The Latest Battle in the Revolution of Attorney Advertising: A Step Too Far

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THE LATEST BATTLE IN THE REVOLUTION OF ATTORNEY ADVERTISING: A STEP TOO FAR?

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I. INTRODUCTION

In 1942, the United States Supreme Court held in Valentine v. Chrestensen¹ that commercial speech did not fall under the protective umbrella of the first amendment to the Constitution. The case involved the distribution of handbills which advertised tours on a retired United States Navy submarine. Distribution of the handbills violated the city's sanitation code. To circumvent the operation of the city code, the distributor printed public interest information on the back of the handbills. However, the Court said that the commercial message printed on one side of the handbills could not acquire Constitutional protection by virtue of the public information printed on the other side.²

Accordingly, attorney advertising fell within the category of commercial speech and was not entitled to protection under the first and fourteenth amendments. Furthermore, at that time it was considered unethical for an attorney to solicit business by way of commercial advertising, and courts throughout the country consistently reaffirmed this restrictive view of attorneys' rights to exercise free speech.³ In fact, one court in Massachusetts asserted that "attorneys at law practice a profession; they do not conduct a trade. It is

¹ Valentine v. Chrestensen, 316 U.S. 52 (1942).
² Id. at 55.
incompatible with the maintenance of correct professional standards to employ commercial methods of attracting patronage."

Nine years later, in *Breard v. Alexandria,* the Supreme Court reaffirmed this restrictive view towards first amendment protection of commercial speech. These court decisions were further solidified in 1969 when the ABA adopted the Code of Professional Responsibility, which banned attorney advertising outright. The ABA contended that such a restriction was in the public's best interest.

The Supreme Court did not retreat from its traditional view of denying first amendment protection to commercial speech until the landmark decision in *Bates v. State Bar of Arizona.* Since *Bates* and its successors have all been decided on an ad hoc basis, it has taken a little over a decade for the Supreme Court to map out the boundaries of its newer, more permissive approach toward attorney advertising. Recently, in *Shapero v. Kentucky Bar Association,* the Court further defined acceptable attorney advertising by holding that a lawyer may solicit business by "sending truthful and non-deceptive letters to potential clients known to face particular legal problems."

This note will trace the eleven year history of the revolutionary change in the Court's stand on attorney advertising, beginning with *Bates* and ending with a discussion of the *Shapero* decision. As will be seen, there has been an about face. The very abuses that the court has been attempting to prevent, invasion of privacy, fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct," are now more likely to occur and will be more difficult to prevent.

9. *Id.*
II. Bates to Zauderer

"[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them . . . ."\(^\text{11}\)

In Bates v. State Bar of Arizona\(^\text{12}\) the Supreme Court afforded constitutional protection to attorney advertising for the first time. The road to this landmark decision had been paved a year earlier in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,\(^\text{13}\) where the Court held that commercial speech is not wholly outside the protection of the first amendment and that consumers and society in general have a strong interest in the free flow of commercial information.\(^\text{14}\) However, the Court noted that its decision was limited to the pharmaceutical profession and the case at bar and that it would not be applicable to attorneys since they provide "services of an infinite variety and nature" as opposed to pharmacists who provide standardized products.\(^\text{15}\) Nevertheless, only a year later the Court was again forced to address the issue as applied to the legal profession in Bates v. State Bar of Arizona.\(^\text{16}\)

Bates involved two young attorneys who had opened a legal clinic in which they performed standard legal services such as uncontested divorces, simple adoptions, name changes and simple personal bankruptcies.\(^\text{17}\) Since the attorneys enjoyed a relatively low return on their services, they relied on substantial volume to maintain a viable practice. Therefore, in order to attract the volume of clients needed, they placed an advertisement in a daily newspaper which listed the services offered by the clinic and the fees charged for those services.\(^\text{18}\) A complaint was filed by the President of the State Bar, and, subsequently, a hearing was held before a three member Special Local

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14. Id.
15. Id. at 773 n.25.
17. Id. at 354.
18. Id.
Administrative Committee. The two attorneys conceded that the advertisement was a clear violation of Disciplinary Rule 2-101(b), incorporated as Rule 29(a) of the Supreme Court of Arizona. However, they claimed, inter alia, that the rule infringed upon their first amendment rights. The Administrative Committee could not address the question of validity, and, consequently, the issue went through the appropriate channels to the Arizona Supreme Court which held that the disciplinary rule "passed First Amendment muster." The United States Supreme Court noted probable jurisdiction, granted certiorari, and affirmed the decision in part and reversed it in part. In its opinion, the Court reiterated its reasoning and holding in Virginia Pharmacy Board and made it clear that its holding in Bates was narrow in scope. The issue in Bates concerned advertising prices for certain routine services, and the court confined its decision to that issue. Furthermore, the issues of in-person solicitation, extravagant claims as to quality of service, and basic factual content of advertisements were not at issue and, thus, were not addressed.

In its opinion, the Arizona court had asserted six justifications for restricting the scope of permissible attorney advertising. Nevertheless, the Supreme Court easily refuted each one: the misleading nature of such advertising, the effect on the administration of justice, economic effects, the effect on the quality of service, the dif-

19. Id. at 356.
20. Disciplinary Rule 2-101(B) incorporated as Rule 29(a) of the Supreme Court of Arizona provided that
   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. Sup. Ct. Ariz. Rule 29(a), 17A ARIZ. REV. STAT., p. 26 (Supp. 1976).
   Id. at 355.
21. Id. at 356. However, the attorneys also asserted that the rule violated sections 1 and 2 of the Sherman Act because of its tendency to restrain competition. The United States Supreme Court held the rule did not violate the Act, distinguishing Bates from Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). Bates, 433 U.S. at 359-62.
23. Id. at 350. The Supreme Court agreed with the Arizona court's holding with respect to the Sherman Act but reversed the decision regarding the first amendment issue.
24. Id. at 366.
25. Id.
difficulties of enforcement, and the adverse effect on professionalism. The Court asserted that true professionalism would not be damaged by advertising legal fees and that the idea that lawyers are “somehow above trade” was an antiquated one. In holding that states may not place blanket bans on attorney advertising, the Bates Court nevertheless recognized that there were “clearly permissible limitations not foreclosed by [its] holding.” For instance, any advertising that is false, misleading or deceptive would be subject to restraint. Furthermore, advertising regarding illegal transactions would obviously be subject to suppression. Lastly, time, place and manner of the advertisement as well as advertisements on electronic broadcast media may warrant some type of regulation.

Thus the constitutional door was opened to attorney advertising. Nevertheless, many questions were left unanswered. In May 1978, the Court had occasion to address one of the issues left undecided by Bates when it was confronted with the question of in-person solicitation in Ohralik v. Ohio State Bar Ass’n. and In re Primus. Ohralik involved an Ohio lawyer who approached two eighteen-year-old girls who had suffered injuries in an automobile accident. The lawyer made repeated visits to the girls and their parents to discuss the possibilities of representing the girls in a suit. One girl finally signed a contract, and the other gave oral assent. Later, both girls asked to be released from their agreements. However, the attorney would not cooperate. Eventually, both girls filed complaints with the County Bar Association which referred the grievances to the Ohio State Bar Association. A formal complaint was then filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The Board did not agree with the attor-

26. Id. at 371-72. Addressing the issue of adverse effects on professionalism, the Court said: “At its core, the argument presumes that attorneys must conceal from themselves and their clients the real-life fact that lawyers earn their livelihood at the bar.” Id.
27. Id. at 383.
28. Id. at 384.
32. Id.
33. Id. at 452 nn.5 & 6.
34. Id. at 452. For a discussion of Ohio disciplinary rules, see id. at 453 n.9.
ney's contention that his conduct was constitutionally protected. The Supreme Court of Ohio affirmed the Board's decision, and the United States Supreme Court followed suit.

The United States Supreme Court noted that the advertising in Ohralik differed from that in Bates "as [did] the strength of the State's countervailing interest in prohibition." Discussing the differences between the two cases, the Court said that:

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 fact, the Court noted that in-person solicitation "actually may disserve the individual and societal interest, identified in Bates, in facilitating 'informed and reliable decisionmaking.'" A critical fact in Ohralik was that the in-person solicitation was made for pecuniary gain. Clearly, the Court intended to stand firm in its position of preserving the honor and reputation of the legal profession and protecting the public from the harmful effects of in-person solicitation, including a "lawyer's exercise of judgment on behalf of the client [which would] be clouded by his own pecuniary self-interest."

Ironically, the Court decided two in-person solicitation cases that day, the other being In re Primus, where the Court reached a conclusion different than that in Ohralik. Consequently, the Court was able to further define the parameters of acceptable in-person solicitation.

35. Id. at 453.
36. Id.
37. Id. at 454.
38. Id. at 455.
39. Id. at 457.
40. Id. at 458.
41. Id. at 461, 470 (Marshall, J., concurring).
42. Id. at 461.
44. Id.
Primus involved a South Carolina lawyer who was working with the American Civil Liberties Union (ACLU).45 The attorney sent a letter to a woman advising her that the ACLU would provide free legal assistance if she wished to seek redress for having been sterilized after receiving public medical treatment.46 Consequently, formal complaints were filed charging the attorney with ethical violations.47 The South Carolina Supreme Court found that the attorney had in fact violated certain disciplinary rules.48 On appeal, the Supreme Court reversed the South Carolina court’s decision.49 In short, the Court decided that

Appellant’s letter of August 30, 1973 to Mrs. Williams thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.50

Furthermore, the attorney’s own pecuniary gain was not a motive for the solicitation. The ACLU is a non-profit organization, and any fees that the court might award would have been the organization’s only compensation.51 Indeed, Justice Marshall in his concurrence distinguished Ohralik:

The facts in Primus, by contrast, show a “solicitation” of employment in accordance with the highest standards of the legal profession. Appellant in this case was acting, not for her own pecuniary benefit, but to promote what she perceived to be the legal rights of persons not likely to appreciate or to be able to vindicate their own rights. The obligation of all lawyers, whether or not members of an association committed to a particular point of view, to see that legal aid is available “where the litigant is in need of assistance, or where important issues are involved in the case,” has long been established.52

As will be seen, this distinction was muddled somewhat in Shapero.53

45. Id. at 415.
46. Id. at 416.
47. Id. at 417. For a discussion of the disciplinary rules in question, see id. at 418 n.10, 420 nn.11 & 12.
48. Id. at 421.
49. Id.
50. Id. at 431.
51. Id. at 430.
Two years later, in 1980, the Court handed down its decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.* 54 Although the case did not involve attorney advertising, 55 *Central Hudson* is significant in that the Court set forth a four prong test to be applied in commercial speech cases, 56 a test which the Court has since consistently applied. 57 *Central Hudson* concerned New York State electric utility companies who had been ordered to "cease all advertising that 'promot[es] the use of electricity.'" 58 The Public Service Commission contended that the ban was justified because of a prevailing fuel shortage. 59 Central Hudson challenged the order in state court, contending that it violated the first and fourteenth amendments as they apply to commercial speech. 60 Nevertheless, the order was upheld by the trial court, the intermediate appellate court and the New York Court of Appeals. 61 However, the Supreme Court reversed. 62

Noting in its opinion that the Constitution affords "a lesser protection to commercial speech than to other constitutionally guaranteed expression," the Court pointed out that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." 63 Next, the Court set forth a "four part analysis" developed from its commercial speech decisions: 64

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive an-

55. For a discussion of another significant commercial speech case that did not involve attorney advertising, see Wallace & McKelvey, *supra* note 10, at 766.
56. *Central Hudson*, 477 U.S. at 566.
59. Id. at 559.
60. Id. at 560.
61. Id. at 561.
62. Id.
63. Id. at 563.
64. Id. at 566.
swers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.65

The Court found that the governmental interest asserted by the Public Service Commission was substantial, i.e., energy conservation. However, the regulation advancing the interest was more extensive than necessary and therefore did not pass the four prong test.66

The Central Hudson test was applied two years later in the attorney advertising case of In re R.M.J.67 That case concerned a Missouri attorney who had advertised in the yellow pages and local newspapers and had sent out announcement cards to a general mailing list.68 Afterwards, the State Advisory Committee69 filed a complaint in the Supreme Court of Missouri charging the attorney with unprofessional conduct. Interestingly, in keeping with the Bates decision, the Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri had revised its restrictions on attorney advertising with the hope of striking "a midpoint between prohibition and unlimited advertising."70 Lawyer advertising would be permitted, but only certain categories and language would be allowed.71 Furthermore, professional announcement cards were allowed but could only be distributed to lawyers, clients, former clients, personal friends and relatives.72 The Missouri Supreme Court rejected the attorney's contention that the restrictions were in violation of the first and fourteenth amendments as applied to commercial speech and issued a private reprimand.73 The case was then argued before the United States Supreme Court, which reversed the judgment of the Missouri Supreme Court.74 After recounting its reasoning and holding in Bates,75 the Supreme Court applied the Central

65. Id.
66. Id. at 572.
68. Id. at 196.
69. Id. at 194 n.5.
70. Id. at 193.
71. Id. at 195 n.6.
72. Id. at 196.
73. Id. at 198.
74. Id.
75. Id. at 199-203.
Hudson\textsuperscript{76} test and concluded that none of the restrictions on attorney advertising met the four-part analysis set forth in Central Hudson.\textsuperscript{77}

In May 1985, the Court handed down a decision which was claimed by some commentators to be the final prescription as to attorney advertising.\textsuperscript{78} In Zauderer v. Office of Disciplinary Counsel,\textsuperscript{79} the appellant was an Ohio attorney who placed an ad in the local newspaper which informed readers that his firm would represent them in drunk driving cases, and if convicted, they would be given a full refund of their legal fee.\textsuperscript{80} The attorney removed the ad two days later after the Office of Disciplinary Counsel of the Supreme Court of Ohio telephoned a warning that "the advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis."\textsuperscript{81} The Ohio Code of Professional Responsibility prohibited such advertisements.\textsuperscript{82} A few months later, the attorney ran yet another ad which contained a drawing of a contraceptive device known as the Dalkon Shield Intrauterine Device (IUD).\textsuperscript{83} The ad then proceeded to describe alleged problems caused by the IUD and to offer legal advice to the reader. Lastly, the ad advised the reader that the firm was currently representing women in suits concerning the IUD on a contingent fee basis.\textsuperscript{84} Subsequently, the Office of Disciplinary Counsel "filed a complaint against [the attorney] charging him with a number of disciplinary violations arising out of" the two advertisements.\textsuperscript{85}

In addition to allegations concerning the drunk driving ad mentioned above, the complaint also alleged that the IUD ad violated DR2-101(B), which prohibited the use of illustrations in advertisements.\textsuperscript{86} Furthermore, the complaint charged that the ads were in

\textsuperscript{76} Id. at 203.
\textsuperscript{77} Id. at 207.
\textsuperscript{78} Whitman & Stoltenberg, Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification, 19 Ind. L. Rev. 497 (1986).
\textsuperscript{79} Zauderer, 471 U.S. 626.
\textsuperscript{80} Id. at 629.
\textsuperscript{81} Id. at 630.
\textsuperscript{82} Id. at 631.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 632 n.4.
violation of two other rules. One prohibited the attorney from accepting employment from laymen to whom he had given unsolicited advice. The other required a disclaimer regarding court costs in any advertisement mentioning contingent fee rates.

The charges were heard before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio which "rejected [the] appellant's constitutional defenses." Subsequently, the panel’s findings were adopted by the Board of Commissioners and then by the Ohio Supreme Court. The United States Supreme Court affirmed in part and reversed in part.

After recapping its decisions in Bates, Ohralik, Central Hudson and In re R.M.J., the Court once again applied the Central Hudson test to determine if the state of Ohio could indeed regulate Mr. Zauderer's advertising as it proposed. The Court held that the advertisement describing the terms of representation in drunk driving cases and the lack of complete information with regard to contingent fees could be regulated by the state on the premise that the public could be misled or otherwise deceived. However, the use of non-deceptive illustrations and the offer of legal advice were entitled to constitutional protection and therefore could not be suppressed by the state.

III. Shapero v. Kentucky Bar Association: "A Step Too Far"

The Supreme Court's latest addition to its attorney advertising decisions is Shapero v. Kentucky Bar Association. The case involved a Kentucky attorney who sought approval of a letter he proposed to send to targeted potential clients. The letter read as follows:

87. Id. at 633.
88. Id.
89. Id. at 635.
90. Id. at 635-36.
91. Id. at 655-56.
92. Id. at 639-36.
94. Id. at 1919.
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. 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.95

Shapero applied to the Kentucky Attorneys’ Advertising Commission for approval of the letter.96 At the time, an existing Kentucky Supreme Court rule prohibited the mailing of written advertisements ‘‘‘precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.’’97 Even though the Commission did not find it deceptive or misleading, it could not approve the letter as it clearly violated a then-existing rule. However, the Commission, relying specifically on the Zauderer decision, recommended that the rule be revised as it determined that the rule itself violated the first amendment.98 Next, at the suggestion of the Commission, Shapero sought an advisory opinion as to the rule’s validity from the Ethics Committee of the Kentucky Bar Association.99

The Ethics Committee found the letter neither deceptive nor misleading. However, it felt compelled to uphold the rule.100 The Kentucky Supreme Court reviewed the advisory opinion and consequently replaced the rule with the ABA’s Rule 7.3:101

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.

95. Id.
96. Id.
97. Id.
98. Id. at 1920.
99. Id.
100. Id.
101. Id.
provided by the lawyer in a particular matter, but who are so situated that they
might in general find such services useful.\textsuperscript{102}

The new rule prohibited targeted, direct-mail solicitation by law-
yers for pecuniary gain and, consequently, the court did not approve
Shapero's letter.\textsuperscript{103} Clearly, the Kentucky Supreme Court was at-
ttempting to exercise the prerogative granted it by the Supreme
Court—regulating attorney advertising while keeping within the nec-
esary boundaries that had been mapped out for the states.\textsuperscript{104} Nev-
evertheless, the Supreme Court reversed the judgment of the Kentucky
court\textsuperscript{105} and, in this author's opinion, went a step too far.

The Court began its reasoning by simply restating the principle
that commercial speech which is not misleading or deceptive or does
not promote unlawful transactions enjoys constitutional protection
unless the state can advance a substantial interest in the regulation
thereof.\textsuperscript{106} The Court then reiterated the \textit{Central Hudson} test,\textsuperscript{107} not-
ing that, in \textit{Zauderer} the application of that test resulted in the
striking down of an Ohio rule that prohibited truthful advertising
concerning a specific legal problem for pecuniary gain.\textsuperscript{108} Moreover,
it distinguished \textit{Ohralik}, in which pecuniary self interest was the
perceived evil, from \textit{Zauderer} in that the dangers which were present
in \textit{Ohralik} were not present in \textit{Zauderer}.\textsuperscript{109} In other words, even
though the \textit{Zauderer} ad was for pecuniary gain and was directed
towards a specific group of readers, the ad was placed in a news-
paper for the general population to read or discard as they pleased.
So long as such advertising was truthful and non-deceptive, it de-
served protection.\textsuperscript{110} The Court thus asserted that the Kentucky court

\textsuperscript{103} \textit{Shapero}, 108 S. Ct. at 1920.
\textsuperscript{104} \textit{See Bates}, 433 U.S. at 383, where the Court held that states may restrain advertising that
is false or misleading; \textit{Ohralik}, 436 U.S. at 460-61, where the Court held that in-person solicitation
for pecuniary gain may be restrained; \textit{Zauderer}, 471 U.S. 626, where the Court held that general
advertisements containing information about specific legal problems may not be suppressed by the
states.
\textsuperscript{105} \textit{Shapero}, 108 S. Ct. at 1925.
\textsuperscript{106} \textit{Id.} at 1921.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
certainly could not prohibit Shapero from sending his letter to the
general population at large with a more general opening line such as "Is your home being foreclosed on?."" The Court patronizingly
noted that the Kentucky court obviously appreciated as much.\textsuperscript{112}

The big surprise in the Court’s reasoning in \textit{Shapero}, however,
is the upholding of targeted mailings such as Shapero’s in the name of efficiency! The Court asserts that Shapero was merely being ef-
ficient in his advertising by wanting to mail the letters solely to those
in need of the particular legal services, as opposed to the general public. Moreover, "the First Amendment does not permit a ban on
certain speech merely because it is more efficient."\textsuperscript{113} If the Court
is so concerned with the efficiency of its brothers at the bar, why
did it not allow \textit{Ohralik} the same consideration? Nothing could be
more efficient than in-person solicitation for pecuniary gain. Fur-
thermore, the Court seems to forget that it allowed the targeted
direct-mailing in \textit{Primus} only because it was not for pecuniary gain.
Therefore, the lawyer’s judgment would not be clouded by her own
self-interest. Additionally, the letter in \textit{Primus} was in furtherance
of associational freedoms.\textsuperscript{114} The \textit{Shapero} Court contends that the
dangers of undue influence, overreaching and intimidation do not exist in the case of targeted mailings as they do in direct solicita-
tion.\textsuperscript{115} However, the very qualities that were lacking in \textit{Primus} and, therefore, distinguished it from \textit{Ohralik}, are present in targeted di-
rect mailings: pecuniary self-interest, undue influence and intimi-
dation.

The Court notes that

\begin{quote}
[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put
in a drawer to be considered later, ignored, or discarded. In short, both types
of solicitation . . . ‘are more conducive to reflection and the exercise of choice
on the part of the consumer than is personal solicitation by an attorney.’\textsuperscript{116}
\end{quote}

\begin{itemize}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.} Rule 7.3 “exempts from the ban ‘letters addressed or advertising circulars distributed
generally to persons . . . who are so situated that they might in general find such services useful.’ ”
\item \textit{Id.}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{In re Primus}, 436 U.S. 412.
\item \textsuperscript{115} \textit{Shapero}, 108 S. Ct. at 1922-23.
\item \textsuperscript{116} \textit{Id.} at 1923 (citing \textit{Zauderer}, 471 U.S. at 642).
\end{itemize}
The Kentucky court had asserted that "the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest"; and that "such a condition is full of the possibility of undue influence, overreaching and intimidation." In response, the Shapero court contends that "the potential client will feel equally 'overwhelmed' by his legal troubles and will have the same 'impaired capacity for good judgment' regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement." Certain, if a potential client receives a targeted letter quite fortuitously at a time when he is overwhelmed with legal troubles, he will not take the time to "shop around," but instead will latch on to the first sign of help that comes his way. In fact, Justice O'Conner in her dissent in Shapero said as much when she asserted that "[u]nsophisticated citizens, understandably intimidated by the courts and its officers, may therefore find it much more difficult to ignore an apparently 'personalized' letter from an attorney than to ignore a general advertisement." Indeed, one reason for targeted mailings is to take advantage of the potential client's immediate situation. It is as close as an attorney may get to permissible in-person solicitation, and this author agrees with the Kentucky Court when it suggests that Shapero is "merely Ohralik in writing." Such conduct, if allowed, will strip the legal profession of the very dignity the Court has ostensibly attempted to protect. Attorneys-at-law, if they are not already, would come to be viewed in the same stereotypical light as used car salesmen.

The Supreme Court readily admits that targeted, direct-mail solicitation "presents an increased risk of deception, intentional or inadvertent." However, the Court also asserts that "direct-mail solicitation—'poses much less risk of overreaching or undue influence' than does in-person solicitation." All advertising carries with

117. Id. at 1922 (citing Shapero, 726 S.W.2d at 301).
118. Id. at 1922.
119. Id. at 1926. (O'Connor, J., dissenting).
120. Id. at 1922.
121. Id. at 1923.
122. Id. at 1922 (quoting Zauderer, 471 U.S. at 642).
it some amount of risk of deception and overreaching, which is why the Court has afforded the states the right to regulate attorney advertising. It would seem, however, that the question now is how much risk are the legal profession and the general public expected to bear?

With respect to regulation, the Court's opinion in Shapero has placed a greater burden on the states in their efforts to oversee attorney advertising. At the same time, it has taken away what little authority remained with the states to preserve the dignity of the profession. Justice Blackmun's suggestions for regulating targeted letter mailings\textsuperscript{123} will work in theory.\textsuperscript{124} However, the Kentucky Supreme Court appreciated the reality of the situation\textsuperscript{125} as did the ABA House of Delegates in its comment to Rule 7.3:

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.\textsuperscript{126}

Justice Blackmun offers a number of options for regulating targeted direct-mailings such as filing the letters with a state agency, supervising mailings, penalizing abuses, requiring lawyers to prove the truth of facts stated in letters, and labels identifying letters as advertisements. The Court further concedes that the state agency or bar responsible for regulation may have its work cut out for it.\textsuperscript{127} With respect to such reasoning, Justice O'Connor could not have been more precise in stating in her dissent that "[t]oday's decision—

\textsuperscript{123} Id. at 1923.
\textsuperscript{124} Id. at 1926.
\textsuperscript{125} Id. at 1923. "The court below offered no basis for its 'belief[ ] that] submission of a blank form letter to the Advertising Commission [does not] provid[e] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.' " Id. (quoting Shapero, 726 S.W.2d at 301).
\textsuperscript{126} Shapero, 108 S. Ct. at 1923 (quoting Model Rules of Professional Conduct Rule 7.3 comment (1984)).
\textsuperscript{127} Shapero, 108 S. Ct. at 1924 (1988). Nevertheless, the Court contends such burdens are justified given that "‘The free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.’ " Id.
which invalidates a similar rule against targeted, direct-mail advertising—wraps the protective mantle of the Constitution around practices that have even more potential for abuse.”

IV. CONCLUSION

Instead of preserving the dignity and professionalism of the legal profession, the Supreme Court’s latest decision with respect to attorney advertising will only serve to corrode those fragile qualities. In Justice O’Connor’s dissent, which has been recognized as strong and well reasoned, she posited that the attorney advertising “decisions have radically curtailed the power of the States to forbid conduct that [she] believe[s] promote[s] distrust of lawyers and disrespect for our own system of justice.”

When Bates was decided eleven years ago, the Supreme Court came out from “hid[ing] behind issues of dignity and professionalism;” and rightly so. Indeed, the court in Bates asserted that it “suspect[ed] few attorneys engaged in the self-deception . . . [that they] must conceal from themselves and from their client the real life fact that lawyers earn their livelihood at the bar.” Dignified, non-deceptive, informative advertising which would be regulated by the States was, it seemed, the Court’s vision in Bates. However, as a result of Shapero, what in 1977 was considered deceptive and misleading advertising which had serious potential for overreaching, undue influence and intimidation is now, ironically, constitutionally protected speech. The Shapero Court concedes that the risk of such dangers are present in targeted, direct-mail advertising but that such advertising “poses much less risk of overreaching or undue influence’ than does in-person solicitation.”

128. Id. at 1926.
130. Id. at 1925.
132. Shapero, 108 S. Ct. at 1927 (quoting Bates, 433 U.S. at 394 (Powell, J., concurring in part and dissenting in part)).
down to this: How much risk are we willing to take with respect to the reputation and dignity of the legal profession? Certainly it matters not the amount of risk the state bar associations deem to be appropriate or safe. In fact, it has been asserted that "[t]he tragedy of this case is that the collective bar associations in this country (including the ABA) abrogated their authority and responsibility to the Supreme Court and now are impotent to effect any restraints on advertising other than those that are false, misleading, or deceptive."\(^{136}\)

In short, the *Shapero* Court has done nothing more than license ambulance chasers to do their chasing through the mail. How long will it be before they are permitted to do their chasing in person?\(^{137}\) The Court’s language in *Shapero* certainly leads one to believe that it will not be long until that obstacle is removed.\(^{138}\)

Finally, in the words of Justice O’Connor’s "well reasoned" dissent from this judicial "snafu,”

In my judgment, . . . fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court’s recent decisions reflect a myopic belief that ‘consumers,’ and thus our nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.\(^{139}\)

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137. *Id.* at 5. “The last remaining obstacle in this area is in-person solicitation, which is still prohibited.” *Id.*
138. *Id.*
139. *Shapero*, at 1931.