FROM BIGELOW TO SHAPERO: STEPS ALONG THE WAY IN ATTORNEY ADVERTISING

by

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HISTORICAL BANS ON ATTORNEY ADVERTISING

Modern restrictions on attorney advertising have historical links to early common law proscriptions against barratry, champerty, and maintenance.1 Such common law bans, originating during the Middle Ages in Europe, were brought to the United States; however, adherence to them was not strict. In fact, during the late nineteenth and early twentieth centuries, abuses in advertising and solicitation were widespread.2 As a result, bar associations asserted themselves in order to control attorney behavior in this area.3

In essence, the rationale for denying attorneys the right to advertise was to protect the public from overly-zealous attorneys who might be inclined to utilize unscrupulous methods to take advantage of unknowing clients.4 Five reasons have been offered to support bans on advertising; (1) protection of consumers from misrepresentation concerning both price and the likelihood of successful litigation; (2) commercialization of the legal profession, resulting in neglect of clients; (3) prevention of overcharging and the securing of too many cases by attorneys to cover the costs of advertising; (4) protection of the bar's integrity; and (5) initiation of too many lawsuits.5

FIRST AMENDMENT PROTECTION OF COMMERCIAL SPEECH

Originally the first amendment did not protect commercial speech. In Valentine v. Chrestensen,6 the Supreme Court upheld a New York City ordinance which prohibited the street distribution of commercial and advertising matter (handbills in this case). The Court found that the control of commercial advertising was a legislative matter and that the Constitution imposed no restraint on government with respect to commercial advertising.7

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2 Id. at 151.

3 Id.


5 Id. at 1013.

6 316 U.S. 52 (1942).

7 Id. at 54.
Thirty-three years later, the Supreme Court, in *Bigelow v. Virginia*, struck a significant blow to the *Valentine* holding. There, the editor of a weekly Virginia newspaper was convicted of a misdemeanor by virtue of advertising the availability of abortions through New York hospitals to women with unwanted pregnancies. In upholding the conviction, the Virginia Supreme Court stated that "because appellant himself lacked a legitimate First Amendment interest, inasmuch as his activity ‘was of a purely commercial nature,’ he had no ‘standing to rely upon the hypothetical rights of those in the non-commercial zone.’” However, the United States Supreme Court reversed the Virginia Supreme Court decision, holding that paid commercial advertisements are not stripped of first amendment protection merely because they appear in that form. Invoking the balance test, the Court weighed the first amendment interest alleged to be at stake against the state’s interest supposedly served by the regulation. The *Bigelow* Court stated:

The fact that the particular advertisement in appellant’s newspaper had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraining merely because the advertisement involved sales or ‘solicitations’ . . . or because appellant’s motive or the motive of the advertiser may have involved financial gain. . . .

Nevertheless, *Bigelow* left unanswered the extent to which first amendment protection would be “afforded commercial advertising under all circumstances and in the face of all kinds of regulation.”

**Consumers’ Right to Know Emerges**

Within one year of *Bigelow*, the Supreme Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.* removed any lingering doubts about first amendment protection for commercial speech. In *Virginia Pharmacy*, consumers of prescription drugs sued the Virginia State Board of Pharmacy, challenging, a Virginia statute on first and fourteenth amendment grounds, declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The Court balanced the state’s paternalistic interest in pro-

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8 421 U.S. 809 (1975).
9 Id. at 812.
10 Id. at 814-815.
11 Id. at 825.
12 Id. at 818.
14 *Bigelow*, 421 U.S. at 818 (citations omitted).
15 Id. at 826.
17 Id.
tecting its citizens against first amendment rights of consumers. However, the Court, in applying the test, weighted freedom of speech heavily and placed the burden on the State to justify its suppression. Concluding that the Virginia statute was unconstitutional, the Court held that a state may not suppress dissemination of truthful information about a lawful activity.

*Virginia Pharmacy* was not a case brought from the perspective of an advertiser’s right to advertise his product, but rather from a perspective of consumers’ right to know the price of a particular product. The decision significantly strengthened the concept of consumers’ right to receive commercial information. In fact, the emphasis on society’s right to receive information, because of first amendment protection, was likely the most important principle coming from the case. The Court asserted that the “free flow of commercial information is indispensable” as it related to intelligent and well informed decisions.

In *Virginia Pharmacy*, the Court made an interesting social observation. It noted that the statute banning advertising, which was enacted to control a profession “affecting the public health, safety, and welfare,” was actually having a detrimental effect on those taking prescriptions most often — i.e., “the poor, the sick, and particularly the aged.”

Notwithstanding the first amendment expansion of the scope of protected commercial speech, the Court in *Virginia Pharmacy* acknowledged that some forms of commercial speech could be regulated. Furthermore, the Court was careful to explain that its holding did not provide categorical protection to professional services’ advertisements. The Court noted:

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.

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18 *Id.* at 769-770.
20 *Virginia Pharmacy*, 425 U.S. at 773.
21 Erickson, *supra* note 4, at 993.
22 *Id.*
23 *Virginia Pharmacy*, 425 U.S. at 756-757.
24 *Id.* at 765.
25 *Id.* at 763; Erickson, *supra* note 4, at 996.
26 425 U.S. at 770.
27 *Id.* at 773 & n.25.
Although the Court in *Virginia Pharmacy* refused to speculate on professional advertising and the permissible regulation of it, it appears that the groundwork was laid for *Bates v. State Bar of Arizona* which would begin to define the scope of permissible activities relating to attorney advertising. Indeed, the *Bigelow* and *Virginia Pharmacy* decisions firmly established first amendment protection for commercial speech and were to provide the basis for the rationale in *Bates* to protect attorney advertising.29

**BAN ON ATTORNEY ADVERTISING ABOLISHED**

The bedrock of the *Bates* rational was first amendment protection of commercial speech as enunciated in *Virginia Pharmacy.* Justice Blackmun went so far as to say: "We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it." 31

The controversy in *Bates* arose because two Phoenix attorneys placed an advertisement in a newspaper, announcing their legal clinic fees for certain routine services. Knowing that when they took out the advertisement, they were in violation of an Arizona Supreme Court disciplinary rule, the attorneys clearly intended to test the constitutionality of the rule. An historic end of one of the oldest canons of professional conduct in Anglo-American law occurred on June 27, 1977, when a 5-4 Supreme Court majority held that the disciplinary rule was an unconstitutional abridgment of first amendment rights.32

Specifically, the Court in *Bates* had been asked to decide whether the "State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services." 33 In response, the Court held that "blanket suppression of legal advertising does not violate the Sherman Act, but does abridge first amendment rights." 34 In deciding the first amendment issue, the Court spoke at length about a strict scrutiny test which had been expressed earlier in *Virginia Pharmacy.* 35 However, the Court in *Bates* did not specify the appropriate level of judicial scrutiny, despite its conclusion that commercial speech was entitled to first amendment protection.36 Interestingly, the Court offered authority for the proposition that in making a determination whether an advertisement is misleading, a court is required to consider the legal

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29 Cloud, *infra* note 13, at 509.
30 Kerr, *infra* note 19, at 106.
31 *Bates*, 433 U.S. at 365.
32 See Kerr, *infra* note 19, at 103.
33 433 U.S. at 384.
34 Kerr, *infra* note 19, at 103.
35 Id. at 105.
sophistication of its audience, as well as the context of the advertisement itself.\textsuperscript{37} The \textit{Bates} Court dismissed the state’s six justifications as inadequate to support the ban on advertising.\textsuperscript{38} Perhaps the bar’s strongest justification was the “inherently misleading nature of attorney advertising” argument.\textsuperscript{39} In dismissing this justification, Justice Blackmun wrote:

\begin{quote}
[T]he argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance . . . . [T]he preferred remedy is more disclosure, rather than less.\textsuperscript{40}
\end{quote}

The Court reaffirmed its faith in the wisdom of the people instead of in the wisdom of the government to act for the people.\textsuperscript{41} As in \textit{Virginia Pharmacy}, the Court seemed more concerned about consumers’ rights to receive information and to make their own decisions regarding it, than in the speaker’s right to disseminate information. Having this concern, the Court was determined not to allow government interference with the free flow of information. Thus, the doctrine behind \textit{Bates} appears to be that society has a compelling first amendment right to receive commercial information in the interest of informed decision making.\textsuperscript{42}

The holding in \textit{Bates} was actually quite narrow: a state may not prevent a truthful advertisement concerning the availability and terms of routine legal services.\textsuperscript{43} The narrowness of the holding left several unanswered issues. What was the constitutional permissibility of advertising services other than routine legal services?\textsuperscript{44} Are advertisements concerning the quality of legal services and in-person solicitation permissible?\textsuperscript{45} The \textit{Bates} court expressly declined to consider the question of in-person solicitation of clients.\textsuperscript{46} Furthermore, the \textit{Bates} decision gave few guidelines to the states to assist them in revamping their disciplinary rules.\textsuperscript{47}

Yet, the \textit{Bates} Court did enunciate what it called “some of the clearly permissible limitations on advertising not foreclosed by the holding.”\textsuperscript{48} In this regard,

\begin{itemize}
\item \textsuperscript{38} 433 U.S. at 368-379.
\item \textsuperscript{39} \textit{Id.} at 372.
\item \textsuperscript{40} \textit{Id.} at 374-375.
\item \textsuperscript{41} See Kerr, \textit{supra} note 19, at 125.
\item \textsuperscript{42} \textit{Id.} at 105.
\item \textsuperscript{43} 433 U.S. at 384.
\item \textsuperscript{44} See Whitman, \textit{supra} note 13, at 459.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} 433 U.S. at 366.
\item \textsuperscript{47} See Cloud, \textit{supra} note 13, at 513.
\item \textsuperscript{48} 433 U.S. at 383.
\end{itemize}
the Court mentioned restraining false, deceptive or misleading advertisements as well as "reasonable restrictions on the time, place, and manner of advertising." The Court indicated strongly that claims as to the quality of services may be restricted, that advertising illegal transactions may be suppressed, and that warnings or disclaimers may be required.

Nevertheless, the Bates Court, for the most part, sought to give the states and the bar a free hand to reform according to decision's general mandates. The American Bar Association (ABA) and the states began to revamp their disciplinary rules accordingly. However, most states were reluctant, in the beginning, to implement far-reaching changes. Consequently, from the initial aftermath of Bates to the present, the ABA and the states have struggled to protect the public from deceptive or misleading advertising, while, at the same time, trying to promulgate guidelines for attorney advertising consistent with the first amendment.

Solicitation Considered

Although the Supreme Court in Bates, had expressly left open the question of attorney solicitation, it directly considered the constitutionality of state regulation of attorney solicitation in two companion cases: Ohralik v. Ohio State Bar Ass'n and In re Primus. At issue in Ohralik and Primus were three competing interests: i.e., (1) the state's interest in regulation of the legal profession on behalf of the public; (2) the individual attorney's first amendment guarantees of free speech; and (3) consumers' interests in the free flow of commercial information regarding legal services.

In Ohralik, an Ohio attorney, went to the hospital without invitation and visited the driver of a car who had been involved in an automobile accident. While visiting, he offered to represent the young woman. Also, he visited her parents and discussed representation with them. Again, without invitation, he similarly visited, in her home, the injured passenger of the same automobile, offering likewise to represent her. The accident victim in the hospital signed a contingent-fee agreement with the attorney, while the passenger victim agreed orally to a contingent-fee arrangement. Although both young women later discharged Mr. Ohralik as their attorney, he was successful in obtaining more than $4,000 in settlement of a lawsuit which he brought against the driver for breach of contract. The Ohio Supreme Court later gave the attorney an indefinite suspension because

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49 Id. at 383-384.
50 Id.
51 Id. at 384.
52 Id.
53 Cloud, supra note 13, at 506.
54 Id.
57 Lenox, supra note 36, at 961.
of his in-person solicitation of clients.\textsuperscript{58} The United States Supreme Court held that the "State — or the Bar acting with state authorization — 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."\textsuperscript{59}

Dismissing the appellant's argument that his solicitation was indistinguishable from the advertisement in \textit{Bates},\textsuperscript{60} the \textit{Ohralik} Court held that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services."\textsuperscript{61} The Court, then, clearly distinguished first amendment protection for in-person solicitation from that provided for advertising.\textsuperscript{62} The Court reasoned that there is considerable potential for harm in circumstances such as those presented in the \textit{Ohralik} case.\textsuperscript{63} The court emphasized that the "potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits [a] lay person," than it is when "face-to-face selling of ordinary consumer products" occurs.\textsuperscript{64} Comparing an advertisement and in-person solicitation, the Court said: "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."\textsuperscript{65} Moreover, the Court noted the difference in public scrutiny between the advertising in \textit{Bates} and in-person solicitation when it wrote: "Often there is no witness other than the lawyer and the law person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place."\textsuperscript{66}

To further the state's interest in protecting the public from the potential overreaching present in an attorney's in-person solicitation of clients, the \textit{Ohralik} Court upheld the need for "prophylactic regulation."\textsuperscript{67} In addition, the Court was apparently suggesting a standard of less scrutiny of state regulation when soliciting for pecuniary gain was at issue.\textsuperscript{68}

In summary, the rationale of \textit{Ohralik} seemed to rest on the state's interest in both "protecting consumers and in maintaining standards among members of the licensed professions."\textsuperscript{69}

\textsuperscript{58} \textit{Ohralik}, 436 U.S. at 447-454.
\textsuperscript{59} \textit{Id.} at 449.
\textsuperscript{60} \textit{Id.} at 455.
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} Lenox, \textit{supra} note 36, at 970.
\textsuperscript{63} \textit{Ohralik}, 436 U.S. at 464.
\textsuperscript{64} \textit{Id.} at 464-465.
\textsuperscript{65} \textit{Id.} at 457.
\textsuperscript{66} \textit{Id.} at 466.
\textsuperscript{67} \textit{Id.} at 468.
\textsuperscript{68} Cloud, \textit{supra} note 13, at 514.
\textsuperscript{69} 436 U.S. at 460; Lenox, \textit{supra} note 36, at 971.
In *Primus*, a South Carolina attorney, who was also a cooperating attorney with a branch of the American Civil Liberties Union (ACLU), advised a group meeting of women, who had been sterilized as a condition of receiving medicaid assistance, of their legal rights. Subsequent to the meeting, Ms. Primus wrote a letter to one of the women who was present at the meeting informing her that the ACLU would provide her with free legal assistance. The South Carolina Supreme Court publicly reprimanded Ms. Primus for soliciting a client in violation of the Court's Disciplinary Rules. The United States Supreme Court held application of the Disciplinary Rules in this case to be in violation of the first and fourteenth amendments.

The Court found that Ms. Primus' letter offering ACLU assistance fell within the "generous zone of First Amendment protection reserved for associational freedoms." To have proscribed Ms. Primus' conduct, South Carolina would have had to show that the means employed in furtherance of its legitimate state interest were "closely drawn to avoid unnecessary abridgment of associational freedoms." However, the Court found the means used by South Carolina (i.e., blanket prohibition of all solicitation activities of attorneys) were excessive. In essence, the state was trying to prohibit all solicitation activities to circumvent the problems that could potentially arise out of some. The Court acknowledged that the state could proscribe solicitation that is "misleading, overbearing, or involves other features of deception or improper influence;" but such was not the case with Ms. Primus' letter.

The solicitation in *Ohralik* and *Primus* are easily distinguishable. First, Ms. Primus sought no pecuniary gain for herself, unlike Mr. Ohralik. Second, the Court characterized Ms. Primus' speech as political expression and association, which calls for significantly more precise (and less broad) state regulation. Third, Ms. Primus solicited by mail on behalf of the ACLU, and in person on behalf of herself. Therefore, it is not difficult to see why the two cases were decided differently. The *Ohralik* Court held that the state may constitutionally proscribe an attorney from "soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent;" while, the *Primus* Court held that, only through "carefully tailored regulation," may the State regulate solicitation involving associational freedom of nonprofit organiza-

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70 *In re* Primus, 436 U.S. at 412.
71 Id. at 439.
72 Id. at 431.
73 Id. at 432; Lenox, *supra* note 36, at 972.
74 *In re* Primus, 436 U.S. at 437-438.
75 Lenox, *supra* note 36, at 973.
76 *In re* Primus, 436 U.S. at 438.
77 Compare *In re* Primus, 436 U.S. at 422 with *Ohralik*, 436 U.S. at 458; Cloud, *supra* note 13, at 515.
78 *In re* Primus, 436 U.S. at 437-438.
79 Lenox, *supra* note 36, at 971.
80 *Ohralik*, 436 U.S. at 449.
Unfortunately, Ohralik and Primus left many doubts as to how solicitation cases were to be decided in the future. This was because Primus’ political overtones removed it from the analytical structure of pure commercial speech, and because Mr. Ohralik’s conduct was so obviously outrageous that the Ohralik case provides few guidelines for less offensive attorney conduct. Two important questions remained unanswered. Is in-person solicitation to be prohibited in all cases? Is direct mail solicitation for pecuniary gain to be totally prohibited?

Four-Part Commercial Speech Test

Despite the far-reaching impact of Bates, Ohralik, and Primus, the states remained in confusion over precise tests for attorney advertising and solicitation. Finally, the Supreme Court gave an appropriate four-part commercial speech test in Central Hudson Gas & Electric Corporation v. Public Service Comm'n of New York. In Central Hudson, the Court held unconstitutional (in violation of the first and fourteenth amendments) a regulation of the New York Public Service Commission which completely banned the utility’s promotional advertising. The regulation was based on the idea that all promotional advertising, promoting the use of electricity, was against the national policy of conserving energy. In reversing the judgment of the New York Court of Appeals, the Supreme Court noted that the protection available for commercial speech “turns on the nature both of the expression and of the governmental interests served by its regulation.”

The Court proceeded to develop a four-step analysis to be used in evaluating the constitutionality of any commercial speech challenges. First, the first amendment must protect the expression, meaning that the speech must at least be lawful and not misleading. Second, the asserted governmental interest must be substantial. If steps one and two yield positive answers, the regulation in question must then directly advance the asserted governmental interest. Finally, the regulation in question should not be more extensive than necessary to serve the asserted interest.

In terms of attorney advertising, the Central Hudson Court provided standards to judge the constitutionality of attorney advertising, something that had been lacking since the Bates decision had ended the ban on advertising. Central Hudson continues the proscription of false and misleading advertising, while
providing guidelines for regulation of inherently misleading types of advertising such as in-person solicitation.\textsuperscript{90} Indeed, \textit{Central Hudson} gave the states something precise and concrete about attorney advertising with which to work. Yet, some state courts did not readily accept the four-part test, and in some cases, they misapplied the test.\textsuperscript{91}

\textbf{CENTRAL HUDSON TEST AND DIRECT MAIL SOLICITATIONS}

After the \textit{Bates} decision, several states amended their disciplinary rules concerning attorney advertising; among those states was Missouri. The revised Missouri regulations restricted legal advertisements to disclosure of specific information categories, and they directed that only specific areas of practice could be listed, using precise terminology provided in the rules — without deviation. Also, the rules did not authorize an attorney to advertise the jurisdictions in which he/she was licensed or the courts in which he was admitted to practice. Furthermore, attorneys were allowed to announce the opening of an office or an address change only to "lawyers, clients, former clients, personal friends, and relatives."\textsuperscript{92}

A St. Louis attorney was given a private reprimand by the Missouri Supreme Court when he published advertisements, listing areas of practice in language other than that specified in the rules, and listing courts in which he was admitted to practice despite such information not being included among the ten categories authorized by the rules. Moreover, he was charged with mailing announcement cards to persons other than those permitted by the rules,\textsuperscript{93} as well as failing to include a disclaimer of expertise in particular areas of practice as required by the rules.\textsuperscript{94} The United States Supreme Court later struck down the Missouri rules as unconstitutional in the \textit{In re R.M.J.} case.\textsuperscript{95}

It has been said that the \textit{R.M.J.} decision "is to \textit{Bates} in the context of lawyer advertising what \textit{Central Hudson} was to \textit{Virginia Pharmacy} in the area of commercial speech generally — an enunciation of a workable standard and an expansion of first amendment protection."\textsuperscript{96}

In testing the validity of attorney advertising regulations vis-a-vis the commercial speech test enunciated in \textit{Central Hudson}, the \textit{R.M.J.} Court seemed to have reached a logical and predictable culmination of commercial speech cases.\textsuperscript{97} In applying the \textit{Central Hudson} test, the following questions should be asked:

1. Does the commercial speech in question concern lawful activity?

\textsuperscript{90} Id.
\textsuperscript{91} Id. at 523.
\textsuperscript{93} \textit{In re R.M.J.}, 455 U.S. 191 (1982).
\textsuperscript{94} Id. at 204.
\textsuperscript{95} Id. at 191.
\textsuperscript{96} Whitman, \textit{supra} note 13, at 469.
\textsuperscript{97} Id. at 468.
2. If so, is the speech not misleading?
3. If so, is the governmental interest asserted to justify the regulation a substantial one?
4. If so, does the regulation in question directly advance that governmental interest?
5. If so, is the regulation any more restrictive than is necessary to serve that interest?  

Actually, since the advertisement in R.M.J. was found to be not unlawful and not misleading, the Court was then concerned with a Central Hudson three-part test, namely the latter three questions above.

Trying to quantify substantially in commercial speech cases in recent years, by means of balancing various factors, has generally resulted in an inclination toward the public’s right to receive information. In this same spirit, the R.M.J. Court decided that the State did not show that a substantial governmental interest justified the regulation.

Articulating the development of the commercial speech doctrine as it applies to professional advertising, the Court in R.M.J. said:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

The general rule, as announced in Bates, was that only routine legal services may be advertised, and the Bates decision placed uncontested divorce, simple adoption, uncontested personal bankruptcy, and change of name within those routine services. However, the R.M.J. Court expanded the list of routine services to twenty-three areas of law.

The R.M.J. Court deemed the attorney’s listing of his admission to the United States Supreme Court to be in bad taste and potentially "misleading to the general

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98 Franck, supra note 92, at 59.
99 455 U.S. at 206-207.
100 See Whitman, supra note 13, at 469.
101 In re R.M.J., 455 U.S. at 205-207.
102 Id. at 203.
103 Bates, 433 U.S. at 372.
public unfamiliar with the requirements of admission to the Bar of [the Supreme Court];” 105 nevertheless, the Court found nothing misleading in this information. 106

Despite its far-reaching effects, the R. M. J. decision indicated that the advertisement of other standardized products or services, and that because of this difference, advertising of professional services has greater potential for misleading and confusing. 107 Hence, a good argument can be made for stricter judicial scrutiny of attorney advertising than for the advertisement of other commercial products and services. 108

Another important issue considered in R. M. J. concerned direct mail solicitation of clients. 109 Before the R. M. J. decision, the states had pursued different approaches to this form of advertising. Reasoning that direct mailing was solicitation for monetary gain and was subject to abuses similar to those of in-person solicitation, some state courts simply proscribed this type of advertising. Other state courts held that such advertising was protected constitutionally under the commercial speech doctrine, reasoning that mailings are similar to the type of advertising Bates’ approved. 110 In R. M. J., the Court appeared appeared to adopt the latter approach, holding that the direct mailing “to persons other than ‘lawyers, clients, former clients, personal friends and relatives’” could not be constitutionally proscribed. 111 Nevertheless, the Court, in strongly suggesting that the states might be justified in more stringent regulation on direct mailing than on traditional advertising, stated that “mailings and handbills may be more difficult to supervise than newspapers.” 112 The Court went further to suggest two possible regulations to prevent direct-mailing abuses. First, to avoid frightening an ordinary consumer, the Court offered the possibility of requiring an attorney to stamp “This is an Advertisement” on the envelope. 113 Second, to help states supervise mailings, the Court suggested the possibility of requiring attorneys to file copies of all general mailings with an Advisory Committee. 114

By extending attorneys’ right to advertise through general mailings in the absence of strong state evidence as to their misleading nature, R. M. J. rendered unconstitutional the direct-mail advertising rules of forty-two states. 115 However, it is clear that the R. M. J. Court did not explicitly deal with several perplexing

105 Id. at 205.
106 Id. at 206.
107 Id. at 203-204 & n.15.
108 See Whitman, supra note 13, at 469.
109 455 U.S. at 206.
110 Whitman, supra note 13, at 471-472.
111 455 U.S. at 206.
112 Id.
113 Id. at 206 & n.20.
114 Id. at 206.
questions, for example: What constitutes a general mailing? Do general mailings include targeted mailings? Do they depend on how many letters are sent, to whom they are sent, and/or what the letters say? What must a state show to establish that a direct mailing is misleading?\textsuperscript{116}

Thus, the \textit{R.M.J.} decision left questions unanswered in the arena of attorney advertising. In fact, the Court stressed that the holding is limited to the circumstances of the \textit{R.M.J.} case\textsuperscript{117} and that the analytical framework of the case must be applied on a case-by-case basis.\textsuperscript{118} Moreover, \textit{R.M.J.} suggested that the State retain some authority to regulate even when a communication is not misleading, provided there is a substantial interest asserted and the interference with speech is in proportion to the asserted interest.\textsuperscript{119} However, what those substantial interests are and what makes them substantial enough to justify regulation of attorney advertising remain unclear.\textsuperscript{120}

Two important impacts of \textit{R.M.J.} should be noted. First, the Court's finding of a less restrictive alternative than total prohibition of direct mail solicitation placed a sizeable burden on the states in future solicitation cases to justify prohibition of solicitation. Second, the Court's application of the \textit{Central Hudson} test to attorney advertising provided a standard for the states to use in determining the constitutionality of their own rules concerning advertising.\textsuperscript{121}

\textbf{Case-Specific Solicitation Considered}

In 1982, Phillip Zauderer, an Ohio attorney, placed several advertisements in local newspapers to attract litigation clients. The most controversial of Mr. Zauderer's advertisements featured a drawing of the Dalcon Shield intrauterine device (IUD) accompanied by the headline "Did You Use This IUD?"\textsuperscript{122} The advertisement cited injuries the shield allegedly caused.\textsuperscript{123} It further stated that Mr. Zauderer was currently handling lawsuits resulting from such injuries and was willing to represent other women asserting similar claims. The readers were advised that they should not assume that their claims were time-barred. Finally, the advertisement stated in part that no legal fees would be charged unless the litigation produced a recovery, and that "free information" was available from Mr. Zauderer's law office.\textsuperscript{124}

The IUD-focused advertisement was highly successful, and Mr. Zauderer initiated 106 lawsuits based on the responses. However, the advertisement also

\textsuperscript{116} \textit{Id.} at 1065.
\textsuperscript{117} 455 U.S. at 206; Alcott, \textit{supra} note 37, at 174.
\textsuperscript{118} 455 U.S. at 204 & n.16.
\textsuperscript{119} \textit{Id.} at 203.
\textsuperscript{120} Alcott, \textit{supra} note 37, at 175.
\textsuperscript{121} Cloud, \textit{supra} note 13, at 526.
\textsuperscript{122} Fuchs, \textit{Commercial Speech and the First Amendment}, 6 Bus. INSIGHTS 21, 23 (No. 1, Fall, 1986).
\textsuperscript{124} Fuchs, \textit{supra} note 122.
resulted in a complaint against Mr. Zauderer by the Ohio Office of Disciplinary Counsel, alleging that Mr. Zauderer had violated state-sanctioned regulations pertaining to attorney advertising. The complaint charged that the Dalcon Shield advertisement violated rules prohibiting the solicitation of legal employment and the use of illustrations in advertisement. The complaint also alleged that the advertisement violated a rule prohibiting false or deceptive statements because it failed to inform clients that they would be liable for litigation costs, as opposed to legal fees, even if their claims were unsuccessful.\textsuperscript{125}

The Ohio Supreme Court adopted the finding of the disciplinary panel and Mr. Zauderer was publicly reprimanded. The attorney appealed the state court ruling to the United States Supreme Court. In the resulting decision, \textit{Zauderer v. Office of Disciplinary Counsel}, the United States Supreme Court continued its step-by-step erosion of the traditional ban on attorney advertising.\textsuperscript{126} In \textit{Zauderer}, the Court struck down Ohio's prohibition on attorney advertising containing information directed at a particular clientele regarding specific legal problems.\textsuperscript{127} By a five-to-three vote, with Justice Powell not participating, and Justice White writing for the majority, the Court ruled that both the legal advice in the advertisement and the illustration of the IUD were protected commercial speech.\textsuperscript{128} The \textit{Zauderer} decision included a reiteration of the Court's previous stand allowing attorney advertising, and, for the first time, ties together the problems of attorney advertising in combination with attorney solicitation of business.\textsuperscript{129}

In \textit{Zauderer}, the Supreme Court reaffirmed the rule it promulgated in \textit{Bates} allowing states to regulate false and misleading advertising, advertising proposing illegal transactions, or even truthful, nondeceptive advertising, if the regulations advance substantial state interest, but only through means which directly advance those interests.\textsuperscript{130} The Court's previous protection of truthful commercial speech was continued as the Court made it more difficult for the states to restrict the content of nonmisleading, professional advertising.\textsuperscript{131}

Commercial speech, that is, speech proposing a commercial transaction, has only recently been accorded constitutional protection.\textsuperscript{132} In \textit{Zauderer}, the Supreme Court prefaced its analysis by restating the established rule that commercial speech is entitled to limited first amendment protection, although the protection may be

\begin{footnotes}
\item[125] Id.
\item[126] Orosz, \textit{Has Lawyer Advertising Finally Received the Protection It Deserves?}, 15 \textit{Stetson L. Rev.} 543, 547 (1986).
\item[130] Zauderer, 105 S. Ct. 2265, 2275 (1985); Orosz, \textit{supra} note 126, at 563-564.
\item[131] Fuchs, \textit{supra} note 122, at 21.
\item[132] Virginia Pharmacy, 425 U.S. at 748; Orosz, \textit{supra} note 126.
\end{footnotes}
less than that accorded noncommercial speech.\textsuperscript{133} The Court retained the distinction between commercial speech and other forms of speech. The Court felt that commercial speech, being primarily protected expression as a result of its informational function, could be regulated to insure the accuracy and truthfulness of the information.\textsuperscript{134}

The Court's decision left open the question of the degree of protection accorded to commercial speech and the standards to be employed to judge state regulation of commercial speech. The Court used an approach that balanced the speaker's relative interest against the state's objectives. The Court's rationale was that the individual's interest in the free flow of price information outweighed the state's objectives proffered in support of the prohibition.\textsuperscript{135} The justification for the protection of commercial speech serves to inform the consuming public. Individuals have an interest in price information for their own benefit. The suppression of that information tends to harm those persons who are least able to obtain the information in an alternative way. Society has an interest in the free flow of commercial information to assure an efficient allocation of resources.\textsuperscript{136} Protection of commercial speech stems from recognition that for a market economy to function, much less function efficiently, information must be available to consumers. The Court reasoned that democratic decision-making is enhanced because commercial speech assists the public in determining the proper role of the state in the economic order. It is better as a matter of policy to "open the channels of communication" rather than to keep the public ignorant.\textsuperscript{137}

The Zauderer decision represents an acknowledgement that the first and fourteenth amendments protect commercial speech from blanket prohibition,\textsuperscript{138} and that advertising lawyers are entitled to the first amendment right of free speech, a right which may be interfered with only when the advertising proves to be misleading or when a substantial state interest exists in support of such prohibition.\textsuperscript{139} The Court said that any regulation of professional advertising is subject to two constitutional constraints. First, the states must choose the least restrictive means of regulation. Second, in view of the admitted benefits of advertising and the consumer's constitutional right to receive it, any such regulation could not extent as far as a ban.\textsuperscript{140} Because the Court struck down all the traditional arguments of state interests supporting prohibition (that is, objections in various guises that advertising has an adverse effect on the quality of service),\textsuperscript{141} essentially the only

\textsuperscript{133} In re R.M.J., 455 U.S. 191 (1982); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980); see also Orosz, supra note 126, at 563-64.
\textsuperscript{134} 425 U.S. 748 (1976); 6 Bus. INSIGHTS, supra note 122, at 21.
\textsuperscript{135} Fuchs, supra note 122, at 21.
\textsuperscript{136} 425 U.S. 748 (1976); Fuchs, supra note 122, at 21.
\textsuperscript{137} Id.
\textsuperscript{138} See generally Thurman, supra note 123.
\textsuperscript{139} See generally Orosz, supra note 126.
\textsuperscript{140} McChesney, supra note 127, at 54-55.
\textsuperscript{141} Id. at 52.
restriction remaining is the regulation of truthfulness. Thus, lawyers may include in their advertisements truthful, nondeceptive advice and accurate, nondeceptive illustrations geared to specific legal problems, and states may require disclosures regarding fees and costs to prevent deceptive advertising.

The court examined Mr. Zauderer’s advertisements and, finding that they inarguably proposed commercial transactions, concluded that they constituted commercial speech. Justice White acknowledged that the outcome in Zauderer would depend upon the application of the commercial speech doctrine to the state advertisement regulations. In light of the Supreme Court cases that had already rejected the state’s ability to employ blanket prohibition on lawyer advertising, along with its previous approval of the state’s ability to prohibit in-person solicitation, the court divided the first amendment question into three issues:

1. the proscription of unsolicited legal advice contained in advertisements;
2. the prohibition on the use of illustrations in attorney advertising; and
3. the propriety of disclosure requirements imposed on the advertisement of contingent-fee arrangements.

Joinder, concurrence and dissent occurred in various combinations on the different issues.

First, a five member majority 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.” The court reached this decision despite the narrow reading the Ohio Supreme Court had given its broad prohibitions on self-recommendation and solicitation. The Ohio court had held only that its rules forbade these activities

142 105 S. Ct. at 2275-81; see also Orosz, supra note 126.
143 Thurman, supra note 123.
144 105 S. Ct. at 2275; Orosz, supra note 126, at 563-564.
145 105 S. Ct. at 2275; Fecher, supra note 129, at 464-465.
147 See Orosz, supra note 126, at 564.
148 105 S. Ct. at 2279.
The court not only found that the advertisement was neither false nor deceptive, but also that it was entirely accurate. After determining that the first part of the Central Hudson test was satisfied, the court placed the burden on the state to establish that prohibiting the use of statements directed at a specific legal problem to solicit or obtain business directly advanced a substantial state interest. The court examined the state's proffered interest in light of the public's right to know. Justice White found no substantial state interest requiring suppression of the advertisement. First, he noted that a printed advertisement lacks the potential to coerce the consumer, which may arise during in-person solicitation, as was noted in Ohralik. That is, no problem of overreaching or invasion of privacy exists since the trained advocate is not personally present and pressing for an immediate answer. The reader has time to consider the information contained in the advertisement and then to make a knowledgeable decision based on personal choice.

Second, Justice White squarely rejected the idea that the advertisement could be suppressed because it might "stir up litigation." Rather, it informed potential clients of their rights. He wrote:

That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The state is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.

Thus, even if Zauderer's truthful and nondeceptive advertisement in fact encouraged other consumers to file lawsuits, it could not justify disciplining Zauderer. The court also observed that the possibility of attorneys filing meritless claims did not give the state the right to ban advertising that contained advice.

Finally, the Court concluded that there was no need for a prophylactic ban on all statements of legal advice in advertising. The state contended a prophylactic rule was necessary to prevent overreaching, undue influence, invasion of privacy, and fraud. The state further took the position that the regulatory difficulties inherent in legal advertising made a prophylactic rule necessary. The state

150 105 S. Ct. at 2276; Parker, supra note 149, at 290.
151 105 S. Ct. at 2277; Parker, supra note 149, at 291.
153 105 S. Ct. at 2277; Filer, supra note 152, at 907.
155 105 S. Ct. at 2278; Kibler, Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the Zauderer Decision, 64 N.C.L. Rev. 170, 174 (1986).
156 Elmer, supra note 154, at 928.
argued that the indeterminacy of legal statements distinguish them from statements about most consumer products since the latter are more easily subject to verification. Accordingly, the state argued that the non-feasibility of weeding out the accurate from the false or misleading statements made a prophylactic rule essential in order to vindicate the state’s substantial interest in insuring that ambiguous or outright false information does not encourage its citizens to litigate.

However, the Court noted that the application of a prophylactic rule to Zauderer conflicted with the requirement that restrictions on commercial speech be narrowly drawn to serve the state’s purposes notwithstanding the fact that his advertisement contained none of the vices allegedly justifying the anti-solicitation rule. Nevertheless, the Court chose not to decide this issue since it was not convinced that the state’s rule was necessary to achieve a substantial government interest. The court was unpersuaded that the problems of distinguishing deceptive from nondeceptive legal advertising were different in kind from those involved in distinguishing between deceptive and nondeceptive advertising generally. Accordingly, the Court expressed its continued faith that the free flow of commercial information was important enough to justify the costs of regulating it.158

The states may restrict only false or deceptive statements. Because the advertisement was not false or misleading, the burden was on the state to show the necessity for an absolute prohibition of targeted advertising. Without a showing of a substantial state interest in prohibiting this kind of speech, and because the state was unable to show that narrower means of regulation were not available, Zauderer could not be disciplined. The accuracy and validity of Zauderer’s statements could be assessed, and the assessment was not so difficult as to justify an absolute prohibition.159

The Court recognized that the states have a substantial interest in insuring that its attorneys behave with dignity and decorum in the courtroom, but was unsure whether the states had a substantial interest in requiring attorneys to maintain dignity in their communications with the public. The Supreme Court was unpersuaded that the undignified behavior would occur so often as to warrant a prophylactic rule.160

Justice White followed the same basic analysis in rejecting the state’s blanket ban on pictures in advertisements: “Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, and prophylactic approach taken by Ohio cannot stand.”161 The court observed that commercial illustrations are granted the same first amendment protection afforded verbal commercial speech.162 Noting that pictures in advertisements “serve important communicative

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158 105 S. Ct. at 2278-80; Parker, supra note 149, at 292-293.
159 105 S. Ct. at 2277-80; Filer supra note 152, at 907-908.
160 105 S. Ct. at 2280; Parker, supra note 149, at 299.
161 105 S. Ct. at 2281; Elmer, supra note 154, at 932.
162 105 S. Ct. at 2277-78; Gosden, supra note 157, at 415.
functions” by attracting attention and imparting information directly, the court held that illustrations in lawyer’s advertisements are “entitled to First Amendment protection, and restrictions on them must survive scrutiny under the Central Hudson test.” 163 Applying that test, the court found that because Zauderer’s illustration was accurate and not likely to deceive, mislead, or confuse, “the burden is on the state to present a substantial government interest justifying the restriction and to demonstrate that the restriction vindicates that interest through the least restrictive means.” 164

Following the discussion of the broader implications behind abrogation of Ohio’s prophylactic restraints, the court’s opinion shifted to the much narrower issues surrounding disclosure requirements applied to attorney advertising. Zauderer did not fare so well on the other two issues decided by the court. Justice White, invoking a means-ends analysis, wrote that the Dalcon Shield advertisement should have disclosed that clients whose cases were handled on a contingent-fee basis would be liable for significant litigation costs regardless of the results of their suits. 165 The court rejected the stringent Central Hudson test with respect to this disclosure requirement, concluding that the advertiser’s constitutional rights would be adequately protected so long as the disclosure was “reasonably related” to the state’s interest in protecting consumers. 166

In other words, when disclosure requirements are concerned, the court will apply a far lower standard of scrutiny. The majority reasoned that because first amendment protection rested on the consumer’s right to receive information, the speaker had only a minimal first amendment interest in not providing particular information. For this reason, traditional first amendment doctrine in the area of compelled speech did not apply. The majority explained that some first amendment protection against compelled speech in the commercial speech context did exist: unjustified or unduly burdensome disclosure requirements would offend the first amendment, “but we hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the state’s interest in preventing deception of consumers.” 167

After Zauderer, attorneys are permitted to solicit business through printed advertising as long as their advertisements are truthful, non-deceptive, non-fraudulent, and do not propose involvement in an illegal transaction. 168 Zauderer is important as a reaffirmation of the Supreme Court’s recognition of the dilemma created by the public’s ignorance regarding legal services. The Court has seemingly laid to rest the dignity interest traditionally asserted as the justification for

163 Thurman, supra note 123, at 72, 82-83.
164 Id.
165 Copenhaver, supra note 146, at 281.
166 See generally Fuchs, supra note 122.
168 Elmer, supra note 154, at 938.
the attorney advertising ban, finding the need to inform the public much more compelling. The disclosure requirement has been approved as a method of state regulation over the content of attorney advertisements.\textsuperscript{169}

In each of the attorney advertising and solicitation cases the Court has narrowly tailored its decision to fit only the facts of the case, and thereby it has offered virtually no guidance to attorneys who wish to advertise or otherwise solicit business.

The \textit{Zauderer} decision increases the bounds within which attorneys may ethically advertise their services.\textsuperscript{170} On the basis of \textit{Zauderer}, attorney advertising in general, and attorneys use of targeted communications has steadily increased.\textsuperscript{\textsuperscript{7}0}\textsuperscript{170}

However, even after the \textit{Zauderer} decision, there is concern that the limited level of protection afforded commercial speech makes attorney advertising and soliciting uncertain, and consequently discourages attorneys from reaching consumers through the media. Consumers ultimately suffer the resulting injury because they are not offered information about available legal services in the market place.\textsuperscript{172}

\textit{Zauderer} has also been characterized as a larger victory for state regulation than for attorneys wishing to advertise. The \textit{Zauderer} Court's application of Ohio's disclosure requirements when there was no indication of their applicability may chill an attorney's inclination to advertise, thus discouraging the dissemination of information to the public.\textsuperscript{173}

"The \textit{Zauderer} decision, while resolving some significant issues in favor of the commercial speech rights of attorneys, leaves at least one important issue unresolved, the approach to be taken when an attorney makes representations regarding the quality of services for expertise."\textsuperscript{174} Presumably, the test to be applied will be the \textit{Central Hudson} test, with each individual representation analyzed in terms of whether it is deceptive or misleading under the first part of the test.\textsuperscript{175}

"The rejection of prophylactic regulations also raises the question of the extent to which the states will be able to enforce a generalized prohibition against false, deceptive, or misleading advertising."\textsuperscript{176} The key to successful enforcement of generalized prohibitions is to prevent deceptive or misleading advertisements from reaching the public, rather than to impose disciplinary sanctions against the

\textsuperscript{169}\textit{ld.} at 939.


\textsuperscript{171}Goering, \textit{supra} note 167, at 1040.

\textsuperscript{172}Kibler, \textit{supra} note 155, at 194.

\textsuperscript{173}Elmer, \textit{supra} note 154, at 939.

\textsuperscript{174}Goering, \textit{supra} note 167, at 1041.

\textsuperscript{175}\textit{ld.} at 1041-1042.

\textsuperscript{176}\textit{ld.} at 1042.
advertising attorney after the harm has been done. One suggested method of prevention is to require that all general mailings be filed with local bar authorities for review. The same procedure could extend to all forms of print advertising and broadcast media advertising.\textsuperscript{177}

Moreover, an attorney should avoid any self-laudatory statements about himself or any attorney with whom he is affiliated, when made for the purpose of solicitation. An attorney should be aware of and broadly construe any disclosure requirements his statement may have, because the United States Supreme Court has found them applicable even when they do not apply by their own terms (that is, the \textit{Zauderer} Court’s application of Ohio’s disclosure requirements when there was no indication of their applicability). Most importantly, an attorney should stick to easily verifiable facts; when advertising with contingency fee agreements, he should disclose the client’s liability for costs and expenses; and, finally, an attorney should avoid anything which, by either affirmative statements or omissions, might be seen as misleading, deceptive, or proposing involvement in an illegal transaction.\textsuperscript{178}

The United States Supreme Court has never directly addressed the issue of lawyer advertising on radio and television. The \textit{Bates} decision was specifically limited to newspaper advertising and the court reserved judgment on the merits of radio and television advertising because such advertising, the court stated, would present “special problems” warranting “special consideration.”\textsuperscript{179}

Although neither \textit{Bates} nor \textit{Zauderer} dealt with radio and television advertising, the principles which the United States Supreme Court announced in these cases, i.e., the false or misleading standard and the substantial interest test, should be applicable to all advertising, including electronic advertising. The interest involved in allowing information to flow freely to the consumer is at stake in all advertising, regardless of the medium used. In light of \textit{Zauderer} and the other previous decisions, the consuming public can anticipate an ever-increasing number and variety of attorney advertisements through electronic means.\textsuperscript{180} In regulating electronic advertising, the state is attempting to protect the citizen from persuasive effectiveness of television.\textsuperscript{181}

\textbf{Targeted Direct-Mail Solicitation}

In a ruling issued June 13, 1988, the United States Supreme Court announced extension of its approval of attorney advertising to targeted direct-mail solicitation.\textsuperscript{182}

\begin{flushright}
\textsuperscript{177} \textit{Id.} at 1042-1043.
\textsuperscript{178} Elmer, \textit{supra} note 154, at 939.
\textsuperscript{179} 433 U.S. at 384; see Fecher, \textit{supra} note 129, at 468, 470.
\textsuperscript{180} \textit{Id.} at 468.
\textsuperscript{181} \textit{Id.} at 473.
\end{flushright}
In delivering the Court’s opinion in *Shapero v. Kentucky Bar Ass’n*, the most recent in the series of lawyer advertising cases, Justice Brennan explained the issue as: “Whether 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.”

The Court’s ruling, presented in a bifurcated opinion, is that a state may not prohibit such advertising.

Mr. Shapero, an attorney licensed to practice law in Kentucky, wanted to send the following letter to prospective clients, that is, individuals with foreclosure actions pending against them:

> 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.

The attorney submitted his letter to the Kentucky Attorneys Advertising Commission for approval. The Commission disallowed use of the letter, citing Kentucky Supreme Court Rule 3.135(5)(b)(i), which prohibited written advertising “precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.” Coupled with its disapproval was the Commission’s asserted opinion that, in light of the *Zauderer* decision, supra, the Rule’s ban on targeted, direct-mail advertising violated the first amendment. Amendment of the Rule was therefore recommended.
In accordance with the Commission’s suggestion, Mr. Shapero requested an advisory opinion regarding the Rule’s constitutionality from the Committee on Legal Ethics of the Kentucky Bar Association. In its opinion, formally adopted by the Board of Governors of the Bar Association, the Ethics Committee did not find Mr. Shapero’s letter false or misleading, but upheld the Rule as consistent with Rule 7.3 of the American Bar Association’s Model Rules of Professional Conduct (1984). The Kentucky State Supreme Court then reviewed the advisory opinion. Without specifying the precise infirmity in Rule 3.135(5)(b)(i), the state court held that Zauderer required deletion of Rule 3.135(5)(b)(i) and that it should be replaced with American Bar Association Rule 7.3, which provides:

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.

The State Supreme Court did not explain how the substitution of Rule 7.3 cured the infirmity in Rule 3.135(5)(b)(i).

The United States Supreme Court granted certiorari to determine whether the blanket prohibition contained in Rule 7.3 is consistent with the first amendment, ultimately holding that it was not, that is, that a state cannot constitutionally prohibit attorneys from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. Summarizing its holdings in the series of cases addressing attorney advertising, from Bates through Zauderer the Court explained that targeted direct-mail solicitation is constitutionally protected commercial speech, speech which a state may restrict only to serve a substantial governmental interest, and only through means that directly advance that interest. The Court said “[t]he ‘unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain’ are ‘not present’ in the context of written advertisements.”

The state court had analogized Mr. Shapero’s letter to the situation in Ohralik v. Ohio State Bar Association which held that a state could categorically ban

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189 Id. at 1920.
190 Id.
191 Id.
192 Id.
194 Id.
all in-person solicitation, stating:

Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible 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.196

The Supreme Court rejected the State Rule's distinction between written advertising directed to the general public versus targeted advertising, the sole basis of the state court's disapproval of Mr. Shapero's letter, pointing out that the only reason to sell advertisements to the general public is to reach a subset of that population, that is, those individuals needing the service offered.197

The United States Supreme Court found much less pressure from a letter than from in-person solicitation by a trained advocate seeking an immediate answer.198 The Court articulated the test as follows: "The relevant inquiry is not whether there exists 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."199

The Court found that the recipient of a letter has choices unavailable to one subjected to in-person solicitation, including setting aside or throwing away the written communication.200 Moreover, unlike in-person solicitation, the state can regulate potential abuse of targeted direct-mail, even of personalized letters, by requiring agency approval and agency imposition of protection, such as requiring the attorney to verify asserted facts, requiring labeling of the letter as an advertisement, and requiring that the letter set forth a mechanism for reporting inaccuracies.201

After settling the question of the constitutionality of the State Rule, because the first amendment's overbreadth doctrine does not apply to professional advertising, the Court considered whether Mr. Shapero's letter merited first amendment protection.202 Two bases were asserted in support of the position that the letter represented overreaching. First, the use of underscored and upper case letters for emphasis was characterized as "fairly shout[ing]" at the recipient to employ Mr. Shapero. Second, it was stated that the letter contained subjective predictions of client satisfaction, that is, that portions of the letter stated no affirmative or objective fact and instead were "pure salesman puffery."203 The Court

196 Shapero, 108 S. Ct. at 1918.
197 Id. at 1921.
198 Id. at 1922.
199 Id., citing Ohralik, at 470.
200 Shapero, 108 S. Ct. at 1922-23.
201 Id. at 1923-24.
202 Id. at 1924.
203 Id.
acknowledged these intention-seeking techniques, but found that they represented no risk of overreaching comparable to in-person solicitation. The Court did note that a letter’s contents could raise substantial state interest justifying its disapproval, for example, by offering “overblown assurances of client satisfaction.”

In summary, the highest Court has now given targeted direct-mail solicitation of business by attorneys its place under the penumbra of protected commercial speech.

CONCLUSION

The Bigelow and Virginia Pharmacy decisions laid the foundation for the Bates decision in 1977. Since Bates, bans on attorney advertising have steadily eroded. Perhaps the strong consumer movement of the 1970s, which continues even today, played a significant role in the Supreme Court’s determination that consumers, in order to make informed choices, should be protected by the first amendment to receive a free flow of commercial information — from whatever the source. Also, the geographics of our society, now largely urban in nature, seem to favor paid attorney advertising as opposed to mere word-of-mouth referrals. Finally, attorney advertising appears to be in the interests of many attorneys and consumers. Advertising helps attorneys who are striving to build their practices and striving to compete with more prestigious attorneys, while it aids consumers in making an informed choice on where to get quality legal services for the best price.

In summary, no aspect of legal ethics has been more hotly debated than attorney advertising and solicitation. The Supreme Court’s analysis of advertising demonstrates its awareness of both the benefits and possible costs of advertising, and provides a standard for state regulation based on their relative weights. The benefits include provision of greater information to consumers and furtherance of competition in the market for professional services. On the costs side, the court does not believe, as professional associations have alleged, that advertising results in a decline in quality. Consumer deception and false advertising are possible, though their likelihood and magnitude are thought to be slight. In light of its analysis, the court leaves a state free to regulate, but the burden of showing that regulations are narrowly drawn to address particular problems remains on the state. Regulation in any event cannot extend to outright bans on advertising.

Obviously, the allowable extent of attorney advertising will never be answered to everyone’s complete satisfaction. Nevertheless, the rationale for close scrutiny

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204 Id. at 1925.

205 See Erickson, supra note 4, at 1019.

206 See Cloud, supra note 13, at 549.

207 Id. See also Holtsford, Seven Years of the Bates Doctrine: Progression or Confusion? 7 Am. J. Trial Advoc. 611, 621 (1984).
of attorney advertising remains valid — that of preventing false, deceptive, or misleading advertising. No matter how far the United States Supreme Court and the state courts go in allowing attorneys to advertise, perhaps the eloquent words of the late Justice Henry of the Tennessee Supreme Court should not be forgotten: The law is an ancient, honorable and learned profession and its practitioners are not tradesmen in the marketplace. The role of the huckster, the hawkster, the haggler and the peddler ill becomes a member of a dignified profession.

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208 See Cloud, supra note 13, at 549.
209 In Re Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638, 641 (Tenn. 1978).