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## Infrequent Telephone Solicitation to a Place of Business Does Not Constitute a Violation of the Massachusetts Privacy Statute

In *Schlesinger v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 409 Mass. 514, 567 N.E.2d 912 (1991), the Supreme Judicial Court of Massachusetts held that telephone solicitations to an attorney at his office scattered over several years did not violate the Massachusetts privacy statute. The court concluded that the telephone solicitation was neither a "substantial" nor "serious" interference with the attorney's privacy. The court expressly limited its decision to places of business.

### Background

Sales representatives of Merrill Lynch, Pierce, Fenner, & Smith, Inc. ("Merrill Lynch"), a securities firm, phoned Alan J. Schlesinger ("Schlesinger"), an attorney, three to five times per year on the average in an attempt to sell him securities. As a result of continued solicitation, Schlesinger wrote two letters to Merrill Lynch, one in 1984 and one in 1985, stating that he did not want to buy securities and did not want Merrill Lynch's sales representatives calling his office.

In 1990, Schlesinger sought to enjoin Merrill Lynch permanently from calling him at his office to solicit the purchase of securities. Merrill Lynch moved for summary judgment. With no facts in dispute, the trial court granted summary judgment in favor of Schlesinger and entered a permanent injunction against Merrill Lynch. Merrill Lynch appealed the order. The Supreme Judicial Court of Massachusetts transferred the case to its court and reversed the order to enjoin Merrill Lynch. The higher court held Merrill Lynch's action did not constitute an actionable invasion under the Massachusetts privacy statute.

### Analysis

The Massachusetts privacy statute states that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy. The Superior Court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages." Schlesinger urged the court to read the statute literally, claiming that three separate theories of recovery existed since the disjunctive pronoun "or" connected the adjectives. Any interference which was "unreasonable" or "substantial" or "serious" would then constitute a violation of the privacy statute.

The court rejected Schlesinger's statutory interpretation. The court instead held that the statute only prohibited intrusion which were "substantial" or "serious" if the interference was unreasonable. The court asserted that such an interpretation would avoid illogical and impractical results.

The court noted that not every intrusion would constitute a legally cognizable violation of privacy. Some intrusion was inevitable, especially in a professional setting, since the expectation and likelihood of receiving telephone solicitations was greater than in a private home. No type of business

that had a telephone number available to the general public could reasonably expect to be free from all, or even most, annoying telephone solicitations.

Examining the undisputed facts in light of its interpretation of the statute and policy reasoning, the court held that Merrill Lynch's intrusion into Schlesinger's privacy was not "substantial" or "serious" within the meaning of the statute. Merrill Lynch's representatives only called three to five times a year. The calls were brief and made pursuant to a legitimate business purpose and did not constitute a pattern of harassment. Schlesinger's policy of taking all calls further lessened his expectation of privacy with regard to phone solicitations. The court found that Schlesinger reasonably should expect to receive calls at his office from people trying to sell him products or services such as office supplies or billing services during business hours. Thus, the court concluded that Merrill Lynch had not violated Massachusetts's privacy statute. The Supreme Judicial Court of Massachusetts reversed the trial court's order enjoining Merrill Lynch from soliciting business from Schlesinger at his law office.

Suzanne Kuzmenka

### CONSUMER UPDATE

#### MINIMUMS FOR PROFESSIONAL PORTFOLIO MANAGEMENT SERVICES REDUCED

Attorneys who specialize in estate planning, trusts, wills, pensions and profit sharing plans can now recommend professional, financial portfolio management services to more clients because the portfolio minimums have been lowered by many money management companies.

In the past, attorneys, individuals and corporations were blocked from using sophisticated portfolio managers because the managers required a minimum portfolio of \$1 to \$5 million in investable assets. The old minimum is far beyond the scope of many individual estates, profit sharing or pension plans. In 1986, the Department of Labor reported only 337,000 pension plans with assets between \$100,000 to \$1 million dollars.

Now companies such as Shearson Lehman Brothers have lowered the portfolio minimum to \$100,000 (some even as low as \$50,000). Many of the money management programs provide due diligence protection, match risk-return philosophies, monitor results quarterly, carry SIPC protection and charge an annual wrap fee that eliminates fear of churning accounts for commission. Importantly, professional money management enhances the attorney-client relationship and reduces fiduciary responsibility.

**Feature:  
BBB**

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guilty of deception and fraud.

Even in our "civilized" society of today, too many thumbs are being held over too many holes. To date, no one has been able to legislate or regulate the personality and techniques of all salesmen, either in the field of trade or politics.

As the tale of "The Hole in the Leopard Skin" points out, the BBB believes that credibility in advertising is paramount to customer acceptance of advertising as a whole and of the business community, as well.

**Charitable Solicitations**

The BBB's Charitable Solicitations program monitors charities, based upon twenty-three different standards including how the funds will be utilized for the cause intended, as well as what percentage of the dollars collected will go to support the actual cause. The Bureau's role in this self-regulatory program is to encourage businesses and the general public to "give, but give wisely."

**The BBB Inquiry Center**

Information on charities, as well as the information contained on any company in the BBB files, is available by telephone from the Bureau's Inquiry Center. Included in the information made available to any caller are the complaints filed against the company, as well as any government actions which have been filed for matters regarding the company's customer relations practices. The Bureau's Inquiry Center and the Charitable Solicitations Program are also available to anyone at no cost. The programs were established to protect potential buyers and givers from dealing with questionable companies, so that their funds are channeled to responsible organizations within the structure of the free enterprise system.

The BBB wants each person to have at their ready reference, adequate information to make knowledgeable and responsible buying and or giving decisions. *Caveat venditor*, let the seller beware and

the buyer be informed, has now firmly replaced *caveat emptor*. This is the best method of control for the marketplace; a knowledgeable person will realize that, when something seems too good to be true, it usually is.

**Self-Regulation Promotes  
Customer Satisfaction**

Looking forward to the decade of the 1990s, I envision the Better Business Bureau as the major source of resolution in buyer-seller disputes. Self-regulation is the means by which disputes are fairly and efficiently resolved. The future of self-regulatory activities cannot be overstated, as the costs and time involved in litigation continue to increase, making it difficult for the average consumer to have their product and or service problem resolved by going to court.

Self-regulation, through the BBB, precludes thousands of consumer complaints from flooding the already overburdened court system. These complaints, it should be noted, are generally not as involved and can be expeditiously handled through the BBB's Alternative Dispute Resolution system. Businesses recognize that a satisfied customer is a repeat customer. A recent TARP study reported each dissatisfied customer tells approximately nine other people about her unhappiness with a company.

The Bureau's Auto Line and Care Programs are designed to encourage consumer complaints because, according to the TARP study, for every complaint a company receives from one of its customers, there are twenty-six other complaints that go unreported. Nine out of ten silent critics will take their business to a competitor. A Roper Reports study notes that the BBB is the mechanism by which complaints should be handled by businesses because dissatisfied customers turn to the BBB for resolution of their complaints three times as often as any other agency.

Government involvement in buyer-seller issues is needed when self-regulatory procedures are not available to address the problems and to enforce the law. Most busi-

nesses are now more sensitive to the needs of the customer and want to hear from their dissatisfied customers. Therefore, businesses are willing to put forth the money and effort needed to resolve consumer problems. *Fortune Magazine* recently termed the 1990s, the decade of customer satisfaction, when it explored the many ways businesses were working to meet the needs of their customers.

Better Business Bureaus are being asked to do more in the alternative dispute resolution field. For example, in Buffalo the BBB handles the neighborhood justice center disputes under contract with the city and county. Similarly in Dallas, the Better Business Bureau is handling buyer-seller complaints filed with the city against companies in an effort to deregulate the complaint handling process in that area. The BBB is regularly being written into consent orders by state attorneys general and other governmental agencies as a means of resolving current and or future disputes between consumers and a specific business.

Self-regulation and government regulation are clearly distinct; yet, many of the people involved in each of these disciplines recognize that by working together they can perform a better service for the people in their area at a lower total cost.

I believe that self-regulation is the moral basis of any regulation. Self-regulation promotes a responsibility on the part of the business community. Self-regulation is really business ethics put into daily practice for the benefit of both the buyer and seller. The free enterprise system of the United States is based on the self-regulation principle and will continue to prosper if the business community understands and accepts its ethical responsibilities in the marketplace so the consumer—you and I—will be able to obtain quality goods and services at a fair price. At the same time, consumers must accept the role of being responsible shoppers by comparing *before* a purchase is made.