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Liberalizing Attorney Advertising Restraints: Targeted Direct-Mailing Gains First Amendment Freedom in Shapero v. Kentucky Bar Association

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NOTE

LIBERALIZING ATTORNEY ADVERTISING RESTRAINTS: TARGETED DIRECT-MAILING GAINS FIRST AMENDMENT FREEDOM IN *SHAPERO V. KENTUCKY BAR ASSOCIATION*

IN 1985, Richard D. Shapero, a Louisville, Kentucky, lawyer, asked the Kentucky Attorneys' Advertising Commission for permission to send a letter to homeowners facing foreclosure.[1] Shapero's proposed correspondence was essentially a recommendation of his services.[2] The Commission found the letter violative of a Kentucky Supreme Court rule prohibiting advertisements targeted toward individuals with particular legal problems.[3] The Commission, however, proffered its opinion with a recommendation that the Kentucky Supreme Court amend the rule because the rule violated the first amendment[4] under the 1985 case of *Zauderer v. Office of Disciplinary Counsel*.[5]

Shapero then asked the Kentucky Bar Association's Ethics Committee for an advisory opinion as to the rule's validity.[6] The Ethics Committee found

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1. The Advertising Commission is responsible for aiding attorneys in ethical advertising so as to protect the public. KY. REV. STAT. ANN., Ky. Sup. Ct. Rule 3.135(3)(a) (Michie 1988).

2. The proposed letter read in part:

> 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.
>
> . . . .
>
> Call NOW, don't wait. It may surprise you what I may be able to do for you. . . . Remember it is FREE, there is NO charge for calling.

Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916, 1919, 100 L. Ed. 2d 475, 482 (1988).

3. The rule prohibited the mailing of written advertisements precipitated by a specific event or occurrence involving the addressee as distinct from the general public. KY. REV. STAT. ANN., Ky. Sup. Ct. Rule 3.135(5)(b)(i) (Michie 1988).

4. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech." The first amendment is made applicable to the states by the fourteenth amendment, which states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

5. 471 U.S. 626 (1985). The U.S. Supreme Court ruled that states could not ban nontargeted advertisements containing legal advice similar to that in Shapero's letter.

6. An attorney in doubt as to the propriety of any professional act may seek an advisory

the rule consistent with rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (Model Rules).[7] Consequently, Shapero petitioned the Kentucky Supreme Court for a review of the Ethics Committee's advisory opinion.[8] The court found the rule unconstitutional, yet merely replaced it with ABA Model Rule 7.3, which contained a virtually identical prohibition against targeted, direct-mail solicitation.[9] Since Shapero's proposed letter solicited potential clients known to face a specific legal problem, the rule still prohibited the letter.[10] The Louisville lawyer ultimately appealed to the United States Supreme Court. *Held, reversed and remanded*: A state may not, without violating the first and fourteenth amendments, categorically ban lawyers from soliciting business for pecuniary gain by sending truthful, nondeceptive letters to potential clients known to face particular legal problems. Such advertising is constitutionally protected commercial speech, which may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. *Shapero v. Kentucky Bar Association*, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

I. HISTORICAL BACKGROUND FOR THE CONSTITUTIONAL PROTECTION OF TARGETED, DIRECT-MAIL ADVERTISING

A. The Commercial Speech Doctrine

Constitutional protection of targeted, direct-mailings by attorneys has as its precedential genesis the watershed case of *Bates v. State Bar*.[11] In 1976, the ABA Model Code of Professional Responsibility banned all forms of attorney advertising.[12] The following year's *Bates* decision, however, held that the blanket suppression of attorney advertising violated the free speech clause of the first amendment.[13] The *Bates* controversy involved two attorneys who had placed an advertisement in a Phoenix, Arizona, newspaper.[14]

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opinion from a special committee of the Kentucky Bar. KY. REV. STAT. ANN., Ky. Sup. Ct. Rule 3.530 (Michie 1988).

7. 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 (1987).

8. For a report on Shapero's advisory opinion, see Underwood, *Advisory Opinions*, KY. BENCH & BAR, Winter 1985-86, at 32.

9. Shapero v. Kentucky Bar Ass'n, 726 S.W.2d 299, 301 (Ky. 1987).

10. The court's opinion remained curiously silent as to what was unconstitutional about the Kentucky rule, and exactly how rule 7.3 remedied the situation. *Id.*

11. 433 U.S. 350 (1977).

12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1976).

13. 433 U.S. at 384.

14. *Id.* at 354.

The advertisement offered legal services at "very reasonable" fees, and listed prices for routine services such as uncontested divorces and personal bankruptcies.[15] The Arizona Supreme Court dismissed the attorneys' claims that the state rule prohibiting their advertisement violated the first amendment.[16]

In deciding the *Bates* question, the Court relied upon *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[17] in which the Court had recently given commercial speech first amendment protection.[18] The Court concluded that truthful attorney advertising concerning the availability and terms of routine legal services merited first amendment protection.[19] The majority added, however, that states could continue to restrain false, deceptive, or misleading attorney advertising.[20] Although narrow, the *Bates* holding granted attorneys a privilege denied them for almost seventy years.[21] While *Bates* set the stage for further expansion, the opinion left unclear how far the Court would go in broadening this now constitutionally protected privilege.[22]

B. The Distinction Between In-Person Solicitation and Solicitation by Letter

In *Ohralik v. Ohio State Bar Association*[23] and *In re Primus*,[24] companion cases decided just a year after *Bates*, the Supreme Court helped define the

15. The dissent strenuously asserted that whether a service was "routine" depended upon the eye of the beholder. Since the public was unable to discern exactly what service they required, they needed protection. *Id.* at 392 n.3 (Powell, J., dissenting).

16. *See* 17A ARIZ. REV. STAT., Sup. Ct. Rules, Code of Professional Responsibility, Rule 29(a), DR 2-101(B) (1976) (Arizona rule prohibiting certain advertisements).

17. 425 U.S. 748 (1976) (advertisement giving prescription drug prices was protected by the first amendment notwithstanding its commercial speech character). The Court gave first amendment protection to commercial speech for the first time the previous year. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) (fact that advertisement in question reflected commercial interests did not negate all first amendment protection). The Court created a "commercial speech doctrine" in 1980. *See infra* text accompanying notes 39-41.

18. The Supreme Court originally denied commercial speech first amendment protection in 1942. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (first amendment not applicable if motive for communication primarily profit-oriented). *See also* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963) (allowing state to prohibit radio station from broadcasting optometrists' advertisements); Williamson v. Lee Optical, 349 U.S. 925 (1955) (statute outlawing solicitation of eyeglasses constitutional); Breard v. City of Alexandria, 341 U.S. 622 (1951) (denying magazine distributor right to solicit subscriptions door-to-door).

19. Bates v. State Bar, 433 U.S. 350, 384 (1977). The Court emphasized that it was addressing only routine services, not the quality of such services. The Court similarly disregarded the issue of in-person solicitation. *Id.* at 383.

20. *Id.*

21. Lawyer advertising was considered acceptable before the 20th century. Note, In re R.M.J.: *Easing Restrictions on Attorney Advertising*, 23 S. TEX. L.J. 455, 456 (1982). The ABA ban started in 1908. *See* 33 A.B.A. REP. 566, 582 (1908) (reprinting letter from Committee on Code of Professional Ethics allowing only "newspaper cards," containing name, address, telephone number, and specialization of the attorney). *See generally* Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 48-57 (1935) (extending theory that attorney advertising proscription has roots in English common law, which followed the Greek and Roman law in prohibiting champerty).

22. For a discussion of the *Bates* aftermath, see Baker, *You Can Advertise Now—But Should You?*, BARRISTER, Summer 1981, at 14.

23. 436 U.S. 447 (1978).

24. 436 U.S. 412 (1978).

limits of first amendment protection for attorneys' advertisements by distinguishing between in-person solicitation and solicitation by letter.[25] This distinction assisted in building a foundation for the constitutionality of targeted, direct-mailings by attorneys.[26] In *Ohralik* an Ohio attorney had approached two persons involved in an automobile accident, coercing them into entering contingent-fee contracts.[27] While the *Bates* Court expressly declined to address the issue of in-person solicitation,[28] the *Ohralik* Court definitively held that a state could ban all attorneys from personally soliciting clients for pecuniary gain under circumstances likely to pose dangers the state had a right to prevent.[29] In *Primus* the Court overruled a state reprimand of a South Carolina ACLU attorney who solicited by mail a client sterilized as a condition to her receiving public medical assistance.[30] The Court stressed that since the lawyer's motivation stemmed from a concern for those unable to vindicate their own rights, rather than pecuniary interests, the state possessed no interest in the matter to which it might subordinate the lawyer's first amendment rights.[31]

Ohralik and *Primus* defined the limits of permissibility within the solicitation spectrum. Standing at opposite ends, the cases clarified a standard of analysis that would classify a lawyer's marketing efforts as either a forbidden form of in-person solicitation, or as a permissible form of advertising.[32] Thus, they introduced a process by which the Court could more comprehensibly classify future attorney advertising cases.

C. *The Mailing of Professional Announcement Cards and the* Central Hudson *Test*

In *In re R.M.J.*[33] the Court granted first amendment protection to an attorney who had mailed professional announcement cards. The Court's decision clarified questions that remained after *Bates* and resolved conflicting

25. The *Ohralik* Court distinguished *Bates* on the grounds that *Bates* applied to pure speech advertising in a newspaper while "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." *Ohralik*, 436 U.S. at 457.

26. *See generally* Thurman, *Direct Mail: Advertising or Solicitation? A Distinction Without a Difference*, 11 STETSON L. REV. 403 (1982) (assesses the implications of the Court's distinction).

27. The attorney used a hidden tape recorder.

28. Bates v. State Bar, 433 U.S. 350, 366 (1977).

29. 436 U.S. at 447. The Court expressed concern over the particular danger of attorneys soliciting victims incapable of making informed judgments. *Id.*

30. The client's first exposure to the attorney was during a lecture at which the lawyer offered free legal advice. 436 U.S. at 413.

31. *Id.* at 422. The Court based its decision primarily on NAACP v. Button, 371 U.S. 415 (1963) (lawyers exonerated from assisting persons seeking legal redress for violations of their constitutional rights); 436 U.S. at 422; *see also* United Transp. Union v. State Bar, 401 U.S. 576 (1971) (railway union members had first amendment right to advise fellow workers of legal rights); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (labor union given constitutional right to advise injured members of availability of legal assistance).

32. *See* Balzer, *Attorney Advertising: Who's Really Afraid of the Big Bad Lawyer?*, 22 NEW ENG. L. REV. 727, 727-31 (1988).

33. 455 U.S. 191 (1982).

district court opinions in mass-mailing cases.[34] Specifically, the decision solidified a lawyer's constitutional right to mail to the general public advertisements not actually or inherently misleading.[35]

The *R.M.J.* Court considered the constitutionality of a Missouri Disciplinary Rule[36] that allowed lawyers to advertise in newspapers, magazines, and the telephone directory yellow pages, provided the advertisements were within one of the rule's ten acceptable categories.[37] The rule also limited the mailing of professional announcement cards to persons specifically enumerated in the rule. In *R.M.J.* the attorney violated the Missouri Disciplinary Rule by mailing cards to persons other than lawyers, clients, personal friends, and relatives.[38] The Court unequivocally struck down Missouri's prohibition and applied a new standard to the attorney advertising debate. The Court adopted the commercial speech test it had created two years prior in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[39]

The *Central Hudson* test consists of a four-part analysis:[40] First, is the advertising activity truthful and lawful? Second, is the government's interest in opposing the expression substantial? If the responses to these two questions are positive, then the third question is, does the governmental regulation directly advance the asserted interest? Finally, is the governmental regulation more extensive than is necessary to serve the asserted interest?[41] In applying the test, the *R.M.J.* Court held that the cards did not mislead persons receiving them and that the state had neither presented a substantial interest in banning the information,[42] nor attempted a less restrictive alternative.[43]

D. Unsolicited Advice

The Court applied first amendment protection to legal advertisements

34. *Compare* Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978) (dismissing complaint against attorneys who had mailed letters to real estate agents) *and In re* Appert, 315 N.W.2d 204 (Minn. 1981) (holding unconstitutional a rule prohibiting lawyers from mass-mailing information describing dangers of Dalkon Shield) *with* Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980) (prohibiting legal advertisement enclosed in mass-mailing packet), *cert. denied*, 450 U.S. 966 (1981) *and* State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982) (disallowing attorney's mass-mailing campaign for employment for particular legal matter).

35. *See generally* Note, In re R.M.J.: *Easing Restrictions on Attorney Advertising*, 23 S. TEX. L.J. 455 (1982).

36. *In re R.M.J.*, 455 U.S. at 194 n.3 (citing MO. REV. STAT., Sup. Ct. Rule 4, DR 2-101(B) (1978) (Index Vol.)).

37. The attorney had deviated from the acceptable "laundry list" of categories by including a statement that he was permitted to practice before the United States Supreme Court. The lawyer had also wandered from required language for describing particular areas of practice such as "personal injury." *Id.* at 197.

38. *Id.* at 196.

39. 447 U.S. 557 (1980) (state ban on promotional advertising by electric utilities violated first amendment).

40. *Id.* at 566.

41. *Id.*

42. 455 U.S. at 206-07.

43. *Id.*

containing unsolicited advice[44] in *Zauderer v. Office of Disciplinary Counsel*.[45] The Court did so by relying on the commercial speech doctrine[46] and the *Central Hudson* test.[47] While *Bates* and *R.M.J.* dealt solely with lawyer dissemination of general information, the *Zauderer* Court confronted advertisements directed at specific legal problems.[48]

At issue in *Zauderer* was an advertisement[49] containing an illustration of the Dalkon Shield IUD.[50] The publication informed readers that if the device had injured them, a suit[51] against the manufacturer might be possible.[52] The Ohio Office of Disciplinary Counsel claimed that the advertisement violated disciplinary rules prohibiting self-recommendation, accepting employment resulting from unsolicited legal advice, and the use of illustrations.[53]

Utilizing the *Central Hudson* test, the Court held that since the advertisement was not false or deceptive, the state had the burden of proving the ban directly supportive of a substantial governmental interest.[54] The majority disregarded the state's attempt to equate its interests with those that justified banning the in-person solicitation at issue in *Ohralik*.[55] In distinguishing *Ohralik*, the Court alleged that print advertising, as opposed to in-person solicitation, presented comparatively little danger to consumers.[56] Further, the Court highlighted the fact that print advertising lacked the coercive force of the personal presence of a trained advocate.[57] The *Zauderer* Court's standards of analysis[58] established a basis for the Court's next confrontation with attorney advertising, *Shapero v. Kentucky Bar Association*.[59]

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44. The illustrative newspaper advertisement at issue in *Zauderer* advised injured users of the Dalkon Shield IUD to inquire about suing the manufacturer.

45. 471 U.S. 626 (1985).

46. *Id.* at 637. By 1985 the Court had firmly established that truthful, nondeceptive advertising deserved first amendment protection in the absence of a substantial governmental interest. *Id.* at 638. For analogous Supreme Court cases where the state did not meet this requirement, see Friedman v. Rogers, 440 U.S. 1 (1979); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973).

47. *Zauderer*, 471 U.S. at 637. For the *Central Hudson* test, see *supra* text accompanying notes 40 & 41.

48. *Zauderer*, 471 U.S. at 629.

49. Actually, two advertisements were at issue in *Zauderer*. The second advertisement extended legal service to drunk-driving defendants. The publication promised to refund the full legal fee if the client were convicted. The Court upheld the Ohio court's reprimand for this advertisement because it failed to mention plea bargaining. If the defendant pleaded guilty to a lesser charge, he or she would still be liable for attorney's fees; therefore, the advertisement was deceptive. *Id.* at 654.

50. The device was inserted into the womb to prevent conception. The Shield was withdrawn from the market in 1974 since it was associated with numerous internal injuries. *See generally* Note, *The Food and Drug Administration's Power to Recall a Harmful Product and Other Remedial Actions: The Powerless Consumer*, 10 VT. L. REV. 129 (1985).

51. 106 women initiated lawsuits as a direct result of the advertisement.

52. 471 U.S. at 631.

53. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A), 2-101(B) (1983).

54. 471 U.S. at 644.

55. *Id.* at 641.

56. *Id.* at 642.

57. *Id.*

58. *See generally* Note, *Protected Solicitation Becomes More Personal*: Zauderer v. Office of Disciplinary Counsel, 31 ST. LOUIS U.L.J. 167 (1986).

59. 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

II. *SHAPERO V. KENTUCKY BAR ASSOCIATION*

A. Defining the Issue

While the Supreme Court addressed various forms of lawyer advertising in the eleven years following *Bates*, it never considered targeted direct-mailings.[60] *Shapero* presented the first opportunity for the Court to consider the constitutionality of this method of advertising.[61] In *Shapero* the Court considered whether a state could constitutionally prohibit attorneys from soliciting legal business for pecuniary gain by sending truthful, nondeceptive letters to potential clients known to face particular legal problems.[62] In concluding that the state could not absolutely ban such advertising, Justice Brennan based his majority opinion[63] on two premises. First, as *Zauderer* recently held,[64] such attorney advertising qualified as constitutionally protected commercial speech in the absence of an overriding governmental interest.[65] Second, the value of free-flowing consumer information outweighed the state's claim of difficulty in regulating against abusive targeted letters.[66] The dissenting opinion, written by Justice O'Connor and joined in by Chief Justice Rehnquist and Justice Scalia, agreed that *Zauderer* could fairly extend to protect targeted, direct-mailings; however, the dissent disputed the underlying rationales of *Zauderer* and the previous Supreme Court attorney advertising cases.[67]

B. Analysis of Majority Opinion

The *Shapero* Court began by reaffirming the constitutionally protected status of lawyer advertising.[68] Reciting the standards of analysis it had applied

60. The Court had refused to hear numerous lower court cases dealing with targeted mailings. *See In re* Von Wiegen, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984) (blanket prohibition of mail solicitation of accident victims violated attorney's first amendment rights of expression), *cert. denied*, 472 U.S. 1007 (1985); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (direct-mail solicitation of 7,500 individual real property owners by lawyers was constitutionally protected commercial speech that could be regulated but not proscribed), *cert. denied*, 450 U.S. 1026 (1981); Dayton Bar Ass'n v. Herzog, 70 Ohio St. 2d 261, 436 N.E.2d 1037 (permanent disbarment of attorney who had mailed between 500 and 1000 letters to defendants in municipal court cases listed in the "Daily Court Reporter"), *cert. denied*, 459 U.S. 1016 (1982).

61. While the Supreme Court had not addressed targeted mailings, state courts had been dealing with the issue with varied results. For a background discussion of the rationales used by the state courts, see Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 520-26 (1986).

62. 108 S. Ct. at 1919, 100 L. Ed. 2d at 485.

63. Justices White, Marshall, Blackmun, Stevens, and Kennedy joined Justice Brennan in the decision of the Court with respect to whether Kentucky's rule was valid. Only Justices Marshall, Blackmun, and Kennedy joined Justice Brennan in part III of the opinion, which addressed the issue of whether Shapero's particular proposed letter was valid. Justices White and Stevens filed a separate opinion concurring in the first two parts, while dissenting to part III, claiming that the particular letter's validity should be left to the state court in the first instance. *Id.* at 1919, 100 L. Ed. 2d at 476.

64. *See supra* text accompanying notes 44-57.

65. 108 S. Ct. at 1921, 100 L. Ed. 2d at 483.

66. *Id.* at 1924, 100 L. Ed. 2d at 487.

67. *Id.* at 1925, 100 L. Ed. 2d at 489.

68. *Id.* at 1921, 100 L. Ed. 2d at 483.

in prior cases, the Court underscored the precept that nondeceptive commercial speech deserved first amendment protection unless the state could assert a substantial governmental interest.[69] Justice Brennan emphasized that its *Central Hudson* test invalidated state rules broader than necessary to prevent the perceived danger.[70]

Next, the Court noted specifically the *Zauderer* decision, which had nullified an Ohio rule that categorically banned solicitation of legal employment for monetary gain through advertisements, even if truthful, directed at specific legal problems.[71] Justice Brennan stressed that while the Court readily distinguished between in-person solicitation and written advertisements, it had never made a distinction between differing *modes* of written general advertisements.[72] Thus, the majority reasoned, constitutional protection extended as readily to mass-mailed advertisements as it did to general advertisements.[73] The Court then hinted at the absurdity of ABA Model Rule 7.3.[74] Justice Brennan explained that Kentucky could not constitutionally prohibit Shapero's letter if the attorney hypothetically altered it, in conformance with rule 7.3, to begin with the words, "Is your home being foreclosed on?", rather than the targeted, "It has come to my attention that . . . ."[75] The Court illustrated the frailty of the Kentucky Supreme Court's argument in lower court by showing how a slight alteration of words would place the advertisement in compliance with the statute.[76]

The state had successfully banned Shapero's proposed letter simply because it targeted particular persons, rather than those situated within a general group.[77] Justice Brennan pointed out that the only reason for sending an advertisement to a general group was to reach particular persons within that group in need of the service.[78] The Court stated that mere efficiency of speech did not deny that speech first amendment protection.[79] In further support of its argument, the majority responded to the lower court's claim that targeted mailings were as likely to overwhelm potential clients as were in-person solicitations.[80] Justice Brennan maintained that an untargeted let-

69. *Id.*

70. *Id.*

71. *Id.* at 1921, 100 L. Ed. 2d at 484.

72. Justice Brennan referred to *Bates* and *R.M.J.* in noting "[o]ur lawyer advertising cases have never distinguished among various modes of written advertising to the general public." *Id.*

73. *Id.*

74. *Id.*; *see supra* note 7.

75. 108 S. Ct. at 1921, 100 L. Ed. 2d at 484.

76. *Id.*

77. *Id.*

78. *Id.* The American Bar Association itself recommended direct-mailings (where permitted by state codes of professional responsibility), since they provided the "[a]bility to reach a specific target audience." *See* A. FOLEY, EFFECTIVE MARKETING OF LEGAL SERVICES THROUGH ADVERTISING: A PRACTICAL GUIDE FOR LAWYERS 38 (1985).

79. 108 S. Ct. at 1921-22, 100 L. Ed. 2d at 484.

80. *Id.* at 1922, 100 L. Ed. 2d at 485. In prohibiting Shapero's letter, the Kentucky Supreme Court stated: "General mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing." Shapero v. Kentucky Bar Ass'n, 726 S.W.2d 299, 301 (Ky. 1987).

ter or newspaper advertisement, both of which receive constitutional protection, could distress a consumer just as much as a targeted letter.[81] The relevant inquiry in assessing potential for undue influence, the Court asserted, should focus not on the condition of the client, but rather on the mode of communication.[82]

As it had done in earlier cases, the Court discussed the potential risks involved in expanding the constitutional protection of lawyer advertising.[83] In concluding that targeted mailings, like print advertising, posed less potential for abuse than in-person solicitation, Justice Brennan listed factors distinguishing targeted letters from in-person solicitation.[84] The majority reasoned that targeted mailings afforded consumers time for reflection, thus allowing them to consider fully the consequences of their decisions.[85] In the Court's view, the possibility of isolated incidents of abuse did not justify an absolute ban on targeted mailings.[86]

Finally, the Court adduced that states could regulate and minimize abuse through measures far less restrictive than total prohibition.[87] Justice Brennan suggested, for example, a requirement that attorneys file any solicitation letter with a state agency for approval.[88] Acknowledging the lower court's concern that state agencies had scant resources and lack of expertise, the Court contended that the scrutiny of targeted letters would be no more difficult, or less accurate, than the scrutiny of advertisements.[89] In concluding its argument, the majority recognized that its holding would create more work for the state regulating agencies, but that the free flow of commercial information more than justified any additional burden.[90]

C. *Analysis of Dissenting Opinion*

In dissent, Justice O'Connor prefaced her analysis by agreeing with the majority that the reasoning of *Zauderer* supported the Court's decision.[91] Nevertheless, the dissent characterized the premises of *Zauderer* and the line of cases supporting it as based upon defective premises and flawed reasoning.[92] Justice O'Connor felt public policy interests required a reexamination of the entire framework of the Court's previous attorney-advertising rationales.[93]

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81. 108 S. Ct. at 1922, 100 L. Ed. 2d at 485.
82. *Id.*
83. *Id.* at 1923, 100 L. Ed. 2d at 486.
84. Consumers were unpressured by letters since they could simply avert their eyes or place the correspondence in a drawer. *Id.* at 1922-23, 100 L. Ed. 2d at 486.
85. *Id.* at 1923, 100 L. Ed. 2d at 486.
86. *Id.*
87. *Id.*
88. The Court further associated targeted mailings with general advertisements by emphasizing the state agencies' ability to supervise and penalize abuses of materials "open to public scrutiny." *Id.*
89. *Id.* at 1923, 100 L. Ed. 2d at 487.
90. *Id.* at 1924, 100 L. Ed. 2d at 487.
91. *Id.* at 1925, 100 L. Ed. 2d at 489.
92. *Id.*
93. *Id.*

In defending its position, the dissent offered reasons why the Court should show deference to the state's efforts at regulating its own attorneys.[94] Justice O'Connor stressed the key distinctions between professional services and other marketable commodities.[95] Justice O'Connor argued that while consumers could evaluate ordinary goods, they lacked the ability to appraise legal services.[96] To equate legal services with ordinary consumer goods, the dissent stated, created the chance for attorneys to subordinate their professional standards to the pursuit of a dollar.[97] Thus, states had an obligation to regulate attorney advertising to protect both the consumer and the integrity of the legal profession.[98]

Justice O'Connor stated that since a targeted, personalized letter from an attorney arrived with the concomitant authority of the law, the layperson would accord the letter greater weight than an ordinary advertisement.[99] Additionally, the dissent pointed to the difficulties in regulating targeted mailings.[100] Since a targeted letter could escape the sight of the bar in general, attorneys would be more inclined to follow their pecuniary interests than to keep foremost in mind their obligations to clients.[101] The dissent then acknowledged the valid distinction between in-person solicitation and advertisements, but contended that this distinction did not invalidate as a matter of course any distinction between targeted mailing and general advertisements.[102]

The dissent next argued that political speech, and not commercial speech, was actually at the root of the first amendment.[103] Thus, Justice O'Connor contended, the Court had erred in the breadth of its *Virginia Pharmacy* commercial speech doctrine.[104] The dissent asserted that the *Central Hudson* test for commercial speech could justify limited attorney advertisements, such as initial consultation fee information, but that anything more expansive would confuse and mislead the consumer.[105]

In conclusion, the dissent emphasized the professional status of lawyers, and probed what it felt was the real cost to society of reducing the restraints on attorney advertising.[106] Justice O'Connor acknowledged the classic argu-

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94. *Id.*

95. Justice O'Connor referred specifically to Shapero's free initial advice over the phone as having serious consequences if the layperson were to evaluate the legal service incorrectly. The dissent warned that free unsolicited advice would most likely be colored by the lawyer's interest in generating business. *Id.* at 1925-26, 100 L. Ed. 2d at 489.

96. *Id.*

97. *Id.* at 1928, 100 L. Ed. 2d at 493.

98. *Id.*

99. Justice O'Connor equated the influence of attorneys with that of policemen. *Id.* at 1926, 100 L. Ed. 2d at 490.

100. *Id.*

101. *Id.* For a background discussion of the ethical considerations unique to attorney advertising, see Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601 (1986).

102. 108 S. Ct. at 1926, 100 L. Ed. 2d at 490.

103. *Id.* at 1926, 100 L. Ed. 2d at 490-91.

104. *Id.* at 1927, 100 L. Ed. 2d at 491; *see supra* notes 17-18 and accompanying text.

105. 108 S. Ct. at 1928, 100 L. Ed. 2d at 492.

106. *Id.* at 1928-31, 100 L. Ed. 2d at 493-96.

ments in favor of lawyer advertising: decreased costs and increased efficiency.[107] Nevertheless, the dissent termed these temporary gains, secondary to the enduring benefits attorney restrictions produced for society.[108] Justice O'Connor stressed that since attorneys constitute a powerful, specialized body of experts, restraints remind them of their ethical obligations to society, and check the economic self-interests that their position allows them to fulfill.[109]

III. CONCLUSION

As the first Supreme Court case to address targeted, direct-mail advertising by attorneys, *Shapero* concluded that a state could not categorically ban this method of advertising. The Court looked to its *Central Hudson* test, holding that a state could not ban truthful commercial speech unless it could present a substantial, overriding governmental interest. The majority emphasized that *Zauderer* had already given attorneys the right to distribute generally written advertising materials, on the grounds that these advertisements did not present the same threat of coercion that justified banning in-person solicitations. Thus, the majority reasoned, a letter mailed to a particular individual did not lose first amendment protection simply because it was not mailed to the public at large. In dismissing the dissent's argument that states could not adequately regulate targeted letters, the Court held that the benefits of free-flowing consumer information outweighed any problems of regulation. As lawyers take advantage of this now constitutionally protected privilege, consumers are likely to find their mailboxes increasingly filled with solicitations directed at their particular legal circumstances.

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107. *Id.* at 1929, 100 L. Ed. 2d at 494.
108. *Id.* at 1930, 100 L. Ed. 2d at 495.
109. *Id.*