Constitutional Regulation of Targeted Direct-Mail Solicitation by Attorneys after Shapero - A Proposed Rule of Conduct

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Notes

CONSTITUTIONAL REGULATION OF “TARGETED DIRECT-MAIL SOLICITATION” BY ATTORNEYS AFTER SHAPERO—A PROPOSED RULE OF CONDUCT

I. Introduction

A topic of enduring controversy in the legal profession has been the propriety of attorney advertising and solicitation.1 The states, through their respective bar associations,2 have traditionally been reluctant to permit their attorneys to engage in such conduct. However, the United States Supreme Court has recently decided that various forms of attorney speech warrant some degree of first amendment protection.3 In re


2. For a brief discussion of the historical development of organized bar associations, see H. Drinker, Legal Ethics 11-21 (1953); C. Wolfram, Modern Legal Ethics 33-58 (1986). In most other professions, while licensing standards are set by statute, the profession’s ethical rules are generally adopted and enforced by separate private groups; however, in the legal profession, bar associations and state supreme courts generally enforce both the licensing standards and ethical rules for lawyers. Maute, Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine, 13 Hastings Const. L.Q. 487, 489 (1986). Although this “quasi-governmental status of state bar associations” has permitted activities such as promulgation of ethical rules to fall within the “state action” exemption to the antitrust rules (for a further discussion of this, see infra note 34). “precisely because they constitute state action these ethical rules are subject to the constitutional constraints of commercial speech doctrine.” Id. at 489-90. For a brief discussion of the “commercial speech” doctrine, see infra note 19.


The first amendment provides in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend. I. The first amendment has been made applicable to the states via the fourteenth amendment. Schneider v. New Jersey, 308 U.S. 147, 160 (1939). For conflicting views as to what forms of speech the first amendment should protect, see infra note 19.

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spense, states have grudgingly revised their ethical standards in purported compliance with the Supreme Court's promulgations.4

One source of significant disagreement and speculation in this area is the extent to which states may regulate targeted direct-mail solicitation by attorneys.5 The Supreme Court of Kentucky addressed this issue by adopting Model Rule 7.3 of the American Bar Association's (ABA) Model Rules of Professional Conduct, which essentially prohibits such solicitation.6 Thus, in Shapero v. Kentucky Bar Association,7 the United States Supreme Court had to decide whether Kentucky could "categorically prohibit a lawyer from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular problems."8 Reversing the Supreme Court of Kentucky's decision, the United States Supreme Court held that Kentucky could not constitutionally prohibit an attorney from engaging in such solicitation.9

This Note will briefly discuss the evolution of the legal profession's regulations regarding attorney advertising and solicitation,10 and will then trace the recent development of constitutional protection afforded

4. See H. Haynsworth, supra note 1, at 5 ("[A]s a general rule, state courts, bar disciplinary authorities and ethics committees have been much more conservative in their attitude toward public relations activities than has the United States Supreme Court, and have shown a marked tendency toward construing the Supreme Court decisions as narrowly as possible.").

5. "Targeted direct-mail solicitation" may be viewed as the process by which an attorney sends printed matter through the mails addressed to a particular class of potential clients with known specific legal problems for the lawyer's own pecuniary gain. For examples of the divergence of opinion among the states regarding the regulation of such attorney communication, see infra notes 185-86 and accompanying text.


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) [hereinafter Model Rules]. See generally Comment, Advertising in the "Learned Professions": The Case For Price Comparisons and Testimonials, 11 S. Ill. U.L.J. 1205, 1214 (1987) (although ABA's ethical rules are not law unless adopted by state or local bar associations, they are very persuasive recommendations which are most often adopted).

8. Id. at 1919.
9. Id. at 1920.
10. See infra notes 14-18 and accompanying text.

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attorney speech.\textsuperscript{11} Further, this Note will discuss the \textit{Shapero} decision and its impact on the states’ attempts to regulate lawyer conduct.\textsuperscript{12} Finally, this Note offers a proposed ethical rule which both comports with \textit{Shapero} and simultaneously affords states ample opportunity to retain control over their attorneys.\textsuperscript{13}

\section*{II. Background}

\subsection*{A. Traditional Prohibitions}

The legal profession’s traditional disapproval of attorney advertising and solicitation is rooted largely in early English rules of professional etiquette.\textsuperscript{14} Whether labelled as “advertising” or “solicitation,”\textsuperscript{15} state bar associations have traditionally been reluctant to permit their attorneys to initiate any communication with potential clients concerning the rendition of legal services. The legal profession’s prohibitions were first formally adopted by the ABA in its 1908 Canons of Ethics,\textsuperscript{16} and later revised and articulated in Canon 2 of its 1969

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11. See infra notes 19-119 and accompanying text.
12. See infra notes 129-220 and accompanying text.
13. See infra notes 221-38 and accompanying text.
14. See H. DRINKER, supra note 2, at 210-15. Drinker noted that early lawyers regarded the law as a form of public service in which the gaining of a livelihood was but an incident. \textit{Id.} He acknowledged that the reasons frequently proffered for the rules prohibiting attorney advertising and solicitation were “commercializing the profession, the tendency of such practices to stir up litigation, the evil effect on the ignorant of alluring assurances by the solicitors, as well as the temptation and probability that the lawyers who advertise and solicit would use improper means to make good their extravagant inducements.” \textit{Id.} (citations omitted). See also Ohralik v. Ohio State Bar Ass’n., 436 U.S. 447, 474 (1978) (Marshall, J., concurring in part and concurring in judgment) (“[T]hese constraints developed as rules of ‘etiquette’ and came to rest on the notion that a lawyer’s reputation in his community would spread by word of mouth and bring business to the worthy lawyer.”).
15. Although “all advertising invokes some degree of solicitation,” a very generalized statement regarding the differences between the two forms of speech is that “advertising usually involves communications directed indiscriminately to the general public, while solicitation includes person-to-person efforts to obtain legal business.” Perschbacher & Hamilton, \textit{Reading Beyond the Labels: Effective Regulation of Lawyers’ Targeted Direct Mail Advertising}, 58 U. COLO. L. REV. 255, 256 (1987).
16. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). Although Canon 27 was revised several times, it originally provided in part: “The publication or circulation of ordinary simple business cards . . . is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional.” H. DRINKER, supra note 2, at 215.

Canon 28 went further to explicitly prohibit pure solicitation:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law . . . . A duty to the public and to the profession devolves upon every member of the Bar having
Model Code of Professional Responsibility. 17

While relatively fewer arguments were made in opposition to the solicitation ban, by the mid-1970's "an increasing number of lawyers and the Justice Department raised issues about the legality of the antiavertising rules on antitrust and free expression grounds." 18 Against this backdrop, the United States Supreme Court faced the issue of the constitutional permissibility of such prohibitions.

knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred. 

Id. at 319.

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1969). The Model Code contained various prohibitions against attorney advertising and solicitation in its disciplinary rules (DRs), including:

DR 2-101 Publicity in General
(A) A lawyer shall not prepare . . . [or] use . . . any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

(B) 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, nor shall he authorize or permit others to do so in his behalf except as permitted under DR 2-103.

DR 2-103 Recommendation of Professional Employment
(A) 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.

(B) Except as permitted under DR 2-103(C), a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.

(C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.

DR 2-104 Suggestion of Need of Legal Services
(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Id.

18. C. Wolfram, supra note 2, at 777.
B. Constitutional Protection Afforded

Since the primary motivation for advertising is to promote the purchasing of goods and services, it is a form of communication which has come to be known as “commercial speech;” however, until 1976, this form of speech received virtually no first amendment protection. In that year the Court decided the seminal case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. In Virginia Pharmacy, consumers of prescription drugs challenged the constitutionality of a Virginia statute which declared it unprofessional for a licensed pharmacist to advertise prices of prescription drugs. Justice Blackmun, deliv-

19. See Valentine v. Chrestensen, 316 U.S. 52 (1942). In Valentine, the Supreme Court upheld a first amendment challenge to the constitutionality of a municipal ordinance which forbade distribution of printed handbills bearing commercial advertising in the streets of New York City. Id. at 54. The Court summarily dismissed the constitutional challenge, stating: “We are ... clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.” Id. (emphasis added).

The first amendment traditionally has protected only noncommercial, or political, speech. See Boos v. Barry, 108 S. Ct. 1157, 1162 (1988) (“We have recognized that the First Amendment reflects a profound national commitment to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open’... and have consistently commented on the central importance of protecting speech on public issues.”) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). The essence of commercial speech, on the other hand, is that it tends to “promote the purchasing of goods or services,” and that the “purpose of the speech is the advancement of the financial interests of the speaker via that transaction.” Note, Constitutional Protection of Commercial Speech, 82 COLUM. L. REV. 720, 720 n.2 (1982) [hereinafter Note, Constitutional Protection]. Many judges and commentators, however, have theorized about exactly what forms of speech the first amendment protects. See Note, Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses With the Zauderer Decision, 65 N.C.L. REV. 170, 176 n.48 (1986) [hereinafter Note, Consumer Loses With Zauderer]. That commentary notes that at least three approaches have been advocated:

1.) restrictive view—only “public” speech is protected (speech connected to public issues or to self-government, but not commercial speech);

2.) moderate view—distills protected speech into four functions (speech which insures self-fulfillment to individuals, provides a means to develop knowledge and discover truth, provides individuals with a means of influencing decision-making and permits a way of balancing change and stability in society); it is unclear whether commercial speech would be protected;

3.) liberal view—since all speech is important as an end in itself, the proper way to control it is to allow it to control itself in the marketplace of ideas; commercial speech would naturally be protected.

Id. (citations omitted).


21. Id. at 753-54. Before deciding the ultimate issue of whether commercial speech was entitled to any constitutional protection, the Court had to decide whether the constitutional protection, if any, could be enjoyed by the consumers as recipients of the information, and not solely by the advertisers. Id. at 756. The Court responded affirmatively, stating that “[i]f there is a right to advertise, there is a reciprocal right to receive the advertising . . . .” Id. at 757.
ering the Court’s opinion, noted that while several previous cases decided by the Supreme Court may have given some indication that commercial speech was totally unprotected, more recent decisions had questioned the viability of that notion. Phrasing the communication as simply: “I will sell you the X prescription drug at the Y price,” Justice Blackmun concluded that speech which “does no more than propose a commercial transaction” does not lack all first amendment protection.

Essentially, Justice Blackmun reasoned that consumers have a substantial interest in the free flow of commercial information, which is indispensable to the formation of intelligent opinions. He stated that “even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.” Although Justice Blackmun recognized the existence of significant state-interest justifications for the advertising ban, he concluded that the

22. Id. at 758-59. Justice Blackmun noted that the notion of unprotected commercial speech had almost disappeared in the case of Bigelow v. Virginia, 421 U.S. 809 (1975), but since the subject matter in Bigelow (advertisement announcing abortions were legal in New York) had involved matters of public interest, and not purely commercial advertising, the idea of a commercial speech exception to first amendment protection arguably persisted. Virginia Pharmacy, 425 U.S. at 759-60.

23. Virginia Pharmacy, 425 U.S. at 761-62. The Court, however, explicitly noted that it was not acceding full first amendment protection to this new doctrine of commercial speech, stating that “we have not held that it is wholly indifferable from other forms [of speech].” Id. at 771 n.24. The Court continued: “There are commonsense differences between speech that does ‘no more than propose a commercial transaction’ and other varieties.” Id. (quoting Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973)). In a subsequent decision, the Court reaffirmed this position by stating that “we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.” Ohrnalik v. Ohio State Bar Ass’n., 436 U.S. 447, 456 (1978). For a discussion of Ohrnalik, see infra notes 49-57 and accompanying text.

24. Virginia Pharmacy, 425 U.S. at 763. Justice Blackmun noted that the consumer’s interest in the free flow of commercial information “may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” Id.

25. Id. at 765 (footnotes omitted). Note that Justice Blackmun shifted the focus from the interests of the speaker (which is usually at the core of traditional first amendment protection) to the interests of the recipient. For a discussion of the conceptual distinction between the “right to expression” and the “right to know,” see Whitman & Stoltenberg, Direct Mail Advertising by Lawyers, 45 U. PITT. L. REV. 381, 382-83 (1984). See also Note, Constitutional Protection, supra note 19, at 725 (Virginia Pharmacy’s analysis in terms of economic efficiency and economic interests of consumers reflects interests foreign to those values in traditional first amendment jurisprudence which historically only protected rights to expression and association).

26. Virginia Pharmacy, 425 U.S. at 766-67. The state had argued that it had a strong interest in protecting consumers by maintaining a high degree of professionalism on the part of licensed pharmacists, and that price advertising would place in jeopardy the pharmacist’s expertise and the customer’s health. Id. The Court dismissed this argument on the basis that high professional standards would be maintained by Virginia’s close regulation of its pharmacists. Id. at 768.
state's protectiveness of its citizens was impermissible because it rested largely on the advantages of its citizens being kept in ignorance. In the last section of his opinion, Justice Blackmun emphasized that although commercial speech warranted some first amendment protection, some forms of state regulation were permissible. For the moment, however, the Court reserved judgment regarding the constitutionality of state regulation of advertising by physicians or lawyers.

Two years later in Bates v. State Bar, the Court decided the question reserved in Virginia Pharmacy. In Bates, two attorneys had knowingly violated a state ethics rule prohibiting attorney advertising by publishing

27. Id. at 769. The Court felt that by prohibiting the dissemination of this information, the Virginia legislature sought to prevent certain assumed detrimental reactions by consumers. Id. However, the Court felt that an alternative to this paternalistic approach is "to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." Id. at 770. Consequently, the Court decided that the option chosen by the Virginia legislature was improper because "[i]t is precisely this kind of choice, between the dangers of its misuse if it is freely available, that the First Amendment makes for us." Id.

28. Id. Particularly, the Court stated that certain time, place and manner restrictions may be permissible but that the Virginia statute in question plainly exceeded those bounds by singling out speech of particular content and seeking to prevent its dissemination completely. Id. at 771. Also, a state may regulate commercial speech which is deceptive or misleading, for example, by requiring the message in a certain form, or by including such additional information, warnings and disclaimers as necessary to prevent deception. Id. at 772 n.24. Moreover, a state may ban untruthful speech or speech which advertises proposed illegal transactions. Id. at 771-72.

29. Id. at 773 n.25. The full footnote reads as follows:

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 distinctions, historical and functional, between professions, may require 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).

In his concurring opinion, Chief Justice Burger stressed that "quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law." Id. at 774 (Burger, C.J., concurring). He also noted that "advertising of professional services carries with it quite different risks from advertising of standardized products." Id. (Burger, C.J., concurring).

In his dissent, Justice (now Chief Justice) Rehnquist recognized the far-reaching implications of this decision on other professions as well, stating: "[T]he Court necessarily adopts a rule which cannot be limited merely to dissemination of price alone, and which cannot possibly be confined to pharmacists but must likewise extend to lawyers, doctors, and all other professions." Id. at 783 (Rehnquist, J., dissenting).

a newspaper advertisement listing the availability of their legal services and stating their fees for certain services.\textsuperscript{31} The Supreme Court of Arizona held that the disciplinary rule did not violate the attorneys' first amendment rights.\textsuperscript{32} The state court noted that restrictions on professional advertising had repeatedly survived constitutional challenges and that the legal profession, like the medical profession, had always prohibited advertising since it was a form of solicitation contrary to public policy.\textsuperscript{33}

The narrow issue before the United States Supreme Court in Bates was whether lawyers "may constitutionally advertise the prices at which certain routine services will be performed."\textsuperscript{34} The Court held Arizona's disciplinary rule unconstitutional on first amendment grounds, relying heavily upon its decision in Virginia Pharmacy, which had emphasized the importance of the free flow of commercial information.\textsuperscript{35} The Court

\textsuperscript{31} Id. at 354. The disciplinary rule in question was Disciplinary Rule 2-101(B) which had been adopted by the Supreme Court of Arizona. Id. at 355. The rule provided in pertinent part:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. The advertisement appeared in the Arizona Republic, a daily newspaper of general circulation in the Phoenix area. Id. at 354.


\textsuperscript{33} Id. The Supreme Court of Arizona recognized that commercial speech had been given some protection in Virginia Pharmacy and Bigelow, yet distinguished them on the grounds that they did not deal specifically with attorney advertising, which requires increased regulation. Id. at 397-98, 555 P.2d at 643-44 (finding concurring opinion of Chief Justice Burger in Virginia Pharmacy, discussed supra, at note 29, particularly persuasive).

\textsuperscript{34} Bates, 433 U.S. at 367-68 (emphasis in original). The Court explicitly did not address two other problems associated with attorney advertising, namely, advertising claims relating to the quality of legal services and the problems associated with in-person solicitation of clients. Id. at 366.

Furthermore, before addressing the first amendment issue, the Bates Court held that state ethical rules are not subject to attack on antitrust grounds. Id. at 363. The Court noted that in Parker v. Brown, 317 U.S. 341 (1943), it had held the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982), inapplicable to certain state action. Bates, 433 U.S. at 359. In Parker, the Court noted that the Sherman Act was not intended "to restrain state action or official action directed by a state," but rather the purpose of the Act "was to suppress [business] combinations to restrain competition and attempts to monopolize by individuals and corporations." Parker, 317 U.S. at 351. The Bates Court held that the state-adopted and state-enforced ethics rules qualified for this "state action" exemption. Bates, 433 U.S. at 359-63. For a discussion of the Supreme Court's decision to scrutinize anticompetitive regulation of attorney advertising and solicitation under the commercial speech doctrine rather than under the antitrust laws, see Maute, supra note 2.

\textsuperscript{35} Bates, 433 U.S. at 365. Specifically, the Court stated:

"We have set out this detailed summary of the Pharmacy opinion be-
then addressed and dismissed each of six proffered justifications for the restriction of attorney price advertising, namely: the adverse effect on professionalism,\textsuperscript{36} the inherently misleading nature of advertising,\textsuperscript{37} the adverse effect on the administration of justice,\textsuperscript{38} the undesirable economic effects of advertising,\textsuperscript{39} the adverse effect of advertising on the quality of service\textsuperscript{40} and the difficulties enforcing less restrictive rules.\textsuperscript{41}

cause the conclusion that Arizona’s disciplinary rule is violative of the First Amendment might be said to flow \textit{a fortiori} from it. Like the Virginia statute, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance.

\textit{Id.} Justice Powell vigorously dissented from this holding, arguing that the majority had improperly “assum[ed] that what it calls ‘routine’ legal services are essentially no different for purposes of First Amendment analysis from prepackaged prescription drugs.” \textit{Id.} at 391 (Powell, J., dissenting in part). Justice Powell reasoned that compared to advertising for standardized products, attorney advertising has a “vastly increased potential for deception” and it would also create “enhanced difficulty of effective regulation in the public interest.” \textit{Id.} (Powell, J., dissenting in part). Justice Powell stated:

[I]t is clear that within undefined limits today’s decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court’s opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined “routine legal services.” In my view, this result is neither required by the First Amendment, nor in the public interest.

\textit{Id.} at 389 (Powell, J., dissenting in part).

\textsuperscript{36} \textit{Id.} at 368 (Court found “postulated connection between advertising and the erosion of true professionalism to be severely strained”). \textit{See also} Metzloff & Smith, \textit{The Future of Attorney Advertising and the Interaction Between Marketing and Liability}, 37 MERCER L. REV. 599, 601 (1986) (in \textit{Bates}, Supreme Court largely ignored ill-defined notions of dignity and professionalism in favor of dissemination of truthful, objective information).

\textsuperscript{37} \textit{Bates}, 433 U.S. at 372. The state argued that attorney advertising is inherently misleading because (1) legal services are individualized, (2) the potential client may not know in advance the services he needs, and (3) advertising will disseminate irrelevant information while failing to demonstrate the relevant factor of skill. \textit{Id.} The Court rejected each, reasoning that certain legal services, like those advertised by Bates, are performed at standardized rates, potential clients are competent to identify desired services, and consumers are sophisticated enough to realize the limitations of advertising. \textit{Id.} at 372-75.

\textsuperscript{38} \textit{Id.} at 375-76 (although advertising might increase litigation in courts because persons will become more aware of their legal rights, Court preferred this alternative to “the notion that it is always better to suffer a wrong silently than to redress it by legal action”).

\textsuperscript{39} \textit{Id.} at 377-78 (arguments that advertising will increase costs in profession and create substantial entry barriers for young attorneys dismissed on grounds that advertising in other professions had demonstrated reduced costs through increased competition; advertising may actually help younger lawyers to penetrate markets dominated by established attorneys).

\textsuperscript{40} \textit{Id.} at 378 (attorneys inclined to “cut quality” will do so regardless of advertising rules).

\textsuperscript{41} \textit{Id.} at 379 (attorney advertising will not necessarily cause attorneys to
In summary, the Court stated: ""[W]e are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys.""42

After the Court held that the first amendment overbreadth doctrine does not apply to professional advertising,43 it determined that the advertisement in question was not misleading and, therefore, was not outside the scope of first amendment protection.44 Finally, as in Virginia Pharmacy, the Bates Court emphasized that although blanket suppression of all attorney advertising is unconstitutional, the states do retain significant authority to regulate such advertising in certain circumstances.45

seize opportunities to mislead and distort; honest lawyers will assist in weeding out those lawyers who abuse the public trust by overreaching through advertising).

42. Id.

43. Id. at 380-81. In traditional first amendment analysis, the "overbreadth doctrine" permits a person to challenge a statute which potentially infringes upon protected speech on the grounds that even though his speech was not affected, a possibility exists that some protected speech might be chilled. Id. at 380. As noted by the Court, this doctrine "represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court." Id. (citations omitted). The traditional justification for use of overbreadth analysis "reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." Id. However, the Court refused to apply this stringent doctrine to professional advertising, stating:

But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. . . . [T]here are "commonsense differences" between commercial speech and other varieties. Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective.


44. Bates, 433 U.S. at 381. The three contentions offered by the state to demonstrate that Bates' advertisement was misleading, but which were dismissed by the Court, were: (1) the advertisement referred to a "legal clinic" without defining the term; (2) the alleged high advertised price for an uncontested divorce did not comport with "very reasonable price" language in the advertisement; and (3) the advertisement did not inform the consumer that he could obtain a name change without any services of an attorney. Id.

45. Id. at 383. The Court noted, for example, that certain restraints could be imposed on false, deceptive or misleading advertising and on in-person solicitation; that supplemental warnings or disclaimers may be required; that reasonable restrictions as to time, place and manner of advertising may be imposed;
C. The Supreme Court Sets Some Boundaries

Soon after the Bates decision, which left some lawyers and state bar associations wondering exactly how much first amendment protection had been given to attorney advertising, the Supreme Court decided the companion cases of Ohralik v. Ohio State Bar Association46 and In re Primus.47 Although both cases involved the issue of attorney solicitation, they arose in disparate factual settings.48

Ohralik was a classic "ambulance chasing" case. Ohralik had personally approached two victims of an automobile accident, one while she was in traction in the hospital and the other the day of her release from the hospital, and had secured from them the right to represent them on a contingent fee basis.49 A state disciplinary board found that Ohralik had violated certain of the state's disciplinary rules.50 This decision was upheld by the Supreme Court of Ohio, which imposed a sanction of indefinite suspension.51 In upholding the disciplinary action taken by the state, the United States Supreme Court held that a state "constitutionally may discipline a lawyer for soliciting clients in person for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."52 The Court acknowledged that, in at least one re-

and that advertising for illegal transactions may be suppressed. Id. For a discussion of the immediate effects of the Bates decision on the profession, see Boden, Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective, 65 MARQ. L. REV. 547 (1982).

48. See Note, Direct-Mail Solicitation By Attorneys: Bates to R.M.J., 33 SYRACUSE L. REV. 1041, 1042 (1982) (since two cases represent "polar opposites" in spectrum of solicitation, they have provided no guidance to members of legal profession, state courts or bar associations).
49. Ohralik, 436 U.S. at 450-51. The two victims subsequently discharged the lawyer, but he received his one-third share of the insurance recovery after insisting that a binding agreement had existed. Id. at 452. The women then filed grievances with the local bar association. Id.
50. Id. at 453. Specifically, Ohralik was found to have violated Disciplinary Rules (DR) 2-103(A) and 2-104(A) of the Ohio Code of Professional Responsibility. Id. at 453. The standards were as follows:

DR 2-103(A) provided:

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.

DR 2-104(A) provided in pertinent part:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Id. at 455 n.9.
51. Id. at 453-54.
52. Id. at 449.
spect, Ohralik’s in-person solicitation may have served the same function as the advertisement in Bates because it imparted certain information about Ohralik’s availability and terms of his legal services.\(^53\) However, the Court noted that significant differences existed, particularly the possibility of procuring a hastily reasoned decision from the client and the absence of any supervisory intervention by concerned persons.\(^54\)

The Court did acknowledge that the state had a legitimate and important interest in preventing the traditional evils allegedly inherent in solicitation and that Ohio’s disciplinary rules served to reduce the likelihood of these evils.\(^55\) Moreover, the Court focused specifically on Ohralik’s conduct\(^56\) and noted that it “present[ed] a striking example of the potential for overreaching that is inherent in a lawyer’s in-person solicitation of professional employment [and] also demonstrate[d] the need for prophylactic regulation in furtherance of the State’s interest in protecting the lay public.”\(^57\)

\(^53\) Id. at 457.
\(^54\) Id. The Court stated:
Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. . . . In-person solicitation . . . actually may disserve the individual and societal interest, identified in Bates, in facilitating “informed and reliable decisionmaking.”

\(^55\) Id. at 457-58 (citation omitted).
\(^56\) Id. at 460-61. The Court noted the following evils of solicitation had been stated over the years: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation. Id. at 461.

\(^57\) Id. at 463. This analysis was required because Ohralik argued that, notwithstanding the facial constitutional validity of the disciplinary rules, the rules were not applicable to his particular acts of solicitation. Id. at 462.

\(^58\) Id. at 468. Some judges and commentators have expressed the view that this language, and that used by the Court in subsequent decisions, did not sustain a blanket prohibition of all in-person solicitation. For example in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985), Justice White cited Ohralik for the proposition that “rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible.” Id. at 638. For a similar view expressed by commentators, see Elliot, Trolling For Clients Under the First Amendment: It’s Hard to Keep a Good Solicitor Down, 60 CONN. B.J. 219, 227-32 (1986) (must examine facts of particular case to determine whether important state interests in preventing identified evils were sufficiently implicated to warrant rule banning in-person solicitation); Moss, The Ethics of Law Practice Marketing, 61 NOTRE DAME L. REV. 601, 675 (1986) (Ohralik could be read narrowly to ban only in-person solicitation of such vulnerable persons as “unsophisticated, injured, or distressed laypersons," but has been read more
In re Primus, the companion case to Ohralik, dealt not with in-person solicitation, but rather concerned direct-mail solicitation of a client. In Primus, a lawyer sent an unsolicited letter to a woman who had been sterilized as a condition of receiving public medical assistance, informing her that the American Civil Liberties Union (ACLU) would represent her free of charge in a threatened suit against the doctor. The Supreme Court of South Carolina held that the state disciplinary rules prohibiting such solicitation were not unconstitutional and thereafter issued a public reprimand for the attorney's violation of those rules.

Although the United States Supreme Court realized that this case, broadly to prohibit all in-person solicitation. For a discussion of Justice Marshall's admonition to accord a narrow reading to Ohralik, see infra notes 70-75 and accompanying text.

59. Id. at 414-16. Primus, who also worked regularly at a law firm, was affiliated with a branch of the ACLU; however, she received no compensation for the services she provided to the ACLU. Id. at 415-16. At the request of a local businessman, Primus had advised a group of women who had been sterilized of their legal rights. Id. at 415. The recipient of the letter in question, who had been an attendee at the meeting, subsequently declined the invitation to join a lawsuit against the doctor. Id. at 417.

60. In re Smith, 268 S.C. 259, 29, 283 S.E.2d 301, 306 (1977), rev'd sub nom. In re Primus, 436 U.S. 412 (1978). Primus was reprimanded for violation of South Carolina disciplinary rules DR 2-103(D)(a) and (c), and DR 2-104(A)(5). Primus, 436 U.S. at 418-21. These rules provided in pertinent part:

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

DR 2-104 (A):

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder
like *Ohralik*, involved attorney solicitation, it recognized that significant differences existed. The precise question before the Court was "whether, in light of the values protected by the First Amendment, these differences materially affect the scope of state regulation of the conduct of lawyers." Specifically, the Court had to determine whether Primus' conduct was entitled to only limited "commercial speech" protection or whether it sufficiently implicated interests of free expression and association to justify full first amendment protection as provided by the Court in *NAACP v. Button*.

As an initial matter, the Court found that no meaningful distinction existed between the fully protected practices of the NAACP and the ACLU. The Court concluded that since the "ACLU engages in litigation as a vehicle for effective political expression and association," Primus' letter on its behalf came "within the generous zone of First Amendment protection reserved for associational freedoms." The Supreme Court thus examined the state's disciplinary action with the "exacting scrutiny applicable to limitations on core First Amendment rights," and concluded that the disciplinary rules in ques-

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61. *Primus*, 436 U.S. at 422. The Court summarized these differences as follows:

Unlike the situation in *Ohralik*, however, appellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain.

62. *Id.*

63. 371 U.S. 415 (1963). In *Button*, the Supreme Court held the National Association for the Advancement of Colored People's (NAACP) activities of advising persons of their legal rights in matters concerning racial segregation "are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of [Virginia's state law] and the Canons of Professional Ethics. *Id.* at 428-29.

In *Primus*, the Court intimated that when the impetus for the speech is the traditional noncommercial, public speech concerns, and not the lawyer's own pecuniary gain, full first amendment protection will be accorded. *Primus*, 436 U.S. at 421-32.

64. *Primus*, 436 U.S. at 427. The Court stated that "the ACLU and its local chapters, much like the NAACP and its local affiliates in *Button*, 'engage in extensive educational and lobbying activities' and 'also [devote] much of [their] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [their] declared purposes.'" *Id.* (quoting *Button*, 371 U.S. at 419-20).

65. *Id.* at 431.

66. *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)).
tion were overbroad.67

Alternatively, the Court stated that even if it ignored the over-
breadth of the regulation, Primus could not be disciplined "unless her
activity in fact involved the type of misconduct at which South Carolina's
broad prohibition [was] said to be directed."68 The Court found no
support in the record for the state's contention that Primus' letter had
been facially misleading; nor was there any evidence of the existence of
such dangers as undue influence, overreaching, misrepresentation, or
invasion of privacy which the Ohralik Court had emphasized.69

Recognizing that bar associations would be looking to these com-
panion cases for some guidance when redrafting their disciplinary rules,
Justice Marshall wrote a separate concurring opinion in Ohralik to articu-
late what he felt the Court had actually decided.70 While he largely
agreed with the decision reached in Primus, he felt that Ohralik should be
limited in its holding to read that states may constitutionally prohibit
"the solicitation of business, under circumstances—such as those found
in this record—presenting substantial dangers of harm to society or the
client independent of the solicitation itself."71 Justice Marshall focused
on the needs of the recipients of the communication to be informed of
their legal rights rather than on the lawyer's motive behind the solicita-
tion.72 While not condoning Ohralik's egregious conduct, Justice Mar-
shall felt that he had nonetheless imparted valuable information to the
accident victims which they might never have received.73 The Court's
suggestion that in-person solicitation was entitled to less first amend-
ment protection than that afforded to commercial speech in Bates dis-
turbed Justice Marshall because he reasoned that the informational
interests served by the solicitation were as equally substantial as those in

67. Id. at 432-33. Applying the strict scrutiny test, the Court found that
although South Carolina had compelling state interests in preventing undue in-
fluence, overreaching, invasion of privacy and the like, the disciplinary rules
were not "closely drawn to avoid unnecessary abridgment of associational free-
doms." Id. at 432-33 (quoting Buckley, 424 U.S. at 25). The Court further em-
phasized: "Where political expression or association is at issue, this Court has
not tolerated the degree of imprecision that often characterizes governmental
regulation of the conduct of commercial affairs." Id. at 434.

68. Id. at 433-34.

69. Id. at 434-36. The Court further found that the "State's interest in
preventing the 'stirring up' of frivolous or vexatious litigation and minimizing
commercialization of the legal profession offer no further justification for the
discipline administered in this case." Id. at 436-37.

70. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468-77 (1978) (Marshall,
J., concurring in part and concurring in judgment).

71. Id. at 470 (Marshall, J., concurring). Justice Marshall felt that what was
objectionable was not so much Ohralik's "solicit[ing] business for himself, but
rather the circumstances in which he performed that solicitation and the means
by which he accomplished it." Id. (Marshall, J., concurring).

72. Id. at 473 (Marshall, J., concurring).

73. Id. (Marshall, J., concurring).
the advertising context. Unfortunately, much of the confusion in the area of the permissibility of state regulation of attorney solicitation has resulted largely because subsequent interpretations of Ohralik have largely disregarded Justice Marshall's admonition to narrowly construe the Court's holding.

The next important case in the commercial speech area was Central Hudson Gas & Electric Corp. v. Public Service Commission. In Central Hudson, the Supreme Court determined that a state regulation which completely banned all promotional advertising by electric utilities violated the first and fourteenth amendments. The Court, after summarizing its recent decisions which had afforded limited first amendment protection to commercial speech, delineated a four-part test to determine the propriety of governmental regulation of commercial speech. The Court articulated the test as follows: first, to fall within the protection of the first amendment, does the commercial speech at least concern lawful activity and is it not misleading?; second, has the state asserted a substantial governmental interest?; third, does the regulation in question directly advance the asserted governmental interest?; and fourth, is the regulation not more extensive than necessary to serve that interest?

74. Id. at 474 (Marshall, J., concurring).
75. See Moss, supra note 57, at 677; Whitman & Stoltenberg, supra note 25, at 407.
76. 447 U.S. 557 (1980).
77. Id. at 570. The regulatory ban, promulgated by the Public Service Commission of New York, sought to curtail demand for electricity during the winter of 1973-74 because of the state's purported insufficient fuel supply. Id. at 558-59. Central Hudson Gas & Electric Corp. opposed the ban on first amendment grounds but the New York Court of Appeals ultimately upheld the ban, reasoning that "[i]n view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionmaking." Consolidated Edison Co. v. Public Serv. Comm'n, 47 N.Y.2d 94, 110, 390 N.E.2d 749, 757, 417 N.Y.S.2d 30, 39 (1979), rev'd sub nom. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).
78. Central Hudson, 447 U.S. at 561-66. The Court has always been cognizant that commercial speech has been accorded less than full first amendment protection. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) ("There is no longer any doubt that . . . commercial speech' is entitled to the protection of the First Amendment, albeit to protection less extensive than that afforded 'noncommercial speech.'"); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 68 (1983) (no reason to provide full first amendment protection when statements made in context of commercial transactions); In re Primus, 436 U.S. 412, 434 (1978) ("Where political expression is at issue, this Court has not tolerated the degree of imprecision that often characterizes governmental regulation of the conduct of commercial affairs."). For a comparison of commercial and noncommercial speech through an analysis of the interests sought to be protected by the first amendment and the values underlying these interests, see Note, Constitutional Protection, supra note 19.
79. Central Hudson, 447 U.S. at 566.
80. Id. Utilizing this framework, the Court found that the regulation had failed the fourth prong because "[t]he Commission had not demonstrated that
At this juncture, however, it was unclear whether this new commercial speech standard would be applicable to attorney speech cases since the Court in Bates and Virginia Pharmacy had previously indicated that attorney advertising may present greater potential for deception than commercial advertising generally.81

D. Targeted and Direct-Mail Advertising Guidelines

Two years later, the Supreme Court resolved this doubt by applying the Central Hudson test to attorney speech in the case of In re R.M.J.82 In R.M.J., the Court considered the constitutionality of Missouri’s ethical rules regarding advertising, which had been revised in light of Bates83 to permit lawyer advertising, but which still imposed certain restrictions regarding permissible categories of information and specified language.84 The new rules essentially limited advertising to ten permissible categories of information;85 required that a lawyer listing areas of practice in an advertisement do so in one of two prescribed ways;86 and

its interest in [energy] conservation [could not have been] protected adequately by [a] more limited regulation of appellant’s commercial expression.” Id. at 570. The Court reasoned that the ban prohibited Central Hudson from promoting more efficient electric services or those which would consume roughly the same amount of energy. Id.

81. See Bates v. State Bar, 433 U.S. 350, 366 (1977) (issue framed narrowly to determine propriety of price advertising only because advertising relating to quality of legal services might be deceptive or misleading); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 n.25 (1976) (physician and attorney advertising may present enhanced possibility for confusion and deception). For discussions of Bates and Virginia Pharmacy, see supra notes 30-45 and 20-29, respectively, and accompanying text.

82. 455 U.S. 191 (1982).

83. In response to Bates, the ABA drafted two model rules governing the regulation of attorney advertising to aid the states in revising their ethics rules: the “regulatory” approach, which narrowly construed Bates and contained numerous restrictions on types of information that could be listed in an advertisement; and the “directive” approach, which broadly interpreted Bates to forbid only “false, fraudulent, misleading or deceptive” advertising. Andrews, Lawyer Advertising and the First Amendment, 1981 AM. B. FOUND. RES. J. 967, 986-88. A majority of the states, including Missouri, had adopted the regulatory approach. Id. See also Boden, supra note 45, at 554-55 (prevailing notion in immediate post-Bates era was to construe decisions as narrowly as possible while preserving much of old tradition in revised rules).

84. R.M.J., 455 U.S. at 193.

85. Id. at 194 (citing Missouri Canon of Professional Responsibility DR 2-101). The permitted categories were: “name, address and 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 fixed fee to be charged for certain specified routine” legal services.” Id.

86. Id. at 194-95 (citing Missouri Canon of Professional Responsibility DR 2-101). The attorney could either list one of three general descriptive terms (“General Civil Practice,” “General Criminal Practice” or “General Civil and Criminal Practice”) or use one or more of a list of 23 specific areas of practice (e.g., “Tort Law,” “Family Law” or “Corporation Law”). Id. & 195 n.6.
permitted mailings to "lawyers, clients, former clients, personal friends, and relatives," while prohibiting general mailings of professional announcement cards. 87

R.M.J. had mailed professional announcements to a selected list of addressees in violation of Missouri’s Disciplinary Rule (DR) 2-101 and had placed several advertisements which did not conform to the specified language requirements of DR 2-102. 88 In a brief conclusory opinion, the Supreme Court of Missouri issued a private reprimand to the attorney for these violations. 89 In upholding the constitutionality of DR 2-101, the Missouri court had expressly refused to apply the commercial speech test formulated in Central Hudson. 90 The United States Supreme Court, however, applied the test and held both rules constitutionally invalid. 91 The Court noted that although the information included in the advertisements was not in strict compliance with DR 2-101, it was not misleading and presented no "apparent danger of deception." 92 Since the state had failed to demonstrate any substantial governmental interest promoted by the restrictions in DR 2-101, the rule failed the second prong of the Central Hudson test. 93 The Court also held unconstitutional the absolute prohibition in DR 2-102 against the direct mailing of professional announcements to a general audience. 94 The Court recognized the supervision difficulties inherent if such mailings were permitted; 95 however, the Court stated that "by requiring a filing with the Advisory Committee a copy of all general mailings, the state may be able to exercise reasonable supervision over such mailings." 96 Moreover, the record did not indicate "a failed effort to proceed along such a less restrictive path." 97

87. Id. at 196 (citing Missouri Canon of Professional Responsibility DR 2-102).
88. Id. at 198.
90. Id. Cognizant that this was a "test" case and dissatisfied with the inconsistency of the Supreme Court’s analyses in commercial speech cases, the Missouri Supreme Court refused the request of R.M.J. to apply the recently announced Central Hudson four-part analysis, stating: "We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the subjective ad hoc judgments of a majority of the justices of the United States Supreme Court." Id. (emphasis in original). For a discussion of the four-part test adopted in Central Hudson, see supra notes 76-81 and accompanying text.
91. R.M.J., 455 U.S. at 207.
92. Id. at 205.
93. Id. at 203 n.15, 205.
94. Id. at 206.
95. Id.
96. Id.
97. Id. For a discussion of the proposition that the Supreme Court, in R.M.J., had created a different and less exacting standard of review for attorney advertising than for other forms of commercial speech, see Note, In re R.M.J.:
In *Bolger v. Youngs Drug Products Corp.*, the Court addressed the constitutionality of a federal statute prohibiting mailings of unsolicited advertisements for contraceptives. Youngs Drug Products Corporation (Youngs) argued that the statute, which prevented Youngs from mass mailing promotional flyers and informational pamphlets to the public, violated the first amendment. The district court held that the regulation was unconstitutional, and the Supreme Court affirmed. The Court recognized that the government undoubtedly had a substantial interest in aiding parents’ efforts to discuss birth control with their children. However, the Court stated that the scope of the statute was more extensive than permissible because its “marginal degree of protection [was] achieved by purging all mailboxes of unsolicited material that [was] entirely suitable for adults,” and it “deny[d] to parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area.” The Court concluded that recipi-

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*Reassessing the Extension of First Amendment Protection to Attorney Advertising, 32 CATH. U.L. REV. 729, 754-57 (1983).*

99. *Id.* at 61. The applicable portion of the statute provides:
(2) Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement—
(A) is mailed to a manufacturer of such matter, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or
(B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.
100. *Bolger*, 463 U.S. at 62-63. Youngs sought to mail the following: multi-page, multi-item flyers promoting a large variety of products available at a drugstore, including prophylactics; flyers exclusively or substantially devoted to promoting prophylactics; and informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs’ products in particular. *Id.* at 62. The Court recognized that although the flyers fell “within the core notion of commercial speech,” the informational pamphlets could not be so easily characterized because they were more than “proposals to engage in commercial transactions.” *Id.* at 66. However, because the pamphlets were advertisements and referred to a specific product, and Youngs’ motivation was economic, the Court concluded that the pamphlets constituted commercial speech “notwithstanding the fact that they contain[ed] discussions of important public issues such as venereal disease and family planning.” *Id.* at 66-68. For a view that the Court apparently reversed itself in this characterization only a few paragraphs later, see L. TRIBE, *supra* note 43, § 12-15, at 897. Tribe focused on the Court’s statement that “where . . . a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease, we have previously found the First Amendment interest served by such speech paramount.” *Id.* (quoting *Bolger*, 436 U.S. at 69).
102. *Bolger*, 463 U.S. at 73.
103. *Id.* at 73-75.
ents of the unsolicited mailing easily could have averted their eyes, finding that the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." 104

Finally, the Court decided the case of Zauderer v. Office of Disciplinary Counsel. 105 In Zauderer, the Office of Disciplinary Counsel of the Supreme Court of Ohio had disciplined an attorney for an advertisement he had placed in several Ohio newspapers. 106 The advertisement recommended that women who had been injured as a result of using the Dalkon Shield Intrauterine Device (IUD) contact him for free information regarding potential legal action against the manufacturer. 107 Zauderer's conduct violated Ohio's disciplinary rules which had placed absolute bans on such advertising. 108 The Supreme Court applied the

104. Id. at 72 (quoting Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.), summarily aff'd, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968)).
106. Id. at 630-35.
107. Id. at 630-31. The advertisement, which also included an illustration of the IUD, read:
The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

Id. at 631. This advertisement was successful in attracting over 200 inquiries, from which Zauderer initiated lawsuits on behalf of 106 of them. Id.
108. Id. at 632-34. As summarized by the Court, his conduct violated the following pertinent ethics rules:
DR 2-103(A), which prohibits an attorney from "recommend[ing] 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"; and DR 2-104(A), which provides (with certain exceptions not applicable here) that "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

Id. at 633. The Supreme Court of Ohio, adopting the findings by a panel (and then the entire Board) of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, distinguished Bates and R.M.J. on the grounds that neither case "had forbidden all regulation of attorney advertising," and relied heavily upon the rationale of Ohralik which had "upheld Ohio's imposition of discipline on an attorney who had engaged in-person solicitation." Id. at 634-35. Recognizing that any rules which would ban all advertising by attorneys would violate the dictate of Bates and R.M.J., the Supreme Court of Ohio chose to uphold its disciplinary rules on the grounds that they "forbade soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem." Id. at 639 (emphasis added).
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Central Hudson test. The Court found that Zauderer’s statements had been neither false nor deceptive and, thus, warranted some first amendment protection. However, the Court searched for, but could not find, a substantial governmental interest served by a prophylactic ban on all such advertising. The Court reasoned that the in-person solicitation concerns expressed in Ohralik were simply not analogous to written advertisements. Specifically, the Court held that “[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.”

However, the Court upheld Ohio’s determination that Zauderer’s claim in the advertisement that “[i]f there is no recovery, no legal fees are owed by our clients” properly subjected him to disciplinary action. The Ohio Supreme Court had found that Zauderer’s advertisement failed to include additional information such as a client’s potential liability for significant litigation costs even if the suit were unsuccessful.

109. Id. at 638.
110. Id. at 641.
111. Id. at 641-44.
112. Id. Although the Supreme Court of Ohio had not specifically mentioned the specific governmental interests served by the rules, the Supreme Court felt that its heavy reliance on Ohralik “suggest[ed] that the Board [of Commissioners] believed that the application to appellant’s advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue in Ohralik.” Id. at 641. However, neither the concerns of Ohralik (invasion of privacy of the recipient of such advertising, potential risk of overreaching, or undue influence) nor the traditional justification for such restraints on solicitation (the fear that lawyers will stir up litigation) persuaded the Court. Id. at 642-44. For a discussion of Ohralik, see supra notes 49-57 and accompanying text.

113. Zauderer, 471 U.S. at 647. The Supreme Court also addressed Ohio’s disciplinary rules regarding an attorney’s use of illustrations. Ohio’s Disciplinary Rule 2-101(B) provided that only certain types of information could be presented in an advertisement, and it additionally stated that “[t]he information disclosed by the lawyer in such publication or broadcast shall . . . be presented in a dignified manner without the use of . . . illustrations . . . .” Id. at 632 n.4. The Court found that since commercial illustrations are entitled to the same first amendment protection afforded verbal commercial speech, any regulations prohibiting such illustrations must also survive the scrutiny of Central Hudson. The state, however, could not justify its contention that the potential dangers associated with the use of illustrations could not be regulated in a manner short of a total ban. Id. at 648-49. Furthermore, since the possibility of policing the use of illustrations in advertising on a case-by-case basis existed, the Court held the prophylactic ban improper. Id.

114. For the full text of the advertisement, see supra note 107.

115. Zauderer, 471 U.S. at 653. The state had claimed that the advertisement violated “DR 2-101(B)(15), which provides that any advertisement that mentions contingent-fee rates must ‘disclos[e] whether percentages are computed before or after deduction of court costs and expenses,’ and that the ad’s failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement ‘deceptive.’” Id. at 633.
ful. While recognizing that the "compulsion to speak may be as violative of the First Amendment as prohibitions on speech," the Court held that since commercial speech was at issue, as long as the disclosure requirements were "reasonably related to the State's interest in preventing deception of consumers," Zauderer's rights were adequately protected.

Unquestionably, from its decisions in Bates through Zauderer, the Supreme Court provided increasing degrees of first amendment protection to attorney advertising and solicitation. Notwithstanding these advances, however, many writers argued that the Court's ad hoc approach and narrow holdings left practitioners and bar associations without adequate guidance for the future.

E. Adoption of the Model Rules

In light of these various Supreme Court decisions and the changing conditions in the practice of law, the need to reexamine the effectiveness of its Model Code of Professional Responsibility confronted the ABA in the late 1970's and early 1980's. In response, the ABA adopted the Model Rules of Professional Conduct (Model Rules) in August, 1983. In Part 7 of the Model Rules, entitled "Information About Legal Services," Rules 7.1 to 7.3 respectively prohibit false or misleading commu-

116. Id. at 650.
117. Id. (citations omitted).
118. Id. at 651. Noting that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected speech," the Court felt that since the advertisement made no distinction between legal fees and legal costs, the possibility of deception was evident and, therefore, permissibly regulated. Id. at 651-52. This analysis has led one commentator to conclude that although the Court would continue to closely scrutinize outright bans on commercial speech, it might be more lenient with respect to rules merely imposing disclosure requirements. See Maute, supra note 2, at 503.
119. See, e.g., Elliot, supra note 57, at 220 ("[T]he increasingly ad hoc directionless course of the Supreme Court in commercial speech cases . . . makes discovery of principled bases for its decisions difficult to discern, and therefore articulation of guidelines from them likely to withstand judicial scrutiny difficult to propound."); McChesney, Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers, 134 U. Pa. L. Rev. 45, 47 & n.11 (1985) (noting some commentators agree constitutional protection of commercial speech is warranted but Supreme Court has failed to achieve any continuity of analysis or consistency of result).
120. See THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES, Preface, at v (ABA Center for Professional Responsibility 1987) [hereinafter RULES' LEGISLATIVE HISTORY]. Specifically, the ABA's Commission on Evaluation of Professional Standards (Kutak Commission) "was charged with evaluating whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law." Id. This commission was referred to as the "Kutak Commission" after its initial chairman. C. Wolfram, supra note 2, at 61.
121. RULES' LEGISLATIVE HISTORY, supra note 120, at 2.
Communications by a lawyer,122 permit advertising subject to certain requirements,123 and essentially prohibit solicitation for pecuniary gain unless it involves a written communication distributed to a general audience.124 Interestingly, the proposed version of the solicitation rule (Kutak Commission Proposed Rule 7.3) would have permitted attorney solicitation under certain circumstances.125 However, after substantial

122. Model Rule 7.1 (Communications Concerning a Lawyer's Services) provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Model Rules, supra note 6, Rule 7.1.

123. Model Rule 7.2 (Advertising) states in pertinent part:

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy of recording or an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

Model Rules, supra note 6, Rule 7.2.

124. Model Rules, supra note 6, Rule 7.3. For the text of Model Rule 7.3, see supra note 6.

125. The Kutak Commission Proposed Rule 7.3 (Personal Contact with Prospective Clients) reads as follows:

(a) Subject to the requirements of paragraph (b), a lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances:

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress or harassment.

Rules' Legislative History, supra note 120, at 182-83. Some of the states
debate, the ABA rejected this proposal¹²⁶ in favor of the current version of Model Rule 7.3.¹²⁷ It was the constitutionality of this adopted rule that the Court tested in Shapero v. Kentucky Bar Association.¹²⁸

III. Discussion

In Shapero, the Supreme Court squarely confronted an aspect of attorney solicitation which it had previously declined to address: targeted direct-mail solicitation of potential clients with known specific legal problems.¹²⁹ Attorney Richard D. Shapero, a member of Kentucky’s integrated Bar Association,¹³⁰ proposed to send a letter to potential clients who recently had foreclosure suits filed against them, to inform them that they could call his office for free information on how to keep their homes.¹³¹ Pursuant to state ethical rules, Shapero sought approval which permit solicitation with certain qualifications have adopted some form of the Kutak Commission’s proposal, rather than Model Rule 7.3, which attempts to distinguish vulnerable recipients from nonvulnerable ones. For a discussion questioning the continued constitutional validity of this proposal, see infra notes 216-20 and accompanying text.

¹²⁶. The critics of the Kutak Commission’s proposal “expressed concern that this version removed practically all prohibitions against in-person solicitation” and that the “restrictions in the proposed rule were vague and would have little practical effect”; on the other hand, its proponents claimed that it “balanced constitutional considerations regarding a lawyer’s First Amendment rights with the states’ interest in regulating conduct of lawyers.” LAWYERS MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA), 81:602 (July 20, 1988) [hereinafter ABA MANUAL].

¹²⁷. For the full text of Model Rule 7.3, see supra note 6. For a view that Model Rule 7.3 presents the “least defensible definition” of solicitation and does so in a confusing manner, see Moss, supra note 57, at 677-79.


¹³⁰. Shapero, 108 S. Ct. at 1919. An “integrated” bar association (as contrasted with a voluntary association) is one “whereby every practicing lawyer must be a supporting member of the bar association and subject to its [ethical rules] and to discipline by it.” H. DRINKER, supra note 2, at 20-21. For a discussion of the view that making bar membership mandatory would permit bar associations to exercise greater control over admission and discipline of lawyers, see C. WOLFRAM, supra note 2, at 36-37. See generally Lathrop v. Donohue, 367 U.S. 820 (1961) (compulsory enrollment in state’s integrated bar not violative of first amendment’s guarantees of free speech and association).

¹³¹. Shapero, 108 S. Ct. at 1919. The proposed letter stated:

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 [sic] 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.
for his proposed letter from the Kentucky Attorney Advertising Commission (Commission).132 Although the Commission found Shapero’s letter to be neither false nor misleading, it denied his request because a then-existing Kentucky Supreme Court rule had prohibited such mailings to persons with specific problems.133 On appeal to the Supreme Court of Kentucky, the court deleted its ethical rule in light of the United States Supreme Court’s decision in Zauderer,134 and replaced it with the ABA’s Model Rule 7.3.135 However, Shapero was still unable to send his letter because “Rule 7.3 like its predecessor prohibit[ed] targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading.”136 The United States Supreme Court, in an opinion by Justice Brennan, reversed, finding the outright ban on protected commercial speech inconsistent with the first and fourteenth amendments.137

Justice Brennan reiterated the protections afforded attorney adver-

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. (emphasis in original).

132. Id. The Commission is charged, pursuant to Kentucky Supreme Court rules, with the responsibility of “regulating attorney advertising as prescribed” in those rules; its decisions are ultimately appealable to the Supreme Court of Kentucky. Id. at 1919 n.1.

133. Id. at 1919. The rule in question provided:

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 by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Id. at 1919 n.2 (emphasis added). Although the Commission denied the request, it expressed its view that the rule was unconstitutional in light of Zauderer and recommended that the Supreme Court of Kentucky amend the rule. Id. at 1920. Shapero then sought an advisory opinion from the Committee on Legal Ethics of the Kentucky Bar Association, which similarly found the letter to be neither false nor misleading, but which upheld Kentucky’s rule because it was consistent with the ABA’s Model Rule 7.3. Id. For the text of Model Rule 7.3, see supra note 6.


136. Id.

137. Id. Justice Brennan was joined by Justices White, Marshall, Blackmun, Stevens and Kennedy with respect to Parts I and II of his opinion. Id. at 1919. For a discussion of Parts I and II of Justice Brennan’s opinion, see infra notes 129-58 and accompanying text. Justices White and Stevens dissented from Part III of Justice Brennan’s opinion. Shapero, 108 S. Ct. at 1919. For a discussion of Part III of Justice Brennan’s opinion, see infra notes 159-64 and accompanying text. Justice O’Connor dissented and filed a separate opinion in which Chief Justice Rehnquist and Justice Scalia joined. Shapero, 108 S. Ct. at 1919. For a discussion of Justice O’Connor’s dissent, see infra notes 165-81 and accompanying text.
tising by Bates and Zauderer, and summarized the applicable standard to be used when governmental regulations have been imposed on attorney speech: "Since state regulation of commercial speech 'may extend only as far as the interest it serves,' state rules that are designed to prevent the 'potential for deception and confusion ... may be no broader than reasonably necessary to prevent the' perceived evil." Justice Brennan re-emphasized that since the unique problems associated with in-person solicitation simply are not present in written advertisements, a prophylactic ban was improper. Justice Brennan recognized that differences existed between written and in-person solicitation; however, he stated that "[o]ur advertising cases have never distinguished among various modes of written advertising to the general public." Thus the attorney in Zauderer, who had used a newspaper advertisement to solicit women who had used the Dalkon Shield, would have had just as much right to mass mail his advertisement to those women as he did to include it in the newspaper. Consequently, Justice Brennan similarly found no reason why Shapero's letter could not also have been mailed to a general audience which might have needed his services. Noting that the only reason to advertise services among a general audience is to reach those actually in need of those services, Justice Brennan succinctly stated: "[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient."  

140. Id.  
141. Id. (emphasis added). For example, the Court noted that in Bates, the Court had equated advertising in a telephone directory with that in a newspaper, and in R.M.J. it had treated mail announcement cards the same as newspaper and telephone directory advertisements. Id.  
142. Id.  
143. Id. (emphasis added). In fact, the Court noted that Model Rule 7.3 would have permitted such a general mailing since it provided that "[t]he term 'solicit' ... does not include letters addressed ... 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, supra note 6, Rule 7.3.  
144. Shapero, 108 S. Ct. at 1921. The anomalous situation presented by Model Rule 7.3 would permit, for example, the mailing of a promotional advertisement to 10,000 individuals thought to need the attorney's services, but would prohibit a more limited mailing to 200 of the 1000 who actually were known to need those services. See also G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 526.1 (Supp. 1987) ("There is something absurd about permitting a targeted message to be sent, but only through a medium (such as newspaper advertising) that will reach a much larger audience than intended. Requiring the message to be sent by deliberately inefficient means in effect imposes a tax on the sender, which will probably be passed on to those who eventually receive it.") (emphasis in original).
Justice Brennan noted that the Supreme Court of Kentucky, in its rationale for disapproving the mailing of Shapero's letter, had improperly analogized direct-mail solicitation to in-person solicitation and its possible dangers of undue influence, overreaching and intimidation which the Court, in Ohralik, held could be permissibly banned.

Justice Brennan articulated the flaw in the Kentucky Supreme Court's reasoning as the assumption that the focus is on the potentially susceptible "condition" of the proposed client, rather than "whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."

Justice Brennan distinguished targeted, direct-mail solicitation from in-person solicitation as to each of the evils sought to be avoided. The potential for overreaching and undue influence in targeted direct-mail solicitation does not exist because "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." Justice Brennan also discounted any potential invasion of privacy that accompanies a targeted mailing because "[t]he invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." Finally, while recognizing the existence of potential deception inherent in personalized letters, Justice Brennan stated that the


146. Shapero, 108 S. Ct. at 1922. Specifically, the Kentucky Supreme Court had reasoned as follows:

The state is free to fashion any reasonable restriction with regard to time, place and manner of solicitation by the members of its bar association. The state has a recognizable governmental interest in regulating members of the professions it licenses and who serve as officers of the courts which justifies the application of rules to prohibit solicitation that is misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. Direct targeted mail to a person with whom the lawyer has no prior relationship should also be prohibited for the same reasons.

Shapero v. Kentucky Bar Ass'n, 726 S.W.2d 299, 300-01 (Ky. 1986) (citations omitted), rev'd, 108 S. Ct. 1916 (1988). The Kentucky Supreme Court further justified its position by stating that "the free speech element is an essential but subordinate component of a situation of in-person solicitation by a lawyer of a potential client." Id. at 301.

147. Shapero, 108 S. Ct. at 1922.

148. Id. at 1922-23. The two factors stated for upholding the categoric ban of in-person solicitation in Ohralik were: first, the "characterization of face-to-face solicitation as 'a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud'"; and second, "'unique . . . difficulties' would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is 'not visible or otherwise open to public scrutiny.'" Id. (quoting Zauderer, 471 U.S. at 641; Ohralik, 436 U.S. at 466).

149. Id. at 1923.

150. Id.
opportunity for "isolated abuses or mistakes does not justify a total ban on that mode of commercial speech."\textsuperscript{151} Rather, the states can regulate through "far less restrictive and more precise means, the most obvious of which is to file any solicitation letter with a state agency, . . . giving the State ample opportunity to supervise mailings and penalize actual abuses."\textsuperscript{152}

Justice Brennan described how the "'regulatory difficulties' that are 'unique' to in-person solicitation" are inapplicable to solicitations by mail.\textsuperscript{153} Since the Supreme Court of Kentucky had not articulated the reasons for its conclusion that supplying blank form letters to a state agency would be an impracticable solution, Justice Brennan presumed the state's concerns were the lack of agency resources to examine all solicitation letters and an inability to determine if letters were actually misleading.\textsuperscript{154}

Justice Brennan noted that the record was devoid of any evidence demonstrating that scrutiny of direct-mail solicitation letters would be any more burdensome or less reliable than scrutiny of advertisements.\textsuperscript{155} Justice Brennan was unpersuaded that a reviewing agency would need specific information about a recipient's identity and legal problems to determine if such letters were misleading.\textsuperscript{156} Furthermore, he enumerated several options available to an agency if the letter included specific facts.\textsuperscript{157} Mindful of the additional costs associated with such prescreening of letters, Justice Brennan concluded that the benefits from the "free flow of commercial information" justified the imposition

\begin{enumerate}
\item \textsuperscript{151} Id. (citing In re R.M.J., 455 U.S. 191, 203 (1982)). For a discussion noting that one judge, recently commenting on Shapero, has narrowly viewed that decision to prohibit only total bans on this form of speech when the justification offered by the state is that the potential for isolated abuses or mistakes exist, see infra note 220 (concurring opinion of Judge McAuliffe).
\item \textsuperscript{152} Shapero, 108 S. Ct. at 1923 (citing R.M.J., 455 U.S. at 206).
\item \textsuperscript{153} Id. (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641 (1985)).
\item \textsuperscript{154} Id. The Court presumed the concerns were those expressed in the Official Comment to Model Rule 7.3, which states in pertinent part:
State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading.
Id. See Model Rules, supra note 6, Rule 7.3 comment.
\item \textsuperscript{155} Shapero, 108 S. Ct. at 1923.
\item \textsuperscript{156} Id. at 1923-24.
\item \textsuperscript{157} Id. at 1924. In particular the Court stated that an agency could require the lawyer to prove the fact asserted, briefly state how the lawyer discovered the fact, label the letter as an advertisement or direct the recipient how to report inaccurate or misleading letters. Id. For an incorporation of these suggestions into a proposed ethical rule, see infra notes 221-33 and accompanying text.
\end{enumerate}
of these costs on the states.\textsuperscript{158}

In Part III of his opinion,\textsuperscript{159} Justice Brennan addressed the Kentucky Bar Association's contentions that, notwithstanding the constitutional invalidity of Model Rule 7.3, Shapero's letter was particularly overreaching and, thus, unprotected by the first amendment.\textsuperscript{160} The Bar Association identified two features of the proposed letter which, in its view, rendered the letter a form of "high pressure solicitation."\textsuperscript{161} First, the Bar Association claimed that the liberal use of underscored, uppercase letters "fairly shouts at the recipient," and second, the letter contained statements which amounted to no more than "pure salesman puffery."\textsuperscript{162} Justice Brennan reasoned that the type and style of a letter simply cannot shout at the recipient in the same manner as a lawyer in a face-to-face setting and, therefore, it "present[ed] no comparable risk of overreaching."\textsuperscript{163} As for the state's second argument, Justice Brennan realized that although some of the statements may have been misleading and thus amenable to certain restrictions, these potential arguments were absent from the record.\textsuperscript{164}

In her dissent, Justice O'Connor\textsuperscript{165} acknowledged that she disagreed with the Court's decision in \textit{Zauderer}, but felt that its reasoning could logically be extended to support the majority's holding.\textsuperscript{166} However, after summarizing her reasons for dissenting from the holding in \textit{Zauderer},\textsuperscript{167} she articulated three reasons why targeted, direct-mail ad-

\textsuperscript{158} Shapero, 108 S. Ct. at 1924 (quoting \textit{Zauderer}, 471 U.S. at 646). But see McChesney, supra note 119, at 62 (Supreme Court's decisions concerning solicitation and tradenames have imposed no additional burdens on states to distinguish beneficial from baleful commercial speech).

\textsuperscript{159} Shapero, 108 S. Ct. at 1924. Justices White and Stevens, who joined Justice Brennan as to Parts I and II of his opinion, felt that the state courts should initially decide the contention that Shapero's letter was particularly overreaching. \textit{Id.} at 1925 (White, J., concurring and dissenting in part). Therefore, since only three of the other justices agreed with Justice Brennan in this part of the opinion, it is of questionable precedential value.

\textsuperscript{160} Id. at 1924. Note that this individualized analysis is ultimately required because the first amendment overbreadth doctrine does not apply to professional advertising. For a further discussion of this doctrine, see supra note 43 and accompanying text.

\textsuperscript{161} Shapero, 108 S. Ct. at 1924 (quoting Brief for Respondent at 20).

\textsuperscript{162} Id. (quoting Brief for Respondent at 19, 20).

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 1925. Justice Brennan stated, however, that any such arguments could be raised and considered on remand. \textit{Id.}

\textsuperscript{165} Justice O'Connor was joined in her dissent by Chief Justice Rehnquist and Justice Scalia. \textit{Id.} (O'Connor, J., dissenting).

\textsuperscript{166} Id. (O'Connor, J., dissenting). Justice O'Connor asserted that "[\textit{Zauderer}], however, was itself the culmination of a line of cases built on defective premises and flawed reasoning." \textit{Id.} (O'Connor, J., dissenting). Justice O'Connor expanded on this comment in Part III of her dissent. For this discussion, see infra notes 178-81 and accompanying text.

\textsuperscript{167} Shapero, 108 S. Ct. at 1925-26 (O'Connor, J., dissenting). Justice O'Connor claimed she dissented in \textit{Zauderer} because "our precedents permitted,
vertising has "even more potential for abuse" than the newspaper advertising permitted in Zauderer. First, unsophisticated consumers may be more overwhelmed at the receipt of a "personalized" letter than by reading a general advertisement.\(^{168}\) Second, personalized form letters may mislead consumers by suggesting that the lawyer has some significant personal knowledge or concern for the recipient.\(^{169}\) Third, direct-mail solicitation is more likely to "contain advice that is unduly tailored to serve the pecuniary interests of the lawyer."\(^{170}\)

Justice O'Connor, in Part II of her dissent, applied the Central Hudson\(^ {171}\) four-part commercial speech test to attorney advertising and concluded that "[s]tates should have considerable latitude to ban advertising that is 'potentially or demonstrably misleading,' as well as truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."\(^ {172}\) Therefore, she intimated that the seminal Bates\(^ {173}\) decision, which permitted attorney price advertising for "routine services," would not pass the Central Hudson test because generally no legal services can be characterized as "routine"; hence, the advertising would be inherently misleading.\(^ {174}\) Furthermore, Justice O'Connor concluded and good judgment required, that we give greater deference to the States' legitimate efforts to regulate advertising by their attorneys." \(\text{Id. at 1925 (O'Connor, J., dissenting).}\) She sought to distinguish unsolicited legal advice from the "free samples that are often used to promote sales in other contexts" by arguing that (1) the quality of legal services is appreciably harder for most consumers to evaluate; (2) consequences of a mistaken judgment could be much more serious, and (3) most importantly, since "an attorney has an obligation to provide clients with complete and disinterested advice," any advice in a targeted letter which would be influenced by the lawyer's own pecuniary interest would "undermine the professional standards that States have a substantial interest in maintaining," \(\text{Id. at 1925-26 (O'Connor, J., dissenting). But see Bates v. State Bar, 433 U.S. 350, 379 (1977)}\) ("It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.").

\(^ {168}\) Shapero, 108 S. Ct. at 1926 (O'Connor, J., dissenting).
\(^ {169}\) \(\text{Id. (O'Connor, J., dissenting).}\)
\(^ {170}\) \(\text{Id. (O'Connor, J., dissenting).}\)
\(^ {174}\) Shapero, 108 S. Ct. at 1928 (O'Connor, J., dissenting). Specifically, Justice O'Connor argued that advertising for such "routine" legal services as uncontested divorces and personal bankruptcies is inherently misleading because "[u]ntil one becomes familiar with a client's particular problems, there is simply no way to know that one is dealing with a 'routine' divorce or bankruptcy." \(\text{Id. (O'Connor, J., dissenting).}\) Therefore, she stated that states should be able to ban such advertising completely. \(\text{Id. (O'Connor, J., dissenting).}\)
that "[i]t may be possible to devise workable rules that would allow something more than the most minimal kinds of price advertising by attorneys," but that in any event the states should be permitted to craft such regulations themselves.175

Applying the Central Hudson test to the present case, Justice O'Connor concluded that Shapero's letter could permissibly be banned under Model Rule 7.3.176 She claimed that "Kentucky had a substantial governmental interest in preventing the potentially misleading effects of direct-mail advertising as well as corrosive effects that such advertising can have on appropriate professional standards," and that Model Rule 7.3 "sweeps no more broadly than is necessary to advance a substantial governmental interest."177

In Part III of her dissent, Justice O'Connor asserted that "[t]he roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations."178 After stating that a traditional justification proffered for the removal of restrictions on attorney advertising is that these competitive barriers hinder economic efficiency, she stated that these economic arguments "ignore[] the delicate role [these restrictions] may play in preserving the norms of the legal profession."179 Ethical standards, she continued, appropriately restrain lawyers in "the exercise of the unique power that they inevitably wield" in our political system.180 Justice O'Connor concluded that "fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession."181

IV. Analysis

The result in the Shapero decision is neither surprising nor unexpected. Given that R.M.J.182 permitted a form of direct-mail advertising

175. Id. (O'Connor, J., dissenting).
176. Id. (O'Connor, J., dissenting).
177. Id. (O'Connor, J., dissenting).
178. Id. at 1928-29 (O'Connor, J., dissenting).
181. Id. at 1951 (O'Connor, J., dissenting).
to potential clients and Zauderer allowed newspaper solicitation targeted to a specific group of potential clients, the logical extension of these two cases necessarily sanctions direct-mail solicitation to potential clients with specific legal problems. Although some courts have upheld bans on direct-mail advertising, more recent state and federal


184. Justice Brennan reasoned that if Shapero's proposed letter was neither false nor misleading, "Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, 'Is your home being foreclosed on?' rather than his observation to the targeted individual that 'It has come to my attention that your home is being foreclosed on.' Shapero, 108 S. Ct. at 1921. See also ABA MANUAL, supra note 126, at 81:606 ("After Zauderer, lawyers in favor of targeted mail asked why, if a lawyer could publish a nondeceptive advertisement in a newspaper, could he not cut it out and mail it to an individual who would most likely be interested in it?"); Moss, supra note 57, at 674 (after Bates, lawyers in anomalous position of being able to publish permitted information in newspaper, but prevented from mass mailing same advertisement to neighboring residences and businesses).

185. See, e.g., McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1216 (8th Cir. 1984) (utilizing Central Hudson standard, plaintiff's counsel prohibited from contacting potential members of class action suit because "direct-mail solicitation of particular plaintiffs for particular lawsuit closely approaches in-person solicitation"); Eaton v. Supreme Court, 270 Ark. 573, 580-81, 607 S.W.2d 55, 60 (1980) (since intent of mass advertisements was to solicit customers, not to provide potential consumers of legal services with means of making informed selection of attorney, state free to design narrowly drawn rules to proscribe solicitation), cert. denied, 450 U.S. 966 (1981); Leoni v. State Bar, 39 Cal. 3d 609, 627, 704 P.2d 183, 194, 217 Cal. Rptr. 423, 434 (1985) (although transmission of commercial speech by mail permissible per Bolger v. Youngs Drug Prod. Corp., 436 U.S. 60 (1983), targeted direct-mail bans proper because such letters "bound to cause panic and fear in lay recipients"); appeal dismissed, 475 U.S. 1001 (1986); In re Frank, 440 N.E.2d 676, 676-77 (Ind. 1982) (although public benefits from information aiding them in recognizing legal problem and selecting lawyer, letters sent to persons charged with drunk driving served to unduly influence unsophisticated persons into believing lawyer would obtain favorable resolution of case; such conduct detrimental to public and offensive to system of justice); State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982) (disciplinary rule properly prohibited targeted letters to potential home sellers because of recipients' vulnerability due to economic conditions); Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489, 496 (La. 1978) (lawyers prevented from soliciting prepaid legal services to employer because direct solicitation more difficult to regulate against potential abuses which are legitimate state interests); Dayton Bar Ass'n v. Herzog, 70 Ohio St. 2d 261, 262-63, 436 N.E.2d 1037, 1038 (solicitation letters referring to "new federal law" as means of forestalling collections and inviting recipients to contact attorney grounds for discipline because letters created potential for overreaching and need for prophylactic regulation), cert. denied, 459 U.S. 1016 (1982); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 428, 399 A.2d 1175, 1181 (1978) (letters sent to former employer's existing clients inducing them to change law firms posed too great a risk that clients would not have opportunity to make careful, informed decision), cert. denied, 442 U.S. 907 (1979).

Commentators have remarked that courts and bar associations which have upheld bans on direct-mail advertising have generally focused on the solicitation aspects of such communication and have accorded a broad reading to Ohralik v.
court decisions have found such prohibitions impermissible.\textsuperscript{186} Additionally, various commentators had prognosticated this Supreme Court decision.\textsuperscript{187} Although the states have substantial governmental interests in maintaining the integrity of the profession and ensuring that consumers are not deceived, the United States Supreme Court has repeatedly struck down regulations consisting of outright bans on protected commercial speech.\textsuperscript{188} Therefore, it is somewhat unfortunate

Ohio State Bar Ass'n, 436 U.S. 447 (1978), and its focus upon vulnerable recipients. See Moss, \textsuperscript{supra} note 57, at 677; Whitman & Stoltenberg, \textsuperscript{supra} note 25, at 407.

\textsuperscript{186} See Adams v. Attorney Registration & Disciplinary Comm'n, 801 F.2d 968 (7th Cir. 1986). In Adams, the court found that prohibitions on direct mailings targeted at persons with specific problems were unconstitutional. \textit{Id.} Although the court understood the state to have a strong governmental interest in protecting the public from misleading communications, it stated that achievement of this goal had to be accomplished through restrictions narrower than a complete ban. \textit{Id.} at 974. Unpersuaded that the dangers of direct-mail advertising rise to the level of those present in in-person solicitations, the court countered: "It is easier to throw out unwanted mail than an uninvited guest." \textit{Id.} at 973. See also Spencer v. Supreme Court, 579 F. Supp. 880, 889-91 (E.D. Pa. 1984) (disciplinary rules completely preventing mailing to targeted group fail \textit{Central Hudson} because only identifiable state interests—protection of public from undue influence, intimidation and overreaching—not advanced by prohibiting all direct mailing), \textit{aff'd}, 760 F.2d 261 (3d Cir. 1985); Bishop v. Comm'n on Professional Ethics & Conduct, 521 F. Supp. 1219, 1230-32 (S.D. Iowa 1981) (disciplinary rules prohibiting targeted direct-mail advertising unconstitutional because restrictions far more extensive than necessary to advance governmental interests), \textit{vacated as moot}, 686 F.2d 1278 (8th Cir. 1982); In re Discipline of Appert, 315 N.W.2d 204 (Minn. 1981) (mass mailings of brochures and letters no cause for discipline since attorney's right to speak freely and public's right to receive commercial information outweigh state's interest in regulating profession); In re Von Wielen, 63 N.Y.2d 163, 175, 470 N.E.2d 888, 845, 481 N.Y.S.2d 40, 47 (1984) (utilizing \textit{Central Hudson}, complete ban on direct-mail solicitation unconstitutional because "state cannot establish interests of sufficient magnitude to override the public's interest in receiving information on the availability of legal services"); however, attorney in question properly disciplined because particularized finding that letters sent were misleading), \textit{cert. denied}, 472 U.S. 1007 (1985); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (mailings to real estate owners and brokers are forms of constitutionally protected commercial speech which may be regulated but not proscribed), \textit{cert. denied}, 450 U.S. 1026 (1981).

\textsuperscript{187} See G. HAZARD & W. HODES, \textit{supra} note 144, at 526.1 (ABA's Committee on Advertising and its Standing Committee on Professional Ethics have concluded targeted mail presents no more serious threat than general circulars and newspaper advertising; although prohibition would be unconstitutional in light of Zauderer, ABA apparently wishes courts to resolve); Elliot, \textit{supra} note 57, at 242-43 (Model Rule 7.3 fails fourth step of \textit{Central Hudson} because too overbroad in its regulation by prohibiting truthful, noncoercive, nondeceitful advice to potential consumers); Metzloff & Smith, \textit{supra} note 36, at 608 (Model Rule 7.3's limitation on direct mailings to targeted individuals raises serious constitutional questions if adopted and enforced by states); Ringleb, Bush & Moncrief, \textit{supra} note 179, at 1244-45 (Court undoubtedly would not uphold state regulation imposing blanket prohibition on direct-mail advertising).

\textsuperscript{188} For discussions of the Supreme Court's decisions finding bans on commercial speech unconstitutional, see Zauderer v. Office of Disciplinary...
that the Shapero decision dealt with an outright ban and not a more narrowly tailored regulation which could possibly have given some guidance to states seeking to restrict this form of speech yet still remain within constitutional bounds.

As stated in Justice O'Connor's dissent,189 "the reasoning in Zauderer supports the conclusion reached" in Shapero.190 The only significant difference between Justice Brennan's phrasing of the issue presented for consideration in Shapero and his summary of the holding in Zauderer is that the former refers to "letters" while the latter refers to "advertisements."191 The bulk of the majority opinion reasons how letters are distinguishable from in-person solicitation which was plausibly banned in Ohralik.192 On the other hand, Justice O'Connor, in her dissent, offers several reasons why direct-mail is more analogous to in-person solicitation than protected newspaper advertising.193 These opposing views reflect the traditional characterization of attorney speech as either "advertising" or "solicitation." Although a concise generalization may be made that the former has traditionally been permitted while the latter prohibited, these labels, viewed by some as only artificial terms,194 are largely unworkable with targeted direct-mail because it


189. For a discussion of Justice O'Connor's dissent in Shapero, see supra notes 165-81 and accompanying text.


191. Justice Brennan framed the issue for consideration as: "[W]hether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems." Id. at 1919 (emphasis added). He later summarized the holding in Zauderer as "striking an Ohio rule that categorically prohibited solicitation of legal employment for pecuniary gain through advertisements containing information or advice, even if truthful and nondeceptive, regarding a specific legal problem." Id. at 1921 (emphasis added).

192. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). For a summary of Justice Brennan's rationale, see supra notes 148-52 and accompanying text. For the view that implicit in Justice Brennan's characterization that direct-mail solicitation is distinguishable from in-person solicitation is the Court's reaffirmation that total bans on in-person solicitation are permissible, see ABA Manual, supra note 126, at 81:2010 (Court seems to have closed door on hope that test based on surrounding circumstances will be applied to in-person solicitation even if activity is not particularly overreaching).

193. For a summary of Justice O'Connor's reasons for differentiating direct-mail solicitation from protected newspaper advertising, see supra notes 168-70 and accompanying text.

194. See, e.g., Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("Regardless of the particular label asserted by the State—whether it calls speech 'commercial'
possesses attributes of both.\textsuperscript{195} However, by observing that none of the Supreme Court cases have ever “distinguished among various modes of written advertising to the general public,”\textsuperscript{196} Justice Brennan has implied that all written communications from an attorney are constitutionally protected unless a particularized demonstration is made that the communication is either false or misleading. Since Justice Brennan disagreed that the dangers of in-person solicitation present in \textit{Ohralik} were equally applicable to direct-mail solicitation, he concluded that the Kentucky ban was impermissible.\textsuperscript{197}

or ‘commercial advertising’ or ‘solicitation’—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.”); Spencer \textit{v.} Supreme Court, 579 F. Supp. 880, 888 (E.D. Pa. 1984) (rules which permit direct mailing to extent it constitutes advertising but prohibit it to extent it constitutes solicitation unconstitutional vague because “unable to draw any line of demarcation between solicitation and advertising”), \textit{aff'd}, 760 F.2d 261 (3d Cir. 1985); Koffler \textit{v.} Joint Bar Ass'n, 51 N.Y.2d 140, 143, 412 N.E.2d 927, 929, 432 N.Y.S.2d 872, 873 (1980) (cannot determine constitutionality of state regulation on commercial speech which is “predicated upon an artificial distinction between solicitation and advertising”), \textit{cert. denied}, 450 U.S. 1026 (1981). For one commentator’s viewpoint as to the confusion caused by these terms, see Thurman, \textit{Direct Mail: Advertising or Solicitation? A Distinction Without a Difference}, 11 STETSON L. REV. 403 (1982).

Unfortunately, some practitioners and regulations still maintain this distinction. For an example of this lingering dichotomy in the Model Rules, see \textit{supra} notes 6 (Model Rule 7.3, regarding solicitation) and 123 (Model Rule 7.2, regarding advertising). In fact, in the \textit{Shapero} case, the briefs submitted on behalf of the Kentucky Bar Association (KBA) maintained this distinction, to which Shapero’s reply brief retorted: “The KBA’s denigration of Shapero’s proposed letter as solicitation rather than advertising is a semantic difference without a constitutional distinction.” Petitioner’s Reply Brief at 3, \textit{Shapero v. Kentucky Bar Ass’n}, 108 S. Ct. 1916 (1988) (No. 87-16).

195. One commentary has characterized the problem as follows:

The difficulty with using the dichotomous “advertising” and “solicitation” labels is that lawyers’ targeted direct mail advertising does not uniformly fit either category. On one hand, it resembles protected media advertising because it lacks immediate and forceful personal contact. The recipient may readily disregard the mailing and must actively respond to engage the lawyer’s services. However, targeted direct mail advertising also resembles disfavored in-person solicitation by attracting the recipient’s attention in a personalized—and thus compelling—way. The contact is private, and the recipients’ circumstances may make them vulnerable to the lawyer’s message.


Writers have consistently commented that bans on direct-mail advertising
In the majority opinion, Justice Brennan repeatedly refers to Zauderer and R.M.J. as the standards for evaluating restrictions on attorney advertising. Interestingly, he makes only a passing reference to Central Hudson, which for several years has been the standard against which regulation of commercial speech has been measured.\footnote{198} Perhaps this reflects Justice Brennan's reluctance to apply the four-part test which had been utilized most recently in the case of Posadas de Puerto Rico Associates v. Tourism Company.\footnote{199} In Posadas, Justice Brennan vigorously dissented from what he\footnote{200} and subsequent commentators\footnote{201} felt had been

or solicitation only consider the costs involved and disregard the potential societal benefits. For discussions by some commentators who have expressed this view, see McClesney, supra note 119, at 57; Perschbacher & Hamilton, supra note 15, at 269; Ringleb, Bush & Moncrief, supra note 179, at 1225.

198. For a discussion of the use of the Central Hudson test in R.M.J. and Zauderer, see supra notes 91-93 and 109-11, respectively.

199. 478 U.S. 328 (1986). In a 5-4 decision which upheld a Puerto Rico statute and regulations prohibiting advertising of casino gambling to its residents, the Court held that the four-part Central Hudson test had been satisfied. Id. at 344. The Court reasoned: first, since the advertising for casino gambling concerned a lawful activity and was not misleading, the first amendment applied; second, the Puerto Rico Legislature had a substantial governmental interest in promoting the health, safety and welfare of its citizens; third, since the ban would reduce the demand for the product, the regulation directly advanced the substantial governmental interest; and finally, since the advertising banned was only that aimed at the residents of Puerto Rico and not foreigners, the regulation was no more extensive than necessary to serve the governmental interest. Id. at 341-43.

200. Id. at 348 (Brennan, J., dissenting). Justice Brennan saw "no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity." Id. at 350 (Brennan, J., dissenting). Therefore, Justice Brennan stated that "where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny." Id. at 351 (Brennan, J., dissenting). Alternatively, he argued that the legislation even failed the more relaxed standards of Central Hudson which are applied to the regulation of commercial speech, but "[w]hile tipping its hat to these standards, the Court does little more than defer to what it perceives to be the determination by Puerto Rico's legislature that a ban on casino advertising aimed at residents is reasonable." Id. at 351-52 (Brennan, J., dissenting). In addition to his disagreement with the majority that the state had asserted a substantial governmental interest or that the regulation was narrowly drawn, he vehemently opposed the assertion by the Court that the fourth prong of Central Hudson may be satisfied by the legislature deciding whether or not the government's interest might be protected by less intrusive means. Id. at 352-57 (Brennan, J., dissenting). He adamantly stated: "Rather, it is incumbent upon the government to prove that more limited means are not sufficient to protect its interests, and for a court to decide whether or not the government has sustained this burden." Id. at 357 (Brennan, J., dissenting) (emphasis in original).

201. See Leahy, A Game of Chance: Commercial Speech After Posadas, A.B.A. J., Sept. 1, 1988 at 58-61 (In Posadas, Supreme Court sharply curtailed scope of constitutional protection for non-misleading advertising of lawful services and products; case suggests that courts will no longer independently scrutinize
a significant relaxation of the commercial speech test because of the great deference the Court had afforded to the Puerto Rico Legislature.

In Shapero, Justice O'Connor applied the Central Hudson test,202 albeit in somewhat of a distorted manner. Justice O'Connor phrased the summary of the test as: the "government may still ban or regulate [protected speech] by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose."203 Semantically, however, this language is somewhat more deferential and subjective than that used in Central Hudson, which permits "regulation [that] directly advances the governmental interest asserted . . . [if] it is not more extensive than is necessary to serve that interest."204 Applying the test to attorney advertising, Justice O'Connor felt that states should have considerable latitude to "ban advertising that is 'potentially or demonstrably misleading.' "205 However, this clearly conflicts with the dictate of R.M.J., which expressly stated that while the Court had not "by any means foreclose[d] restrictions on potentially or demonstrably misleading advertising," it emphatically declared that "[s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive."206 Justice O'Connor also felt that Central Hudson enabled states to ban "truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."207 In so doing, Justice O'Connor has perpetuated the anachronistic paternalistic attitude that the Court dismissed over a decade ago in Virginia Pharmacy.208

whether regulation advances governmental objective but may adopt legislature's judgment; Recent Development, Trends in First Amendment Protection of Commercial Speech, 41 Vand. L. Rev. 173, 175 (1988) (Court's deference toward legislature's judgments prohibiting commercial speech signals retreat from first amendment protection of commercial speech and willingness to encourage governmental paternalism that this protection was intended to avoid); Note, Consumer Loses With Zauderer, supra note 19, at 183 (by narrowing protection afforded commercial speech by first amendment, Court has ignored position taken in Virginia Pharmacy that information alone is not harmful).


203. Id. at 1927 (O'Connor, J., dissenting).

204. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980). Interestingly, though, Justice O'Connor did not make any reference to Posadas which has been viewed by some as according more deferential treatment to the states. For a discussion of some of the reactions to the decision in Posadas, see supra notes 200-01 and accompanying text.


206. R.M.J., 455 U.S. at 202-03.


208. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (consumers will perceive own best interests only if well enough informed, and best means to that end is to open channels of communication rather than close them). For a further discussion of Virginia Pharmacy, see supra notes 20-29 and accompanying text.
Given the recent United States Supreme Court attorney advertising cases and the federal and state court decisions striking down rules completely barring such direct-mail solicitation, it is somewhat surprising that the states continue to be almost equally divided in permitting such solicitation. The ABA, in its amicus curiae brief in support of the Kentucky Bar Association, noted that since 1983, of the twenty-five states which adopted some amended version of its Model Rules governing lawyer solicitation, fourteen adopted a rule prohibiting such solicitation. Of the nine states which essentially permit direct-mail solicitation, most have modeled their rules after the Kutak Commission Proposed Rule 7.3.

Although the Court in Shapero held that a total ban on attorney targeted direct-mail speech is improper, the Court is still mindful of the states' substantial governmental interest in regulating the conduct of their attorneys, and has stated that the states may regulate such conduct through far less restrictive and more precise means. The task left to

See also Maute, supra note 2, at 524 (legal profession and regulators must trust that consumers have capacity to make rational decisions about securing legal representation when they receive truthful, noncoercive information about available legal services).

209. For a listing of cases holding as unconstitutional various states' rules prohibiting direct-mail solicitation, see supra note 186.

210. In its amicus curiae brief, the ABA stated that "[c]urrently 26 jurisdictions permit targeted mail solicitation for pecuniary gain in one form or another; one jurisdiction limits it to business or commercial targets, and 25 jurisdictions prohibit it." Brief of the American Bar Association as Amicus Curiae in Support of Respondent at 5, Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988) (No. 87-16) (hereinafter ABA Amicus Brief). In his brief for petition for writ of certiorari, Shapero noted the decisions of state bar association ethics committees regarding the issue of targeted direct-mail have been diverse. Petitioner's Brief for Writ of Certiorari at 18, Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988) (No. 87-16). In a connected footnote, the brief provided an extensive list of ethics opinions which demonstrates the divergence of thought in the area. See id. at 18 n.4.

211. ABA Amicus Brief, supra note 210, at 4-5. The 25 states which had adopted some form of the Model Rules regarding attorney solicitation are: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Dakota, Utah, Washington, Wisconsin and Wyoming. Id. at 4 & n.3. Of these states, the following 14 have prohibited direct-mail solicitation: Arizona, Arkansas, Delaware, Idaho, Indiana, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, South Dakota, Utah, Washington and Wyoming. Id. at 4-5 and 5 n.5.

212. For a summary of the amended rules adopted by these states, see ABA Manual, supra note 126, at 81:602-04. For the text of the Kutak Commission Proposed Rule 7.3, which permits direct-mail solicitation in certain circumstances, see supra note 125 and accompanying text.

213. In Shapero and in other cases where complete bans have been held impermissible, the Supreme Court has repeatedly emphasized that other less restrictive means may be permissible. See, e.g., Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916, 1923 (1988) (most obvious less restrictive alternative means is to
those states which have traditionally been reluctant to permit this type of
attorney speech is to design a rule of conduct that will concurrently
comply with Shapero and also guard against many of the perceived
hazards of direct-mail solicitation.214

States such as Kentucky which have a rule similar to Model Rule 7.3
must amend their rules.215 A logical step for these states would be to
adopt the Kutak Commission's proposal.216 However, as permissive as
that standard may seem, it arguably fails the constitutional dictates of
Shapero. As previously noted, the Proposed Rule 7.3(b)(1) would pre-
vent any "written communication to a prospective client for the purpose
of obtaining professional employment if the lawyer knows or reasonably
should know that the physical, emotional or mental state of the person is
such that the person could not exercise reasonable judgment in employ-
ing a lawyer."217 In refuting the contention of the Kentucky Supreme
Court that a potential client "may feel overwhelmed by the basic situa-
tion" and "may have seriously impaired capacity for good judgment,"
Justice Brennan replied that the client would feel this way regardless of
whether the communication was an untargeted letter, a newspaper ad-
vertisement or a targeted letter.218 He argued that the "relevant inquiry
require lawyer to file any solicitation letter with state agency); Central Hudson
(although ban on all promotional advertising by utility improper, regulatory
commission could attempt to restrict format and content of advertising by re-
quiring advertisements to include information about relative efficiency and ex-
 pense offered service currently and in future); In re Primus, 436 U.S. 412, 438
(1978) (reasonable time, place and manner restrictions permitted); Bates v.
State Bar, 433 U.S. 350, 351 (1977) (warnings or disclaimer permitted, as well as
other reasonable time, place and manner restrictions).

214. ABA Manual, supra note 126, at 81:608.
215. Shortly after the Shapero decision was rendered, the ABA President re-
leased the following statement:

    The interest of the American Bar Association was and is the pro-
tection of the public. The Association's model rule, which was held
unconstitutional today, was drafted in an attempt to balance the First
Amendment rights of attorneys against the protection of the potential
consumer of legal services from false, misleading or overbearing com-
mercial solicitation.

    Private direct mail solicitations, as distinguished from publicly dis-
seminated advertising, present unique problems with respect to polici-
ing and enforcement to prevent undue influence on the consumer.

    The ABA has a continuing obligation to the consuming public to
advance professional rules of conduct which will protect the public
from the overreaching and undue influence of counsel seeking to solicit
legal work. We will undertake promptly to develop the most effective
standard we can devise to protect the consumer consistent with today's
ruling.

216. For the text of the Kutak Commission Proposed Rule 7.3, see supra
note 125.
217. Rules' Legislative History, supra note 120, at 182-83.
is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.\textsuperscript{219} Ostensibly, the Kutak Commission's proposal would fail this standard since its focus is on the vulnerability of the potential recipients.\textsuperscript{220}

For those states which remain unwilling to permit unrestricted targeted direct-mail solicitation, a proposed ethical rule regulating written attorney solicitation\textsuperscript{221} which would be both acceptable to the courts as well as the states might read as follows:

\textit{Rule 7.3} \textsuperscript{222} \textbf{Written Contact with Prospective Clients}

(a) Subject to the requirements of Rule 7.1 and 7.2, and paragraphs (b) and (c) below, a lawyer may send a written communication to a prospective client for the purpose of obtaining professional employment (even if the intended recipient is known to face a specific legal problem), provided that the lawyer has:

\begin{enumerate}
  \item at least [ten]\textsuperscript{223} days prior to the anticipated mailing,
\end{enumerate}

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} In fact, at least one recent state supreme court interpreting \textit{Shapero} has questioned the constitutionality of the Kutak Commission's proposal. See Unnamed Attorney v. Attorney Grievance Comm'n, 313 Md. 357, 545 A.2d 685 (1988). In Unnamed Attorney, the Attorney Grievance Commission (AGC) had received four complaints concerning letters which had been mailed by the attorney "to very recently injured persons informing the latter of the availability of [his] legal services." \textit{Id.} at 360, 545 A.2d at 687. In determining the propriety of the issuance of a subpoena by an Inquiry Board, the Court of Appeals of Maryland addressed, among other things, the argument by the AGC that Maryland's Rule 7.3 (which followed the Kutak Commission's proposal) would "not allow an attorney to forward targeted mail to a person whose state of health would impair the recipient's ability to make a reasonable judgment." \textit{Id.} at 367-68, 545 A.2d at 691. The court noted the "doubtful constitutional validity" of the rule in light of \textit{Shapero}, "at least to the extent it proscribes written contact," and therefore concluded: "We interpret \textit{Shapero} to mean that written modes of solicitation (as opposed to in-person solicitation) are protected by the First Amendment, regardless of the recipient's condition, so long as such communication is neither false, misleading, or overreaching." \textit{Id.} at 368, 545 A.2d at 691. However, one judge could not agree that "every direct written solicitation is protected unless it is false, misleading or overreaching"; rather, he understood \textit{Shapero} to stand for the proposition that a "\textit{total ban} on targeted, direct-mail solicitation is not justified by the fact that there may be isolated abuses." \textit{Id.} at 369-70, 545 A.2d at 691-92 (McAuliffe, J., concurring) (emphasis in original).

\textsuperscript{221} Although Model Rule 7.3 expressly forbade in-person solicitation and solicitation by telephone or telegraph in addition to prohibiting targeted direct-mail solicitation, this proposed rule is only intended to address the latter form of communication.

\textsuperscript{222} This assumes that the current Model Rules 7.1 and 7.2 would be retained and, therefore, any restrictions contained therein would also apply to this proposed rule. For the text of these rules, see supra notes 122-23.

\textsuperscript{223} The 10-day period is arbitrary, but it should provide the state bar association with adequate time to evaluate the proposed letter while not unreasonable.
submitted a copy of the intended written communication to the [appropriate state bar association agency] together with:

(A) documents or other materials supporting how the lawyer came to know of the existence of all facts asserted in the letter and what measures were taken to ascertain their validity;\(^{224}\) and

(B) a listing of all of the intended recipients' names and addresses in the event that written communications are sent to two or more prospective clients and are identical in content.\(^{225}\)

\(^{(2)}\) included affirmative statements in the letter which:

(A) explain how the lawyer came to know of the existence of the facts asserted in the letter and what measures were taken to ascertain their validity;\(^ {226}\) and

(B) conspicuously labels in bold type print each page of the letter (as well as the envelope) with the words: "Advertising Material;"\(^{227}\)

\(^{224}\) For a discussion of Virginia Pharmacy, see supra notes 20-29 and accompanying text.


\(^{226}\) Shapero, 108 S. Ct. at 1924 (dictum).

\(^{227}\) The Supreme Court has previously stated, albeit in dicta, that requiring the inclusion of supplemental warnings or disclaimers, such as the labeling of the communication as an advertisement, would be a less restrictive form of regulation. See id.; In re R.M.J., 455 U.S. 191, 206 n.20 (1982); Bates v. State Bar, 433 U.S. 350, 384 (1977). For one of the more stringent state ethical requirements, see Iowa Code of Professional Responsibility for Lawyers DR 2-
C) direct the intended recipient how to report inaccurate or misleading letters to [the appropriate state bar association agency].228

3) retained a copy of the letter for [five] years.229

b) A lawyer shall not send, or knowingly permit to be sent, a written communication to a prospective client for the purpose of obtaining professional employment if:

1) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;230

2) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;231 or

3) the communication involves coercion, duress, or harassment.232

c) If any written communication is sent by an attorney pursuant to paragraph (a) which contains any information regarding contingent fees, the language must conspicuously:

1) distinguish between legal fees charged by an attorney for legal services, and court costs and expenses; and

2) state that legal fees are not permitted in all types of cases; and

3) state that even if legal fees are not owed by the client, that court costs and expenses usually must be paid by the client regardless of the outcome of the legal matter.233

101(B) (1980) (direct-mail communication and envelope containing same shall carry following disclosure in red ink in type approximately two times size used in communication sent: “ADVERTISEMENT ONLY”), reprinted in State Codes of Professional Responsibility, supra note 225.

228. Shapero, 108 S. Ct. at 1924 (dictum).

229. Again, the five-year term has been arbitrarily chosen. For the text of Model Rule 7.2 (Advertising), which requires copies of all advertisements sent by an attorney to be retained for two years, see Model Rules, supra note 6, Rule 7.2. Several states have required a significantly longer period. See, e.g., Arkansas Rules of the Court Regulating Professional Conduct Rule 7.3 (1986) (five years), Georgia Code of Professional Responsibility Standard 6(C) (1987) (four years) [hereinafter Georgia Code], Indiana Code of Professional Conduct Rule 7.1(e) (1987) (six years), Mississippi Rules of Professional Conduct Rule 7.2(b) (1987) (six years), each reprinted in State Codes of Professional Responsibility, supra note 225.

230. See Arizona Rules, supra note 225, ER 7.2(f)(1); Florida Rules, supra note 225, Rule 4-7.3(b)(2); Georgia Code, supra note 229, Standard 6(D)(1); Montana Rules of Professional Conduct Rule 7.3(d) (1985), reprinted in State Codes of Professional Responsibility, supra note 225.

231. See Rules’ Legislative History, supra note 120, at 182-83 (Kutak Commission Proposed Rule 7.3(b)(2)).

232. See id. (Kutak Commission Proposed Rule 7.3(b)(3)).

233. For an example of a state having related requirements, see Georgia Code, supra note 229, Standard 5(B). For the discussion of the Supreme Court’s
Such a rule would comport with the constitutional guidelines prescribed by the Supreme Court's decisions from Bates\textsuperscript{234} to Shapero, while also providing the states with the ability to maintain relative control over their attorneys' solicitation practices. Lawyers would benefit from such a rule since it sanctions a form of solicitation which may be the most effective and efficient means of attracting new business.\textsuperscript{235} At the same time, however, lawyers would have to subject themselves to the stringent requirements necessary to ensure that these advantages are not received at the expense of exposing consumers to the dangers of overreaching, undue influence, and invasion of privacy inherent in in-person solicitation, which concerned the Court in Ohralik.\textsuperscript{236}

Concurrently, the states will be able to pre-screen letters to halt those mailings determined to be false or misleading and, thus, detrimental to the public, thereby maintaining their substantial governmental interest in protecting the unwary public from impermissible attorney solicitation. Undoubtedly, this prophylactic mechanism will impose significant costs to state regulators;\textsuperscript{237} however, the additional expense is justified given the ultimate recipients of the letters will reap the rewards from this increased flow of commercial information.\textsuperscript{238}

V. Conclusion

With its decision in Shapero the Supreme Court has finally sounded the death knell for states' attempts to regulate written attorney speech through the imposition of prophylactic bans. In so doing, the Court has
decision in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), upholding the disciplinary actions imposed against an attorney for violation of a similar state ethical rule, see supra notes 114-18 and accompanying text.


\textsuperscript{235} One view has advocated that of all the forms of attorney promotion available, direct-mail advertising has the following advantages:

Substantially it (1) permits the advertiser to send his or her message to a well defined audience—as opposed to the public at large, (2) the length, timing and form of the message is more flexible with direct mail than with other methods, (3) it is fairly easy to determine when the advertisement will be received by the recipient if first class mail is utilized, (4) it permits the advertiser to determine more quickly if the advertisement is productive, [and] mail order testing produces more accurate results than does testing of other advertising methods.

Whitman & Stoltenberg, supra note 25, at 417-18 (citations omitted).

\textsuperscript{236} Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). For a discussion of the Supreme Court's traditional view that although bans on attorney speech are improper, a state still retains significant discretion to impose time, place and manner restrictions on commercial speech, see supra note 213 and accompanying text.

\textsuperscript{237} For the view that state bar associations have traditionally lacked adequate resources to monitor advertising complaints, see supra note 154 and accompanying text.

articulated that the form of attorney speech denoted “targeted direct-mail solicitation” warrants the qualified, yet nonetheless substantial, first amendment protection afforded commercial speech. Therefore, the states which were previously unwilling to permit this form of speech must now redraft their ethical rules to comply with the commands of Shapero, and design regulatory vehicles to ensure compliance with these rules. Cognizant that substantial benefits to be derived from such constitutional protection will accrue to society in the form of free flow of commercial information, the Court has sensibly determined that if additional costs are to be incurred to monitor such speech, they must be borne by the state regulators.

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