Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. 96-232, 96-233, 96-234, 96-235 and 96-236

IN THE MATTER OF

Ravich, Koster, Tobin, Oleckna Reitman & Greenstein, P.C., a/k/a TEAMLAW, a Law Firm,

and

Kenneth S. Oleckna
and
Charles E. Meaden
and
Samuel V. Convery, Jr.
and
Raymond Eisdorfer

ATTORNEYS AT LAW

Decision

Argued: September 18, 1996

Decided: April 8, 1997

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics in all matters.

David B. Rubin appeared on behalf of respondents TEAMLAW and Kenneth S. Oleckna.

Bernard K. Freamon appeared on behalf of respondent Charles E. Meaden.

Warren W. Wilentz appeared on behalf of respondent Samuel V. Convery, Jr.

Michael P. Ambrosio appeared on behalf of respondent Raymond Eisdorfer.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

These matters were before the Board based on a recommendation for discipline filed by the Committee on Attorney Advertising ("CAA"), pursuant to R.1:19A-4. All respondents were charged with unethical conduct arising out of the same event: a gas pipeline explosion in Edison, New Jersey in March 1994. Specifically, respondents were charged with violations of RPC 7.3(b)(1) (contacting a prospective client for the purpose of obtaining professional employment) and RPC 7.3(b)(4) (direct contact with a prospective client concerning a specific event when pecuniary gain is a significant motive for the contact). Because respondents were charged with violations of the same rule, the matters were consolidated for a hearing before the CAA.

In its report, the CAA set forth the following factual background:

> Shortly before midnight on Wednesday, March 23, 1994, a 36-inch natural gas pipeline owned by Texas Eastern Transmission Corp. exploded a few hundred yards from the Durham Woods apartment complex in Edison, New Jersey. Eight of the 63 apartment buildings were completely destroyed by fire and all 1500 residents living in the complex were displaced for various lengths of time. Surprisingly, none of the residents were killed and relatively few were physically injured.
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> Within the first 45 minutes to one hour following the explosion, the Middlesex County chapter of the American Red Cross established an emergency shelter in the Edison High School. Signs designating the high school as a Red Cross disaster shelter or service area were quickly erected on the street and placed on the doors of and inside the building. Red

Cross volunteers, wearing shirts, jackets and/or badges with the Red Cross insignia, set up the cafeteria as a reception and food area and the gymnasium as a sleeping and living area. Approximately 50-60 cots were initially set up in the gym, with approximately four feet between cots. The Monmouth County chapter arrived sometime later with a trailer full of cots which were also set up on the gymnasium floor. Witnesses described the atmosphere in the shelter as chaotic and the Durham Woods residents themselves as scared, disoriented and distraught.

According to reports in several newspapers, lawyers were at the site within an hour or so of the explosion and maintained a presence there, and at the Red Cross shelter, for the next few days. Specifically, it was reported that one law firm had parked a recreational vehicle near the site and that other lawyers were observed handing out business cards to victims in the shelter.

On April 7, 1994, the Supreme Court asked the Committee to commence an investigation into the reports of lawyers' activities following the explosion. Recognizing that the Committee did not possess the personnel or other resources necessary to conduct an investigation of this magnitude, arrangements were made to have the Office of Attorney Ethics conduct the investigation on behalf of and prosecute any complaints it might file before the Committee. The investigation resulted in the filing of formal complaints against Samuel V. Convery, Jr., Raymond Eisdorfer, Charles E. Meaden, Kenneth S. Oleckna, and Ravish, Koster, Tobin, Oleckna, Reitman, Greenstein, P.C., a/k/a 'TEAMLAW.'

[CAA report at 2-3]

RAVICH, KOSTER et al., a/k/a TEAMLAW (DRB 96-232)

and

KENNETH S. OLECKNA (DRB 96-233)

Respondent Oleckna was admitted to the New Jersey bar in 1972. He has no prior disciplinary history. He is a partner in the Ravich, Koster firm.

Respondent Oleckna and the OAE entered into a stipulation of facts (Exhibit P-1), in which TEAMLAW did not join. The facts in Oleckna and TEAMLAW were set forth in the CAA report as follows:

> Upon arriving at his office at 9:00 a.m. on the morning of March 24, 1994, Respondent Oleckna received a series of telephone calls from former and/or current clients who resided at the Durham Woods apartment complex. The callers advised him of the explosion and requested his legal assistance.
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> Later that day, Oleckna discussed the explosion with his partners Michael Reitman, David Ravich and Arnold Koster. Among other things, the four partners discussed advertising their legal services to Durham Woods residents in the local newspapers. They ultimately made preparations to run a newspaper advertisement that weekend which would feature an aerial photograph of the explosion site.
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> They also contacted a trailer company about leasing a construction trailer or some other type of mobile office to be located near the site. Having read announcements in two local newspapers seeking donations of clothing and other personal items for the victims of the explosion, the partners also discussed purchasing toiletry kits for distribution to Durham Woods clients.
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> On Friday, March 25, 1994, Arnold Koster rented a Winnebago-type recreational vehicle (hereinafter 'RV') to be used as a mobile office and arranged to have it located near the explosion site by the weekend. That

afternoon, after filing a class action complaint on behalf of the Durham Woods residents, Oleckna received a telephone call from Koster who advised him that an RV was being driven to Edison High School where Oleckna was to meet it. The firm's plan was for potential clients who called the office to be directed to the RV where Oleckna would meet with them.

Oleckna arrived at Edison High School between 6:00 and 7:00 p.m. and boarded the RV, which was equipped with a cellular telephone. At the time, there were in excess of 100 vehicles in the high school parking lot, including emergency vehicles belonging to the media. The firm's RV was parked approximately 100 feet from the high school and was the fourth in a line of other vehicles located to the left of the entrance to the building. Its location was between the shelter entrance and a bank of telephones set up for the use of the shelter patrons. Several Edison Township Police Department vehicles were double-parked in front of it. At approximately 9:00 p.m., having received no telephone calls from the firm, Oleckna left the vehicle and the site.

On Saturday, March 26, 1994, in the middle of the morning, Oleckna received a telephone call at his home from Reitman who was at the office. Reitman advised him that they had just received calls from two clients who were unable to come to the office and that he, Oleckna, should go to the RV to meet with them. Oleckna brought some tape to the RV with the idea of placing some materials identifying the firm on the vehicles's windows in order to assist these and other clients with appointments in finding the vehicle. He then went to the firm's offices, photocopied the prototype newspaper advertisement, returned to the RV and taped two 8 1/2 by 11" copies to the front windshield, one to the window located in the rear door, and a fourth in a picture window on the other side of the vehicle. The advertisements, which were not published until Sunday, March 27, 1994, were the only markings identifying the RV with the firm.

Later that afternoon, Ron Cella, a paralegal in the firm, delivered a case of toiletry kits to the RV. Some were given to clients who were interviewed by Oleckna after having been referred to the RV by the firm's principal office. Before leaving the site at the end of the day, Oleckna entered the shelter at the Edison High School and deposited the remaining toiletry kits on an empty table. The kits, which were of nominal value, did not bear any markings identifying them with the firm.

At approximately 9:00 a.m. on Sunday morning, March 27, 1994, Oleckna received a telephone call at home from the office. He was advised that the Edison Police Department had called the firm and stated that the RV would be towed unless it was moved promptly. He then picked up the driver and went to the Edison High School to remove the RV from the parking lot. All of the advertisements in the windows of the RV were removed at that time.

Oleckna and the driver moved the RV to the Durham Woods apartment complex and parked it on the grass next to a Texas Eastern trailer, from which adjusters were taking releases and paying residents. Oleckna entered the trailer to secure an advance check for one of his clients who had been injured. He also sought, and was granted, permission to park the RV on the grass next to the trailer. Oleckna went home at approximately 6:00 p.m. and returned shortly thereafter upon receiving a call from a Texas Eastern official ordering him to remove the RV. He traveled back to the complex and drove the RV back to his house.

By Monday, March 28, 1994, the newspaper advertisement had generated a substantial number of telephone inquiries to the firm's offices from Durham Woods residents, many of whom had been permitted to move back into their apartments. Due to the volume of calls, Oleckna drove the RV back to the apartment complex that afternoon.

As clients continued to call the principal office, paralegals were dispatched from the RV to their apartments to gather information and take care of necessary

paperwork. Oleckna remained in the RV throughout the day, using it as a mobile office. The RV was returned to the lessor on Tuesday, March 29, 1994.

Based upon the foregoing facts, the formal Complaint alleged that Respondents Oleckna and the law firm of Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, a/k/a 'TEAMLAW,' had violated RPC 7.3(b)(1), in that they contacted prospective clients for the purpose of obtaining professional employment when they knew or should have known that the physical, emotional or mental state of the people was such that they could not exercise reasonable judgment in employing a lawyer, and also violated RPC 7.3(b)(4), in that they had direct contact with prospective clients for the purpose of obtaining professional employment and the communication involved direct contact with prospective clients concerning a specific event when the contact had pecuniary gain as a significant motive. [CAA report at 15-20]

CHARLES E. MEADEN (DRB 96-234)

Respondent Meaden was admitted to the New Jersey bar in 1982. He has no prior disciplinary history.

The CAA reported the relevant facts as follows:

On March 24, 1996, Respondent, a solo practitioner with a part-time practice and few clients, went to his law office in Tenafly. When a client failed to appear for a 12:00 noon appointment, he left for the day and headed home. However, having heard about the explosion on the radio and television, he decided to drive to Edison out of 'curiosity as much as anything else' and because he 'was interested in seeing if clients could be obtained.' [Transcript of interview conducted by Office of Attorney Ethics on June 7, 1994, Exhibit C-7].

Following directions he had received at a fire station in Metuchen, Respondent soon learned that most of the roads leading to the

vicinity of the explosion had been blocked off by the police. He parked his car and decided to try [to] walk to the site but again found his way blocked by police.

At this point, Respondent walked to a nearby gas station where he called his office and answering machine. While there, he met an individual who introduced himself as Ariv Khan. When Respondent advised Mr. Khan that he was an attorney, Khan indicated that his girlfriend, Rona Lawson, a resident of the Durham Woods apartment complex who had been relocated to the Red Roof Inn, might be interested in speaking to an attorney. He further indicated that he knew the way to the Red Roof Inn and offered to direct him there. Having learned from a Mr. Vasalick, a person he met while attempting to walk to the site, that there was a potential for contacting people at the Red Roof Inn, Respondent followed Mr. Khan's directions to the motel.

Upon arriving at the Red Roof Inn, Mr. Khan led Respondent to Ms. Lawson's room. She was not in at the time, so they waited for her in the second floor lounge. She returned from running errands approximately 30 minutes later.

Mr. Khan introduced Ms. Lawson to Respondent, who advised her he was an attorney, gave her copies of his business card and retainer agreement, and offered his services. Ms. Lawson seemed to be very cool to the entire discussion and Respondent withdrew to the second floor lounge.

The lounge was crowded with people watching television news reports on the explosion and partaking of the hot and cold buffet being offered by the motel. Most, but not all, of the people there appeared to be with a group of Virginia retirees on a bus tour. Although he is not certain, Respondent believes he may have obtained the names of one or two prospective clients while mingling in the lounge.

When it became apparent from the news broadcasts and personal observation that he was going to be unable to leave the motel for

quite a while, Respondent went down to the main lobby to make some phone calls. While sitting there, a large Hispanic man by the name of Torres sat down next to him. Mr. Torres, who was visibly upset, spoke about the effect the explosion had had on him and, crying at one point, expressed concern about his wife's condition. Respondent gave Mr. Torres a copy of his business card and told him that he might follow up by sending him a letter.

Respondent was at the Red Roof Inn for approximately three or four hours. During that period of time he made direct contact with and handed out business cards to approximately four or five people. He also compiled a list of the names of 16 prospective clients who were injured or lost their homes and/or property in the explosion.

On the following day, Friday, March 25, 1994, Respondent went to his office and drafted what he referred to as a 'follow-up' letter to be sent to the individuals on the list. Since he did not have the individuals' current addresses, the letters were addressed to the prospective clients, care of the American Red Cross, Central New Jersey Chapter. When he was satisfied with the final draft, Respondent authorized his secretary, who was located off-site, to print the letters, sign his name and mail them. The letters were postmarked March 29, 1994, the sixth day following the explosion.

Based upon the foregoing facts, the formal Complaint alleged that Respondent violated RPC 7.3(b)(1) in that he contacted and/or sent written communications to prospective clients for the purpose of obtaining professional employment when he knew or reasonably should have known '....that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer[,]' and violated RPC 7.3(b)(4) in that he sent written communications to prospective clients concerning a specific event when the contact had pecuniary gain as a significant motive, and the written communication did not

contain the wording required by subparagraphs (i) through (iii).

[CAA report at 8-11]

SAMUEL V. CONVERY, JR. (DRB 96-235)

Respondent Convery was admitted to the New Jersey bar in 1980. He has no prior disciplinary history.

Respondent and the OAE entered into a stipulation of facts. Exhibit J-1. In addition, the CAA heard testimony of various individuals. The facts, as set forth by the CAA, are as follows:

> Respondent, a resident of Edison, heard the Durham Woods gas pipeline explosion shortly before midnight on Wednesday, March 23, 1994. Knowing that a home on a neighboring street had previously blown up from a gas explosion, when he heard the 'pop,' which was followed by a 'loud swishing sound,' and saw an orange glow in the nighttime sky, he took his wife, daughter and pets and left to spend the night at his son's home.
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> On Friday, March 25, 1994, Respondent received a call at his law office from Praful Raja, a leader of the Indian community with whom he had worked closely while serving as Mayor of Edison from 1991-1993. Mr. Raja advised him that a number of Indian citizens had been displaced as a result of the explosion and asked Respondent to accompany him to the Edison High School which had been established as a Red Cross shelter. At approximately noontime, Respondent, Mr. Raja and a mutual acquaintance named Richard Luszcewski drove to the shelter. According to Respondent, he visited the shelter as a former mayor and longtime friend of the Indian community.
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> Upon arriving at the shelter, Respondent was greeted by residents and politicians, and shared his concern for the victims of the explosion. At one point, he was interviewed by a reporter for radio station WCTC, who mistakenly believed him to be the then-current mayor of Edison, George Spador. At no time

during the interview or his visit to the shelter did Respondent discuss the legal implications of the disaster or allude to his availability as a lawyer to represent the victims. He left the shelter approximately 45 minutes after he arrived.

Later that afternoon, Respondent spoke to Prabhu Patel, a long-time friend, client, and respected leader of the Indian community who had also been at the shelter. During their conversation, Mr. Patel advised respondent that many members of the Indian community had approached him expressing a need for legal advice and that he had recommended Respondent, distributing some of his business cards. He then asked Respondent if his firm could and would handle the kind of legal work the victims might require. After speaking with one of his per diem associates, Benjamin Leibowitz, Respondent advised Mr. Patel that his office would be willing to represent the displaced families and agreed to meet with some of them the next day.

On Saturday, March 26, 1994, Prabhu Patel and several of the families to whom he had recommended Respondent arrived at Respondent's offices. On his own initiative, Mr. Patel took some of Respondent's business cards that were available on Respondent's desk with the intention of distributing them to other members of the Indian community in need of legal advice. Although Respondent did not know that Mr. Patel had taken business cards at that time, he acknowledged that Mr. Patel had free access to his office, carried a number of his cards with him, and had referred a number of cases to him in the past. However, he never asked or otherwise induced Mr. Patel to solicit clients on his behalf with regard to this or any other matter.[1]

On Saturday, March 26, and Sunday, March 27, in response to specific requests by Prabhu Patel and Praful Raja, who were acting as

[1] Patel testified that he made respondent aware of the fact that he would be recommending respondent's services to several members of the Indian community at the shelter. Respondent did not disagree with that testimony. Rather, respondent testified that he believed Patel would recommend his services only to those persons who approached Patel with legal questions or who specifically asked for a referral.

intermediaries or 'ombudsmen' for the Indian community, lawyers from Respondent's firm spoke with several Indian families and advised them of their legal rights. Respondent's firm was ultimately retained by approximately 40 families, 12 of whom later left for other firms.

[CAA report at 20-23]

RAYMOND EISDORFER (DRB 96-236)

Respondent Eisdorfer was admitted to the New Jersey bar in 1988. He has no prior disciplinary history.

Respondent and the Office of Attorney Ethics ("OAE") entered into a stipulation of facts. In addition, the CAA heard testimony from various individuals, including respondent. The facts, as set forth in the CAA's report, are as follows:

> Respondent first learned of the natural gas pipeline explosion in the late morning or early afternoon of Friday, March 25, 1994, when he returned a telephone call his office had received from Raphael Londono. Mr. Londono, a former client and close personal friend, resided in the Durham Woods apartment complex and had been relocated to the Red Cross emergency shelter following the blast.
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> Mr. Londono told Respondent that he had gathered a group of about 15 of his relatives and friends (hereinafter 'the Londono group' or 'the group') who resided in the apartment complex and were in need of legal advice. He asked Respondent if he would meet with the group at the shelter and Respondent agreed.
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> The meeting was held the afternoon of Friday, March 25, 1994, in the gymnasium portion of the shelter which was being used as a sleeping and living area. It was at the shelter that Respondent met with and spoke to all but one of the members of the group for the first time. However, Respondent had been recommended to every member of this initial group by either Mr. Londono or some other

member of the group and all were expecting him to speak with them. Some members claim that even before meeting him they knew Respondent would represent them. Others attended the meeting only to meet him before making a decision about legal representation.

Upon arriving at the shelter and observing the members of the group, Respondent concluded:

> Everyone had injuries, some physical, and all psychological. Parents were telling me that their children were crying at night, that they were afraid of loud noises and that they couldn't be left alone. The adults also indicated that they were jumpy and fearful of loud noises. I was specifically asked to find Spanish speaking psychiatrists, psychologists and various other doctors who would agree to treat people without requiring any money right away. Many of the people I spoke with had no insurance whatsoever. [Letter from Respondent to Office of Attorney Ethics dated June 16, 1994, attached to Stipulation of Facts as Exhibit 3.]

Respondent spoke to the group for approximately one and one-half hours through his secretary, who served as his interpreter. For the most part, the members of the group sought Respondent's counsel before speaking with representatives of Texas Eastern Transmission Corp. or its insurance carrier, Continental Insurance Co. These representatives were also present in the shelter making payments, and obtaining receipts, apparently for emergency living expenses, although the testimony was not dispositive on this issue. During the course of this meeting, Respondent assured the members of the group that they were not giving up their legal rights by accepting emergency payments for living expenses from Texas Eastern or Continental Insurance. He also produced retainer agreements, completed them and had them executed by some of the members of the group.

At some point during the meeting, Arthur Lape, a Red Cross official, approached Respondent and asked him to leave because lawyers were not permitted in the shelter. Mr. Londono objected and told Mr. Lape that he had invited Respondent to the shelter to speak to the group. Mr. Lape advised Respondent and Mr. Londono that the meeting could not take place in the shelter and offered to transport the group to another site where they could meet in privacy. He then advised Respondent that a van for the use of the group would be parked at the back door. Respondent agreed with this proposed course of action and Mr. Lape left the area. Respondent remained. Respondent left only after Mr. Lape returned, some 30 minutes later, with a police officer and again asked him to leave the premises.

By the end of Friday, March 25, 1994, within 48 hours after the explosion, Respondent had signed retainer agreements with 26 Durham Woods residents from seven households. On Saturday, March 26, 1994, Respondent obtained signed retainer agreements from an additional 20 Durham Woods residents from six households. By the time he was interviewed by the Office of Attorney Ethics on June 17, 1994, Respondent represented a total of 222 victims from 84 households, almost none of whom had been clients of his before the explosion. According to Respondent, these clients were the results of unsolicited referrals made by other members of the initial Londono group.

Based upon the foregoing facts, the formal Complaint alleged that Respondent violated RPC 7.3(b)(1) in that he contacted prospective clients for the purpose of obtaining professional employment when he knew or should have known '...that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer' and violated RPC 7.3(b)(4) in that he had direct contact with prospective clients for the purpose of obtaining professional employment and the communication involved direct contact with prospective clients concerning a specific

event when the contact had pecuniary gain as a significant motive.

[CAA report at 11-15]

* * *

Before making its factual findings, the CAA set forth the conclusions of law that served as the basis for its factual findings. Some of those conclusions established guidelines for interpreting RPC 7.3, inasmuch as little New Jersey law exists in this regard. For example, in interpreting RPC 7.3(b)(1), with which all respondents were charged (which prohibits a lawyer from contacting a prospective client for the purpose of obtaining professional employment if the lawyer knows or reasonably should know that the person could not exercise reasonable judgment in employing a lawyer due to the person's physical, mental or emotional state), the CAA announced:

> When an accident or disaster occurs, which by its nature is sufficiently serious to suggest to an ordinarily prudent attorney that the victims may be so injured or upset that they may not be able to 'exercise reasonable judgment in employing a lawyer,' particularly when subjected to importunings, the burden then shifts to the attorney to demonstrate that, prior to seeking to initiate contact with such victims, she or he knows that each such prospective contact is in fact able to exercise reasonable judgment. [Original emphasis].[2]
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> [CAA report at 26-27]

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[2] This standard departs from that enunciated by the Court in In re Anis, 126 N.J. 448 (1992). In that case, which involved a letter of solicitation to the father of a Lockerbie crash victim one day after his son's remains were identified, the Court held that the standard to be applied in determining whether a potential client is able to exercise reasonable judgment in employing a lawyer is an objective one (knew or should have known). The standard offered by the CAA is more stringent, imposing on the attorney a burden to ascertain whether prospective clients might be unduly sensitive.

In determining which actions constitute attempts to initiate contact with a potential client, the CAA noted:

> [A]ttempts to initiate contact may take many forms, some unconventional, and indeed the very degree of unconventionality may in some cases be key to the contact strategy. Such efforts to make in-person contacts could include not only telephone calls or personal self-introductions but any form of activity which puts the attorney or attorney's representative in physical proximity to the prospective client in a manner reasonably calculated to lead to direct personal communication with that client. Thus, setting up a booth at a key direct access point to an accident or disaster site, or at the site of a temporary shelter for victims, would be prohibited. An installation physically more removed from an accident site, but which was intended to draw attention by virtue of its characteristics, such as a flamboyant, noisy, or outsized display or setting, would also be improper. The test is whether the proximity and overall nature of the setting is calculated or makes it reasonably likely to attract the attention and interest of victims, considering the physical distance and any other relevant factors.
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> It should be apparent from the foregoing that the mere fact that a particular prospective client, rather than the lawyer, utters the first word or knocks on the lawyer's door is not enough to make the lawyer's conduct ethical. Rather, it is necessary to look carefully at the facts of each case to determine whether the lawyer's overall presence -- however it is manifest -- in the vicinity of an accident or disaster site makes it reasonably likely that victims will approach the lawyer.
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> In sum, by taking any actions to put themselves in proximity to an accident or disaster site, lawyers create a presumption that they are seeking to initiate contact with prospective clients for pecuniary gain, and thus also put themselves within the zone of scrutiny compelled by RPC 7.3(b).
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> [CAA report at 27-29]

As to TEAMLAW, the CAA found that the decision to rent the recreational vehicle was made by the firm, not just by respondent Oleckna, acting alone. In addition, the CAA noted, the vehicle bore the firm's ad. The CAA, therefore, recommended that the firm as a whole be held responsible for actions taken by its principals acting on behalf of the firm, citing the Board's decision in In re Jacoby and Meyers, N.J. (1997) (law firm reprimanded for recordkeeping violations). Of course, distinct from Jacoby and Meyers, the principals in this New Jersey firm are individually admitted to the practice of law in New Jersey. The CAA recommended that the firm be reprimanded for its misconduct.

As to respondent Oleckna, the CAA found that he violated RPC 7.3(b)(1) by placing a recreational vehicle — with window advertisements targeting disaster victims — in reasonably close proximity to both the Red Cross shelter and, later, the site of the victims' apartments. The CAA found that respondent's use of the ad evidenced a design on his part to attract or initiate contact with prospective clients. The CAA remarked that, even if the use of the ad was not intentional, respondent should have known that the above was a reasonably likely result. Finally, the CAA found that, if respondent's sole motivation had been to service existing firm clients who had previously called asking for help, he could have chosen far less intrusive and offensive alternatives, such as arranging for the transportation of the clients to and from his office.

Although the CAA determined that such conduct should merit a suspension from the practice of law, it recommended that respondent receive only a reprimand because of the absence of prior decisional law.

As to respondent Meaden, the CAA found him guilty of a violation of RPC 7.3(b)(1) by "initiating personal contact" with Mr. Torres, who was crying and obviously upset, and by approaching Ms. Lawson. The CAA noted that

> [w]hile in some circumstances approaching a prospective client after receiving information from an intermediary on behalf of an accident or disaster victim might be permissible, before doing so the lawyer would have to be clear that in extending the invitation the intermediary was acting at the request and with the full knowledge and consent of the victim. The testimony as to Mr. Meaden's solicitation of Ms. Lawson did not establish the requisite degree of victim volition, relating only that the victim might be interested in speaking to an attorney.
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> [CAA report at 29]

Finally, the CAA found that respondent violated RPC 7.3(b)(4) by forwarding a "targeted direct-mail solicitation letter to victims in care of the Red Cross without meeting the specific requirements of that paragraph." Id. at 30.

The CAA recommended that respondent receive a three-month suspension from the practice of law, "given the number of rule violations and the aggravating circumstance of an approach to an individual who was already crying."

With respect to respondent Convery, the CAA concluded that the evidence presented left unresolved the question of whether respondent knew of Patel's activities in distributing respondent's

business cards at the shelter. The CAA noted, however, that Patel had telephoned respondent on Friday afternoon, just days after the explosion, and had asked respondent if he handled such cases and if his firm would agree to interview prospective clients. Given respondent's knowledge that Patel had distributed respondent's business cards in the past and that he was in touch with victims of the blast, the CAA found that respondent had the duty to expressly warn Patel that (1) he should not solicit clients in respondent's behalf and (2) he should confine the distribution of the business cards to those individuals who approached him in an unsolicited fashion. Analogizing Patel to an intermediary, the CAA further found that, to the extent that Patel was acting with respondent's knowledge, Patel's mere presence at the shelter "created [the] potential for the same kinds of misconduct that we have sanctioned in the earlier cases [and that respondent] should have warned Mr. Patel, as set forth above." Due to the lack of decisional law addressing similar misconduct, however, the CAA declined to recommend any discipline. The CAA determined to issue an advisory opinion with guidelines on the use of business cards and intermediaries.

With regard to respondent Eisdorfer, the CAA found that he violated RPC 7.3(b)(1) for his intrusion into the gymnasium, which had become a living and sleeping area for at least 100 disaster victims. The CAA noted that respondent

> ...spoke in an open area where he could have been overheard and seen by many who were not

> in Mr. Londono's group.[3] He received no permission to be there from any Red Cross official in a position of authority. By putting himself in such close proximity to what a Red Cross representative described as the distraught victims' only 'safe haven,' we believe Mr. Eisdorfer's actions were calculated, at least in part, to initiate contact with prospective clients beyond those who arguably had invited him there (the members of Mr. Londono's immediate group). Moreover, even if it were not so calculated, he should have known that his presence made it reasonably likely that contacts with other prospective clients would ensue. No inquiry or effort was made by Mr. Eisdorfer to find other, completely private alternatives where he would not be speaking in a public area, even after a Red Cross official offered to help him do so. Indeed we find Mr. Eisdorfer's failure to leave for 30 minutes after being requested to do so by a Red Cross official, and until a second request was made in the company of a police officer, to be conduct which substantially aggravated the violation.
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> [CAA report at 30-31]

The CAA acknowledged that there was no evidence of any affirmative efforts by respondent to obtain prospective clients. The CAA remarked that, in reaching its decision, it drew no inferences from respondent's success in obtaining approximately 230 new clients that were affected by the explosion.

The CAA concluded that respondent's misconduct should compel a suspension from the practice of law. However, because of the absence of prior decisional law applying RPC 7.3(b)(1) to conduct

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[3] This factual finding by the CAA should be contrasted to the testimony of Arthur Lape, the Red Cross official who approached respondent and asked him to leave. Lape specifically testified that, even as he approached the group respondent was addressing, he could not hear what respondent was saying.

similar to respondent's, the CAA recommended that respondent receive a reprimand.

* * *

The CAA suggested that, in order to reconcile the need for immediate legal assistance to disaster victims with the prohibition against soliciting vulnerable victims, the state and county bar associations should work with various branches of state government and private agencies, such as the Red Cross, to create emergency legal response teams of lawyers who could be present at a disaster site within a matter of hours to offer free advice, information and referral to disaster victims. The CAA suggested that these volunteer attorneys be prohibited from representing disaster victims for compensation.[4]

* * *

As pointed out by the CAA, there is very little decisional law in New Jersey to guide the interpretation of RPC 7.3. On the other hand, there are a fair number of out-of-state and U.S. Supreme court cases that deal with the constitutionality of regulation of commercial speech. That issue, however, raised by all of these respondents, is reserved for the New Jersey Supreme Court's consideration.

[4] It appears that one such program is already in place in Middlesex County and that lawyers from that program were present at the Durham Woods shelter site. In addition, a similar plan is pending with the New Jersey State Bar Association.

Because of the scarcity of decisional law on the subject, the Board must look not only to the purpose of the regulation of commercial speech — to guard against intrusion on the special vulnerability and private grief of victims and their families — but also to the particular facts of every case. We must further bear in mind one of the most frequently cited themes in attorney regulation, that is, the need to maintain public confidence in the bar. Appearances and public perception, therefore, frequently become issues for concern, as we see in many of our conflict of interest cases. That is especially true in cases such as these because of the national publicity generated by the media. Although the CAA discounted any consideration of media accounts of the lawyers' activities, it was probably moved by the images stirred by those accounts. See, e.g., CAA report at 32.

Following a de novo review of the record, the Board makes the following findings:

AS TO RESPONDENT OLECKNA

and

RESPONDENT TEAMLAW

To recap the facts: the gas explosion occurred shortly before midnight on Wednesday, March 23, 1994. On the morning of Thursday, March 24, 1994, respondent received a series of telephone calls from former and/or current clients who were victims of the disaster, requesting legal assistance. That same day, Thursday, Oleckna and three other law partners decided to place an advertisement in local newspapers, beginning on Sunday, March 27,

1994. The Office of Attorney Ethics ("OAE") found nothing wrong with the running of the ad. Respondent Oleckna and the three partners also decided to distribute to the victims free toiletry kits with no markings identifying the firm. Again, the OAE found no fault with this action. Lastly, respondent Oleckna and the three partners decided to rent a van to serve as a mobile office near the shelter site to facilitate access to the firm by potential clients who had called the law firm.

On Friday, March 25, 1992, one of the partners, Arnold Koster, rented a van and arranged to have it parked near the explosion site by the weekend. Before the van was taken to the shelter parking lot, respondent Oleckna had already filed a class action complaint on behalf of the Durham Woods residents. Koster then called respondent Oleckna to inform him that the van was being driven to the shelter site, where respondent Oleckna was to meet him. The van had no signs or markings identifying the firm's name.

On Friday, respondent Oleckna arrived at the shelter site between 6:00 and 7:00 P.M. and entered the van. At that time, more than 100 vehicles were present in the high school parking lot. The firm's van was parked approximately 100 feet from the entrance to the high school and was the fourth in a line of other vehicles located to the left of the entrance of the building. The van was located between the shelter entrance and a bank of telephones set up for the use of the victims. At about 9:00 P.M., respondent Oleckna left the vehicle and the site. Again, as of that time, there was nothing identifying the firm as the user of the van.

According to the OAE, up until that point nothing that either respondent Oleckna or respondent Teamlaw did violated the ethics rules.

The next day, Saturday, March 26, 1994, in the middle of the morning, respondent Oleckna received a telephone call from another partner, Reitman, who was at the office at the time. Reitman notified respondent Oleckna that the firm had just received calls from two clients who were unable to come to the office. Reitman requested that respondent Oleckna go to the van site to meet with the clients. It is at this juncture that, the OAE charged, respondent Oleckna and respondent TEAMLAW began to engage in unethical conduct. Specifically, on arriving at the parking lot, respondent Oleckna taped two 8 1/2" x 11" copies of the newspaper ad to the front windshield of the van, one to the window located in the rear door and another in a picture window on the other side of the vehicle. As noted earlier, the ad still had not been published in the newspaper at that time. The copies of the ad were the only markings linking the van with TEAMLAW. According to the OAE, the ad on the van, coupled with the vehicle's close proximity to the shelter entrance, had the potential to attract the attention of victims who might be walking to the location of the telephones and, therefore, constituted an improper direct contact with the disaster victims, in violation of RPC 7.3(b)(1). Otherwise stated, the OAE took issue with the taping of the ad to the van, because it had the potential to attract not only the clients who had called respondent TEAMLAW for representation, but also other victims who had not

contacted respondent TEAMLAW and who happened to be passing by the van. The OAE conceded that there was no evidence that such potential had become a reality in this case, that is, that the ads on the van had lured any passers-by. Nevertheless, the OAE disapproved of respondents' attempt at direct contact with prospective clients, because of the possibility that the victims might be exploited. The CAA agreed with the OAE, concluding that the window advertisements targeted disaster victims and evidenced an intent on respondents' part to attract or initiate contact with prospective clients. Because of the absence of prior decisional law in this area, the CAA recommended that respondents receive only a reprimand. The CAA suggested that any efforts to make impermissible contact with a prospective client, whether or not those efforts are successful, are prohibited activities described in RPC 7.3(b)(1) thorough (4).

* * *

RPC 7.3 (personal contact with prospective clients) reads as follows:

> (a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).
>
> (b) A lawyer shall not contact *** a prospective client for the purpose of obtaining professional employment if:
>
> (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or
>
> * * *

> (4) the communication involves direct contact with a prospective client concerning a specific event when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided that the letter [complies with subparagraphs (i),(ii) and (iii)].
>
> * * *

The Board cannot concur with the OAE and the CAA that respondents TEAMLAW and Oleckna violated RPC 7.3(b)(1) and (4).

The OAE argued that respondents' placement of the advertisement in the van's windows "created the distinct, palpable danger of exploiting the victims of the disaster as they passed by the camper." OAE's brief to the Board at 4. The OAE's concern was that, because the camper was parked 100 feet from the entrance of the shelter, between the entrance and the telephones, any victims who might be walking to the telephones might see the van with the "targeted" advertisement in its windows. Although the OAE did not expressly articulate its objection in greater detail, it is logical to infer that the OAE viewed this conduct as an attempt at contact with prospective clients without first ascertaining the physical, emotional or mental state of the individuals [RPC 7.3(b)(1)], as well as an attempt at direct contact with prospective clients about a specific event, conduct that is generally labeled as targeted direct contact [RPC 7.3(b)(4)]. The OAE argued that the possibility that the ad and the vehicle might be spotted by the explosion victims supported a finding of unethical conduct on respondents' part. The Board disagrees.

In reaching the conclusion that respondents' actions did not rise to the level of unethical conduct, the Board found it unnecessary to draw a distinction among (1) an aborted attempt at misconduct, (2) an action that, although completed, did not accomplish the intended results, and (3) a finalized action that actually produced the intended outcome. Although, here, respondents successfully completed the placement of the ad in the windows of the van — as opposed to a mere attempt to affix the ads — the Board's finding of no misconduct was grounded not on respondents' lack of success in retaining new clients through the ad on the van, but instead on the following factors:

First, unlike the attorney in In re Anis, 126 N.J. 448 (1992), respondents did not send letters of solicitation to the victims of the pipeline explosion. The 8 1/2" x 11" copies of the newspaper ad that were placed in the windows of the van constituted the alleged offense, that is, the "contact" mentioned in RPC 7.3(b)(1) and (4). Second, unlike Anis, there is nothing indicating that respondents knew or should have known that the victims' physical, emotional or mental state at the time was such that they could not exercise reasonable judgment in employing a lawyer. In this regard, the Board was persuaded by respondents' counsel's argument that, unlike in Anis, there was no disrespect for a mourning family in the initial throes of private grief. Indeed, the ads on the van could not reasonably make the victims who happened to be passing by feel importuned, overwhelmed by respondents' presence or pressured to enter into an unwanted professional relationship.

They were free to stop by the van, to look at the ads and to continue walking if they so desired. The circumstances attendant to the location of the van or to the placement of the ads in the windows were not of the sort that would give the displaced residents reason to feel that their personal privacy had been invaded or their personal suffering increased. Third, even if respondents' conduct had been patently offensive, it would be unfair to discipline them in view of the dearth of clear guidelines to the bar in the area of advertisement and solicitation in certain specific circumstances. And while ignorance of the law is never an excuse for unethical conduct, it cannot be denied that the law in this area is insufficiently developed to mandate discipline in this case. Indeed, even the OAE acknowledged that it was reasonable for respondents to conclude that, inasmuch as the running of the ad in the newspapers was permissible, its placement on the van, too, was perfectly proper. As disciplinary matters continue to be reviewed on a case-by-case basis, until this area is clarified and provides greater guidance to the members of the profession, the Board cannot conclude that the conduct complained of deviated from well-established principles of law. Adding to the Board's conviction that dismissal is the right result in this matter is the unavoidable sense conveyed by the record that respondents did not act with venality, greed or even poor judgment.

For all the above reasons, a six-member majority determined to dismiss the charges against respondents Oleckna and TEAMLAW. Three members would have imposed a reprimand, finding that respondents in

essence solicited prospective clients when they placed the ads on the van parked at the relief center. One of those members believed that there should be an absolute ban on establishing temporary branch law offices at the location of a disaster or accident.

AS TO RESPONDENT MEADEN

As recited earlier, some twelve hours after the Edison gas explosion, respondent Meaden drove to the site out of curiosity and also to "see if clients could be obtained." Because of a roadblock, he was unable to get close to the Durham Woods complex. After respondent stopped at a gas station to make some telephone calls, he met a Mr. Khan, who was attempting to get to the Red Roof Inn, where his girlfriend and other victims of the pipeline explosion had been relocated. Learning that respondent was an attorney, Mr. Khan indicated that his girlfriend might be interested in consulting with a lawyer. Respondent and Mr. Khan then drove to the Red Roof Inn, arriving there at approximately 4:00 P.M. Following a very brief conversation with Ms. Lawson, during which respondent gave her a copy of his business card and a retainer agreement, respondent retreated, sensing that Ms. Lawson was unreceptive to the discussion.

Respondent's next stop was at the second floor lounge, which was crowded with people watching television news reports about the explosion. According to respondent, no one seemed injured or upset. In fact, respondent added, the displaced residents seemed to be having a reasonably good time watching television and

sampling food from a free buffet. While there, respondent compiled a list of names of approximately sixteen people mentioned to him by residents of Durham Woods that he had met at the Red Roof Inn. Respondent also met four or five other people, who appeared to be "normal, both physically and emotionally." The only exception, according to respondent, was Mr. Torres.

Respondent testified that, when he went down to the main lobby to make some phone calls, a man by the name of Torres sat down next to him and started a conversation with him. Visibly upset, Mr. Torres talked about the explosion and, crying at one point, told respondent of his concern about Mrs. Torres' condition. Respondent then gave Mr. Torres a copy of his business card and told him that he might follow up by sending him a letter.

Respondent stayed at the Red Roof Inn for approximately three or four hours, waiting for the roadblocks to clear. On the following day, Friday, March 25, 1994, respondent went to his office and sent letters to the individuals on the compiled list. The letters were postmarked March 29, 1994, six days after the explosion.

The CAA found that respondent violated RPC 7.3 (b) (1) by approaching Ms. Lawson. Although the CAA allowed that, in some situations, it is not unethical for an attorney to approach a prospective client after receiving information from an intermediary in behalf of a victim of an accident, the CAA remarked that the lawyer would have to satisfy himself or herself that the intermediary was acting with the full knowledge and consent of the

victim. Concluding that the evidence did not establish "the requisite degree of victim volition," the CAA found that respondent violated RPC 7.3 (b) (1) when he contacted Ms. Lawson.

RPC 7.3 (b) (1) states as follows:

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

In essence, the CAA found that respondent improperly contacted Ms. Lawson (1) because she had not requested his legal representation, (2) because respondent had not assured himself that Mr. Khan was acting in her behalf when he told respondent that Ms. Lawson might be interested in talking to an attorney, and (3) because respondent should have known that Ms. Lawson's physical, emotional or mental state was such that she could not exercise reasonable judgment in employing a lawyer.

It is undeniable that respondent did not make certain that Ms. Lawson wanted to consult with him. It is also undisputed that respondent did not make sure that Ms. Lawson was not extremely vulnerable and, therefore, unable to exercise reasonable judgment in retaining him. Respondent contended, however, that he did nothing wrong in approaching Ms. Lawson. He pointed to Mr. Khan's invitation to speak with Ms. Lawson and to his quick discontinuation of the conversation after learning that Mr. Khan was incorrect in his assessment of Lawson's interest. Respondent

also pointed to the fact that Ms. Lawson was not in any sort of distress, mental or physical. Arguing that it was reasonable for him to infer that Mr. Khan knew that Ms. Lawson was in a healthy state of body and mind, respondent claimed that he did everything that he should have done under the rule. The CAA would require a higher standard: that respondent first verify that Mr. Khan was right and next ascertain that Ms. Lawson's condition was such that she was fully capable of exercising reasonable judgment in engaging a lawyer.

RPC 7.3 does not always require that the lawyer first determine the state of mind of a prospective client before having direct contact with the client about a specific event. See RPC 7.3 (b)(4). Only when an ordinarily prudent person would assume under the circumstances that the prospective client would be extremely vulnerable does the rule proscribe a lawyer's contact with the prospective client. In Anis, the Court, while making it clear that it was not establishing a bright-line rule, concluded that no discipline would be imposed for truthful letters of solicitation sent more than two weeks after a disaster occurs or a loss becomes known. The Court remarked that the two-week time limitation was merely a reasonable interim guidance, pending an informational hearing by the CAA on how to draw a clearer line of vulnerability. The Court recognized that there might be several degrees of loss or suffering and that mildly injured survivors of an overturned bus incident, for example, might be less vulnerable than the families of the mass airline disaster in Anis.

It is not so clear from the CAA report whether, in its view, respondent violated RPC 7.3 (b) (1) because he failed to make sure that Ms. Lawson indeed wished to speak to an attorney, or failed to verify Ms. Lawson's physical, emotional or mental state, or both. It is equally not so clear whether, in the context of the Edison explosion disaster, an ordinarily prudent person would assume that the victims were so emotionally weak or vulnerable that they would not be able to exercise reasonable judgment in employing an attorney. The record tells us that the explosion victims suffered mostly property loss, with very few and mild injuries. Only in one case did death follow, seemingly because of a pre-existing condition. Under these circumstances, it is not clear that the attorneys had to exercise the same degree of care as the lawyer in the Lockerbie tragedy (Anis) and in other mass disasters of greater proportions. In addition, it might have been reasonable for respondent to assume that Mr. Khan, who represented himself as the boyfriend of Ms. Lawson, might be telling the truth.

In short, all of the above demonstrates that not enough guidance has been given to the bar as to what conduct is banned and what conduct is permissible in the area of solicitation and advertising. If that is so, the Board cannot find by clear and convincing evidence that respondent violated RPC 7.3(b)(1) in the Lawson case.

In the Torres matter, the CAA found that respondent violated RPC 7.3 (b)(1) by "initiating personal contact with Mr. Torres, who was crying and obviously upset." That was the extent of the CAA's

pronouncement in Torres. Again, it is not entirely clear whether the CAA disapproved of respondent's conduct solely because he had personal contact with Mr. Torres, or because the personal contact was at a time when Mr. Torres was visibly distraught, or both. The Board cannot agree, however, with the CAA's finding that respondent initiated personal contact with Mr. Torres. Mr. Torres did not testify at the CAA hearing. The only testimony came from respondent Meaden himself, who contended that Mr. Torres had approached him. Because there is no evidence in the record that respondent was the one to initiate personal contact with Mr. Torres, the CAA's analysis in this regard cannot be sustained. This is not to say, however, that the central issue to a finding of unethical conduct under these circumstances is the determination of who began the contact. In some circumstances, it makes no difference who started the conversation. The relevant inquiry is whether the attorney solicited the representation of the individual, regardless of who uttered the first word in a casual conversation. Here, after informing Mr. Torres that he was an attorney, respondent gave him a business card and told Mr. Torres that he might be sending him a follow-up letter. Respondent himself acknowledged that Mr. Torres was clearly distressed. Charged with the knowledge that Mr. Torres' emotional condition was such that he could not exercise reasonable judgment in employing a lawyer, respondent improperly continued the contact with Mr. Torres, handing him a business card and, in essence, importuning and compounding his sorrow. That is precisely what Anis seeks to

prevent. Accordingly, the Board found that respondent violated RPC 7.3 (b) (1) when he solicited Mr. Torres' representation at a time when he knew that the prospective client was vulnerable.

Respondent also violated RPC 7.3 (b) (4), as he admitted, when he sent targeted direct-mail solicitation letters to victims of the disaster without meeting the specific requirements of subsections (i) through (iii).

In light of the foregoing, a seven-member majority of the Board determined to impose a reprimand. Two members would have dismissed the allegations against respondent, finding no impropriety in the Lawson and Torres matters and believing that the mailing of the letters did not rise to the level of unethical conduct warranting discipline.

AS TO RESPONDENT CONVERY

For the same reasons expressed in the CAA report, the Board unanimously determined to dismiss the allegations of unethical conduct against respondent Convery. The OAE, too, concurred with the CAA's dismissal.

AS TO RESPONDENT EISDORFER

As recited above, approximately two days after the blast, respondent received a telephone call from a Mr. Londono, who was a former client and also a personal friend of respondent. Mr. Londono resided in the Durham Woods apartment complex and had been moved to the Red Cross shelter along with some relatives and

friends. Mr. Londono told respondent that a group of fifteen or so of his family members and friends needed legal advice. He asked respondent to come over to the shelter to meet with them. Respondent agreed. On the afternoon of Friday, March 25, 1994, respondent met with all but one of the members of the Londono group in the gymnasium portion of the shelter, which was being used as a sleeping and living area. It is undisputed that respondent went to the shelter at those individuals' request.

Respondent talked to the group for approximately one and one-half hours. At some point during their meeting, a Red Cross official, Arthur Lape, asked respondent to leave the premises because lawyers were not permitted in the shelter. Mr. Londono, however, objected and informed Mr. Lape that respondent was there at his invitation. Mr. Lape then advised respondent and Mr. Londono that they could not meet in the shelter area and offered to move the group to another location in a van. Respondent agreed and Mr. Lape left the area. When Mr. Londono, however, insisted that respondent stay and speak with the group, respondent remained. He left thirty minutes later, when Mr. Lape returned with a police officer and again asked him to leave the shelter.

The formal complaint charged respondent with violations of RPC 7.3(b)(1) for contacting prospective clients when he knew or should have known that their physical or emotional state was such that they could not exercise reasonable judgment in employing a lawyer, and RPC 7.3(b)(4) for his direct contact with prospective clients for the purpose of obtaining professional employment.

The CAA found that respondent violated RPC 7.3(b)(1) only. It made no mention of a violation of RPC 7.3(b)(4). The CAA took issue (1) with respondent's intrusion into the living and sleeping area of at least 100 accident victims, (2) with respondent's meeting with the Londono group in an open area where he could have been overheard and seen by other victims outside of the Londono group, and (3) with the fact that his actions were allegedly calculated to initiate contact with prospective clients beyond those who had invited him there or, at minimum, posed the reasonable likelihood that contact with other such prospective clients would ensue. The CAA found that respondent's failure to leave for thirty minutes after being requested to do so by Mr. Lape was an aggravating factor. The CAA believed that respondent's conduct merited a suspension from the practice of law, but recommended a reprimand because of the absence of prior decisional law applying RPC 7.3(b)(1) to conduct such as respondent's.

As found by the CAA, respondent's conduct did not violate RPC 7.3(b)(4). Indeed, there is no evidence that respondent had unsolicited direct contact with prospective clients for the purpose of obtaining professional employment. Accordingly, the Board unanimously determined to dismiss that charge of the complaint. For several reasons, however, the Board cannot concur with the CAA's finding that respondent violated RPC 7.3(b)(1) by placing himself in close proximity to prospective clients with the intent to initiate contact with them:

(1) respondent did nothing to identify himself to other prospective clients as an attorney;

(2) respondent met with those who invited him in a remote corner in the gymnasium at a time when the bulk of the other victims were in a separate room (cafeteria) having a meal;

(3) the noise level in the gymnasium was fairly high due to the close proximity of the cafeteria, thereby decreasing the possibility that other victims might overhear respondent's discussion with those who invited him; and

(4) there is no evidence that anyone actually overheard respondent's conversation. In fact, the Red Cross representative testified that he did not overhear any portion of respondent's conversation with the group even as he was approaching them.

Similarly, respondent's failure to leave the premises cannot be deemed an aggravating factor. The record does not clearly establish that, once the van was at the back door to transport respondent to his office, respondent was actually notified of that fact. Mr. Lape admitted that he did not do so, as he had no other conversation or contact with respondent between the first and second time he asked respondent to leave. Furthermore, Mr. Londono testified that he and the rest of the group objected to the notion of leaving the shelter to meet with respondent elsewhere, as they had invited respondent there, where they were temporarily living. To require respondent to leave the shelter would have limited the Londono group's assembly and speech rights in a situation where

there was virtually no reasonable likelihood that the privacy of other victims might be invaded. Lastly, counsel's argument that there can be no punishment without law is well taken. In light of the lack of prior decisional law in the area, as acknowledged by the CAA, it would be unfair to discipline respondent under these facts.

Accordingly, a seven-member majority of the Board determined to dismiss the allegations of the complaint. Two members dissented, voting for a reprimand for the reasons contained in the CAA report.

* * *

The foregoing demonstrates the obvious uncertainty — indeed confusion — that prevails in the field of advertising and solicitation of legal services. The lack of notice of appropriate behavior in this area is the result of (1) the acknowledged absence of decisional law interpreting the advertising rules and guiding the bar, (2) the dearth of attorney advertising guidelines, and (3) the lack of clarity of some of the advertising rules, particularly certain provisions of RPC 7.3.

In 1986, a petition was filed with our Supreme Court attacking the constitutionality of a regulation on attorney advertising adopted in 1984 and then found in RPC 7.2(a). Petition of Felsmeister & Isaacs, 104 N.J. 515 (1986). Writing for the Court, Chief Justice Wilentz stated as follows:

> We believe that attorney advertising without any restrictions whatsoever might seriously

> damage important public interests, but that excessive restriction might harm other public interests equally important. The goal, as we view it, is to strike the proper balance, one that results in the largest net gain for the public. The effort to do so, however, though guided by logic, necessarily suffers from inexperience; the modern era of attorney advertising, which commenced with Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed. 2d 810 (1977), is less than a decade old. That effort is therefore undertaken with an open mind and a willingness to change as we learn more, as we learn perhaps, of a better balance.

[Petition of Felsmeister & Isaacs, supra, 104 N.J. at 517-18]

Since then some progress has been made in this area. It is all too clear from the instant cases, however, that more needs to be learned. It is known, for example, that a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through mailed, written communication. It is also known that states may not, consistent with the First and Fourteenth Amendments of the Constitution, categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems. Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed. 2d. 475 (1988). Shapero held that such targeted, direct-mail solicitation was constitutionally protected commercial speech and that it differed from face-to-face solicitation because the "recipient of such advertising is not faced with the coercive pressure of a trained advocate or the pressure for an immediate yes-or-no answer ***." Shapero v.

Kentucky Bar Association, supra, 108 S.Ct. at 1919. Shapero pointed out that a personalized letter can be regulated by, among other things, requiring the use of the word "advertisement" on it or requiring an instruction to the reader on how to report inaccurate or misleading statements.

RPC 7.3(b)(4) allows a lawyer to send a letter by mail to a prospective client about a specific event when such contact has pecuniary gain as a significant motive, provided that (1) the word "advertisement" is prominently displayed in capital letters at the top of the first page; (2) the letter contains a cautionary note that, before selecting a lawyer, the recipient should give the matter careful thought; and (3) the letter contains a notice that, if any statements are inaccurate or misleading, the reader may report such to the Committee on Attorney Advertising.

In 1992, our Court reviewed the propriety of a targeted direct-mail solicitation letter sent to the father of one of the victims of the Pan American Flight 103 disaster over Lockerbie, Scotland. In re Anis, supra, 126 N.J. 448 (1992). There, the letter containing misleading statements and offering legal services was sent one day after the remains of the victim were identified. The Court found that the attorney's conduct was unethical because he solicited legal representation at a time when he "knew or should have known that the prospective clients could not exercise reasonable judgment in employing an attorney, in violation of RPC 7.3(b)(1)." Id. at 460. The Court made it clear that it was not enacting a blanket ban on targeted direct-mail solicitation. The

Court reasoned, however, that the proscription of RPC 7.3(b)(1) against such direct solicitation of clients who are vulnerable certainly embraced the hours and days after a tragic disaster occurs or loss becomes known. Accordingly, the Court fashioned an interim guideline, pending a suggested public hearing process by the Committee on Attorney Advertising. The Court ruled that no discipline will be imposed for truthful letters of solicitation mailed more than two weeks after a disaster takes place or a loss becomes known.

It is known also that states may constitutionally place a total ban on in-person solicitation for pecuniary gain under certain circumstances. Ohralick v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed. 2d 444 (1978). The Court remarked that

> [u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

[Ohralick v. Ohio State Bar Association, supra, 436 U.S. at 458]

What is not so evident is whether RPC 7.3 absolutely prohibits face-to-face solicitation. RPC 7.3(a) allows a lawyer to initiate "personal contact" with a prospective client, subject to certain requirements. While it is probable that this RPC, adopted in 1984,

bans face-to-face solicitation, as the rule postdated the 1978 Ohralick ruling that states may constitutionally ban in-person solicitation, a reading of paragraph (a) does not make it so obvious. It is not known, for example, if "personal" means "in-person" as well. It is also not known if "personal" encompasses "telephonic." In the same vein, paragraph (b) talks about "contact" and section (1) mentions "direct contact." It is not clear, for instance, if "contact" includes "face-to-face contact" too.

The above examples are only a few that come readily to mind. On deeper reflection, perhaps more could be found. And if this Board's members expressed some disagreement about the interpretation of the rules — as demonstrated by the fact that, in all but one case (Convery), the Board's vote was divided — it stands to reason that the bar and the general public, too, may have a misunderstanding about what is permissible and what is not. The Board, thus, urges the Court to embrace this opportunity to take steps to dispel some of the reigning confusion in the area of advertising and solicitation, either by making it clearer to the bar and the public what RPC 7.3 allows and disallows, or by requesting that the Committee on Attorney Advertising issue more guidelines on the subject, or both. Alternatively, the Court may wish to consder submitting the issue to the Professional Responsibility Rules Committee. What should not continue, in the Board's view, is the state of perplexity apparently experienced by

members of the bar and by the public as well when the application of the advertising rules is invoked.

In sum, the Board's vote was as follows:

As to Respondents Oleckna and TEAMLAW:

Dismiss - six

Reprimand - three

As to Respondent Meaden:

Reprimand - seven

Dismiss - two

As to Respondent Convery:

Dismiss - unanimous

As to Respondent Eisdorfer:

Dismiss - seven

Reprimand - two

The Board also determined to require respondent Meaden to reimburse the Disciplinary Oversight Committee for administrative costs incurred in connection with his disciplinary matter.

Dated: 4/8/97

LEE M. HYMERLING
Chair
Disciplinary Review Board