# HOW THE BALL GAME IS PLAYED:

## *Ethical Boundaries on Cold Calling Potential Clients*



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## Introduction

Most well established law firms get the majority of their new clients from doing a superior job and getting referrals from other clients. Still, securing that major lawsuit or big client is an exciting opportunity, and more importantly, a financial imperative for many firms. Unfortunately, the ethical implications of client recruiting are often quite restrictive and securing a major new client while navigating the web of ethical rules is in many ways similar to strikes in a baseball game. The object is to hit the baseball and not strike out.

This paper strives to provide direction for lawyers and law firms attempting to find their way through the ethical rules and secure desired business. Managing to persuade a specific client to consider your law firm for their legal needs is a difficult task even without the ethical rules of conduct. With the ethical rules in place, many forms of contact that may seem ordinary are forbidden. Consequently, it is essential for every attorney to be familiar with the rules of the game before they attempt to play. The purpose of this paper is to lay out these rules, their implications, and suggest useful strategies to play the game fairly, within the rules of the game, and still win in the end.

Given that the rules of the game change in some degree according the league, the scope of this paper is limited to the specific ethical rules of Texas as they apply to contacting potential clients. While the ethical rules of all states are substantially similar, it is important to be familiar with the specific rules of the jurisdiction in which you practice. Regardless of jurisdiction, this paper should be a useful guide for anyone interested in recruiting specific clients.

After a brief background of the rules of professional responsibility (the rules of the game), this paper will explore the impact of the rules on different strategies employed by attorneys to contact prospective clients. The body of the paper is divided into five sections. Each discusses another tactic that attorneys desiring to contact a specific client may consider. First, the paper discusses what seems like the most ordinary tactic, picking up the phone and calling the client. Unfortunately, it is clear that this tactic is specifically forbidden by the rules of professional responsibility and can result in striking out. With the most obvious answer to contacting a prospective client out of the question, this paper next delves into what you *can* do to secure a desirable client. The following topics discuss the ethical limits of general advertising, contact by mail and prerecorded messages, direct contact with attorney's involved in the matter and securing a permanent client from participation in a single lawsuit.

**Background**

Early versions of the rules of the game are the ethical standards for lawyers that have been in existence since the early twentieth century when the American Bar Association adopted the 1908 Cannons of Ethics.[1] The 1908 Canons were a set of suggested standards for attorneys.[2] Many courts did not formally adopt the cannons and,

[1] *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A new Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1125 (1999) (discussing the evolution of the body of professional responsibility law).

[2] *Id.*

in most areas, attorneys were not required to follow the canons.[3] Still, the 1908 Cannons of Ethics served to represent the general view that attorney advertising and solicitation was not proper. Cannon 27 provided that "[s]olicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional."[4]

As the legal profession grew and society changed, the 1908 Cannons of Ethics quickly became outdated. Thus, new rules of the game in the form of the 1969 Model Code of Professional Responsibility were drafted. The 1969 Model Code included a section of disciplinary rules setting forth the minimum ethical conduct required by attorneys and providing for repercussions should those standards not be met.[5] Like the 1908 Cannons, the 1969 Model Code also included a general ban on solicitation and advertising.[6] Soon after the ABA adopted the Model Code in 1969 it was met with criticism due to it's focus on attorneys as advocates among other things.[7] Thus, soon after it's adoption, the 1969 Model Code was replaced and the 1983 Model Rules of

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[3] *Id.* at 1125-27.

[4] Nathan M. Crystal, PROFESSIONAL RESPONSIBILITY PROBLEMS OF PRACTICE AND THE PROFESSION 417 (Erwin Chemerinsky, ed., Aspen Publishers 2004).

[5] Mary C. Daly, *The Dichotomy Between Standards and Rules: A new Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1128-29 (1999).

[6] *Id.*

[7] Nathan M. Crystal, PROFESSIONAL RESPONSIBILITY PROBLEMS OF PRACTICE AND THE PROFESSION 13 (Erwin Chemerinsky, ed., Aspen Publishers 2004).

Professional Conduct were formulated, the current rules of the game.[8] The 1983 Model Rules of Professional Responsibility, although amended in 2002, remain in force today and forty states have adopted the model rules in some form.[9]

As all rules of any game have grey areas, it becomes necessary to have an umpire to settle disputes. The ultimate umpire is courts. For example, the ban on attorney advertising remained unquestioned until 1976 when the Supreme Court of the United States declared that commercial speech is protected, to some degree by the First Amendment of the Constitution in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*.[10] In this case the court determined that commercial speech that simply states prescription drug information is protected by the First Amendment.[11] While the Court's decision in *Virginia State Board of Pharmacy* did not have any immediate effect on attorney advertising, it laid the groundwork necessary to declare the ban on attorney advertising unconstitutional. Three years later, the Supreme Court did just that in *Bates v. State Bar of Arizona*.[12]

The *Bates* case revolved around an advertisement placed in an Arizona newspaper by John Bates and Van O'Steen, two attorneys running a legal clinic.[13] The

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[8] *Id.*

[9] *Id.*

[10] 425 U.S. 748 (1976).

[11] *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748, 772-73 (1976).

[12] 433 U.S. 350 (1978).

[13] *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354 (1978).

advertisement stated that "appellants were offering 'legal services at very reasonable fees' and listed their fees for certain services."[14] After noting that it was not ruling on advertisements relating to the quality of legal services or in-person solicitation, the Court held that a state may not prevent a "truthful advertisement concerning the availability and terms of routine legal services" from being published in a newspaper.[15] The court specifically stated that the advertisers "did not wish to report any particularly newsworthy fact or to comment on any cultural, philosophical, or political subject."[16] Despite this fact, the court ruled, as it had in *Virginia Pharmacy*, that the commercial speech was protected.[17]

In the wake of *Bates*, every state's statutes on attorney advertising were suddenly unconstitutional. Attorney advertising skyrocketed and states created their own umpires, in the form of disciplinary committees and took steps to re-implement rules that would control the advertising. Missouri amended it's Professional Responsibility Code to provide for attorney advertising in the limited categories of name, address, telephone number, areas of practice, date and place of birth, schools attended, foreign language ability, office hours, fee for an initial consultation, availability of a schedule of fees, credit arrangements, and the fee for specific routine legal services.[18] The Missouri

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[14] *Id.*

[15] *Id.* at 384.

[16] *Id.* at 363.

[17] *Id.* at 384.

[18] *In re R.M.J.*, 455 U.S. 191, 194 (1982).

statute was challenged in *In re R.M.J.*[19] in 1982. The rules of the game changed when the Court concluded that the statute was unconstitutional and laid out three rules for use in determining the constitutionality of advertising restrictions.[20] First, the Court concluded that "when experience has proved that in fact such advertising is subject to abuse," a state could prohibit attorneys from promulgating false or inherently misleading advertisements.[21] Secondly, the Court determined that a state may not fully prohibit advertising that is potentially misleading but may regulate it provided that the regulation is "no broader than reasonably necessary to prevent the deception."[22] Finally, the Court held that regulation of truthful advertising is limited when the state has "a substantial interest" and the regulation is "in proportion to the interest served."[23]

During the time that the Court considered the constitutionality of certain bans on legal advertising, it also considered the implications of the first amendment on allowing attorneys to solicit potential clients in-person. While it would seem that the line of cases on in-person solicitation would be similar to those involving advertising, the Court determined in *Ohralik v. Ohio State Bar Assn.*[24] that since in-person solicitation involves both speech and conduct it is subject to a lower level of scrutiny than advertising.[25]

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[19] 455 U.S. 191 (1982).

[20] *Id.* at 204-07.

[21] *Id.* at 203.

[22] *Id.*

[23] *Id.*

[24] 346 U.S. 447 (1978).

[25] *Id.* at 457.

Thus, in the interest of preventing fraud, overreaching, undue influence, intimidation, and other forms of "vexatious conduct," the court again changed the rules of the game by concluding that states are free to prohibit in-person solicitation.[26]

The United States Supreme Court has also considered other forms of direct solicitation including advertising targeted at specific individuals and direct mailings to specific people.[27] In both of the above situations, the court found a violation of the first amendment rights of attorneys to prohibit them from engaging in solicitation targeted at a specific individual or group of individuals.[28] The Court found that these cases differ because they are not in-person and thus not subject to the same risks of fraud and overreaching.[29]

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[26] *Id.* at 462.

[27] *See generally Shapero v. Ky. Bar Assoc.*, 486 U.S. 466 (1988) (determining that "direct mail advertising" by attorneys cannot be banned by a state); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (determining that a state cannot prohibit targeted advertising).

[28] *See generally Shapero*, 486 U.S. 466 (determining that "direct mail advertising" by attorneys cannot be banned by a state); *Zauderer*, 471 U.S. 626 (determining that a state cannot prohibit targeted advertising).

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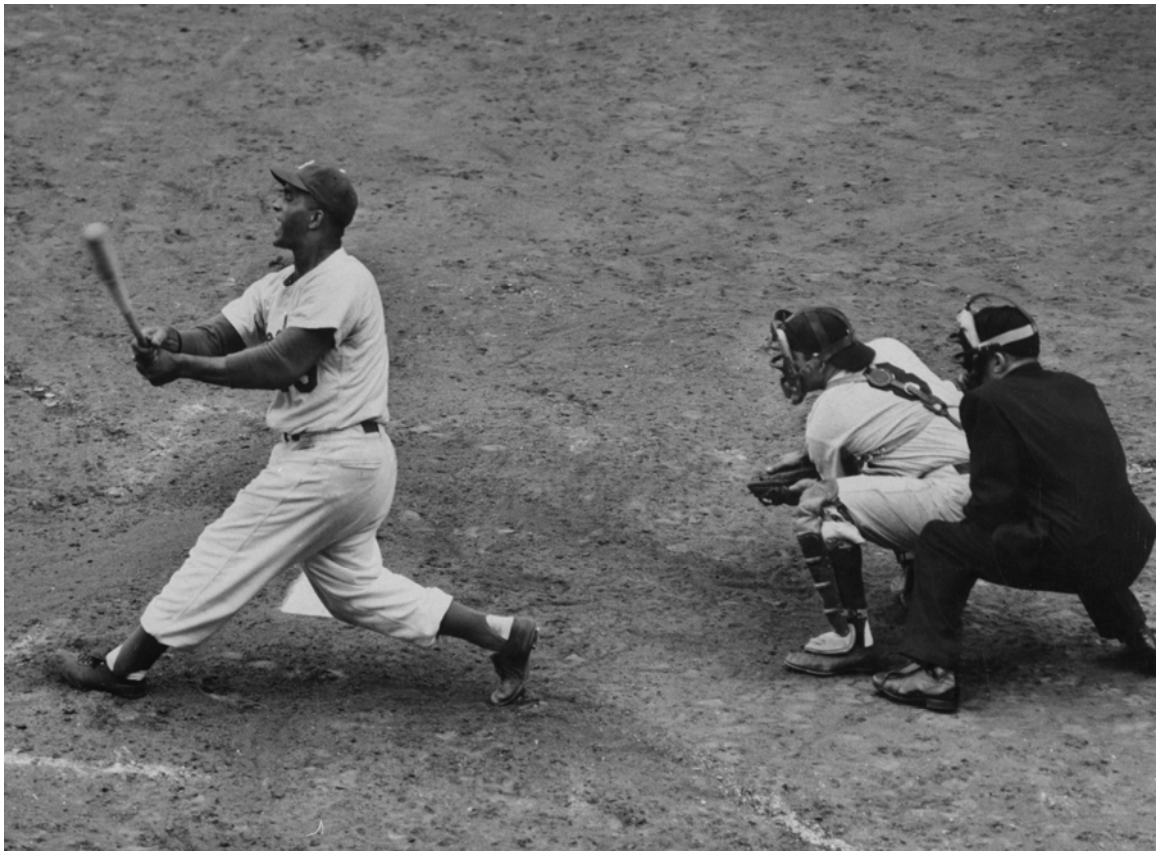

Rookie Joe Black swings for a strike during the 1952 World Series.

**Discussion**

A. *Don't strike out: Direct Contact with Potential Clients is Prohibited*

*"[B]ut there is no joy in Mudville –*
*mighty Casey has struck out.*[30]*"*

When an attorney desires to become involved with an attractive piece of litigation, it seems only natural to pick up the phone and call the client involved. The rules of professional responsibility, however, prohibit this natural reaction.[31] The reasoning behind prohibiting this type of conduct is related to the elevated risk of fraud

[30] Ernest Lawrence Thayer, *Casey at the Bat*, SAN FRANCISCO EXAMINER, June 3, 1888.

[31] *See* TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.03 (Vernon 2006).

and overreaching that is associated with any type of direct contact.[32] Because telephone solicitation is so similar to in-person solicitation, they have been categorized together. Thus, calling a client or personally visiting them in order to solicit business is forbidden by the ethical standards that govern attorneys.[33] Punishment for breach of this ethical standard is usually suspension or disbarment.[34] The attorney may not only strike out, but could be suspended from any future games.

With regard to intellectual property attorneys, this standard may not always be the same. While there are currently no special provisions allowing intellectual property attorneys to have in-person or telephone contact with potential clients, it has been recognized that patent attorneys generally deal with clients who are "sophisticated persons" and "generally need less protection from false or misleading advertising."[35] Following this line of reasoning, it seems possible that an attorney could successfully argue that the policy concerns of overreaching and fraud are not applicable to the sophisticated clients that patent attorneys deal with in the course of business. This line of reasoning would not be entirely new. A special exception for the practice of patent law

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[32] *See, e.g., Quinn v. State Bar of Texas*, 763 S.W.2d 397, 400 (Tex. 1988) (stating that in-person solicitation poses "dangers of overreaching and misrepresentation").

[33] *See* TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.03 (Vernon 2006).

[34] *See, e.g.,Neely v. Comm'n for Lawyer Discipline*, 196 S.W.3d 174, 186-88 (Tex. App.—Houston [1 Dist.] 2006 pet. filed).

[35] *Texans Against Censorship, Inc. v. State Bar of Tex.*, 888 F.Supp. 1328, 1371 (E.D. Tex. 1995).

was recognized by the Supreme Court with regard to practicing in different jurisdictions and practice by a non-lawyer.[36] However, until the time when this argument is successfully made for direct client contact, it is advisable for attorneys to continue to conduct business within the bounds of the ethical rules of their jurisdiction.

B. *Getting to First Base: General Advertising*

*"But Flynn let drive a single, to the wonderment of all*[37]*"*

When considering different methods of attracting potential clients, it is important not to overlook general advertising. General advertising takes on many forms including television, radio, print and web pages. Especially useful for newer firms that are not established in the legal community, general advertising, at the very least, provides name recognition for potential new clients when determining what attorney they want to represent them.

General advertising is daunting for many attorneys because of it's heavily regulated nature.[38] While the precise complexities of the rules with regard to advertising are beyond the scope of this paper, it is important to note that most jurisdictions provide attorneys with the opportunity to have their advertisements pre-approved.[39] Pre-approval removes the fear for many attorneys that their advertisement will unwittingly subject

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[36] *Sperry v. State of Florida*, 373 U.S. 379 (1963).

[37] Ernest Lawrence Thayer, *Casey at the Bat*, SAN FRANCISCO EXAMINER, June 3, 1888.

[38] *See generally* TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rules 7.02, 7.04, 7.07 (Vernon 2006).

[39] *See, e.g., Texans Against Censorship, Inc.*, 888 F.Supp at 1365-66.

them to discipline from their state bar. Thus, with the pre-approval option available, general advertising is a useful way for attorneys to get name recognition and new clients.

One of the most difficult problems to regulate in baseball is steroid use. Much like that, website regulation is a difficult area in attorney advertising. Due to many factors, including a lack of familiarity with the rules and a general indifference to them, the websites of many attorneys and law firms are not compliant with the rules of professional responsibility. Solutions to this problem have been suggested, but often it seems that many attorneys embrace a passive route to website compliance. With a passive route, attorneys make their website without taking the rules into consideration and reform it later if the disciplinary board requests they do so. This is a rapidly growing area of professional responsibility and attorneys should look carefully into the rules of their states when formulating a web site for their practice.[40]

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[40] *See generally* Andy Grieser, *Don't Get Snared by Web Rules*, 2 No. 34 A.B.A.J. E-Report 6 (2003); Daniel Backer, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 FORDHAM L. REV. 2409 (2002); *Final Changes and Comments to the Texas Disciplinary Rules of Professional Conduct Part VII*, 68 TEX. B.J. 398 (2005); Jeffrey E. Kirky, *Legal Ethics in Cyberspace: Keeping Lawyers and Their Computers Out of Trouble*, 18 T.M. COOLEY L. REV. 37 (2001); Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 ST. JOHN'S J. LEGAL COMMENT. 529 (2002); Margaret Hensler Nicholls, *A Quagmire of Internet Ethics Law and the ABA Guidelines for Legal Website Providers*, 18 GEO. J. LEGAL ETHICS 1021 (2005).

Lou Gehrig shakes the hand of Babe Ruth as he rounds the base.

C. *Rounding Second Base: Contacting Potential Clients by Mail*

*"There was Jimmy safe at second . . .*[41]*"*

One permissible way of directly contacting a potential client is through the mail.[42] The problem with this method is that it is quite impersonal and requires an affirmative act on behalf of the potential client – namely picking up the phone and calling you. Because

[41] Ernest Lawrence Thayer, *Casey at the Bat*, SAN FRANCISCO EXAMINER, June 3, 1888.

[42] *See* TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rules 7.05, 7.07 (Vernon 2006); *Shapero*, 486 U.S. 466.

most potential clients are not versed in the rules of professional responsibility governing attorneys, they may feel that your letter indicates that you are too busy or too lazy to contact them personally. This is a bad first impression to make on a desired client and thus these methods are often undesirable.

When sending a letter to a potential client, Texas requires that the envelope be clearly marked "ADVERTISEMENT."[43] This further lowers the possibility that the client will even open the letter, let alone pick up the phone and call the attorney if they do open it. Further, regulations relating to this type of solicitation are quite high.[44] Texas further requires that the letter be filed with the state and an application fee is required.[45]

The Texas Disciplinary Rules of Professional Conduct (Texas Rules) are illustrative of the type of regulation typical in the area of personal solicitation by mail. The Texas Rules require that the letter as well as the envelope it is sent in be marked "ADVERTISEMENT" in a "color that contrasts sharply with the background color."[46] The Texas Rules further state that the word "ADVERTISEMENT" be in a font size that is at "least 3/8" vertically or three times the vertical height of the letters used in the body

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[43] *See, e.g.*, TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rules 7.05, 7.07 (Vernon 2006).

[44] *See* TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rules 7.05, 7.07 (Vernon 2006).

[45] *See* TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rules 7.05, 7.07 (Vernon 2006).

[46] TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.05(b)(1)(i) (Vernon 2006).

of such a communication, whichever is larger."[47] After the solicitation is created, the attorney must review and approve the writing and retain a copy "for four years after its dissemination."[48]

The Texas Rules also contain a filing requirement for personal solicitations.[49] This requirement states that an attorney must "file with the Advertising Review Committee of the State Bar of Texas, no later than the mailing or sending by any means."[50] The Texas Rules require that a copy of the mailing as well as a "representative sample of the envelopes or other packaging in which the communications are enclosed," an application form, and a "check or money order payable to the State Bar of Texas for a fee set by the Board of Directors. Such Fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations."[51]

Because of the ineffective nature of mailings and the hoops that attorneys are required to jump through in order to use them, solicitation of potential clients through the mail is not the most desirable or practical method for obtaining new business. Still,

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[47] TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.05(b(1)(ii) (Vernon 2006).

[48] TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.05(e) (Vernon 2006).

[49] TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.07 (Vernon 2006).

[50] TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.07(a) (Vernon 2006).

[51] TEX. GOV'T CODE ANN. TIT. 2, Subt. G, App A, Art. 10 § 9 Rule 7.07(a)(1)-(3) (Vernon 2006).

despite the undesirable traits of solicitation by mail, it is sometimes the only method by which an attorney can make contact with a potential client. Further, because all attorneys are bound by the same rules, clients are likely to receive mailings from more than one attorney. When selecting the attorney for their needs, clients are likely to use the mailings as a starting place. If you have not been able to make contact with the potential client in any other way, sending a mailing is often a prudent choice.

D. *Making it to Third Base: Attorney-to-Attorney Contact*

*". . . and Flynn a-hugging third.*[52]*"*

Despite heavy regulation on attorney conduct with regard to potential clients, attorney conduct with regard to contacting other attorneys is almost non-existent.[53] Thus, one very simple way of becoming involved in an attractive piece of litigation is by contacting an attorney already involved. Using this method, attorneys can easily become involved as specialists or local counsel. When contacting an attorney who is involved in the case it is important to showcase your talents and let them know what you or your firm can add to the team already in place. Often your firm can add knowledge of the local rules and familiarity with the judges in the area. Other times attorneys with particularized specialties can add important knowledge of an eclectic niche in the law or a particular type of patent. Becoming involved in litigation through dealings with an attorney who is already involved is, with regard to the ethical rules, the easiest way to gain a potential new client.

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[52] Ernest Lawrence Thayer, *Casey at the Bat*, SAN FRANCISCO EXAMINER, June 3, 1888.

[53] *See Generally* Sheryl Nance, *Ethics Ruling Allows Solicitation of Former Clients*, N.Y.L.J. June 1990, at *1.

Perhaps it is the turf, the officials, or even the times zone, but some baseball fields are more desirable than others are. Similarly, some courts are more desirable than others are. With regard to patent law, the Eastern District of Texas sees more patent work than any other district. Thus, attorneys desiring to be hired as local counsel are very successful if they are admitted to practice in this district. Ted D. Lee, the coauthor of this paper, had a personal experience with this type of solicitation in the Eastern District of Texas. Upon filing an answer to a lawsuit, a myriad of solicitations in varying forms were received from attorneys admitted to practice before the Eastern District. While the case ultimately settled, it was interesting to experience this type of solicitation firsthand.

The legendary Babe Ruth hits his 60th home run of the season.

E. *Hitting a Home Run: Converting Participation in an Individual Lawsuit to Becoming the Permanent Counsel for a Business*

*"Today I am the Luckiest Man Alive*[54]*"*

In order to become a baseball player for any given major league team an individual usually is scouted at their high school and college games. Further, once recruited for a major league team, additional trading may occur. Thus, in order to get a spot on a great team, a player always has to play their best. The same can be said for an attorney who has been hired for one specific case. Once an attorney has gained a new client for a specific lawsuit, most of the red tape regarding solicitation disappears. There are few practical or ethical bars from contacting an existing client about other legal needs

[54] Lou Gehrig, *Speech at Yankee Stadium*, quotation can be found at http://www.all-baseball.com/archives/021879.html.

that they may have. Provided that you do not mislead, harass, or act fraudulently towards your client, the ethical rules will not bar you from attempting to solicit more business from an existing client.

Further, in situations where there is a current lawsuit, factors leading up to the lawsuit often lead clients to believe that their current general counsel is ineffective or that certain changes need to be made. Your participation in the lawsuit is the perfect time to garner a positive reputation with the client and earn their trust. Thus, participation in an individual lawsuit puts an attorney in the perfect place to solicit more business from a client who may be looking for new counsel anyway.

Legendary Baseball player, Lou Gehrig after his speech in Yankee Stadium.

## Conclusion

Regardless of the game, the ultimate goal is always the same: to win. This is true in baseball as well as the legal field. The method of winning may change depending on the game. For example in baseball, you have to get the most batters around the bases and into home plate. In the legal field, "winning" is not so cut and dry. You can win a lawsuit, a particular motion, or even just "win" the client in the first place. For the purposes of this paper, winning is about getting the desired client to hire you, preferably for all of their business.

What makes any game uniform and fair is a good set of rules. Thus, in baseball you cannot just win by any means necessary, you must win within the framework of the rules of the game. Thus, you cannot just put the ball in your pocket and run around the bases. The same is true in the legal field. You cannot just pick up the phone and call a potential client; you have to contact them through the channels that are available to you under the rules. This means that in order to get a "home run" in the legal world you have to use the channels of general advertising, solicitation by mail, attorney-to-attorney contact, and contact with an existing client. An attorney who uses these channels of allowable contact and plays by the rules of professional responsibility has the best chance of ultimately winning the game.