Rule 1-400[C]'s escape clause is not the answer

Rule 1-400(C) applies "unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California." But resting on that escape clause is not a fix to the anti-soliciting rule. Every law is enforceable until it is held unconstitutional. That does not mean that unconstitutional laws should be kept on the books until they are proved unenforceable. The very existence of Rule 1-400(C) deters lawyers from exercising constitutionally protected rights. It places a burden on the exercise of those rights in that a lawyer who tried to solicit a client would have to bet his license on the court holding that his efforts were within the law. When a rule is unconstitutional on its face, it should be rejected[8] or replaced.

Conclusion

That the U.S. Supreme Court has not extended First Amendment protection to prior restraints on truthful lawyer solicitation stems from its perspective that commercial speech is only worthy of limited First Amendment protection. The California Supreme Court, and, for that matter, the State Bar of California and the Legislature, are not so constrained. The Liberty of Speech Clause comes out of a tradition that recognized commercial speech to be every bit as entitled to protection as any other subject.

There does not appear to be a compelling reason to totally ban all soliciting. Concerns over personal-injury lawyers taking advantage of accident victims, in-person or by phone, can be addressed by less restrictive means. For the rest of the profession, the ban on soliciting may violate their rights under the Liberty of Speech Clause.


McGrane

Bill McGrane has been practicing law in San Francisco, California, since he was admitted to the bar in December 1973. He has successfully tried commercial cases involving hundreds of millions of dollars to civil juries, civil judges sitting without juries, arbitration panels, as well as bankruptcy courts. These cases have encompassed virtually every aspect of civil litigation, including contract disputes, corporate governance disputes, partnership disputes, securities disputes, intellectual property disputes, real estate disputes, professional malpractice disputes, and bankruptcy-related disputes of all kinds.


Chyette

Mitchell Chyette was admitted to the State Bar of California in 1984. His practice encompasses the diverse variety of business-related litigation and alternative dispute resolution issues: contracts, intellectual property, real property, business torts, arbitration etc. He has conducted many hearings and trials in state and federal courts, courts of appeal and administrative proceedings.

Endnotes:

[1] Soliciting also includes communication directed to someone who is already represented by counsel; but that is not the subject here.

[2] *Id*. at 456 ("we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."). See also *Fla. Bar v. Went for It*, (1995) 515 U.S. 618, 623-624.

[3] *In re Taylor* (2015) 60 Cal.4th 1019, 1036; *Fashion Valley Mall, LLC v. National Labor Relations Bd*. (2007) 42 Cal.4th 850, 865 ("A content-based restriction is subjected to strict scrutiny.")

[4] Ultimately, the decision rested on the principle that misleading advertising is not protected by either the First Amendment or the Liberty of Speech Clause in any event.

[5] The reason it was not protected under the First Amendment was related to whether the shopping mall was private property or "public space," another area in which the First Amendment and the Liberty of Speech Clause differ in scope.

[6] The First Amendment being the lesser included rule, if a law fails the First Amendment test, it fails the Liberty of Speech Clause test.

[7] "in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts . . . private hospitals, sanitariums . . . ."

[8] See *Am. Acad. of Pediatrics v. Lungren*, (1997) 16 Cal.4th 307, 346 ("whenever the court has determined that the defenders of a measure have failed to provide a sufficient justification to support a challenged provision's overall impingement upon the constitutional rights at issue, the court has struck down the provision 'on its face,' even if the statute may encompass at least some situations in which its provisions would not unduly burden the constitutional right.")