CONSTITUTIONAL LAW—FIRST AMENDMENT—TARGETED, DIRECT-MAIL ATTORNEY ADVERTISING WHICH IS TRUTHFUL AND NONDECEPTIVE IS CONSTITUTIONALLY PROTECTED—*Shapero v. Kentucky Bar Association*, 108 S. Ct. 1916 (1988).

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] While this amendment has traditionally afforded protection to various forms of political expression,[2] its protective hedge has, to a limited extent, been expanded to encompass commercial speech.[3] This expansion is evidenced by a series of United States Supreme Court decisions dealing with attorney advertising.[4] Most recently, in *Shapero v. Kentucky Bar Association*[5] the Court delineated one specific aspect of attorney advertising which warrants protection under the aegis of free speech.[6] Examining a Kentucky law prohibiting targeted, direct-mail advertising, the *Shapero* Court held that a state may

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[1] U.S. CONST. amend. I. The Supreme Court initially applied the first amendment to the states through the fourteenth amendment in Gitlow v. New York, 268 U.S. 652 (1925). In *Gitlow*, the Court stated that "freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

[2] Political speech is considered to be at the heart of the first amendment. *See, e.g.*, Boos v. Barry, 108 S. Ct. 1157, 1170 (1988) (striking down a District of Columbia statute prohibiting the display of signs containing messages criticizing a foreign government within 500 feet of an embassy as a "*content-based* restriction on *political speech* in a *public forum* . . . .") (emphasis added); Bond v. Floyd, 385 U.S. 116, 136 (1966) (state may not prohibit a member of the state legislature from publicly expressing his or her views on national or foreign policy); NAACP v. Button, 371 U.S. 415 (1963) (upholding the right of the NAACP to express its political views through litigation).

[3] *See, e.g.*, *In re* R.M.J., 455 U.S. 191 (1982) (applying limited first amendment protection to paid attorney advertising); Bigelow v. Virginia, 421 U.S. 809 (1975) (applying first amendment protection to paid commercial advertising by an abortion referral agency). *See also* Ohralik v. Ohio Bar Ass'n, 436 U.S. 447 (1978). In *Ohralik*, Justice Powell, writing for the majority, noted that rather than devitalize the first amendment with respect to its protection of political speech, "we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . ." *Id.* at 456.

[4] *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (nondeceptive attorney advertising may not be subjected to blanket suppression); *In re* Primus, 436 U.S. 412 (1978) (expanding first amendment protection to include attorney solicitation by a nonprofit organization); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (invalidating the Arizona Bar Association's ban on attorney advertising).

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

[6] *Id.* at 1921.

not categorically prohibit attorneys from soliciting business for monetary gain by sending nondeceptive letters to potential clients known to be confronted with particular legal problems.[7]

On July 12, 1985, Richard D. Shapero, an attorney licensed to practice law in the Commonwealth of Kentucky, submitted a model form letter to the Attorneys Advertising Commission (Advertising Commission) of the Kentucky Bar Association (Bar Association).[8] In accordance with Kentucky law,[9] Shapero requested approval from the Advertising Commission to send the proposed letter to potential clients facing foreclosure suits.[10] Although the Advertising Commission did not find the letter to be false, deceptive or misleading,[11] it refused to approve the letter, deeming it a violation of Kentucky Supreme Court Rule

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[7] *See id.* at 1924. It is interesting to note that in 1985, the Court refused to grant certiorari to a case involving targeted, direct-mail solicitation. *See* Committee on Professional Standards v. Von Weigen, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (N.Y. 1984), *cert. denied*, 105 S. Ct. 2701 (1985). *Von Weigen* involved targeted, direct-mail advertising by an attorney who solicited victims of the Hyatt Regency skywalk collapse in Kansas City. The New York Court of Appeals invalidated the state's blanket restriction on all mailings to potential clients. *In re* Von Weigen, 481 N.Y.S.2d at 43.

[8] *Shapero*, 108 S. Ct. at 1919.

[9] Under Kentucky Supreme Court Rule 3.135(6)(b), an attorney licensed to practice law in the State of Kentucky must submit any proposed advertisements to the Attorneys Advertising Commission for review 30 days prior to the date on which the advertisement is used. Ky. Sup. Ct. R. 3.135(6)(b) (1988), *reprinted in* KY. REV. STAT. ANN. (Michie/Bobbs-Merrill 1988).

[10] *Shapero*, 108 S. Ct. at 1919. The Attorneys Advertising Commission regulates attorney advertising in accordance with the Rules of the Kentucky Supreme Court. *See* Ky. Sup. Ct. R. 3.135(3)(e) (1988), *reprinted in* KY. REV. STAT. ANN. (Michie/Bobbs-Merrill 1988). All decisions of the Advertising Commission are appealable to the Board of Governors of the Kentucky Bar Association pursuant to a Kentucky Supreme Court Rule. Ky. Sup. Ct. R. 3.135(8)(b) (1988), *reprinted in* KY. REV. STAT. ANN. (Michie/Bobbs-Merrill 1988). Opinions of the Kentucky Bar Association are purely recommendatory; the Supreme Court of Kentucky renders the final decision. Ky. Sup. Ct. R. 3.530(3) & (4) (1988), *reprinted in* KY. REV. STAT. ANN. (Michie/Bobbs-Merrill 1988).

[11] *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 300, (Ky. 1987), *rev'd*, 108 S. Ct. 1916 (1988). Shapero's proposed letter read in its entirety:

> 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] *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.

Shapero, 108 S. Ct. at 1919 (emphasis in original).

3.135(5)(b)(i).[12] After careful analysis of recent decisions by the United States Supreme Court, however, the Advertising Commission cautioned that this rule violated the first amendment by effectuating a ban on all targeted, direct-mail advertising.[13] Consequently, the Advertising Commission recommended that the rule be amended by the Supreme Court of Kentucky.[14]

Shapero then sought an advisory opinion from the Kentucky Bar Association's Ethics Committee as to the validity of Rule 3.135(5)(b)(i).[15] The Ethics Committee concurred with the Advertising Commission, determining that while the proposed letter was not false or misleading, it nonetheless violated existing Kentucky law.[16] Contrary to the Advertising Commission's recommendation, however, the Ethics Committee upheld the Rule as consistent with Rule 7.3 of the American Bar Association's (ABA) Model Rules of Professional Conduct.[17] The Ethics Com-

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[12] *Shapero*, 726 S.W. 2d at 300. Kentucky Supreme Court Rule 3.135 prohibits all targeted, direct-mail advertising by attorneys. The Rule states in pertinent part:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Ky. Sup. Ct. R. 3.135(5)(b)(i) (1988), *reprinted in* KY. REV. STAT. ANN. (Michie/Bobbs-Merrill 1988).

[13] *See Shapero*, 726 S.W.2d at 300. The Commission specifically reviewed the principles espoused in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (truthful, non-deceptive advertising is not a violation of attorney ethics). *Shapero*, 726 S.W.2d at 300.

[14] *Id.*

[15] *Id.* Shapero undertook this course of conduct pursuant to Kentucky Supreme Court Rule 3.530(1) which allows any attorney who questions "the propriety of any professional act contemplated by him" to seek an advisory opinion from a committee of the Kentucky Bar Association. Ky. Sup. Ct. R. 3.530(1), *reprinted in* KY. REV. STAT. ANN. (Michie/Bobbs-Merrill 1988). The Rule provides that the Ethics Committee may issue a written informal opinion on the appropriateness of an act in question. *Id.* If the question poses an issue of significant magnitude, the Ethics Committee may request the Board of Governors to render its opinion on the issue. Ky. Sup. Ct. R. 3.530(2), *reprinted in* KY. REV. STAT. ANN. (Michie/Bobbs-Merrill 1988). If the Board concurs with the Ethics Committee's informal opinion, the Board may issue it as its formal opinion. *Id; see also* Brief For Respondent at 3-4, Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988) (No. 87-15).

[16] *Shapero*, 726 S.W.2d at 300.

[17] *Id.* Rule 7.3 of the Model Rules of Professional Conduct, as noted by the Kentucky Supreme Court, was adopted by the ABA several years before the *Zauderer* decision. *Id.* At the time of the Ethics Committee's review of Kentucky Supreme Court Rule 3.135(5)(b)(i), Model Rule 7.3 was under consideration by a Special Committee of the Kentucky Bar Association. Brief For Respondent, *supra* note 15, at 4.

mittee's advisory opinion was formally adopted by the Kentucky Bar Association.[18]

Subsequently, Shapero petitioned the Supreme Court of Kentucky for review of this advisory opinion, as well as Rule 3.135(5)(b)(i).[19] Shapero alleged that in light of the recent United States Supreme Court decision in *Zauderer v. Office of Disciplinary Counsel*,[20] the existing rule violated the first and fourteenth amendments to the United States Constitution.[21]

In determining the constitutionality of Kentucky Supreme Court Rule 3.135(5)(b)(i), Kentucky's highest court directed its attention to recent developments in the law with respect to attorney advertising. After a review of relevant case law, the court ordered the deletion of the existing rule.[22] Without explanation, the court adopted Rule 7.3 of the Model Rules of Professional Conduct and retroactively applied it to Shapero.[23] The new rule differed from the prior Kentucky rule only in that it limited the prohibition on targeted, direct-mail advertising to situations where the attorney's primary objective was pecuniary gain.[24]

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

19 *See* Motion for Review of Advisory Opinion E-310, (No. 86-SC-335) (Sup. Ct. Ky.).

20 471 U.S. 626 (1985).

21 *Shapero*, 726 S.W.2d at 299. *See also* Brief for Respondent, *supra* note 15, at 12-22. Shapero argued that Kentucky Supreme Court Rule 3.135(5)(b)(i), prohibiting direct-mail advertising by attorneys, "does not advance a substantial governmental interest and . . . is more restrictive than necessary" in light of the *Zauderer* decision. *Shapero*, 726 S.W.2d at 299. In *Zauderer*, the United States Supreme Court posited that attorney advertising is a form of protected commercial speech under the first amendment and therefore may not be subjected to absolute suppression. *Zauderer*, 471 U.S. at 637.

22 *Shapero*, 726 S.W.2d at 300. The Supreme Court of Kentucky considered the ultimate issue to be whether a state has a compelling interest that is served by placing a blanket restriction on solicitation by attorneys through targeted, direct-mailings sent to persons known to have particular legal problems. *Id.*

23 *See id.* at 301. Rule 7.3 of the Model Rules of Professional Conduct 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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1988).

24 *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1988) (prohibiting targeted, direct-mail attorney advertising if attorney's sole purpose was pecuniary gain) *with* Ky. Sup. Ct. R. 3.135(5)(b)(i), *reprinted in* KY. REV. STAT. ANN.

Shapero appealed the decision to the United States Supreme Court which granted certiorari in 1987.[25] Reversing the Supreme Court of Kentucky, the Court postulated that nondeceptive attorney advertising falls within the scope of first amendment protection and, therefore, may be restricted only in the service of a significant state interest.[26] Since Kentucky failed to prove this requisite interest, the *Shapero* Court struck down Kentucky's actions as overly burdensome.[27]

Traditionally, society viewed the legal profession as one of public service and not as a means of achieving wealth.[28] In nineteenth century England, any advertising done to enhance an attorney's practice was eschewed as both unnecessary and unprofessional.[29] Accordingly, attorneys who advertised were subject to various legal sanctions.[30]

This disparaging view of attorney advertising was carried over into American law, where commercial speech was believed to fall beyond the protective mantle of the first amendment.[31] In response to deep-seated ethical objections from within the legal

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(Michie/Bobbs-Merrill 1988) (prohibiting all targeted, direct-mail attorney advertising). For the complete text of Model Rule 7.3 see *supra* note 23. For the complete text of Kentucky Supreme Court Rule 3.135(5)(b)(i) see *supra* note 12.

25 Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 64 (1987).

26 *See Shapero*, 108 S. Ct. at 1921.

27 *See id.* at 1924.

28 *See* H. DRINKER, LEGAL ETHICS 210-12 (1953).

29 *See id.* at 210. In early English society, lawyers looked with disdain upon the notion of their practice as a trade. Most law students came from wealthy backgrounds and therefore were not interested in the law as an instrument for pecuniary gain. *Id.* "They regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident." *Id.*

30 *See* Comment, *Solicitation By Attorneys: A Prediction And A Recommendation*, 16 HOUS. L. REV. 452, 453-54 (1979). At common law, attorneys who advertised or solicited clients were subject to punishment by prohibitions against the crimes of maintenance, barratry and champerty. *Id.* at 453-54. For a general discussion of these common law crimes see Radin, *Maintenance By Champerty*, 24 CALIF. L. REV. 48 (1936).

31 *See* H. DRINKER, *supra* note 28, at 210-11. The author explained this development:

> Reasons frequently given for the rules proscribing advertising and soliciting are, in addition to commercializing the profession, the tendency of such practices to stir up litigation, the evil effect on the ignorant of alluring assurances by the solicitors, as well as the temptation and probability that the lawyers who advertise and solicit would use improper means to make good their extravagant inducements. While these considerations doubtless have contributed to the retention of the proscriptions, they do not, it is believed, account for their origin.

Id. at 212 (footnotes omitted). *See also* Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965) (tracing historical limitations on advertising).

profession,[32] the ABA in 1908 announced a formal ban on attorney advertising.[33] Not until *Valentine v. Chrestensen*[34] in 1942, however, did the United States Supreme Court rule on the degree of constitutional protection afforded commercial speech.[35]

In *Chrestensen*, the owner of an old Navy submarine distributed handbills soliciting visitors to tour the vessel for a stated fee.[36] The Police Commissioner advised Chrestensen that this activity violated a city ordinance prohibiting the distribution of commercial advertisements in the streets.[37] In response, Chrestensen revised the handbill to include a political message protesting certain acts of the Commissioner.[38] Despite this revi-

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[32] *See* H. DRINKER, *supra* note 28, at 210-15.

[33] *See* ABA CANONS OF PROFESSIONAL ETHICS No. 27 (1908). From 1908 to 1937, CANON 27 stated:

> The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

Id. See also Note, *Protected Solicitation Becomes More Personal: Zauderer v. Office of Disciplinary Counsel*, 31 ST. LOUIS U.L.J. 167 (1986). "Until 1973, the United States Supreme Court uniformly followed a self-declared mandate that excluded commercial speech from the protection of the United States Constitution." *Id.* at 168 (footnote omitted); Andrews, *Lawyer Advertising and the First Amendment*, AM. B. FOUND. RES. J. 967 (1981). The ABA justified the ban by stating that solicitation and advertising were not necessary in the legal profession. Additionally, the ABA asserted that an attorney's best source of advertising was his reputation. *Id.* at 968.

[34] 316 U.S. 52 (1942).

[35] *Id.*

[36] *Id.* at 52-53.

[37] *Id.* at 53. The owner of the submarine was told that although advertisements would be prohibited, he was free to distribute handbills furnishing information or regarding a public protest. *Id.*

[38] *Id.* In revising the handbill, Chrestensen prepared a double faced advertisement. One side contained the original commercial message without the statement regarding admission fees. The opposite side contained a protest against the city's refusal to allow Chrestensen to dock his vessel at a city pier. *Id.*

sion, Chrestensen was restrained by the police, and thereafter sought an injunction against this interference.[39]

Reversing the lower court's injunction, a unanimous United States Supreme Court determined that a state may forbid commercial advertising in public streets as a means of avoiding interference with the free use of the highways.[40] The Court stressed that although the streets are a proper place to exercise one's political expression, purely commercial advertising is afforded no such constitutional protection.[41] Thus, the Court refused to extend first amendment protection to commercial expression, emphasizing that such an extension would permit any person to distribute advertisements in a public area provided that the advertisement contained a political message.[42]

The principles espoused in *Chrestensen* stood firm for over thirty years. In *Bigelow v. Virginia*,[43] however, the Court finally cast aside the commercial speech doctrine set forth in *Chrestensen*. In *Bigelow*, the Court granted first amendment protection to a Virginia newspaper that published a commercial advertisement for a New York abortion referral agency.[44] A Virginia statute prohibited this type of advertising.[45] Reversing the Virginia Supreme Court, the United States Supreme Court determined that the state court erred in placing the advertisement outside the

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39 *Id.* at 54-55.

40 *Id.* at 54. The Court explicitly stated that the degree to which a person may solicit business in the street is a matter for the legislature. *Id.*

41 *Id.*

42 *Id.* at 55. The Court declared that broadening the scope of the first amendment to include commercial speech would allow merchants wishing to distribute leaflets in the streets to "only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Id.*

43 421 U.S. 809 (1975). Until a 1973 decision, the Supreme Court uniformly excluded commercial speech from the protection of the first amendment. *See* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973). *Pittsburgh Press* involved a newspaper charged with violating an ordinance prohibiting sex-designated help-wanted advertisements. *Id.* at 379-80. The Court found the commercial proposal to be illegal since it violated an ordinance which prohibited newspapers from printing such advertisements in sex-designated columns. *Id.* at 380-81. Quite significantly, however, the Court indicated in dicta that the advertisement would have received some degree of first amendment protection had the newspaper's practice been legal. *See id.* at 389. This case set the stage for the *Bigelow* decision by indicating that the country's highest Court was ready to reconsider its position on the commercial speech exception to the first amendment.

44 *Bigelow*, 421 U.S. at 829. The advertisement offered to arrange placements for women with unwanted pregnancies in accredited New York hospitals where abortion was legal, as opposed to Virginia where it was illegal. *Id.* at 812.

45 *Id.* at 813. See VA. CODE ANN. §§ 16.1-132 and 16.1-136 (1960) for the complete text of the Act.

protective zone of the first amendment.[46]

Reaching its conclusion, the Court narrowly construed the scope of the *Chrestensen* decision.[47] The *Bigelow* majority stressed that *Chrestensen* certainly should not be interpreted as a blanket proposition that advertising is per se unprotected speech.[48] The Court further suggested that the commercial advertisement at issue in *Bigelow* conveyed information of public interest to potential clients as well as to those persons possessing a genuine interest in its message.[49] Thus, the Court declared that a commercial advertisement is protected by both an advertiser's right to free expression as well as a consumer's right to receive information.[50] To determine the extent to which commercial speech may be regulated, the Court applied a balancing test,[51] weighing the individual's rights against the government's interest in proscribing such speech.[52] While the *Bigelow* Court broadened the scope of first amendment protection to commercial speech, it refused to delineate the precise degree of that protection.[53]

One year after the *Bigelow* decision, the Court was again confronted with a challenge to the commercial speech doctrine in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*.[54] In *Virginia Pharmacy*, a group of prescription drug users instituted an action against the Virginia State Board of Pharmacy and its individual members.[55] The consumers challenged the constitutional-

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46 *Bigelow*, 421 U.S. at 818. The Court stated:

> The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form.

Id. (citations omitted).

47 *Id.* at 820. Specifically, the Court stated that the *Chrestensen* decision "is distinctively a narrow one." *Id.* at 819.

48 *Id.* at 820.

49 *Id.* at 822. The Court recognized that the abortion advertisement contained information which was of interest to readers in need of the service as well as to readers with an inquiry as to the law of another state. *Id.*

50 *See id.*

51 *Id.* at 821. The balancing test applied in *Bigelow* was first expounded by the Court in an earlier decision. *See* Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376 (1973). This test weighed the first amendment interests served by commercial speech against the governmental interest of regulating such advertisements. *Bigelow*, 421 U.S. at 821 (citing Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376, 389 (1973)).

52 *Bigelow*, 421 U.S. at 82.

53 *Id.* at 825.

54 425 U.S. 748 (1976).

55 *Id.* at 753-54. The parties who brought this action were an individual Virginia

ity of a Virginia statute, which declared it illegal for a licensed pharmacist to advertise prescription drug prices.[56]

Utilizing the balancing test applied in *Bigelow*,[57] the Court struck down the Virginia statute as unconstitutional.[58] The majority determined that a consumer's right to receive commercial information regarding prices of prescription drugs outweighed the state's interest in maintaining a semblance of professionalism among licensed pharmacists.[59] The Court further explained that a state may not suppress the dissemination of truthful, non-misleading information regarding lawful activity.[60] Nonetheless, the Court limited its holding to the advertising of prescription drugs.[61]

The following term, in *Bates v. State Bar of Arizona*,[62] the Court extended the *Virginia Pharmacy* holding to attorney advertising. In *Bates*, two attorneys were disciplined for violating an Arizona Supreme Court disciplinary rule which prohibited attorney advertising in newspapers.[63] The attorneys argued that this rule infringed upon their first amendment rights.[64] Striking down the state rule, the Supreme Court focused upon the broadness of the rule at issue, as well as the significance of the public's

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resident who was required to take prescription drugs daily, and two non-profit organizations, the Virginia Citizens Consumer Council and the Virginia State AFL-CIO. *Id.* at 753 n.10.

56 *Id.* at 749-50. *See* VA. CODE ANN. § 54-524.35 (1974) (making it illegal for a pharmacist to advertise about his professional service in a manner which might "have a tendency to deceive or defraud the public, contrary to the public health and welfare.").

57 *See supra* note 51 and accompanying text.

58 *See Virginia Pharmacy*, 425 U.S. at 773. The Court viewed the Virginia statute at issue as one which "singles out speech of a particular content and seeks to prevent its dissemination completely." *Id.* at 771.

59 *See id.* at 761-63.

60 *Id.* at 773.

61 *Id.* at 773 n.25. In this footnote, Justice Blackmun explained:

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

Id. (emphasis in original).

62 433 U.S. 350 (1977).

63 *Id.* at 353-54. The attorneys advertised a legal clinic, and that they were offering legal services at reasonable prices. *Id.* at 354. The newspaper ad also contained a listing of their fees for particular services. *See id.*

64 *Id.* at 356.

interest in receiving an unimpeded flow of information.[65] Relying upon the principles espoused in *Virginia Pharmacy*, the Court indicated that Arizona's disciplinary rule, much like the Virginia statute, served to keep the public in ignorance by restraining the free flow of information.[66] The majority noted that in light of this important interest, restraints on attorney advertising such as those mandated by Arizona's supreme court could not be upheld.[67] The Court recognized that attorney advertising provides a significant means of expression for the attorney while serving to inform the public.[68] Thus, the *Bates* Court held that advertising by attorneys cannot be summarily suppressed.[69] The Court was careful to note, however, that its holding should be construed narrowly, to permit only the unrestrained flow of truthful advertising concerning routine legal services.[70]

In 1978, the Court issued two decisions on the same day which helped to clarify the first amendment parameters surrounding legal advertising. In the first case, *In re Primus*,[71] the Court determined that solicitation which promoted political and ideological goals fell within the first amendment's protective ambit.[72] *Primus* involved an attorney who was reprimanded for violating a South Carolina Supreme Court disciplinary rule.[73] The

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65 *See id.* at 363-64.

66 *Id.* at 365.

67 *See id.* at 384. The Court balanced the public's interest in receiving commercial information with the various justifications set forth by the Arizona bar in favor of its disciplinary rules. *Id.* at 368-70. Arizona's asserted concerns included the potential for deceitful, misleading advertising; the advertisement's potential negative effect upon the integrity of professionalism; the possible encouragement of fraudulent or vexatious litigation; and the problems of enforcing regulations on attorney advertising. *Id.* at 372-79. Observing that Arizona's concerns about the potentially abusive effects of legal advertisements were, for the most part, unfounded, the Court dismissed the Arizona state bar's claims. *Id.* at 379.

68 *See id.*

69 *Id.* at 383.

70 *See id.* Although the *Bates* holding laid the groundwork for a new era of Supreme Court decisions regarding the constitutionality of attorney advertising, the Court's opinion indicated that the states were free to regulate some forms of attorney advertising. *See id.* For instance, the Court stated that it remained within the power of a government to prohibit deceptive, false or misleading advertising. *Id.* Moreover, the Court acknowledged questions concerning electronic broadcast advertising, in-person solicitation and advertisements containing claims about an attorney's quality of services, but was unwilling to resolve them. *See id.* at 383-84. In effect, by highlighting these unresolved issues, the Court was able to illustrate the narrowness of the *Bates* decision. *See id.* at 384.

71 436 U.S. 412 (1978).

72 *Id.* at 439.

73 *Id.* at 417-18.

alleged violation occurred when the attorney sent a letter to a woman who had been sterilized by a doctor, after the doctor informed the woman that her Medicaid benefits were contingent upon this procedure.[74] The letter stated that the American Civil Liberties Union (ACLU) would provide her with free legal representation if she agreed to institute a lawsuit against the doctor.[75]

The Court began its analysis by noting that the ACLU pursues litigation as a means of political expression.[76] Determining that the attorney's actions were politically motivated and not aimed at achieving monetary gain, the Court reasoned that the letter must be afforded the same first amendment protection extended to political speech.[77] Accordingly, the Court stated that South Carolina's fear of undue influence, invasion of privacy and misrepresentation failed to constitute a legitimate governmental interest.[78] *Primus* thus exhibited a new standard by which legal advertisements could be analyzed.

In the second of the two contemporaneous decisions, *Ohralik v. State Bar of Ohio*,[79] the Court addressed the specific issue of in-person solicitation by attorneys.[80] In *Ohralik*, the Ohio Supreme Court indefinitely suspended an attorney for violating a state disciplinary rule by conducting in-person solicitation.[81] Affirming the attorney's suspension, the Supreme Court held that Ohio's proscription of in-person solicitation for financial gain was supported by a legitimate state interest.[82] The Court explained that

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74 *Id.* at 416-17 & n.6. The ACLU attorney had advised this woman, as well as other similarly situated women, that she might have a cause of action against the doctor. *Id.*

75 *Id.*

76 *Id.* at 428.

77 *See id.* at 429-30. The Court's decision was primarily drawn from its holding in NAACP v. Button, 371 U.S. 415 (1963). *See Primus*, 436 U.S. at 430 (citing NAACP v. Button, 371 U.S. 415 (1963). In *Button*, the Court held that certain activities of the NAACP did not constitute solicitation of legal business and therefore did not violate a state statute. *Button*, 371 U.S. at 444. The Court declared that the activities of the NAACP were modes of association and expression protected by both the first and fourteenth amendments. *Id.*

78 *See Primus*, 436 U.S. at 438.

79 436 U.S. 447 (1978).

80 *Id.* at 449.

81 *Id.* at 453-54. The attorney personally approached two women who had sustained injuries in an automobile accident. *Id.* at 449-50. Both women orally agreed to retain the attorney, but shortly thereafter informed the attorney that they no longer desired his services. *Id.* at 452. The attorney had secretly recorded the women's statements and threatened to sue them for breach of contract if they did not remit attorney's fees. *Id.* at 450-52.

82 *Id.* at 462. The Court recognized that the state has both a general interest in regulating commercial transactions and protecting consumers as well as a specific

in-person solicitation breeds fraud, misrepresentation, undue influence and other forms of unconscionable conduct, the prevention of which warrants governmental regulation.[83]

In support of its conclusion, the Court drew a distinction between printed advertisements and in-person solicitation.[84] The Court reasoned that advertising simply serves to provide the consumer with a noncoercive flow of information.[85] Conversely, the Court posited, in-person solicitation may impose undue pressure upon an individual without allowing that person an opportunity for reflection or comparison.[86] Hence, *Ohralik* represented the extent to which the Court was willing to afford constitutional protection for attorney advertising motivated by pecuniary gain.

The next development concerning attorney advertising occurred in *In re R.M.J.*[87] In that case, the Court examined the activities of a St. Louis attorney who advertised the opening of his practice in newspapers and the phone book.[88] The attorney also announced the advent of his business by mailing cards to a list of pre-selected addresses.[89] The Supreme Court of Missouri held that he breached several state disciplinary rules by including unauthorized information in the legal advertisements, as well as by soliciting groups of persons not permitted by the rules.[90]

The United States Supreme Court reversed the Missouri court, holding that the disciplinary rules were wrongfully applied to the advertisement at issue.[91] While recognizing that some of the attorney's statements were potentially misleading or decep-

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interest in maintaining certain standards among the licensed professions. *Id.* at 460.

83 *Id.* at 462.

84 *Id.* at 457.

85 *Id.*

86 *Id.*

87 455 U.S. 191 (1982).

88 *Id.* at 196.

89 *Id.*

90 *See id.* at 198. Missouri Disciplinary Rule 2-101(B) allowed an attorney to include ten categories of information in an advertisement. Additionally, the rule placed limitations on the terminology which an attorney could use in describing his practice. *Id.* In the advertisement at issue, the attorney used the words "real estate" and "personal injury" in place of the authorized descriptions "property law" and "tort law." *Id.* at 197. He also violated the rule by stating in the advertisement that he was a member of the Illinois and Missouri bars and was admitted to practice before the United States Supreme Court. *Id.* Additionally, the attorney sent professional announcement cards to persons other than lawyers, clients, former clients, relatives and personal friends as proscribed by Missouri Disciplinary Rule 2-102(A)(2). *Id.* at 198.

91 *Id.* at 207.

tive, the Court held that restrictions upon such advertisements may extend no further than is reasonably necessary to avoid the dissemination of deceptive advertisements.[92] Applying this least-restrictive means analysis, the Court displayed its desire to afford constitutional protection to truthful, nondeceptive attorney advertising.[93]

The Court's most extensive discussion of attorney advertising was set forth in *Zauderer v. Office of Disciplinary Counsel*.[94] In *Zauderer*, an Ohio attorney, Phillip Zauderer, ran two different newspaper advertisements addressing specific legal problems.[95] Alleging that Zauderer had violated several disciplinary rules, the Ohio Supreme Court's Office of Disciplinary Counsel (Disciplinary Counsel) filed a complaint against him.[96] The Ohio Supreme Court determined that the attorney was in violation of several state disciplinary rules and issued a public reprimand.[97]

Noting that attorney advertising warrants constitutional protection, the United States Supreme Court insisted that commercial speech which is neither false nor deceptive may be restricted only if the limitation directly advances a substantial governmen-

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92 *Id.* at 203. In reaching this conclusion, the Court applied the four prong test promulgated in Central Hudson Gas & Electric Co. v. Public Service Comm'n, 457 U.S. 557 (1980). *See R.M.J.*, 445 U.S. at 203. The test stated:

> 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 answers, 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.

Central Hudson, 457 U.S. at 566.

93 *See R.M.J.*, 455 U.S. at 203-04.

94 471 U.S. 626 (1985).

95 *Id.* at 629-30. Zauderer announced in his first advertisement that his firm would represent drunk driving defendants on a contingency basis. *Id.* at 629. In the second advertisement, he expressed his willingness to represent women who sustained injury from using the Dalkon Shield Intrauterine Device. *Id.* at 630.

96 *Id.* at 631. In its complaint, the Office of Disciplinary Counsel alleged that the drunk driving advertisement was deceptive in that it proposed a transaction violative of the disciplinary rule forbidding contingent-fee representation of criminal defendants. *Id.* In addition, the Dalkon Shield advertisement allegedly violated rules prohibiting the solicitation of potential clients by the use of illustrations in advertisements. *Id.* at 632. Finally, the complaint contended that the contraceptive device advertisement abrogated a disciplinary rule against false or deceptive claims because it neglected to inform potential clients that they may still be liable for costs despite the failure of their lawsuit. *Id.* at 633.

97 *Id.* at 635-36. For a discussion of the history of the disciplinary rules at issue, see Warren, *Solicitation of Legal Services—A Crime*, 22 OHIO ST. L.J. 691-95 (1961).

tal interest.[98] The Court then considered the various restrictions imposed on attorney advertising by Ohio's disciplinary rules.[99]

First, the Court examined Ohio's prohibition on attorney advertisements containing information regarding particular legal problems.[100] The Court stressed that because the statements in the advertisement at issue were not false or misleading, the burden fell on the state to prove that the prohibitions imposed by the rule served a significant governmental interest.[101] The Disciplinary Counsel asserted that the state's ban on attorney advertising regarding specific legal problems served to insulate the public from undue influence, invasion of privacy, overreaching and fraud.[102] According to the *Zauderer* Court, all of these alleged interests may justify a state's prophylactic rule forbidding attorneys from conducting in-person solicitation for pecuniary gain.[103] The Court concluded, however, that since the printed advertisement posed no such risk it could not be prohibited.[104]

The Court next evaluated Ohio's ban on illustrations in attorney advertisements.[105] The Disciplinary Counsel stressed the importance of this restriction, asserting that it served to preserve the integrity of the legal profession and to avoid the possibility that the general public might be manipulated, confused or misled.[106] Utilizing the established balancing test, the *Zauderer* majority refused to sustain the regulation, holding that the interests advanced by the state were insufficient to justify the ban on the use of illustrations in attorney advertisements.[107]

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98 *Zauderer*, 471 U.S. at 638.

99 *Id.* at 639-53.

100 *Id.* at 639.

101 *Id.* at 641.

102 *See id.* at 642. The state also argued that its restriction on the use of legal information and advice was justified as a means of preventing misleading or false advertising designed "to stir up meritless litigation against innocent defendants." *Id.* at 643. The Court, however, found this reason to be an insufficient rationalization for state regulations. *Id.*

103 *Id.* at 641-42.

104 *Id.* at 642.

105 *Id.* at 647. The ad, which was accompanied by a drawing of a Dalkon Shield, also indicated that the device had generated many lawsuits; that the attorney was handling similar lawsuits and was willing to handle others; that victims should not assume their potential suits to be time barred; that his firm would handle these cases on a contingent-fee basis; and that "[i]f there is no recovery, no legal fees are owed by our clients." *Id.* at 631. The advertisements resulted in the retention of 106 clients. *Id.*

106 *Id.* at 648-49.

107 *Id.* at 649. The Court noted that were it to accept Ohio's argument, states may prohibit the use of any illustrations or pictures in advertising because the usual

Finally, in examining Ohio's disclosure requirements concerning the terms of contingent fees, the Court upheld Ohio's reprimand of Zauderer.[108] In one of his advertisements, Zauderer listed a contingent fee, but failed to state that unsuccessful clients may still be liable for litigation costs.[109] Citing the misleading nature of this omission, the Court determined that the state's interest in protecting consumers from deception was significant enough to warrant Ohio's reprimand.[110] The *Zauderer* decision thus served to refine and clarify the Court's position with respect to many important aspects of attorney advertising.

It was against this backdrop that the Court was recently called upon to define yet another parameter regarding the constitutional protection accorded to attorney advertising. In *Shapero v. Kentucky Bar Association*,[111] the United States Supreme Court upheld the constitutionality of targeted, direct-mail solicitation.[112] Writing for the majority, Justice Brennan began his discussion of this issue by declaring that attorney advertising falls within the Constitution's protective scope.[113] Emphasizing the *Zauderer* and *R.M.J.* holdings, the Court reiterated that truthful, nondeceptive advertising may be regulated only upon the showing of a substantial governmental interest.[114] Moreover, the Court cautioned that a state's regulation of commercial speech can be no broader than is necessary to avoid the perceived evil.[115]

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elements of an advertisement might, under some circumstances, be manipulative or deceptive. *Id.* Hence, the Court found this blanket ban to be too restrictive. *Id.*

108 *Id.* at 650-53.

109 *Id.* at 633.

110 *Id.* at 652-54.

111 108 S. Ct. 1916 (1988).

112 *Id.* at 1925.

113 *Id.* at 1921. Writing for the majority, Justice Brennan was joined by Justices White, Marshall, Blackmun, Stevens, and Kennedy as to Parts I and II of the opinion. However, as to Part III, Justices White and Stevens dissented. Justice White, joined by Justice Stevens, concurred with the majority's position that a state may not issue a blanket ban against direct-mail solicitation letters by attorneys for pecuniary gain. *Id.* at 1925. Both Justices dissented, however, from the majority's consideration of the Bar Association's novel contentions that Shapero's letter was overreaching. *Id.* Instead, Justice White believed that any new issues raised on appeal should be addressed by the state courts before the Supreme Court considers them. *Id.* Justice Brennan framed the issue to be whether a state may, in accordance with the first and fourteenth amendments, restrain attorneys from sending truthful, nondeceptive letters to persons known to have particular legal problems for the sole purpose of soliciting business for pecuniary gain. *Id.* at 1919.

114 *Id.* at 1921.

115 *Id.*

In distinguishing between written advertisements and in-person solicitation, the majority emphasized that certain features of in-person solicitation warrant the application of a prophylactic rule prohibiting that form of attorney advertising.[116] However, the Court stated, such a rule is not applicable to written advertisements since this type of commercial speech poses no risk of fraud, undue influence or invasion of privacy.[117] The Court recognized, however, that prior cases dealing with attorney advertising failed to differentiate between various types of written advertisements.[118]

Justice Brennan stressed that the lower court's sole reason for refusing to approve the proposed letter was that it targeted persons who were known to have specific legal problems.[119] Reviewing Shapero's letter, the Court rationalized that the Bar Association could not constitutionally prohibit the mailing of the letter at issue if the letter was sent to the general public rather than a targeted individual.[120] The Court rationalized that the purpose of disseminating advertisements to a generalized group of people is to reach those persons who are in need of the services offered.[121] The Court further determined that "the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable."[122] The majority observed, however, that this was not the position relied on by the lower court.[123]

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116 *Id.*

117 *Id.* The Court stated that "[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." *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641-42 (1985)).

118 *Id.*

119 *Id.*

120 *Id.* at 1921-22. The Court suggested that the Bar Association could not restrict Shapero from sending the letter if he changed the opening line from "[i]t has come to my attention that your home is being foreclosed on" to "[i]s your home being foreclosed on?" *Id.* at 1921. The Court theorized that the authors of Rule 7.3 were apparently cognizant of this since they drafted the rule to exempt general mailings to persons who may have occasion to utilize the attorney's services. *Id.*

121 *Id.*

122 *Id.* at 1921-22.

123 *Id.* at 1922. Instead, the majority stated, the Supreme Court of Kentucky approved the blanket ban on targeted, direct-mail advertising because of the overwhelming possibility for abuse or undue influence by attorneys upon those known to need particular legal services. *Id.*

Criticizing the lower court's reasoning, the majority stated that a person who receives an untargeted letter or views a newspaper advertisement may feel as equally overwhelmed and confused by his legal problems as a person receiving a targeted letter.[124] The Court framed the central inquiry to be whether a certain mode of advertising has a tendency to unduly influence a potential client, as opposed to whether potential clients exist whose condition makes them amenable to such influence.[125]

Citing the inherent coerciveness of in-person solicitation, the Court rejected the Bar Association's contention that Shapero's letter could be equated to the in-person solicitation at issue in *Ohralik*.[126] According to the Court, in-person solicitation has great potential for overreaching, undue influence, fraud or invasion of privacy.[127] Furthermore, the majority recognized the inherent difficulty experienced by a state in regulating solicitation not visible to public scrutiny.[128] Finally, the Court stated that print advertising is less likely to result in undue influence or overreaching than is in-person solicitation.[129] In support of this position, the Court noted that potential clients have the option of utilizing the information in the advertisement or ignoring it.[130]

After accepting targeted, direct-mail advertising as an acceptable form of attorney advertising, the majority addressed its possible negative effects.[131] The Court conceded that a personalized letter has an increased potential for deception and may cause the recipient to overestimate the attorney's knowledge and ability.[132] Additionally, the Court noted, an erroneously targeted letter may cause the recipient to seek out legal advice when he or

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124 *Id.*

125 *See id.* The Court stated that "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* The Court stated that neither Shapero's letter nor targeted, direct-mail solicitation in general "involves 'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.' " *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985)).

130 *Id.* at 1923. The Court recognized that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.*

131 *Id.* The Court referred to the possible negative effects of targeted, direct-mail solicitation as "isolated abuses or mistakes . . . ." *Id.*

132 *See id.* The Court stated:

she in fact does not have any legal problems.[133] Positing that these possible abuses do not justify an absolute ban on targeted, direct-mail advertising by attorneys, the Court stated that there are less restrictive and more accurate means by which a state can regulate this form of commercial speech.[134] The Court suggested that requiring attorneys to file solicitation letters with a state agency for review before mailing them would allow states to supervise such mailings and curtail any potential abuses.[135] Additionally, the Court suggested that a state could require lawyers to prove the truth of the assertions set forth in their proposed advertisements.[136] The Court conceded that although these safeguards will impose a greater workload upon regulatory agencies, the constitutional protection of the free flow of commercial speech justifies this added burden.[137]

Finally, the Court focused its attention on the Bar Association's argument that Shapero's letter was overreaching.[138] The Court rejected the contention that Shapero's bold, underscored letters shouted at the recipient in an overreaching manner.[139] Moreover, the Court dispelled the Bar Association's argument that Shapero's letter contained assertions stating no objective or affirmative fact.[140] Justice Brennan concluded that if a letter is

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> Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire that it really is.

Id. (citing the Brief for the ABA as *Amicus Curiae* at 9, Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988) (No. 87-15)).

133 *Id.*

134 *Id.*

135 *Id.* Continuing its discussion of alternate modes through which targeted, direct-mail solicitation could be regulated, the majority noted that many of the regulatory difficulties regarding in-person solicitation are not applicable to written solicitation. *Id.* Moreover, the Court dismissed the lower court's concerns that submission of targeted letters to a committee will not adequately protect the public from intimidation or overreaching. *Id.* Justice Brennan noted that evaluating a targeted advertisement requires no more specific knowledge about the recipient than analyzing a newspaper advertisement requires about its readers. *Id.* at 1923-24. The Court added that even if a letter is directed and tailored to particular recipients, there exists various safeguards which a state regulatory agency might enact to protect against undue influence or overreaching. *Id.* at 1924.

136 *Id.* The Court stated that the reviewing committee could require attorneys to supply documentation that supports the contentions set forth in the advertisement or to explain how he or she discovered the information. *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

truthful and nondeceptive, neither the size of its print nor inclusions of subjective predictions can present any amount of overreaching comparable to that of in-person solicitation.[141] The Court further reasoned that "so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations . . . ."[142] In addition, the Court indicated, a state may not enact a ban on certain types of information having the potential to mislead, unless the state first demonstrates a significant governmental interest being directly advanced by such a prohibition.[143] Here, the Court determined, the state failed to make such a showing.[144]

In dissent, Justice O'Connor began by conceding that the conclusion reached by the *Shapero* majority was amply supported by case law.[145] In Justice O'Connor's opinion, however, the analytical framework expounded by the Court in *Zauderer*, and utilized by the *Shapero* majority, was the product of "flawed reasoning."[146] Thus, Justice O'Connor asserted, the time was ripe for a reexamination of the foundation underlying *Zauderer* and its predecessors.[147]

Referring to her dissent in *Zauderer*, Justice O'Connor summarized her opinion as one which afforded greater deference to the legitimate efforts by a state to regulate attorney advertis-

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141 *See id.*

142 *Id.* at 1924.

143 *Id.* The Court concluded:

> "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive," unless the State "assert[s] a substantial interest that such a restriction would directly advance."

Id. (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)).

144 *Id.* at 1925.

145 *Id.* (O'Connor, J., dissenting).

146 *Id.* Justice O'Connor stated that *Zauderer*, a case in which she dissented in part, "was itself the culmination of a line of cases built on defective premises and flawed reasoning." *Id.* Noting that the majority relied primarily on *Zauderer* in reaching its decision, the dissent asserted that the targeted, direct-mail advertising approved by the *Shapero* majority is potentially more dangerous than the newspaper advertisements at issue in that case. *Id.*

147 *Id.* Chastising the majority's reasoning, Justice O'Connor stated:

> As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

Id.

ing.[148] Justice O'Connor indicated that her dissent in *Zauderer* was premised on the notion that differences exist between professional services advertising and consumer products advertising.[149] Drawing a distinction between consumer products and professional services, Justice O'Connor stated that unsolicited legal advice could not logically be compared to the marketing of consumer goods.[150] The Justice stressed that an attorney's obligation to provide an individual with informal and unbiased advice is likely to be compromised by an advertising attorney's efforts to achieve pecuniary gain.[151] Justice O'Connor then recognized that no such obligation exists in the marketing of consumer products.[152]

Justice O'Connor noted that the *Zauderer* Court invalidated a state rule forbidding attorneys from soliciting or accepting employment via advertisements containing advice concerning particular legal problems.[153] Turning to *Shapero*, Justice O'Connor theorized that the majority's holding would prohibit states from regulating a far more potentially dangerous practice than that upheld in *Zauderer*.[154] In support of this proposition, the dissent first suggested that a personalized letter is "likely 'to overpower the will and judgment of lay people who would not have sought [the lawyer's] advice.' "[155] In addition, the dissent explained, personalized form letters are composed to create an illusion that the sender possesses personal knowledge about the recipient's situation.[156] Justice O'Connor further stated that although a lay person is able to perceive fraudulent or misleading claims in consumer advertisements, he is not so inclined to question the integrity of a representative belonging to a profession associated with

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148 *Id.*

149 *Id.* In particular, Justice O'Connor indicated that restricted legal advice has a greater potential for misleading a consumer that does ordinary consumer goods. *Id.*

150 *Id.* The dissent stated that unsolicited legal advice is not comparable to free samples offered as promotional gimmicks in standard consumer products advertising. *Id.*

151 *Id.* at 1926 (O'Connor, J., dissenting).

152 *Id.*

153 *Id.*

154 *Id.* Reflecting upon the *Zauderer* decision, Justice O'Connor stated, "[t]oday's decision—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." *Id.*

155 *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 971 U.S. 626, 678 (1985)).

156 *Id.*

uprighteousness and sanctity.[157] Finally, Justice O'Connor postulated that the type of mailings at issue contained advice which was "unduly tailored to serve the pecuniary interests of the lawyer."[158] In Justice O'Connor's opinion, the Court was extending the scope of the first amendment to cover a form of attorney advertising which was not deserving of constitutional protection.[159]

Continuing her critique of the analytical framework supporting the contemporary attorney advertising doctrine, Justice O'Connor emphasized the importance which has historically attached to political speech.[160] Recognizing the vital position political expression occupies in a pluralistic, democratic society, Justice O'Connor reasoned that it must be afforded a greater degree of constitutional protection than that enjoyed by commercial speech.[161] Justice O'Connor noted that as a result of *Bates* and its progeny, the government's power to regulate an activity which leads to society's disrespect and distrust of both attorneys and the justice system was drastically circumscribed.[162]

The dissent next asserted that the Court should be somewhat more hesitant in applying its commercial speech doctrine to various types of attorney advertising.[163] Justice O'Connor stated that commercial speech may be constitutionally protected "only if [the speech] concerns lawful activities and is not misleading; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest

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157 *Id.*

158 *Id.* Justice O'Connor further recognized that due to the inherently private nature of targeted, direct-mail advertising, an attorney might not be compelled to uphold his obligation for ethical accuracy as he would be through public advertising wherein he would be subject to the scrutiny of his peers. *Id.*

159 *Id.* Conceding that the majority's holding fell in line with the principles espoused in *Zauderer*, the dissent nonetheless implicitly directed that both the *Zauderer* and *Shapero* majorities were erroneous in narrowly construing *Ohralik*'s support for bans on attorney advertising as applying only to in-person solicitation. *Id.*

160 *Id.* at 1926-27 (O'Connor, J., dissenting).

161 *Id.* at 1927 (O'Connor, J., dissenting). The dissent observed that the constitutional hedge surrounding the political freedom of speech traditionally did not extend to protect commercial transactions from state regulation. *Id.* However, the dissent stated, with the majority's holding in *Virginia Pharmacy*, the Court extended the constitutional shield surrounding political speech to protect commercial speech from governmental regulation. *Id.* Justice O'Connor commented that the dissent in *Virginia Pharmacy* had correctly predicted that the majority opinion would eventually and necessarily encompass professional advertising. *Id.*

162 *Id.* (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 394 (1977) (Powell, J., concurring in part and dissenting in part)). Turning to the commercial speech decisions subsequent to *Bates*, Justice O'Connor asserted that even they require the Court to give greater latitude to the states in regulating attorney advertising. *Id.*

163 *Id.*

and are appropriately tailored to that purpose."[164] Applying this commercial speech test to attorney advertising, the dissent posited that the state should be given considerable leeway in regulating any potentially misleading advertising, as well as any truthful advertising, which hinders the state's preservation of high ethical standards required within the legal profession.[165]

In support of her limited reading of the commercial speech test, Justice O'Connor rationalized that some forms of attorney advertising, such as the listing of an initial consultation fee, might warrant first amendment protection.[166] The dissent expressed its approval, however, of any bans on price advertising for claims such as "routine" bankruptcies or divorces, commenting that a determination of "routineness" cannot be made until one is thoroughly familiar with the particulars of each case.[167] Moreover, the dissent asserted, not only does the layperson lack the knowledge to make a determination as to whether his bankruptcy or divorce will be routine, but in addition, routine prices might create incentives for the attorney to slight a client's particular needs.[168] Thus, according to Justice O'Connor, because price advertising can both mislead the public and cause the professional to compromise his ethical obligations, the state is well justified in banning or stringently regulating most types of price advertising.[169] At the very least, the dissent stated, such a determination properly rests with the state.[170]

Next, the dissent declared that unsolicited legal advertisements like Shapero's require an even greater degree of regulation than does price advertising.[171] Applying the commercial speech test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[172] to the letter at issue, Justice O'Connor

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164 *Id.* (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980)).

165 *Id.* at 1928 (O'Connor, J., dissenting).

166 *Id.*

167 *Id.*

168 *Id.* The dissent also stated that an attorney might offer a fixed rate for an apparently simple problem, only to later realize that the problem is not so simple. In these instances, the attorney might not give normal attention to the matter upon realizing he would receive no compensation for his additional efforts. *Id.*

169 Justice O'Connor asserted that, "as soon as one steps into the realm of prices for 'routine' legal services such as uncontested divorces and personal bankruptcies . . . it is quite clear to me that the States may ban such advertising completely." *Id.*

170 *Id.*

171 *Id.*

172 447 U.S. 557 (1980). *Central Hudson* concerned a regulation which banned advertising by an electrical utility company. *Id.* at 558. In striking down the regula-

reasoned that Kentucky's interest in curtailing the possible "corrosive effects" which targeted, direct-mail advertising may impose on the legal profession are substantial enough to justify the regulation.[173] The dissent therefore contended that the Kentucky Supreme Court's prohibition of Shapero's solicitation under Rule 7.3 should have been upheld as directly advancing a substantial governmental interest.[174]

Returning to the Court's comparison of legal services and consumer goods, the dissent determined that the Court had drawn a "defective analogy" between standardized consumer products and professional advertising.[175] Recognizing this as one of the two grave defects in the Court's attorney advertising decisions, Justice O'Connor next focused on what she considered to be the second fundamental error.[176] Specifically, the dissent criticized, the majority was inappropriately skeptical about the justifications advanced by the states for their regulations on attorney advertising.[177] To illustrate its point, the dissent alluded to the *Bates* decision as sounding in legislative fact-finding, as opposed to being grounded upon constitutional footing.[178] Additionally, Justice O'Connor criticized the *Bates* majority for its determination that the virtues of attorney advertising outweigh its potential dangers.[179] The dissent asserted that such a flawed determination does not flow from the first amendment's protection and, therefore, should not be used to override Kentucky's regulation.[180]

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tion, the Court stated that the degree of protection available for commercial speech depends upon both the nature of the expression and the governmental interest served by its regulation. *Id.* at 563. The Court then proceeded to develop a four-part analysis to decide the constitutionality of a regulation. *Id.* at 566. First, the speech must concern lawful, non-misleading activity. *Id.* Second, the governmental interest must be substantial. *Id.* Third, the regulation must directly advance the governmental interest. *Id.* Fourth, the regulation must not be more extensive than necessary. *Id.* Since the court concluded that the regulation at issue did not satisfy the fourth criterion, it was held unconstitutional. *Id.* at 511.

173 *Shapero*, 108 S. Ct. at 1928 (O'Connor, J., dissenting).

174 *See id.*

175 *Id.*

176 *Id.* at 1928-29 (O'Connor, J., dissenting).

177 *Id.* at 1929 (O'Connor, J., dissenting).

178 *Id.* The dissent referred to Justice Powell's dissent in *Bates*, which gave a detailed critique of the legislative fact-finding underlying the majority's analysis. *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 350, 373 (1977) (Powell, J., concurring in part and dissenting in part)).

179 *Id.* at 1929 (O'Connor, J., dissenting). The *Bates* majority was critical of the government's argument that price advertising would harm customers. *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 350, 368-79 (1977)).

180 *Id.* In light of the erroneous nature of *Bates* and its progeny, Justice O'Connor

Justice O'Connor stipulated that even if the dissent were to approve of the Court's assumption of decision making with respect to what types of attorney advertising are in the best interests of the public, it would nonetheless be compelled to take exception to the majority's holding.[181] The dissent considered the most persuasive arguments in favor of attorney advertising to be those which are economically motivated.[182] Such arguments, the dissent stated, are premised upon the notion that restrictions on attorney advertising artificially interfere with supply and demand principles, thereby decreasing the efficiency of the economic machine.[183] Opposing these arguments, Justice O'Connor countered that decreasing information available to consumers might very well serve to increase the price/quality ratio, or even to increase the prices an attorney can charge his client.[184] Moreover, even if the removal of attorney advertising regulations were to increase the efficiency of legal services, the dissent expressed, there is no indicia that this effect would hold true in the long run.[185] Justifying its position, the dissent maintained that the economic argument against regulation fails to take note of the intricate role these restrictions play in the preservation of the norms of the legal system.[186]

The dissent next addressed the distinction between a profession and other occupations, stating that the former entails an ethical obligation to control one's selfish pursuit of pecuniary gain.[187] Justice O'Connor recognized that the privileges and advantages accruing to an attorney in the necessary pursuit of earning a living are the rewards and satisfaction of public service.[188] The dissent emphasized that special ethical standards are needed

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stated that it was incumbent on the Court to reverse its mistake by returning to the states the legislative function rightfully belonging to them. *Id.* The dissent suggested that the Court should adopt a test allowing bans or restrictions on attorney advertising which are appropriately fitted to directly advance a substantial state interest. *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.* Justice O'Connor conceded that her theories in favor of increased price fees or price/quality ratio were more speculative than empirically verifiable. *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.* at 1929-30 (O'Connor, J., dissenting). Justice O'Connor stated:

> There are sound reasons to continue pursuing the goal that is implicit in the traditional view of personal life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that

which serve to restrain attorneys from abusing the unique powers they inherently wield in American society.[189]

In conclusion, the dissent noted that while there are no hard and fast rules concerning the effectiveness or appropriateness of each regulation, "severe constraints" on attorney advertising are necessary to preserve the legal profession.[190] Criticizing the majority for failing to give due deference to professionalism's fragile foundation, the dissent warned that unless the Court soon reversed its position, the ethical constraints setting genuine professions apart from other occupations might well be irreparably destroyed.[191]

Although the majority's application of existing Supreme Court precedent seems to be well justified, some of the means utilized to reach its conclusion do not appear so strongly entrenched. For instance, the majority acknowledged at the outset that truthful, nondeceptive attorney advertising could be restricted only in the advancement of a substantial governmental interest.[192] To illustrate this precept, the Court discussed its holding in *Ohralik*, which had approved a state's categorical ban on all in-person solicitation by attorneys.[193]

The majority then reasoned that since targeted, direct-mail advertising did not pose the same dangers presented by in-per-

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> transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms.

Id.

189 *Id.* at 1930 (O'Connor, J., dissenting). Justice O'Connor further suggested that because the law is a "learned profession," requiring highly trained individuals, the powers possessed by its members might easily be used to manipulate or abuse the justice system for personal gain. *Id.* The dissent explained:

> Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arms-length manner that may be appropriate when buying an automobile or choosing a dry cleaner.

Id. In Justice O'Connor's view, the many mechanisms implemented to impart ethical standards to professionals are not by themselves adequate to compel obeyance with professional ethics. *Id.* The dissent, therefore, concluded that restrictions on attorney advertising and solicitation play a significant role in compelling adherence to the heightened ethical demands. *Id.* Justice O'Connor further noted that some of these mechanisms include efforts which have been undertaken to improve the standards necessary to pass the bar, an attempt to create genuine scholars within the legal profession and the creation of bar associations. *Id.*

190 *Id.* at 1931 (O'Connor, J., dissenting).

191 *Id.*

192 *Id.* at 1921.

193 *Id.* at 1922.

son solicitation, it could not be restricted.[194] With respect to this analysis, however, the Court must be criticized for merely engaging in a comparison of the perceived evils between in-person solicitation and targeted, direct-mail advertising in determining whether the latter could be restricted or otherwise regulated by a state. *Ohralik* was not designed to be used as a threshold inquiry, but rather as an application of the developing commercial speech doctrine. Had the Court subjected the Bar Association's disciplinary rule solely to the commercial speech test, it appears that it would nevertheless have been able to strike down the blanket ban without substantially relying on *Orhalik*.

Moreover, the majority's approach to analyzing the disciplinary rule may be criticized as being overly mechanical. Apparently not willing to make a fresh declaration in support of the constitutionality of attorney advertising, the Court merely reiterated the same points advanced in *Zauderer* and thereafter concluded that the regulation in question must necessarily be stricken.[195] Utilizing this approach, the majority failed to seize the opportunity to further refine the principles underlying the attorney advertising doctrine. Had the Court addressed the arguments raised in dissent, such treatment would have clarified any doubts as to the forcefulness of the Court's holding.

Additionally, the Court failed to delineate the bounds by which a court is limited in review of a questioned restriction. In reversing the decision of the Supreme Court of Kentucky, the Court set forth its own ideas as to what forms of legal advertising are in the best interests of the public.[196] In so doing, the Court disregarded the notion that a state might find the preservation of integrity and respect for a profession to be a substantial governmental interest outweighing an individual's right to solicit persons through advertising for pecuniary gain.

It is the Court's duty to evaluate a regulation solely to determine whether it directly advances a substantial state interest. It is not within the scope of the Court's authority to offer its own policy decisions as a replacement for others which, although perhaps less reasonable, do advance a substantial state interest. Although the *Shapero* Court was justified in carefully scrutinizing Kentucky's regulation to determine whether it directly advanced a substantial state interest, it should have exercised a greater

194 *Id.*
195 *See id.* at 1921-23.
196 *Id.* at 1922.

amount of deference to the legitimate policies advanced by the state. By the Court's failing to do so, future courts might be led to construe the *Shapero* holding as implicitly permitting broad latitude to the judiciary's engaging in legislative fact-finding concerning attorney advertising. Although certainly not the intent of the Court, this might be an unfortunate side effect.

Perhaps the most troubling aspect of the holding in *Shapero* was the Court's unwillingness to address the potential corrosive effects that targeted, direct-mail advertising might have on the legal profession. While the majority considered the risks of deception and overreaching inherent to targeted, direct-mail advertising, it refused to look beyond these dangers to those posed by truthful attorney advertising. For instance, even though an attorney's direct-mail advertisement might be truthful, such advertising could still compromise or otherwise jeopardize the integrity of the legal profession. Due to the *Shapero* Court's shortsightedness, the full ramifications of its holding remain to be seen.

Despite its analytical shortcomings, the *Shapero* decision marks an important progression in the advancement of an attorney's right to advertise. By restricting the states from prohibiting nondeceptive targeted, direct-mail advertising, the Court has extended the bounds of constitutional protection afforded to attorney advertising. Justice Brennan's opinion also directs states on how to regulate targeted, direct-mail advertisements to protect against the evils of undue influence or deception. The *Shapero* decision thus provides greater clarity and direction to states and attorneys as to what modes of advertising are constitutionally protected under the rubric of free speech.

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