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## ***Shapero v. Kentucky Bar Association: United States Supreme Court Gives First Amendment Protection to Ambulance Chasing Through the Mail***

### INTRODUCTION

Advertising by attorneys became permissible in 1977 when the United States Supreme Court struck down a state disciplinary rule that prohibited attorneys from advertising.<sup>1</sup> The Court held that limited forms of advertising by attorneys are constitutionally protected by the free speech clause of the first amendment.<sup>2</sup> Based on this decision, the Court has consistently held that total bans on the various modes of advertising by attorneys are unconstitutional under the first amendment's free speech guarantee.<sup>3</sup> From initially allowing very limited newspaper advertising<sup>4</sup> the Court has continually expanded the permissible tactics attorneys may use to advertise for new clients.

This expansion reached its peak in *Shapero v. Kentucky Bar Association*.<sup>5</sup> In *Shapero*, the United States Supreme Court for the first time failed to apply the distinction it had previously made between attorney advertising and soliciting of potential clients. By including solicitation within the scope of permissible attorney expression, attorneys may now obtain the names of potential clients from such sources as police reports, court records, obituaries, and the evening news. They may then write these individuals personalized letters, known as targeted direct-mail solicitation letters,<sup>6</sup> offering services for particularized legal problems.

This Note will show how this development occurred and will

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1. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

2. *Id.* at 384. The first amendment's free speech clause provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The first amendment is applicable to the states through the due process clause of the fourteenth amendment. *Bridges v. California*, 314 U.S. 252, 263 n.6 (1941) (citing *Schneider v. State*, 308 U.S. 147, 160 (1939)).

3. See *In re R.M.J.*, 455 U.S. 191 (1982), *infra* notes 77-78 and accompanying text (where the Court struck down an absolute ban that prohibited attorneys from mailing announcement cards to the general public). See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), *infra* notes 81-85 and accompanying text (where the Court invalidated a regulation that prohibited advertising by attorneys that contained information and advice targeted to individuals with a specific legal problem).

4. *Bates*, 433 U.S. at 384.

5. 108 S. Ct. 1916 (1988).

6. *Id.* at 1922.

argue that the expansion to attorney solicitation was inappropriate. The Note argues that although the Court has not specifically distinguished between advertising and soliciting as modes of communication, its past cases have, up until *Shapero*, consistently demonstrated the application of this distinction.

This Note begins with an overview of attorney advertising and solicitation from both judicial and public perspectives. Then the cases that led to the *Shapero* decision are reviewed in the context of how the distinction between advertising and solicitation guided the Court in its previous decisions. The Note will then discuss the *Shapero* Court's opinion and evaluate its reasoning, particularly its overextension of free speech protection to targeted attorney solicitation letters. Finally, the argument will be made that the Court erred in blurring its previously-held distinction between advertising and soliciting.

## I. AN OVERVIEW OF ATTORNEY ADVERTISING AND SOLICITING

The right to speak has never been treated by the United States Supreme Court as an absolute right to say anything.<sup>7</sup> Rather, the Court takes the view that certain types of speech are subordinate to other interests of society and may therefore be regulated by the states.<sup>8</sup> The Court recognizes commercial speech, that is, speech related to the economic interests of the speaker and audience,<sup>9</sup> as such a subordinate category of speech.<sup>10</sup> Commercial speech is less vigorously protected than other types of speech because the Court gives deference to society's interest in restricting such speech.<sup>11</sup>

Attorney advertising and soliciting is included in the category of commercial speech that may be regulated by the states.<sup>12</sup> Since 1977 the Court has, however, consistently held that the first and fourteenth amendments prohibit the states from imposing com-

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7. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50 (1961): "[W]e reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are absolutes. . . . Throughout its history this Court has consistently recognized . . . ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk."

8. *Id.* at 50-51: "[R]egulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First and Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interest. . . ."

9. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (citation omitted).

10. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

11. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971) affirmed without opinion *sub nom.*, *Capital Broadcasting Co. v. Acting Attorney General Kleindienst*, 405 U.S. 1000 (citation omitted).

12. *Shapero*, 108 S. Ct. at 1921 (citation omitted).

plete bans on advertising by attorneys.<sup>13</sup> The Court has determined that complete bans on attorney advertising are overly broad and that the regulation of advertising must be no more extensive than is necessary to serve the states' interest.<sup>14</sup>

Currently, attorneys may engage in a wide range of advertising tactics designed to bring in new clients. This development has caused several Justices to argue that attorneys are putting fees ahead of their clients' interests. Justice Powell, since his retirement from the United States Supreme Court, has expressed this view:

One of the developments that I personally regret is virtually unlimited advertising by lawyers. . . . I like to think of one who is a lawyer as not practicing law primarily to make money. I realize you have to make enough to pay your overhead and to provide for your family, so I'm not suggesting that lawyers should not be adequately compensated.

But our system depends on the rule of the law, and lawyers are officers of the court. And the courts persevere only with the aid and assistance of lawyers [in protecting] the liberties and freedoms of our people.<sup>15</sup>

Retired Chief Justice Reynoldson of the Iowa Supreme Court in reverting to Justice Powell's observations writes: "I suggest that the legal profession is a calling that, unlike a business, still involves the unique and basic concept that a client's interest must be put before that of the lawyer. It follows that the pursuit of clients and fees must not be the all-consuming goal of the practitioner."<sup>16</sup>

In *Florida Bar v. Schreiber*,<sup>17</sup> Justice Ehrlich in his concurring opinion wrote the following regarding attorney direct-mail solicitation letters:

My sadness emanates from my realization that we are leaving an era of professionalism in the practice of law which has well served our profession and the public most of this century, and are now embarked on a course of continued commercialization of the legal profession under the guise of first amendment rights, mandated by the highest court in the land, where direct-mail solicitation apparently cannot be proscribed.<sup>18</sup>

These recent decisions removing restrictions on attorney advertising and soliciting have also been significant in undermining public opinion on the legal profession. One Iowa survey demon-

13. See *infra* notes 77-78, 81-85 and accompanying text.

14. *Zauderer*, 471 U.S. at 638 (citing *Central Hudson*, 447 U.S. at 566).

15. Reynoldson, *The Case Against Lawyer Advertising*, 75 A.B.A. J., Jan. 1989, at 60.

16. *Id.* at 61.

17. 402 So. 2d 599, 599 (Fla. 1982).

18. *Id.* (Ehrlich, J., concurring).

strates that virtually unlimited attorney advertising is detrimental to the legal profession. In *Committee on Professional Ethics v. Humphrey*,<sup>19</sup> a case dealing with Iowa's electronic media rule, the Iowa Supreme Court appointed former Chief Justice Moore as a hearing officer.<sup>20</sup> The evidentiary record included a public survey on attitudes and opinions regarding attorney advertising.<sup>21</sup> The survey questioned persons on their attitudes about attorneys both before and after viewing television commercials.<sup>22</sup> After viewing the commercials, opinions dropped significantly with respect to several characteristics of an attorney: trustworthiness, from seventy-one percent to fourteen percent; professionalism, from seventy-one percent to twenty-one percent; and honesty from sixty-five percent to fourteen percent.<sup>23</sup>

A recent Florida survey demonstrates that direct-mail solicitation will have a negative effect on attorneys' professional image and the legal system. The survey was conducted in response to Florida's allowing its attorneys to engage in direct-mail solicitation beginning on January 1, 1987.<sup>24</sup> Shortly after its inception, the Florida Bar commissioned an independent firm to survey public response to direct-mail solicitation.<sup>25</sup> The survey found a significant percentage of Floridians believe that direct-mail solicitation by attorneys contains minimal information and appeals to emotions rather than to reason.<sup>26</sup> Floridians also believe this form of solicitation causes frivolous lawsuits that result in increased legal costs.<sup>27</sup> A significant number of those who received one of these letters indicated that it lessened their respect for the legal profession and the judicial process as a whole.<sup>28</sup>

A committee appointed by the Florida Bar president to ascertain whether Florida lawyers were abusing direct-mail solicitation found abuses by lawyers and harm to the public were inherent in direct-mail solicitation.<sup>29</sup> The committee concluded that the prac-

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19. 355 N.W.2d 565 (Iowa 1984).

20. *Id.* at 567.

21. *Reynoldson*, *supra* note 15, at 60.

22. *Id.*

23. *Id.*

24. Rules Regulating the Florida Bar, 494 So. 2d 977, 978 (Fla. 1986). After studying direct-mail solicitation to persons known to have a specific legal problem, the Florida Supreme Court found that it could be regulated but not completely prohibited. *Id.* The Florida Supreme Court stated that if the regulation proves unworkable and is continually abused, the court would consider amending the solicitation rule. *Id.*

25. Brief of Amicus Curiae The Florida Bar in Support of the Respondent at 9, *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (No. 87-16).

26. *Id.*

27. *Id.*

28. *Id.* at 9-10.

29. *Id.* at A2.

tice should be banned absolutely;<sup>30</sup> the *Shapero* decision precludes that ban from happening.

In *Shapero*, the United States Supreme Court struck down another complete ban on attorney expression.<sup>31</sup> The ban at issue was designed to serve the state's interest by preventing attorneys from sending personalized solicitation letters to individuals whom the attorneys knew to have a legal problem<sup>32</sup>—in other words, “ambulance chasing through the mail.” The *Shapero* decision is significant because for the first time the Court declared unconstitutional a disciplinary rule that prohibited attorneys from soliciting for clients. Previously, it had only struck down prohibitions on attorney advertising for clients. While advertising and solicitation are alike in that all advertising contains an element of solicitation,<sup>33</sup> solicitation does not involve advertising.<sup>34</sup> “Solicitation” refers to a communication that is directed specifically to a particular individual and is often designed to get an individual to take action.<sup>35</sup> “Advertising,” on the other hand, most often refers to a communication directed to the general public, usually through an impersonal medium such as a newspaper or billboard.<sup>36</sup>

This Note will show, based on prior Supreme Court decisions, that the distinction between advertising and soliciting is both appropriate and necessary. In fact, it is just the Court's failure to adhere to this distinction that gave rise to the incorrect decision in *Shapero*. The analysis will begin with a history of the cases on attorney advertising and soliciting, and will then show how the *Shapero* Court misinterpreted these decisions.

## II. A HISTORY OF THE FREE SPEECH PROTECTION GIVEN TO ATTORNEY ADVERTISING AND SOLICITING

The *Shapero* decision departs from a line of cases on advertising and soliciting by attorneys that established the boundary of their protected free speech. To understand what repercussions may occur as a result of the Court's failure to follow its own precedent, it is first necessary to analyze the prior Supreme Court decisions.

In one of the earliest decisions concerning advertising and free speech, the Court in *Valentine v. Chrestensen*<sup>37</sup> recognized that

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30. *Id.*

31. *Shapero*, 108 S. Ct. at 1923.

32. *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 300-01 (1987).

33. See generally BLACK'S LAW DICTIONARY 50 (5th ed. 1979).

34. *Id.* at 1248-49.

35. *Id.*

36. *Id.* at 50.

37. 316 U.S. 52 (1942). Chrestensen was restrained by the police from distributing

commercial speech, in this case handbill advertising, is not protected by the first amendment's free speech clause.<sup>38</sup> The *Chrestensen* Court found it was within the states' power to regulate commercial advertising as a matter of legislative judgment.<sup>39</sup>

After *Chrestensen*, virtually every state exercised its regulatory power by adopting the American Bar Association's Code of Professional Responsibility.<sup>40</sup> The code contained disciplinary rules prohibiting attorneys from advertising or soliciting.<sup>41</sup>

The commercial speech doctrine was subsequently restricted by the Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>42</sup> In *Virginia*, the Court redefined the scope of *Chrestensen* and extended a limited free speech protection to commercial speech, in this case prescription price advertising.<sup>43</sup> They made it clear, however, that the state could regulate pharmacists and protect small pharmacies as long as it did so without imposing a total prohibition on the free flow of information.<sup>44</sup> The Court held the public had a protected first amendment interest in the free flow of truthful information.<sup>45</sup> It found that a total prohibition on prescription price advertising took away information needed by consumers to make intelligent economic decisions.<sup>46</sup>

In a particularly significant footnote, the Court in *Virginia* distinguished attorneys, as well as doctors, under its commercial speech doctrine.<sup>47</sup> In making a distinction between professions

handbill advertisements in violation of a sanitary code. He obtained an injunction to enjoin the police from interfering with the distribution. The Supreme Court reversed the decree.

38. *Id.* at 54. The Court found that the first amendment protects the free conveyance of information and opinion but does not impose upon government any restraints in regulating commercial advertising. *Id.*

39. *Id.*

40. Report of Spec. Comm. to Secure Adoption of the Code of Prof. Resp., 97 Ann. Rep. ABA 268 (1972).

41. Disciplinary Rule 2-101(B) provided in pertinent part: "A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity. . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1969). Disciplinary rule 2-103(A) provided in full: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1969).

42. 425 U.S. 748 (1976) (where a consumer group challenged a Virginia statute forbidding the advertising of prescription drug prices as necessary to maintain the professional standards of pharmacists and to protect smaller pharmacies).

43. *Id.* at 770.

44. *Id.*

45. *Id.* at 765

46. *Id.*

47. *Id.* at 773 n.25.

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the

that provide a product as opposed to those that provide a service, the Court emphasized the evils inherent in attorney advertising.<sup>48</sup>

Once the door was opened by allowing pharmacists to advertise prescription prices, attorneys also began to advertise. Choosing to overlook the dictum of the *Virginia* Court's footnote, in *Bates v. State Bar of Arizona*,<sup>49</sup> the Court specifically determined that advertising by attorneys was entitled to the free speech protection of the first amendment.<sup>50</sup> The *Bates* Court made inroads into the complete ban that existed on attorney advertising by holding that the free speech clause protects truthful newspaper price advertising by attorneys for routine legal services.<sup>51</sup>

The *Bates* decision did not completely abolish the states' power to regulate advertising by attorneys.<sup>52</sup> The Court found that false, deceptive, or misleading advertising is subject to prior restraint.<sup>53</sup> For attorney advertising that does not fall into one of these categories, the Court established three principles which provide a basis for determining whether attorney commercial speech is protected by the free speech clause or whether a prohibition on such speech is properly within the states' regulatory power. First, the free speech interest to be protected is the consumer's need for the free flow of information.<sup>54</sup> Second, this interest in the free flow of information is balanced against the states' interest in preventing the evils of advertising and maintaining the integrity of the legal profession.<sup>55</sup> Third, the states may place reasonable restrictions on the time, place, and manner of advertising by attorneys.<sup>56</sup>

In determining that consumers have a substantial need for attorney advertising, the *Bates* Court looked to advertising to pro-

distinctions, historical and functional, between professions, may required consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

*Id.* (emphasis in original).

48. *Id.*

49. 433 U.S. 350 (1977). Petitioners placed an advertisement in a newspaper listing their fees for certain routine legal services. The Arizona Supreme Court upheld the disciplinary measures taken against the attorneys for violating the ban on attorney advertising.

50. *Id.* at 384.

51. *Id.* at 383-84.

52. *Id.* at 383.

53. *Id.*

54. *Id.* at 364. Consumers often have a concern for the free flow of advertising because of the important societal interests served by such speech. *Id.*

55. *Id.* at 367-79. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454 (1978), the Court found *Bates* to hold "[t]hat the justifications for prohibiting truthful, 'restrained' advertising concerning 'the availability and terms of routine legal services' are insufficient to override society's interest, safeguarded by the First and Fourteenth Amendments, in assuring the free flow of commercial information."

56. *Id.* at 384.



vide a free flow of information that assures informed and reliable decisionmaking.<sup>57</sup> In applying the balancing-of-interest test, the Bar Association argued the complete ban on advertising should remain intact because of advertising's negative effect on professionalism<sup>58</sup> and its inherently misleading nature.<sup>59</sup> The Court, however, rejected these arguments. In rejecting the Bar's analysis, the Court followed the precedent of *Virginia* by extending free speech protection in the commercial setting to newspaper price advertising of routine legal services.<sup>60</sup>

The Court held that advertising by attorneys deserves limited free speech protection.<sup>61</sup> In reaching this finding, the Court noted that the medical profession allows advertisements but prohibits solicitation of patients.<sup>62</sup> This is a distinction that the *Bates* Court seemed willing to make, if only in dictum. Subsequent courts, however, have adopted it.

Only two years later, the Court expressly confined free speech protection to advertisements by attorneys,<sup>63</sup> and they refused to extend the protection to in-person solicitation by attorneys.<sup>64</sup> In *Ohralik v. Ohio State Bar Association*, an attorney was disciplined for violating a total ban on solicitation when he visited two accident victims in person and persuaded them to retain him.<sup>65</sup> In upholding the disciplinary action taken against the attorney, the Supreme Court made a distinction between newspaper price advertising and in-person soliciting.<sup>66</sup> The Court stated that in-person solicitation, unlike the advertisements at issue in *Bates*, is not protected by the free speech clause.<sup>67</sup>

57. *Id.* at 364 (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-65 (1976)). The Court reasoned that advertising informs the public of the availability, nature, and prices of products and services thereby performing a role in the allocation of resources in our economic system. *Id.*

58. *Id.* at 368-72. The Bar asserted that the advertising would have a negative impact on the profession because clients would perceive attorneys as being motivated by pecuniary gain. The Court responded that clients do not expect attorneys to work for free. *Id.* at 368-69.

59. *Id.* at 372-75. The Bar also argued that attorney services are individualized, and therefore comparisons among attorneys are misleading because consumers are ignorant as to the specific legal services they require, and that advertising will not concentrate on the skill factor of the practitioner. The Court found that, although some services provided by attorneys are unique, the only ones that would be advertised are routine. Also, the inevitable uniqueness of advertising by attorneys does not cause the advertisement to be misleading provided the attorney charges only the fee stated in the advertisement. *Id.* at 372-73.

60. *Id.* at 384.

61. *Id.* at 383.

62. *Id.* at 369 n.20 (citing 235 J.A.M.A. 2328 (1976)).

63. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455 (1978).

64. *Id.* at 449.

65. *Id.* at 449-54.

66. *Id.* at 455.

67. *Id.*

In applying the balancing test set out in *Bates*, the *Ohralik* Court found the states' interest in regulating solicitation outweighs the consumer's need for the free flow of information and is therefore within the states' regulatory power.<sup>68</sup> In justifying the complete ban on in-person solicitation, the Court found that the states have a "compelling" interest in protecting consumers from aspects of solicitation that involve overreaching and undue influence.<sup>69</sup> The Court also distinguished advertisements from in-person solicitation by noting that the latter is not open to public scrutiny, unlike the former.<sup>70</sup>

The *Ohralik* Court used the same premise as the *Bates* Court in focusing on the consumers' need for the free flow of information to make informed and reliable decisions.<sup>71</sup> In *Ohralik*, however, the Court saw the consumers' need as not substantially advanced by in-person solicitation.<sup>72</sup> Furthermore, the Court found the advertising allowed by the *Bates* decision provided consumers with a source of information needed to make informed and reliable decisions, and this precluded the need for in-person solicitation.<sup>73</sup>

In keeping with this distinction between advertising and solicitation, the Court in *In re Primus*<sup>74</sup> found the states may, under certain circumstances, impose a complete ban on all potential client solicitation speech by attorneys that involves a commercial transaction.<sup>75</sup> As in *Bates*, the Court reiterated that the states are free to place reasonable time, place, and manner restrictions on solicitation by attorneys, as the states have a special interest in

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68. *Id.* at 457-59.

69. *Id.* at 462. Unlike advertising that the reader can easily ignore, in-person solicitation may often be a pressure situation not giving the potential client time for comparison or reflection before responding. The goal of in-person solicitation may be to give only one side of the presentation, which leads to a fast and perhaps poor decision. *Id.* at 457. The ban on in-person solicitation prohibits attorneys from using information as bait with which to obtain an agreement to represent a client for a fee. *Id.* at 458.

70. *Id.* at 466. With in-person solicitation it is difficult or impossible to obtain reliable proof of what actually happened because there are often no witnesses. *Id.*

71. *Id.* at 457-58 (citing *Bates*, 433 U.S. at 364).

72. *Id.*

73. *Id.* at 458 n.15.

74. 436 U.S. 412 (1978)(involving an attorney who sent a letter to an individual offering free legal representation by the American Civil Liberties Union in a lawsuit. In reversing the disciplinary measures that were taken against the attorney for violating a complete ban on attorney solicitation, the Court did not invoke the free speech clause of the first amendment. Rather, the Court found the solicitation ban impinged upon the associational rights of the attorney under the first amendment. The Court, in finding that the attorney's actions were not within the state's regulatory power, gave considerable weight to the fact that the letter was not motivated by pecuniary gain and that the ACLU pursues litigation as a means of effective political expression and association).

75. *Id.* at 437 (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

regulating members of a profession they license.<sup>76</sup>

Following this trend of cases, the Court expanded the free speech protection which was formerly limited to newspaper price advertising to include blanket mailings by attorneys to the public at large.<sup>77</sup> In refusing to allow a complete ban on such mailing, the Court in *In re R.M.J.* reasoned that mailings to the public at large are not inherently misleading and possible deception can be controlled by means less restrictive than a complete ban.<sup>78</sup>

In reaching its decision in *R.M.J.* the Court applied a four-part test that was first announced in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*.<sup>79</sup> The test refined the principles used in *Bates*<sup>80</sup> to determine whether commercial speech is protected by the first amendment. Under the *Central Hudson* test, in order for commercial speech (such as attorney advertising) to receive free speech protection, it must concern lawful activity and not be misleading. Next, the Court requires the governmental interest to be served by the regulation of commercial speech to be substantial. The regulation must also advance the governmental interest. Finally, the regulation must be no more extensive than is necessary to serve that governmental interest. The Court has continued to apply the *Central Hudson* test in cases involving attorney expression; it was applied in both *Zauderer* and *Shapero*.

Both the *Bates* and the *R.M.J.* decisions protect advertising by attorneys which is distributed to the general public. This protection was expanded by the Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*<sup>81</sup> to include advertising distributed to the general public that is directed to a group of persons with a specific legal problem.<sup>82</sup> The Court rejected the argument that this type of advertising was soliciting.<sup>83</sup> Instead, the Court found because this advertising is open to public scrutiny and does not require an immediate response, it does not pose the

76. *Id.* at 438.

77. *In re R.M.J.*, 455 U.S. 191, 206 (1982).

78. *Id.* at 206-07

79. 447 U.S. 557 (1980) (where the Court struck down a regulation that prohibited electric utilities from advertising to promote the use of electricity as a violation of the free speech clause).

80. *See supra* notes 52-56 and accompanying text.

81. 471 U.S. 626 (1985).

82. Appellant ran a newspaper advertisement suggesting that his firm would represent defendants in drunk driving cases. *Id.* at 629-30. Later he ran a newspaper advertisement aimed at women who had suffered injuries from their use of a contraceptive known as the Dalkon Shield. *Id.* at 630-31. The appellant was issued a public reprimand by the Ohio Supreme Court for, among other things, soliciting legal employment. *Id.* at 636.

83. *Id.* at 641.

problems of in-person soliciting that justify a total ban.<sup>84</sup> The Court concluded that attorneys may not be disciplined for truthfully soliciting through written advertisements.<sup>85</sup>

This series of cases illustrates the Court's distinction between advertising and soliciting. Advertising, which is directed to the general public, was given free speech protection. Soliciting, which is directed to a particular individual, did not receive the protection. In *Shapero*, however, the Court abandoned this distinction.

### III. THE SHAPERO DECISION EXPANDS FREE SPEECH PROTECTION TO INCLUDE TARGETED DIRECT-MAIL SOLICITATION LETTERS

In *Shapero v. Kentucky Bar Association*<sup>86</sup> the Court blurred its previously distinguishable line between advertising and soliciting. This was accomplished by giving free speech protection to solicitation letters sent by attorneys directly to individuals with a known legal problem.<sup>87</sup>

Petitioner, Richard D. Shapero, sought permission from the Kentucky Attorneys' Advertising Commission<sup>88</sup> to send a solicitation letter<sup>89</sup> for legal business to homeowners who had a foreclosure suit filed against them.<sup>90</sup> The Commission declined to approve the letter, as it was in conflict with a Kentucky rule<sup>91</sup> prohibiting the sending of solicitation letters to individuals with a

84. *Id.* at 641-42.

85. *Id.* at 647.

86. 108 S. Ct. 1916.

87. *Id.* at 1921-22.

88. The Attorneys' Advertising Commission is responsible for upholding the attorney advertising regulations stated in the Rules of the Kentucky Supreme Court. Ky. Sup. Ct. Rule 3.135(3)(1988). *Id.* at 1919 n.1.

89. The solicitation letter read as follows:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

*Id.* at 1919 (emphasis in original).

90. *Id.*

91. The Kentucky rule provided in full, "A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." Ky. Sup. Ct. Rule 3.135(5)(b)(i). *Id.* at 1919-20 n.2

known legal problem.<sup>92</sup> Although the Commission declined to approve the letter, it recommended that the Kentucky Supreme Court amend the rule in light of the *Zauderer* decision<sup>93</sup> because the rule violated free speech.<sup>94</sup>

Shapero petitioned the Kentucky Bar Association's Ethics Committee<sup>95</sup> for an advisory opinion regarding the rule.<sup>96</sup> The Ethics Committee upheld the rule, reasoning that it was consistent with Rule 7.3<sup>97</sup> of the American Bar Association's Model Rules of Professional Conduct.<sup>98</sup>

92. *Id.* at 1919.

93. In *Zauderer*, the Supreme Court held that a state may not, consistent with the free speech clause, prohibit attorneys from soliciting clients through public advertisements directed to persons with a specific legal problem. *Zauderer*, 471 U.S. at 647. *See supra* notes 81-85 and accompanying text.

94. *Shapero*, 108 S. Ct. at 1920.

95. The Ethics Committee is the committee of the Kentucky Bar Association that provides advisory opinions to attorneys who are in doubt regarding the propriety of contemplated conduct. Ky. Sup. Ct. Rule 3.530. *Id.* at 1919 n.1.

96. *Id.* at 1920.

97. ABA Model Rule 7.3, Direct Contact with Prospective Clients, provided in full, A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in-person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

After the United States Supreme Court decided *Shapero*, the American Bar Association amended ABA Model Rule 7.3, Direct Contact with Prospective Clients; the amended rule provides in full:

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions of paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983, as amended in 1989).

98. *Shapero*, 108 S. Ct. at 1920.

In reviewing the Ethics Committee's Advisory Opinion, the Kentucky Supreme Court found the Kentucky rule to be in conflict with the first amendment's free speech clause as expressed in *Zauderer*.<sup>99</sup> The Court then replaced the Kentucky rule with ABA Model Rule 7.3.<sup>100</sup> Both rules placed a complete ban on solicitation letters by attorneys to individuals with a known legal problem.<sup>101</sup> The Kentucky Supreme Court did not state how ABA Model Rule 7.3 corrected the deficiencies of the Kentucky rule.<sup>102</sup>

The United States Supreme Court granted certiorari to resolve the issue of whether ABA Model Rule 7.3 was consistent with the free speech clause of the first amendment, made applicable to the States through the fourteenth amendment.<sup>103</sup> The Court in *Shapero* was confronted with deciding a case that fell between *Ohralik* and *Zauderer*. On the one hand, the case was similar to *Ohralik* in that the solicitation letter Shapero desired to send was personalized and directed to an individual with a known legal problem. The crucial difference was that *Ohralik* involved an in-person solicitation, whereas Shapero's planned solicitation took the form of a letter. On the other hand, Shapero's letter was like the newspaper advertisement in *Zauderer* because both were in writing and addressed specific legal problems. However, Shapero's letter was different because it was directed to a *specific individual* with a *known* legal problem discovered by a prior investigation.

The Court found that *Shapero* was an extension of *Zauderer*.<sup>104</sup> The Court held the free speech clause protects written efforts by attorneys to bring in new clients, whether these efforts are directed to a specific group in a newspaper advertisement or whether they are directed to an individual in personalized letters.<sup>105</sup>

The Court reasoned that the purpose of advertising by attorneys is to reach individuals who actually need the legal services provided by the attorney.<sup>106</sup> The Court found the free speech clause does not allow a ban on certain speech just because it is more efficient; states may not prohibit direct-mail solicitation letters solely on the theory that to send the letters only to those they

99. *Shapero*, 726 S.W.2d at 300.

100. *Id.* at 301.

101. *See supra* notes 91 & 97.

102. *Shapero*, 108 S. Ct. at 1920.

103. *Id.* at 1920.

104. *Id.* at 1921 (citing *Zauderer*, 471 U.S. at 641-42).

105. *Id.* The Court stated that "[K]entucky could not constitutionally prohibit [Shapero] from sending at large an identical letter opening with the query, 'Is your home being foreclosed on?' rather than his observation to the targeted individuals that 'It has come to my attention that your home is being foreclosed on.'" *Id.*

106. *Id.*

would interest the most is somehow improper.<sup>107</sup>

The Supreme Court rejected the lower court's reasoning that the potential client who is subjected to the pressure of an attorney in a personal manner through a direct-mail solicitation letter may be overwhelmed by the situation and may be susceptible to undue influence.<sup>108</sup> In writing for the majority, Justice Brennan<sup>109</sup> reasoned that a potential client will feel equally "overwhelmed" by his legal troubles regardless of whether he is exposed to a writing distributed to the general public addressing his particular legal problem or a personal letter sent by an attorney to him specifically.<sup>110</sup> According to Justice Brennan, the general advertisement and the direct-mail solicitation letter have the *same* effect on the potential client because they are both written.<sup>111</sup>

The Court distinguished direct-mail solicitation letters by attorneys from in-person solicitation, which was not afforded free speech protection in *Ohralik*. Justice Brennan found that, when the form of communication is in-person solicitation (such as in *Ohralik*), there exists a greater potential for overreaching and undue influence.<sup>112</sup> He also noted that, because in-person solicitation is not open to public scrutiny, it would be virtually impossible for the states to regulate it.<sup>113</sup> In dismissing the arguments that prevailed in *Ohralik*, Justice Brennan reasoned that, when the form of communication is written, such as a direct-mail solicitation letter, it can be put aside, considered later, or discarded, thereby removing the evils of overreaching and undue influence.<sup>114</sup>

In recognizing the potential for deception inherent in solicitation letters, Justice Brennan pointed out that state agencies could

107. *Id.* at 1921-22.

108. *Shapero*, 726 S.W.2d at 301.

109. Justice Brennan was joined by Justices Marshall, Blackmun, Kennedy, White, and Stevens in finding that ABA Model Rule 7.3 was invalid. *Shapero*, 108 S. Ct. at 1919. However, Justice White joined by Justice Stevens, wrote separately expressing the view that the determination of whether a particular letter is worthy of free speech protection should be addressed by the state courts in the first instance. *Id.* at 1925. Justice O'Connor, joined by the Chief Justice and Justice Scalia, dissented, expressing the view that the states should be given considerable deference in banning advertising that is potentially misleading as well as advertising that undermines the states' interest in maintaining high ethical standards for the legal profession. *Id.* at 1925-31.

110. *Id.* at 1922. According to Brennan, it is not the "condition" of the potential client that makes him or her susceptible to undue influence. *Id.* His theory is that it is the "mode" of communication that represents the danger of lawyers overwhelming a potential client with undue influence. *Id.*

111. *Id.* "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Id.*

112. *Id.* See *supra* note 69 and accompanying text.

113. *Id.* (citing *Ohralik*, 433 U.S. at 466). See *supra* note 70 and accompanying text.

114. *Id.* at 1922-23.

operate to minimize this risk.<sup>115</sup> He determined that the opportunity for abuse or mistake involving direct-mail solicitation letters does not justify a complete prohibition on that type of speech.<sup>116</sup> The Court concluded the free flow of information obtained by solicitation letters is valuable enough to outweigh the regulatory cost of separating harmful information from helpful information.<sup>117</sup> Having now shown how the Court has derived its opinion in *Shapero*, this Note will go on to demonstrate how the Court's analysis was in error.

#### IV. FREE SPEECH PROTECTION FOR TARGETED DIRECT-MAIL SOLICITATION LETTERS WAS NOT JUSTIFIED

In *Shapero*, the Court found the form that communication takes determines whether or not attorney expression receives free speech protection.<sup>118</sup> Because direct-mail solicitation letters are in written form, they are entitled to free speech protection and therefore cannot be completely banned by the states.<sup>119</sup> In basing its decision on the form the attorney communication takes, the Court failed to recognize the distinction between advertising and soliciting that guided the Court in the past. The three distinctions the Court failed to make are that direct-mail solicitation letters, more so than advertisements: (1) do not substantially advance the free flow of information; (2) overreach potential clients; and (3) mislead and put pressure on potential clients.

##### *A. The Free Flow of Information Required to Make Informed and Reliable Decisions Is Not Appreciably Enhanced by Direct-Mail Solicitation Letters*

Consider, first, the basis the Court previously used to reach its decisions on constitutionally protected attorney advertising. It is the consumer's need for the free flow of information to make informed and reliable decisions, not the attorney's right to speak, that justified the free speech protection given to attorney advertising.<sup>120</sup> This justification was enunciated in *Bates* to allow advertis-

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115. *Id.* at 1923. Unlike in-person solicitation, which is not visible or open to public scrutiny, written solicitation provides proof of what actually happened. *Id.* (citing *Ohralik*, 436 U.S. at 466). State agencies, for example, could require attorneys to prove the truth of their facts stated, to explain how they discovered the facts and to substantiate their accuracy, to label the letters as advertising, or to include in the letters directions on how to report inaccurate or misleading letters. *Id.* at 1924.

116. *Id.* at 1923.

117. *Id.* at 1924 (citing *Zauderer*, 471 U.S. at 646).

118. *Id.* at 1922. See *supra* note 111 and accompanying text.

119. *Id.* at 1923.

120. *Bates*, 433 U.S. at 364.



ing by attorneys and used in *Ohralik* to uphold a complete ban on in-person solicitations by attorneys.<sup>121</sup>

In *Ohralik*, the Court found the consumers' need for the free flow of information was not advanced by in-person solicitation.<sup>122</sup> This same reasoning was not applied in *Shapero*, yet solicitation letters do not appreciably advance the goal of informed consumer decision making, because, as with in-person solicitation, the letters discourage consumers from making comparisons of legal services. This can result in spontaneous decisions that are not based on informed and reliable information.

Solicitation letters by attorneys need not be given free speech protection because, as the Court found in *Ohralik*, there are alternative means for consumers to obtain legal information in order to make informed and reliable decisions.<sup>123</sup> Consumers are barraged by attorney advertising on television and radio and in newspapers, magazines, billboards, and letters sent to the public at large. Therefore, the increase in the free flow of legal information attributable to solicitation letters will be minimally effective in supplying reliable data to consumers. Additionally, solicitation letters contribute very little to the quality of consumer information, as they are often written to overwhelm the potential client into retaining the attorney.

#### *B. Solicitation Has the Potential for Overreaching and Undue Influence, Whether It Is In-person or in a Direct-Mail Solicitation Letter*

Consider next the basis the Court previously used to uphold as constitutional a complete ban on in-person attorney solicitation. In *Ohralik*, the Court allowed a total ban on in-person solicitation to avert the likely possibility of overreaching and undue influence by the attorney.<sup>124</sup> Because of the great potential for these evils, the *Ohralik* Court considered a total ban on in-person solicitation to be a reasonable restriction on the manner of speech.<sup>125</sup>

Although the *Shapero* Court found solicitation letters not to contain the evils of overreaching and undue influence because they are in written form,<sup>126</sup> many of the evils of in-person solicitation are present in a direct-mail solicitation letter. An unexpected per-

121. See *supra* notes 57 and 71 and accompanying text.

122. 436 U.S. at 457-58. See *supra* note 72 and accompanying text.

123. *Id.* at 458 n.15. See *supra* note 73 and accompanying text.

124. *Id.* at 462. See *supra* note 69 and accompanying text.

125. *Id.* at 449.

126. "Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—poses much less risk of overreaching or undue influence' than does in-person solicitation." *Shapero*, 108 S. Ct. at 1922 (citing *Zauderer*, 471 U.S. at 642).

sonalized letter from an attorney directed to an individual's particular legal problem has the potential to both unduly influence and to intimidate the potential client.<sup>127</sup> Solicitation letters are likely to cause a potential client to submit to an attorney's offer of representation because, as with in-person solicitation, the attorney is already familiar with the individual's legal problem and has offered his service. Additionally, solicitation letters in some instances will give attorneys an opportunity for an in-person encounter before the potential client has a chance to weigh the available alternatives.<sup>128</sup>

Because of the potential for abuse, a total ban on solicitation, whether in person or in writing, should be considered a reasonable restriction on speech. Thus, a ban like the one struck down by the Court in ABA Model Rule 7.3 should not be considered unconstitutional, as it is just such a reasonable restriction on speech, it is without reference to the content of the speech it regulates, and it only restricts very limited types of communication: in-person solicitation and direct-mail solicitation letters sent to individuals with a known legal problem.<sup>129</sup> Since ABA Model Rule 7.3 is a reasonable restriction on the manner of attorney speech, it should be within the states' regulatory power as determined by the Court in both its *Bates* and *In re Primus* decisions.<sup>130</sup>

Along with overreaching potential clients, solicitation letters such as the one written by Shapero often mislead by suggesting what the attorney can do for the person solicited.<sup>131</sup> Direct-mail solicitation letters, like Shapero's, also pressure the persons solicited by encouraging them to call immediately.<sup>132</sup>

*C. A Total Ban on Solicitation Is Justified Because Solicitation Is More Likely to Mislead and Exert Pressure on Potential Clients Than Advertising*

Finally, consider the basis the Court previously used to find price advertising is not misleading and in-person solicitation puts pressure on potential clients. In *Bates*, the Court found price advertising is not misleading as it is doubtful any attorney would or could advertise fixed prices for services that are unique.<sup>133</sup> The *Bates* Court also found the only attorney services that lend them-

127. This is especially true because lawyers are trained to be persuasive writers. *In re Primus*, 436 U.S. at 445 (Rehnquist, J., dissenting).

128. See also *Ohralik*, at 457-58.

129. See *supra* note 97.

130. *Bates*, 433 U.S. at 384; *In re Primus*, 436 U.S. at 438.

131. See *supra* note 89.

132. *Id.*

133. *Bates*, 433 U.S. at 372.

selves to advertisements are certain routine ones.<sup>134</sup> Solicitation, however, lacks the characteristics that kept advertising from being misleading.<sup>135</sup> Solicitation is usually not geared toward the supply of routine services, but, rather, toward an individual's unique situation. Additionally, because the situation is unique, prices are generally not given in solicitation offers.

Attorneys may also mislead potential clients by sending them a personalized solicitation letter without actually being familiar with their legal problem. With the use of computers, attorneys are able to personalize solicitation letters that are actually part of a mass mailing. This will mislead potential clients into believing the attorney has particular knowledge of their legal problems and that the attorney has specifically tailored a course of action to deal with the problem.

In addition to misleading potential clients, solicitation also exerts undue pressure. The Court in *Ohralik* allowed the states to place a complete ban on in-person solicitation, as solicitation was used to put pressure on potential clients to agree to a representation.<sup>136</sup> Similarly, solicitation letters pressure potential clients by enticing them with cost-free offers or by stressing the urgency of the situation. In *Shapero*, the Court failed to give deference to the states' interest in regulating the pressure tactics that lead into a professional relationship.<sup>137</sup> Instead, the *Shapero* Court found that solicitation letters could be put aside and considered later,<sup>138</sup> thus treating solicitation letters from attorneys like those designed to sell consumer goods.

Unlike solicitation letters used to sell consumer goods, solicitation letters by attorneys address individualized and specific legal problems and are signed by an officer of the court. Therefore, consumers who have had few contacts with the judicial system may feel they must at least call the sender of such a letter, whereas few consumers would hesitate to discard a solicitation letter peddling a consumer good.

#### CONCLUSION

In *Shapero*, the Court redefines the extent to which free speech protection will be extended to attorney efforts to bring in new clients. The Court found the form of communication determined if

134. *Id.*

135. The routine nature of the legal services advertised and the fee being stated is what kept attorney advertising from being misleading in *Bates*. *Id.* at 372-73.

136. *Ohralik*, 436 U.S. at 457. *See supra* note 69.

137. *Shapero*, 108 S. Ct. at 1925 (O'Connor, J., dissenting).

138. *Id.* at 1923. *See supra* note 114 and accompanying text.

free speech protection attached to attorney expression. This method prohibits in-person solicitation, but allows solicitation that takes the form of a letter written to a specific individual.

The same reasons for allowing a complete ban on in-person solicitation are applicable to direct-mail solicitation letters by attorneys. Permissible advertising by attorneys already provides consumers with a constant flow of legal information. This allows consumers to make informed and reliable decisions, thereby negating the need for solicitation letters. Solicitation letters by attorneys are addressed to an individual's specific legal problem, thereby opening the door to overreaching and undue influence by attorneys. These letters often urge the solicited individual to take immediate action, thus pressuring and intimidating the potential client.

Solicitation by attorneys, whether in person or written, seeks to incite an individual to retain the attorney. The Court, in granting free speech protection to direct-mail solicitation letters, is placing form over substance by ignoring the difference between advertising and solicitation.

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