NEW MEXICO LAW REVIEW

Volume 20
Issue 1 *Winter 1990*

Winter 1990

Direct Mail Advertising by Attorneys

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DIRECT MAIL ADVERTISING BY ATTORNEYS

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I. INTRODUCTION

Many attorneys erroneously believe that the law has always restricted them from engaging in advertising. Before 1830, American lawyers, like their British counterparts, regarded themselves as an elite group. Because they rejected the commercialization of law, attorneys chose to prohibit advertising. By the mid-1800's, however, some attorneys were advertising their services.[1] Nonetheless, in the early twentieth century many states began to formally prohibit attorneys from engaging in advertising by adopting the American Bar Association's first Code of Ethics in 1908.[2] This prohibition on advertising remained in place until the United States Supreme Court decided *Bates v. State Bar of Arizona*.[3]

Since the decision in *Bates*, the legal profession has grappled with the issue of attorney advertising. The approach followed by the states seems to have been to restrict as much as possible the right of attorneys to promote their practices through advertising.[4] The focus of most of the regulations adopted by the states has been on prohibiting false and deceptive *statements* by attorneys. This emphasis overlooks the fact that an attorney might mislead the public without ever making a false or deceptive statement. After briefly examining

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1. *See* H. Drinker, LEGAL ETHICS 210-211 (1953). By 1984, the increase in lawyer advertising had begun to level off. Reskin, *Lawpoll: Lawyer Advertising Levels Off: P.R. Use Growing*, 70 A.B.A. J. 48 (1984). Even so, by 1987 almost one third of all lawyers indicated they had advertised their services at some point. Reidinger, *Lawpoll*, 73 A.B.A. J. 25 (1987).

2. *See* Note, *Advertising Legal Services: The Case for Quality and Self-Laudatory Claims*, 37 U. FLA. L. REV. 969-70 n.1 (1985). CANON 27 prohibited the use of advertising.

It is ironic that the American Bar Association chose to add restraints on the ability of attorneys to compete with one another at the very same time that the federal government passed the Sherman and Clayton Antitrust Acts, acts designed to prohibit restraints on competition. Sherman Act, 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1982), and the Clayton Act, 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1982). To the Supreme Court's credit, it later rejected the argument that restraints on advertising were constitutional because lawyers are above trade. Bates v. State Bar of Arizona, 433 U.S. 350, 371-72 (1977).

3. 433 U.S. 350 (1977). In this seminal case the United States Supreme Court recognized the right of the public to receive advertising by attorneys. *See generally* Whitman, *Advertising by Professionals*, 16 AM. BUS. L.J. 39 (1978).

4. Lori Andrews, a research attorney at the American Bar Foundation, observed that many of the state rules adopted after the *Bates* case were so restrictive that the very advertisement in *Bates* would not have been permissible in most states. Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RES. J. 967, 970.

One must conclude from this that the bar in general opposed legal advertising and wanted to discourage attorneys from using it if at all possible.

the development of the law on attorney advertising, this article explores what can be done about information that is true on its face, but nonetheless misleading.

II. THE COMMERCIAL SPEECH DOCTRINE

Until quite recently, lawyers believed that purely commercial speech was not protected by the first amendment and therefore a state could restrict commercial advertising in any manner desired. In 1942, the Supreme Court in *Valentine v. Chrestensen* enunciated the commercial speech doctrine, holding that commercial speech was not protected by the first amendment.[5] Although some commentators have expressed the opinion that commercial speech should not be protected,[6] other writers have applauded the Court's extension of the first amendment to matters other than strictly political speech.[7]

Over time, the Court modified the commercial speech doctrine in a series of cases which broadened constitutional protection for com-

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5. 316 U.S. 52 (1942). In *Valentine* the Court reviewed an ordinance that prohibited the distribution of handbills that promoted a submarine tour. While the streets are a proper place for the communication of information, the Court reasoned that when a person uses the streets to communicate a commercial message, such a communication is not protected by the first amendment. *Id.* at 54.

6. For example, Thomas Jackson and John Jeffries argued against protecting commercial speech:

> In the first place, commercial speech has no apparent connection with the idea of individual self-fulfillment. Whatever else it may mean, the concept of a first amendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares. . . . Governmental regulation of commercial advertising also does no violence to the protection of political speech . . . . For this kind of communication, the structure of representative democracy yields no inference of inviolability because commercial speech concerns economic rather than political decisionmaking.

Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14-15 (1979). *See also* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 459-60 (1980).

7. Burt Neuborne made the following argument in favor of protecting commercial speech:

> However, even within the confines of a strict utilitarian theory of the first amendment, a degree of enhanced institutional protection for commercial speech is appropriate on two levels. First, the respect for rational political decision-making which underlies the Meiklejohn approach to political speech seems equally applicable to speech which is necessary to rationalize economic choices. . . . Second, even if one rejects equating political with economic choice as a justification for providing enhanced institutional protection for information likely to be of assistance to the chooser, knowledge about the economic marketplace is critical to an informed opinion on the concededly political issue of whether and to what extent the economic marketplace should be regulated.

Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437, 448 (1980). Laurence Tribe also argues that commercial speech should be protected. "[T]he fact that the advertiser seeks a profit certainly can not justify stripping the communication of all first amendment protection." L. Tribe, AMERICAN CONSTITUTIONAL LAW 891 (1988).

mercial speech that involved advertising.[8] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* the Court held that the first amendment extended its protection to purely commercial advertisements.[9] Thus, in *Virginia State Board of Pharmacy* the Court abandoned the commercial speech doctrine and set the stage for a direct challenge to the restraints imposed by the states on advertising by lawyers.

III. ATTORNEY ADVERTISING CASES

After *Virginia State Board of Pharmacy*, it was clear that the Court intended to protect commercial as well as political speech under the first amendment. The very next year the Court considered an excellent test case involving lawyer advertising, *Bates v. State Bar of Arizona.*[10]

By 1975 the Court had given some inkling of its position with respect to the regulation of legal activities in *Goldfarb v. Virginia State Bar.*[11] In that case the Court considered the use of minimum fee schedules by the states. The plaintiffs in *Goldfarb* were aggrieved because no attorney in Fairfax County was able to perform a title examination for them for a price lower than the price specified in the Fairfax County minimum fee schedule. In spite of the Court's finding that the state and county bar associations had a compelling interest in regulating the practice of law, the Court nonetheless held that such anticompetitive activity was within the reach of the Sherman

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8. *See* New York Times v. Sullivan, 376 U.S. 254 (1964), in which the Court examined an advertisement soliciting funds on behalf of a civil rights movement. The Court characterized the advertisement as not commercial because it involved freedom of expression on a public issue. *Id.* at 271. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), dealt with a newspaper that was charged with violating an ordinance prohibiting publication of sex-designated classified advertisements. The Court upheld the right of a governmental agency to stop newspapers from allowing advertisers to place help wanted advertisements in sex-designated columns. The Court characterized the speech in this case as not commercial even though it related to an advertisement. *Id.* at 384. In Bigelow v. Virginia, 421 U.S. 809 (1975), the Court overturned the criminal conviction of the editor of a Virginia newspaper who had published an advertisement dealing with abortions. The Court noted that the advertisement in this case dealt with a matter of public interest, and thus the publication of this information could not be prohibited by the state of Virginia. *Id.* at 822.

9. 425 U.S. 748 (1976). In that case, consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy. These consumers objected to the rule adopted by the State Board that prohibited licensed pharmacists from advertising the price of prescription drugs. The Supreme Court ruled that even though such advertising is clearly commercial, because it is of general public interest, it is entitled to first amendment protection. *Id.* at 764-65.

10. 433 U.S. 350 (1977).

11. 421 U.S. 773 (1975). The facts of *Goldfarb* are stated in the opinion at pp. 775-80. *See generally* Corley and Arnould, *Professional Fee Schedules and the Sherman Act*, 13 AM. BUS. L.J. 21 (1975).

Act.[12] This case clearly indicated a new-found willingness by the Supreme Court to set aside regulations that the state bars had adopted.

The opportunity to further expand its control over the state bars presented itself in the *Bates* case.[13] In that seminal case, the Court considered whether two Arizona attorneys, John Bates and Van O'Steen, could be prohibited by the state of Arizona from advertising their clinic in a newspaper. Bates and O'Steen placed an advertisement that listed the price for the following services: divorces or legal separations, uncontested divorces, adoptions, bankruptcies, and name changes. This information was very useful to people contemplating any of these suits. If nothing else, people could use the prices quoted as a basis for comparison with the fees quoted by their own attorneys. Perhaps many attorneys opposed such advertising for this very reason.

Arizona urged six separate grounds for sustaining the regulation.[14] The Court was not persuaded by any of Arizona's arguments and

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12. *Id.* at 790-91. In examining this opinion, attorneys may have concluded that states still had a right to regulate attorneys. While it is true the state bars retained the right to regulate lawyers, perhaps this view reflected the generalized wish that the Court would not strip the state bars of their right to prohibit legal advertising.

In the *Goldfarb* case the Court sent another shock to the bar when it ruled that simply because the law is a learned profession it is not exempt from the antitrust laws. The Court observed:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

421 U.S. at 788-89 n.17.

13. 433 U.S. 350 (1977). The facts of *Bates* are stated in the opinion at pp. 353-58. At a later date, the Chief Justice of the Missouri Supreme Court remarked with some bitterness that the United States Supreme Court had no business telling the state how to regulate its judicial system in the first place. K.C. TIMES, JANUARY 26, 1982, at 3A, col. 1. In an article dealing with his thoughts about the United States Supreme Court, Chief Justice Donnelly commented:

> It is a fact that at some point in time after World War II the Supreme Court of the United States ceased to function only as a court. It molded itself into an organ for control of social policy and made that policy effectual by utilization of the fourteenth amendment to amend the Constitution according to the predilections of its majority.

Donnelly, *The State of the Judiciary in Missouri* - 1982, J. Mo. B. March 1982, at 81, 84. In response to this, Senator Eagleton of Missouri rejected suggestions made by Chief Justice Donnelly to reduce the power of the United States Supreme Court. Miller, *Supreme Court is Defended,* K.C. STAR, MARCH 12, 1982, at 11A, col. 1.

14. Arizona argued that the regulation should be upheld based on: (1) the adverse effect on professionalism, (2) the inherently misleading nature of attorney advertising, (3) the adverse effect on the administration of justice, (4) the undesirable economic effects of advertising, (5) the adverse effect of advertising on the quality of service, and (6) the difficulties of enforcement. 433 U.S. at 368-79.

ruled that Bates and O'Steen could not be disciplined for placing this advertisement in the newspaper. It did, however, limit its decision to the issue of whether a state could prevent the publication in a newspaper of a truthful advertisement concerning the availability and terms of routine legal services.[15] The Court indicated that states could impose reasonable time, place, and manner restrictions, outlaw advertising dealing with illegal transactions, and could prohibit false, deceptive, or misleading advertising.[16]

Two subsequent cases, *In re Primus*[17] and *Ohralik v. Ohio State Bar Association*,[18] resolved the issue of solicitation which had been left unresolved in *Bates*. In *In re Primus*, a lawyer associated with the American Civil Liberties Union sent a letter to Williams, a woman who had been sterilized. The letter informed Williams that the ACLU would represent her for free. A complaint was filed against the lawyer with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Carolina. The United States Supreme Court characterized the activities of the ACLU as forms of political association and expression protected by the first amendment.[19] Primus had not engaged in solicitation of a client as her speech was exercised to advance the political beliefs of the ACLU.[20]

Ohralik v. Ohio State Bar Association[21] dealt with an experienced attorney who personally solicited the business of two young automobile accident victims, offering to represent them in a suit to recover insurance money. He visited Carol McClintock in a hospital room where she lay in traction, and he sought out Wanda Lou

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15. *Id.* at 384. The Court expressly stated that it was not considering the issues of advertising claims related to the *quality* of legal services or the problems associated with the in-person solicitation of clients. *Id.* at 366. Even so, the Court indicated that it would be unwise to make statements relating to quality when it observed that "[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation." *Id.* at 383-84.

16. *Id.* at 383-84.

17. 436 U.S. 412 (1978). The facts of *In re Primus* are stated in the opinion at pp. 414-21.

18. 436 U.S. 447 (1978). The facts of *Ohralik* are stated in the opinion at pp. 449-54.

19. 436 U.S. at 431.

20. The Court observed:

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

436 U.S. at 422. This case can thus be understood without reference to the commercial speech doctrine. The political activity engaged in by the lawyer in this case was subject to the full protection of the first amendment, not the partial protection of the commercial speech doctrine.

21. 436 U.S. 447 (1978).

Holbert on the day she came home from the hospital. After they hired him, these women wanted to discharge Ohralik, but he refused to withdraw. Following a disciplinary hearing by the Board of Commissioners on Grievance and Discipline of the Supreme Court of Ohio, Ohralik was found in violation of in-person solicitation rules. The United States Supreme Court distinguished in-person solicitation from the advertising that had been approved in *Bates*[22] and ruled that Ohralik could be disciplined for engaging in solicitation of accident victims. *Ohralik* illustrates the Court's belief that commercial speech does not deserve full first amendment protection. Some regulation of speech, such as Ohio's prohibition on solicitation, is constitutionally permissible.[23]

Friedman v. Rogers[24] is a noteworthy case to attorneys seeking to promote their practices through the use of trade names. In *Friedman* the plaintiff challenged a provision of the Texas Optometry Act that prohibited the practice of optometry under a trade name. The Supreme Court characterized the use of a trade name as a form

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22. The Court distinguished advertising from solicitation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

436 U.S. at 457.

There is a considerable controversy between commentators as to whether solicitation should be permitted or not. For example, Charles Pulaski, Jr. argued that an attorney must solicit employment to survive. Thus, any restrictions on solicitation merely limit, but do not prohibit entirely, situations in which an attorney may engage in solicitation. Pulaski, *In-Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided?*, 1979 ARIZ. ST. L.J. 23, 55 (1979). *See generally* McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985). As McChesney observes, restrictions on promotional activities have competitive implications. "A ban on a type of promotion deprives professionals of one means of competing in the marketplace - vying to supply better information about themselves and their services." *Id.* at 83.

23. Interestingly, while the Court in *Bates* rejected the argument that advertising would have an adverse effect on the professionalism of lawyers, 433 U.S. at 368, the Court in *Ohralik* seems to regard the protection of professionalism as a legitimate basis for upholding this regulation. 436 U.S. at 461.

This argument relates to the issue of whether states should be able to prohibit advertising that is undignified. Adrian Foley, former chair of the American Bar Association Commission on Advertising feels that attorney advertising should be dignified: "Part of the reluctance of some lawyers to advertise is a traditional fear that advertising is undignified. Ensuring dignity is very important if advertising is to become more widely accepted." *Is Dignity Important in Legal Advertising: Peer Pressure*, 73 A.B.A. J. 53 (1987). The Supreme Court of Iowa apparently agrees. It considered its rule DR 2-101(B) which provides in part: "Any such information shall be presented in a dignified manner." The court upheld this rule, and consequently its dignity requirement, in Committee on Professional Ethics v. Humphrey, 377 N.W.2d 643 (Iowa 1985), *reh'g denied*, 476 U.S. 1165 (1985).

24. 440 U.S. 1 (1979). The facts of *Friedman* are stated in the opinion at pp. 3-7.

of commercial speech[25] and distinguished this case from *Bates* and *Virginia Board of Pharmacy*.[26] The Court concluded that the law prohibiting the use of a trade name was constitutional because the state had a substantial interest in regulating this form of commercial speech and because advertising alternatives were available.[27] In 1980 the Supreme Court again ruled that commercial speech is entitled to less protection than political speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[28] the Court announced a four-part test to guide courts in analyzing commercial speech cases:

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25. *Id.* at 11.

26. The Court observed:

> In those cases, the State had proscribed advertising by pharmacists and lawyers that contained statements about the products or services offered and their prices. These statements were self-contained and self-explanatory. Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public. [Footnote omitted]

Id. at 12-13. The Court also observed that an optometrist was still free to advertise information about "the type of service he offers, the prices he charges, and whether he practices as a partner, associate, or employee with other optometrists," even though he could not use a trade name. *Id.* at 16.

27. *Id.* at 15-16. This decision was widely criticized by commentators. The author of a note in the Texas Law Review accused the Court of abandoning the reasoning of its earlier cases. "On balance, the *Friedman* opinion is confusing: the Court announced that it would rely on the *Virginia Pharmacy* and *Bates* decisions, but sub silentio rejected the primary rule from all of the previous commercial speech cases—that consumer deception should be remedied by requiring more speech, not less." Note, *Reuniting Commercial Speech and Due Process Analysis: The Standard for Deceptiveness in Friedman v. Rogers*, 57 TEX. L. REV. 1456, 1473 (1979); Comment, *Constitutional Law-First Amendment-Narrowing the Scope of First Amendment Protection for Commercial Expression—Friedman v. Rogers, 99 S.Ct. 887 (1979)*, 13 SUFFOLK U.L. REV. 1503, 1522-23 (1979)(suggesting that optometrists could have been required to reveal more information); Note, *Constitutional Law-Commercial Speech-Trade Names are not a Protected Form of Commercial Speech*, 11 TEX. TECH L. REV. 717, 726-27 (1979)(accusing the Court of abandoning the standard of review it had adopted in the past for reviewing commercial speech cases); Note, *Professional Trade Names: Unprotected Commercial Speech*, 59 NEB. L. REV. 482, 504-05 (1980)(discussing the impact that *Friedman* might have on the use of trade names by lawyers); *see also Sign of the Times - Law Logos*, 73 A.B.A. J. 44 (August 1987) for a brief discussion of the increasing use of law logos by attorneys.

28. 447 U.S. 557 (1980). This case dealt with a regulation promulgated by the Public Service Commission of New York that ordered all electric utilities in New York to stop engaging in advertising that promoted the use of electricity in order to promote the conservation of energy. The Court found no unlawful or deceptive speech in this case. It ruled that the state's interest in preserving the program of energy conservation was substantial. The Court overturned this rule because this complete suppression of speech was more extensive than was necessary to further the state's interest in energy conservation and the state did not establish that a more limited restriction on speech would not adequately serve the state's interests. *Id.* at 570. The Court therefore found the order of the Commission to be unconstitutional. *Id.* at 570.

> In commercial speech cases, then, a four-part analysis has developed. 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.[29]

This test has been employed in subsequent attorney advertising cases.

An attorney advertising case in which *Central Hudson* was followed is *In re R.M.J.*[30] R.M.J. was a Missouri attorney who advertised areas of practice other than those specified in Rule 4 of the Supreme Court of Missouri, a laundry list type of rule that allowed only certain areas of law to be advertised and that required the precise wording of the rule be adhered to by the advertiser.[31] R.M.J. placed

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29. *Id.* at 566. It has been argued that the Court erred in adopting this standard for commercial speech and in fact the Court should have accorded commercial speech full constitutional protection. First of all, commercial speech serves the same function in the economic marketplace that political speech serves in the marketplace of ideas. *The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 165 (1980). Secondly, full protection of commercial speech will help the democratic process function better:

> An even more important purpose of the first amendment is to ensure the proper functioning of the representative process by precluding the state from regulating the content of expression. Content-based regulation poses the danger that government officials will suppress views that undermine their status in office. Since commercial messages necessarily contain social and political implications, they possess the same potential as other forms of speech to challenge those in political power and constitute a portion of the public dialogue on policy issues. In fact, the ban on promotional advertising contested in *Central Hudson* was based in part on the PSC's finding that the message of such advertisements was "misleading" in that it conflicted with the government's position that energy was in short supply.

Id. at 165-66.

Another commentator criticized this opinion on the grounds that the Court assumed that advertising conveys a lot of information when in fact it does not.

> *Central Hudson's* protective attitude toward advertising's informational function in general seems somewhat overzealous. Advertisements which, in the Court's phrases, are neither "more likely to deceive the public than inform it," nor are "related to illegal activity," do not always convey any significant information. . . . In practice, comparatively little commercial promotion performs a purely informational function, and it has been pointed out that "the majority of advertising emphasizes persuasional and noninformational techniques, generally to the exclusion of relevant facts about the goods or services."

Note, *Recent Developments, Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 11 ENVTL. L. 767, 774 (1981).

30. 455 U.S. 191 (1982). *See generally* Whitman and Stoltenberg, *The Present Constitutional Status of Lawyer Advertising - Theoretical and Practical Implications of In re R.M.J.,* 57 ST. JOHN'S L. REV. 445 (1983) [hereinafter cited as Whitman, *Constitutional Status*] and Whitman and Stoltenberg, *Direct Mail Advertising by Lawyers,* 45 U. PITT. L. REV. 381 (1984) [hereinafter cited as Whitman, *Direct Mail*].

31. 455 U.S. at 195. For example, R.M.J. used the term "personal injury" rather than the approved phrase "tort law." *Id.* at 191.

several advertisements in local newspapers and in the yellow pages of the telephone directory that did not conform to the precise requirements of the disciplinary rules. He also mailed professional announcement cards to a larger group of persons than was allowed by DR 2-101(A)(2).[32]

The United States Supreme Court reviewed the rules of the Missouri Supreme Court in light of its earlier decisions. The Court essentially applied the *Central Hudson* test to attorney advertising:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when the experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive . . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.[33]

Such language effectively answered the fears of commentators that the Court's decision in *Friedman v. Rogers* presaged a movement away from the least-restrictive-means analysis.[34] But when the Court examined the facts of the case, it found itself unable to apply the principles that allow a state to regulate in the commercial speech area because the state of Missouri failed to show the advertisements were misleading. Nor did Missouri advance any substantial state interest to support its position.[35]

In re R.M.J. also dealt with the issue of the use of direct mail by attorneys. The Court rejected Missouri's prohibition of direct

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32. *Id.* at 198.
33. *Id.* at 203.
34. *See supra* note 27.
35. 455 U.S. at 205. The Court noted:

> Because the listing published by the appellant has not been shown to be misleading, and because the Advisory Committee suggests no substantial interest promoted by the restriction, we conclude that this portion of RULE 4 is an invalid restriction upon speech as applied to appellant's advertisements. Nor has the Advisory Committee identified any substantial interest in a rule that prohibits a lawyer from identifying the jurisdictions in which he is licensed to practice. Such information is not misleading on its face.

Id.

mail,[36] concluding that since there were no findings that R.M.J.'s speech was misleading or even *inherently* misleading, the requirements of the *Central Hudson* test had not been met.[37]

Following *In re R.M.J.* the Supreme Court again dealt with attorney advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[38] In this case the Court considered two advertisements placed by an attorney.[39] The more important advertisement of the two concerned an illustration of a Dalkon Shield intrauterine device and stated that it was not too late to take action against the manufacturer for injuries caused by the intrauterine device.[40] The advertisement also had an illustration of a Dalkon

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36. It appears from the decision that the Court felt that direct mailings may not be prohibited by the states:

> Finally, appellant was charged with mailing cards announcing the opening of his office to persons other than "lawyers, clients, former clients, personal friends and relatives." Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings. There is no indication in the record of a failed effort to proceed along such a less restrictive path.

Id. at 206.

37. 455 U.S. at 207. *R.M.J.* was a strong signal to the states to be less restrictive in regulating attorney advertising. *See* Webster, *Easing Restrictions on Attorney Advertising*, 23 S. TEX. L.J. 453, 465 (1982).

38. 471 U.S. 626 (1985).

39. *Id.* at 631. The initial charge accused him of violating DR 2-101(B) which required that only certain information designated in the rule may appear in the advertising. This rule also required that advertisements be presented in a dignified manner. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1982). This charge was dropped on appeal. It should be noted that the Court in *In re R.M.J.* considered the use of a laundry list approach of what facts may be presented in an advertisement. In that case, the Court considered the reprimand of R.M.J. for deviating from the list of areas of practice in that rule. As there was no evidence R.M.J.'s advertisement was misleading or that Missouri had a substantial interest to be promoted by requiring strict adherence to this rule, the Court found the rule as applied violated R.M.J.'s first amendment rights. 455 U.S. at 206-07. While the Court did not invalidate the laundry list approach outright, it certainly cast doubt upon its validity. *See* Whitman and Stoltenberg, *Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification*, 19 IND. L. REV. 497, 546-51 (1986).

40. 471 U.S. at 631. The advertisement stated in part: "If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer." *Id.* This allegedly violated DR 2-103(A) which prohibits an attorney from recommending himself to a non-lawyer who has not sought his advice regarding employment of a lawyer. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1982). It also allegedly violated DR 2-104(A) which prohibited an attorney from accepting employment after he has given unsolicited advice to a layman to take legal action. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1982). The advertisement also indicated the firm would take cases on a contingent fee basis and stated, "If there is no recovery, no legal fees are owed by our clients." 471 U.S. at 631. This allegedly violated DR 2-101(B)(15) which required that certain disclosures must be revealed in any advertisement concerning contingent fees. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(15) (1982). The advertisement was to indicate that clients would be liable for court costs and expenses. OHIO CODE OF PROFESSIONAL

Shield, which was not permitted by Ohio's rules.[41] The second advertisement dealt with drunk driving. It stated that Zauderer's clients would receive a full refund of their legal fee if convicted.[42]

The Court indicated that its approach to commercial speech was well settled.[43] On the issue of whether the Dalkon Shield advertisement could properly be used to find Zauderer in violation of the rules prohibiting self-recommendation and prohibiting the acceptance of employment resulting from unsolicited legal advice, the Court ruled for Zauderer.[44] In light of the fact that the advertisements were

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RESPONSIBILITY DR 2-101(A) (1982). Interestingly, the advertisement generated over 200 inquiries and Zauderer initiated lawsuits on behalf of 106 women as a result of placing the advertisement. 471 U.S. at 631. This illustrates the fact that violating the ethical codes can be economically beneficial:

> In fact, there is a certain advantage to engaging in activities other persons regard as unethical or even illegal. In this case, the advantage is that other people are not going to advertise. One might ask whether placing advertisements such as the one discussed in this case really makes economic sense. As the Supreme Court gradually lowers the inhibitions of other lawyers, more attorneys will advertise. The likely effect of this will be that advertising as a whole will be far less effective - or perhaps not effective at all. It is the *failure of others to advertise*, in the authors' opinion, that results in such advertising being so successful.

Whitman and Stoltenberg, *Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification*, 19 IND. L. REV. 497 n.204 (1986).

41. 471 U.S. at 630. OHIO'S CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) read in part as follows:

> The information disclosed by a lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1982). It is interesting to note that even the *Bates* case involved an illustration of the scales of justice. 433 U.S. at 385. Obviously, one reason that DR 2-101(B) includes the reference to the scales of justice is that the Supreme Court approved of such an illustration, by implication, in *Bates*.

However, illustrations certainly can grab the attention of readers. Illustrations help the advertiser get his message to the readers. When Zauderer used an advertisement without the Dalkon Shield illustration, he got no response to his advertising. *See* BRIEF FOR APPELLANT at 14-15, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). This suggests how important illustrations can be to the success of an advertising campaign.

42. 471 U.S. at 630. This violated the Ohio Code of Professional Responsibility. In effect, it was an improper offer to represent criminal defendants on a contingent fee basis. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1982).

43. The Court stated:

> The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. 471 U.S. at 638 (citing Friedman v. Rogers, 440 U.S. 1 (1979); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)).

44. 471 U.S. at 647. For a discussion of the issue of self-laudatory claims in advertising, see generally Note, *Advertising Legal Services: The Case for Quality and Self-Laudatory Claims*, 37 U. FLA. L. REV. 969 (1985).

neither false nor deceptive, the burden was on Ohio to establish that prohibiting such statements in legal advertising directly advanced a substantial state interest.[45] It found that the state had failed to establish that such a rule was necessary to achieve a substantial governmental interest.[46]

The Court rejected Ohio's blanket ban on illustrations. Applying the *Central Hudson* test, the Court found that Ohio had failed to present a substantial state interest which justified its restriction.[47] Since advertisements can be examined on a case-by-case basis, the Court saw no reason for a complete prohibition of illustrations.[48]

As to the failure of Zauderer to include in his advertising information warning potential clients that they would remain responsible for the costs of a suit even if they lost, the Court declined to follow the *Central Hudson* test in its analysis. The Court distinguished this issue because Ohio was not preventing attorneys from speaking.[49] Because the disclosure furthered the state's interest, it was permissible.[50] Since an advertisement without the required disclosure could easily mislead the public, it is reasonable for the state to require that information concerning the client's liability for the costs of the suit be disclosed in the advertising.[51] The Court affirmed the Ohio Supreme Court's decision to discipline Zauderer for placing the drunk driving advertisement.[52]

By dismissing the allegation that Zauderer accepted employment after he recommended himself for employment, the Court implicitly recognized the fact that advertisements are placed in order to generate business.[53] This raises the question of whether a person may promote

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45. 471 U.S. at 644.

46. *Id.* at 646-47. Perhaps one of the reasons that Ohio disapproved of this advertising was because it was geared to specific people with particular legal problems. Thomas B. Metzloff and Jeffrey M. Smith assert that attorneys must have the right to use creative marketing methods in order for their advertising to be effective. Metzloff and Smith, *The Future of Attorney Advertising and the Interaction Between Marketing and Liability*, 37 MERCER L. REV. 599, 605 (1986). Clearly, attorneys who advertise should address specific advertisements to specific groups of persons since this can be a very effective method of advertising. *See* Whitman and Stoltenberg, *Direct Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381, 416-19 (1984).

47. 471 U.S. at 649.

48. *Id.* The Court observed that consumers rarely base their decisions as to whether to employ an attorney on visual illustrations in advertisements. *Id.* One might question whether the Court is mistaken in this conclusion. If illustrations are so unimportant, why did Zauderer's advertisement that lacked an illustration produce no response? Quite possibly, illustrations are more important than the Court believes.

49. *Id.* at 651.

50. *Id.*

51. *Id.*

52. *Id.* at 654-55.

53. To quote Frederick C. Moss, "The Supreme Court has finally acknowledged the obvious: a major purpose of all advertising is to attract customers. Therefore, attention getting devices are legitimate adjuncts of protected commercial speech." Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 637 (1986). Of course, it is possible to generate business without engaging in theatrics. Dick and Gagen, *Effective Lawyer Advertising*, 33 PRAC. LAW. 65, 66 (1987).

his or her services through the use of some means other than an advertisement in a newspaper. Specifically, a question left unanswered was whether an attorney may convey the same information through direct mail advertising that can be conveyed through newspaper advertising. This issue is dealt with in the next section of this article.

IV. DIRECT MAIL ADVERTISING BY ATTORNEYS

The decision in *R.M.J.* dealt in part with the issue of the use of direct mail because R.M.J. mailed professional announcement cards announcing the opening of his office to persons that he did not personally know.[54] The Court concluded that there was no evidence any of R.M.J.'s mailings were misleading.[55] Furthermore, the Court stated an absolute prohibition is unnecessary in light of the fact the state could require a copy of all mailings be filed with the state.[56] If a state chooses to regulate such activities, it must do so in the least restrictive manner.[57]

Prior to and even after the *R.M.J.* case a number of states considered the issue of direct mail advertising by attorneys. Some of the states have taken the position that direct mail advertising by lawyers is permissible while others view it as impermissible conduct. To give the reader some insight into the reasoning of the various courts across the United States on this issue, a brief consideration of these cases follows.

A. State Court Cases Permitting Direct Mail Advertising By Attorneys

The state courts that have permitted direct mail advertising tend to have done so because the courts view the states' interest in prohibiting such communications as rather insignificant in relation

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54. MO. ANN. RULES OF COURT, RULE 4, DR 4.27 (Vernon 1981) permitted lawyers to send announcement cards only to "lawyers, clients, former clients, personal friends and relatives." These cards could state "new or changed associates or addresses, change of firm name, or similar matters." *Id.*

55. 455 U.S. at 206-07.

56. *Id.* at 206.

57. *Id.* It would seem rather clear after *R.M.J.* that attorneys could not be restricted from engaging in direct mail solicitation of clients, although the states still retain the power to review any mailings to make certain nothing improper is contained in such literature. *See* Whitman, *Direct Mail*, *supra* note 30, where the author notes:

> Lawyers must choose the language of any direct mailing carefully in order to maintain accuracy and avoid any possible claim of false or misleading content. In addition, even though the distinction between advertising and solicitation has been characterized as artificial and meaningless, many states' rules maintain it; thus, lawyers should avoid language of direct solicitation. Finally, lawyers must appreciate the risks of creating conflicts of interest by directing mailings to third parties whose assistance is sought in generating clients.

Id. at 420.

to the first amendment interests of advertising attorneys. Furthermore, many courts were influenced by the fact that a person receiving such information could simply ignore the mailing. For this reason, a blanket ban on direct mail has been treated by many courts as more excessive than is necessary to protect the interests of the state.

In *Kentucky Bar Association v. Stuart*,[58] attorneys Stuart and Thompson sent letters to two real estate agencies.[59] These letters stated their fees, qualifications, and the time they would require to perform certain services.[60] The Board of Governors of the bar association regarded sending such letters as impermissible solicitation.[61] The Kentucky Supreme Court, in a *per curiam* decision, decided that it could not equate this particular mailing with in-person solicitation, nor did it find any of the dangers associated with the personal solicitation of clients to be present in a case dealing with direct mail advertising by attorneys.[62] The information in the letters could be verified, and unless the bar association could point to a valid reason for prohibiting such mailings, such speech was therefore treated as being constitutionally protected.[63]

The court rejected the arguments that such mailings create a greater potential for undue influence than newspaper advertising and that enforcing a rule permitting direct mail advertising would be very difficult.[64] On these grounds the court dismissed the complaint.[65]

In a 1980 case from New York, *Koffler v. Joint Bar Association*,[66] the New York Court of Appeals evaluated the actions of an attorney who sent out 7,500 letters to owners of real estate in which he solicited their business in the sale of their property. At the same time Koffler sent letters to real estate brokers in which he asked the real estate brokers to send him their real estate clients. Koffler testified that he did about 200 closings at the price stated in the letters. The court rejected all arguments made by the bar association and concluded that such mailings could not be prohibited.[67]

In *In re Appert*[68] the Minnesota Supreme Court examined the brochures mailed out by Appert and his partner which were distributed with circulars. This material discussed the attorneys' familiarity with Dalkon Shield litigation. In light of the significant

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58. 568 S.W.2d 933 (Ky. 1978).
59. *Id.*
60. *Id.*
61. *Id.* at 933-34.
62. *Id.* at 934.
63. *Id.*
64. *Id.*
65. *Id.*
66. 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980). The facts of *Koffler* are stated at 51 N.Y.2d at 143-44.
67. *Id.* at 147, 412 N.E.2d at 934.
68. 315 N.W.2d 204 (Minn. 1981). The facts of *Appert* are stated in the opinion at pp. 205-07.

interest of the public in receiving such information, the court concluded that the state's interest in prohibiting such mailings was not sufficiently compelling to justify a rule prohibiting the distribution of this information.[69]

In *Grievance Committee For the Hartford-New Britain Judicial District v. Trantolo*,[70] the court considered, among other charges, the allegation that Joseph and Vincent Trantolo had done something improper when they mailed announcements to twenty-five Hartford realtors, some of whom they had not previously had a professional or personal relationship with in the past.[71] The mailing included a brochure that explained the nature of their practice.[72]

The Supreme Court of Connecticut treated the announcements and brochures as commercial speech that were entitled to constitutional protection.[73] The court applied the *Central Hudson* test to arrive at its conclusion that because Connecticut's rule was a blanket prohibition of mailed solicitations it was an unnecessary restriction on free speech. Connecticut's rule was struck down because it was not the least restrictive possible rule that could be adopted to deal with this situation.[74] Because the mailings were found to be not misleading, the court reasoned that they were entitled to the protection accorded to commercial speech.[75] The court ruled that the disciplinary rule failed the fourth part of the *Central Hudson* test in that this rule, a blanket prohibition on the use of direct mail, was more extensive than necessary to serve the interests of the state. It therefore concluded that a blanket prohibition of mailed solicitations violates the first amendment.[76]

In *In the Matter of Amendment to S.J.C. Rule 3:07*,[77] the Supreme Judicial Court of Massachusetts considered its rule in light of the *Zauderer* decision. The Massachussetts rule prohibited direct solicitation whether in person or by phone. Placing direct mail in the category of indirect solicitation, the court reasoned that the recipient of a piece of mail can always simply discard it. The court merely required that such mailings be labeled as advertising and the attorney keep a copy of the letters for two years.[78]

The position of these courts seems to be that truthful direct mail advertising is protected by the first amendment. Under the *Central Hudson* test, states are not free to prohibit such mailings outright

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69. *Id.* at 212.
70. 192 Conn. 27, 470 A.2d 235 (1984).
71. *Id.* at 28, 470 A.2d at 236.
72. *Id.*
73. *Id.* at 30, 470 A.2d at 238.
74. *Id.* at 31, 470 A.2d at 239.
75. *Id.* at 30, 470 A.2d at 238.
76. *Id.* at 31, 470 A.2d at 239.
77. 398 Mass. 73, 495 N.E.2d 282 (1986).
78. *Id.* at 81, 495 N.E.2d at 290-91.

because such a rule would be more restrictive than necessary to protect the interests of the state. These courts do not view direct mail advertising as analogous to in-person solicitation, unlike many of the courts that have ruled against the use of direct mail by attorneys.

B. State Court Cases Not Permitting Direct Mail Advertising By Attorneys

A number of states that have prohibited the use of direct mail have done so because their courts equated the use of direct mail with in-person solicitation. To these courts, the dangers posed by direct mail are just as great as those posed by in-person solicitation. Some other states were concerned about possible conflicts of interest when mailings that requested referrals were sent to third parties. Finally, some states viewed direct mail as permissible, but not if the literature contained false and deceptive statements.

In a Louisiana case, *Allison v. Louisiana State Bar Association,*[79] the court considered the propriety of the actions of an attorney who sent letters to people concerning prepaid legal plans for employees. The court equated the actions of the attorney with those of a lawyer who solicits business in person. It therefore concluded that such activities could be prohibited as direct solicitation for pecuniary gain.[80]

In the same year Pennsylvania examined the activities of a group of lawyers who, after leaving one firm, sent letters to the clients of their former employer asking the clients to employ them.[81] The court ruled that the actions of the attorneys violated Pennsylvania's rules prohibiting self-recommendation and amounted to an interference with contractual relations between the firm and its clients.[82]

Arkansas considered the actions of an attorney who used a discount coupon mailing to advertise his services. The Arkansas court held the attorney could be disciplined for his actions.[83]

In 1981 the New York courts again considered the use of direct mail by attorneys in the case *Greene v. Grievance Committee for the Ninth Judicial District.*[84] In August of 1978 Alan Greene sent

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79. 362 So. 2d 489 (La. 1978). The facts of *Allison* are stated in the opinion at pp. 489-90.

80. *Id.* at 496.

81. Adler v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied*, 442 U.S. 907 (1979).

82. Id. at 429-36, 393 A.2d at 1181-86.

83. Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981). This case involved a number of other improper actions by the attorney which the Arkansas court viewed as potentially deceptive, thus it has limited application to the issue of the propriety of using direct mail.

84. 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981). The facts of *Greene* are stated at 54 N.Y.2d at 121-22.

approximately one thousand direct mail fliers to real estate brokers in Westchester County and Putnam County. The letters indicated the price Greene charged for full legal representation in property transactions and the letters suggested that the brokers refer clients to Greene. Greene never got any business from these letters.[85]

The New York Court of Appeals applied the four-part *Central Hudson* test in resolving this case. The court did not examine whether these letters were deceptive or misleading because this issue was not alleged.[86] However, the New York Court of Appeals found a valid and compelling state interest in preventing conflicts of interest between an attorney and his client.[87] The court thought that such activities should be prohibited because the attorney could not separate the interests of the client and the brokers, whose interests would necessarily clash at some point.[88] In light of these considerations, the New York Court of Appeals upheld the regulation as a proper exercise of power.[89]

Another case in which the court found that an attorney used direct mail improperly arose out of Ohio, *Dayton Bar Association v. Herzog*.[90] Attorney Harold J.T. Herzog mailed between 500 and 1,000 letters to defendants in Dayton Municipal Court cases. The letters suggested that the defendants could escape the collections process due to a new federal law. The letters suggested the recipients call his office. The court regarded his actions as improper because he directly solicited or attempted to solicit professional employment.[91]

In a case challenging the revisions of Utah's advertising rules, *In re Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Advertising*,[92] the Utah Supreme Court held that the state has a substantial interest in maintaining high standards for attorneys. However, because it appeared that the new rule would even prohibit the mailing of announcement cards, a matter which was permitted by the Supreme Court in *R.M.J.*, the court ordered the Utah Board of Bar Commissions to resubmit revised rules on direct mail advertising.[93]

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85. *Id.*

86. *Id.* at 122, 429 N.E.2d at 394-95, 444 N.Y.S.2d at 887.

87. *Id.* at 123, 429 N.E.2d at 395, 444 N.Y.S.2d at 888.

88. *Id.* at 124, 429 N.E.2d at 396, 444 N.Y.S.2d at 889.

89. *Id.* at 128-129, 429 N.E.2d at 395, 444 N.Y.S.2d at 888.

90. 70 Ohio St. 2d 261, 436 N.E.2d 1037 (1982). The facts of *Herzog* are stated at 70 Ohio St. 2d 261-62.

91. *Id.* at 262, 436 N.E.2d at 1038. Herzog was disbarred because he had been suspended before and reinstated in 1975 and had subsequently engaged in this and other improper activities. The court regarded the letters sent by Herzog, even in light of the decision in R.M.J., as "patent solicitation" which is not constitutionally protected speech. It viewed the letters as creating the possibility of overreaching. The court noted that the Supreme Court in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 468 (1978), permitted state rules that prohibit solicitation. 70 Ohio St. 2d at 262 n.1, 436 N.E.2d at 1038 n.1.

92. 647 P.2d 991 (Utah 1982).

93. *Id.* at 995.

In 1982 the Kansas Supreme Court dealt with a direct mail case in *State v. Moses*.[94] Attorney Earl Moses sent out 150 letters to persons who had listed their homes with realtors. Moses had no previous contact with any of the home-sellers. The letter listed Moses' fee and told the recipients how to cancel their listings so that they could sell their own homes. The letters also listed Moses' experience in real estate sales and clearly identified him as an attorney, listed his office address, and included his telephone number.

The Kansas Supreme Court reasoned in light of the decision in *R.M.J.* that advertising is permissible but that solicitation is not permissible because of the possibility of overreaching and undue influence.[95] Direct solicitation is not a protected form of speech because of the possible abuses that might occur if attorneys were permitted to engage in it.[96] The Kansas Supreme Court concluded that the rule prohibiting direct solicitation was constitutional, that Moses had engaged in direct mail solicitation of a stranger for employment for a particular legal matter, and therefore his censure was upheld.[97]

In another case dealing with letters mailed to realtors, *In re Alessi*,[98] the New York Court of Appeals considered the actions of Donald A. Alessi and John P. Bartolomei. Alessi's and Bartolomei's legal clinic mailed letters to 1,000 Albany New York realtors in an apparent attempt to solicit clients. The letters quoted fees for various legal services related to the closing of real estate transactions.[99] The New York Court of Appeals found that there was a great potential for conflict of interest between the realtors who were solicited and the clients of the realtors who were to be future clients of the attorneys.[100] An attorney who receives referrals from a realtor could not adequately advocate the position of a client against that realtor.[101] The state has "'a substantial governmental interest in preventing conflicts of interest . . . for which there is no adequately protective less restrictive alternative.'"[102] The court therefore upheld the decision of the Appellate Division against the attorneys.[103]

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94. 231 Kan. 243, 642 P.2d 1004 (1982). The facts of *Moses* are stated at 231 Kan. at 244.

95. *Id.* at 245, 642 P.2d at 1006.

96. *Id.* at 246, 642 P.2d at 1007.

97. *Id.*.

98. 60 N.Y.2d 229, 457 N.E.2d 682, 469 N.Y.S.2d 577, *cert. denied*, 465 U.S. 1102 (1984). The facts of *Alessi* are stated at 60 N.Y.2d at 231-32.

99. *Id.* at 231, 457 N.E.2d at 684, 469 N.Y.S.2d at 579.

100. *Id.* at 233, 457 N.E.2d at 686, 469 N.Y.S.2d at 581.

101. *Id.* at 234, 457 N.E.2d at 687, 469 N.Y.S.2d at 582 (Cooke, C.J., dissenting).

102. *Id.* at 232, 457 N.E.2d at 685, 469 N.Y.S.2d at 580 (quoting *Matter of Greene*, 54 N.Y.2d 118, 127, 444 N.Y.S.2d 883, 892, 429 N.E.2d 390, 399 (1981), *cert denied*, 455 U.S. 1035 (1982)).

103. 60 N.Y.2d at 234, 457 N.E.2d at 687, 469 N.Y.S.2d at 582.

In a case arising out of the partial collapse of a building, *In re von Wiegen*,[104] the New York Court of Appeals again dealt with a direct mail case. Eric von Wiegen sent letters to 250 victims and their families of the Hyatt skywalk collapse in Kansas City, Missouri. The letters claimed that a litigation committee had been formed to assist the victims and that von Wiegen had been retained by many of the victims. The Committee consisted only of von Wiegen and his secretary, and no victims had retained him.

The New York Court of Appeals started with the proposition that there is a distinction between personal and mailed solicitation.[105] In the case of the latter, a state may regulate mailings but it may not prohibit them entirely.[106] As this mailing did not relate to an unlawful activity nor was it misleading, the court examined the governmental interests involved in preventing such a mailing. Such mailings, the state alleged, give rise to the possibility of over-commercialization, invasion of privacy, undue influence, stirring up litigation, and the potential for deception.[107] The court concluded that none of these interests was of a sufficient magnitude to override the public's interest in receiving information on the availability of legal services.[108] The last two parts of the *Central Hudson* test ask whether the restrictions directly advance the governmental interest in question and whether there is a less drastic alternative. The New York Court of Appeals found that a copy of the mailing could be filed with the state and therefore a complete ban would be unconstitutional. Thus it dismissed the charge of direct mail solicitation.[109] However, the court did affirm the finding that the mailings in question were deceptive.[110]

A California case dealing with this question is *Leoni v. State Bar of California*.[111] In that case attorneys Slate and Leoni engaged in the mailing of 250,000 letters and pamphlets between November 1978 and July 1980, after the decision in *Bates* was published. The pamphlets were of a general informational nature and were included in the mailing based on the type of proceeding in which the addressee was involved. The firm revised the material over time to make certain nothing in the mailings was misleading.

In 1981 the State Bar brought a disciplinary action against the attorneys as a result of complaints by other attorneys and their clients who had been misled by the mailings. The California Supreme

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104. 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40, *cert denied*, 472 U.S. 1007 (1985). The facts of *von Wiegen* are stated at 63 N.Y.2d at 166-68.

105. *Id.* at 170, 470 N.E.2d 845, 481 N.Y.S.2d 47.

106. *Id.* at 166, 470 N.E.2d 841, 481 N.Y.S.2d 43.

107. *Id.* at 168, 470 N.E.2d 843, 481 N.Y.S.2d 45.

108. *Id.* at 169-70, 470 N.E.2d 844-45, 481 N.Y.S.2d 46-7.

109. *Id.* at 170, 470 N.E.2d 845, 481 N.Y.S.2d 47.

110. *Id.* at 168, 470 N.E.2d 843, 481 N.Y.S.2d 45.

111. 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985). The facts of *Leoni* are stated at 39 Cal. 3d at 614-621.

Court found the mailings to be commercial speech. The court ruled that it had, consistent with United States Supreme Court decisions, the power to regulate misleading advertising.[112] The court then considered whether it could prohibit an advertising campaign that explains the status of the recipients' cases and debtors' legal rights and remedies. The rule in question prohibited misleading messages. The court found these letters to be misleading. Therefore, it held the rule could constitutionally be applied in this case. It did note, however, that the rule could not prohibit mass mailings that are not false or misleading.[113]

These states tended to equate the use of direct mailings with in-person solicitation. They viewed a person using such promotional devices much like a person who visits an accident victim in his hospital bed. The similarity between the two seems strained. A person who is in the physical presence of an attorney is much more likely to be influenced than a person who reads a letter. Furthermore, a great number of persons may throw the letter away the moment they realize it is a mere business solicitation. In light of the very real differences between the two, there is much less justification for a blanket prohibition on direct mailings than for a blanket prohibition on in-person solicitation. This is the position adopted by the United States Supreme Court in its most recent attorney advertising case, *Shapero v. Kentucky Bar Association*.[114]

V. THE PRESENT STATUS OF DIRECT MAIL ADVERTISING: *SHAPERO V. KENTUCKY BAR ASSOCIATION*

After the decision in *Zauderer*, attorney Richard Shapero submitted, pursuant to a Kentucky Supreme Court rule, a proposed form letter to the Kentucky Bar's Advertising Commission. Shapero hoped to send this form letter to potential clients whose homes were being foreclosed. The Commission found that the proposed letter violated Kentucky's rule which prohibited solicitation precipitated by a specific event or occurrence or which related to the addressees as distinct from the general public.[115] The letter was not found to be false, misleading, or deceptive. Shapero then requested an opinion

112. 39 Cal. 3d at 619, 704 P.2d at 193, 217 Cal. Rptr. at 433.

113. 39 Cal. 3d at 621, 704 P.2d at 195, 217 Cal. Rptr. at 435.

114. 108 S.Ct. 1916 (1988). The facts of *Shapero* are stated in the opinion at pp. 1919-20.

115. *Id.*. The rule in question, Supreme Court Rule 3.135(5)(b)(i), provided:

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

Id. at 1919-20 n.2.

from the ethics committee which also disapproved of the letter. Shapero then petitioned for a review of the letter in question by the Kentucky Supreme Court.

The Kentucky Supreme Court found that the rule in question was in conflict with the United States Supreme Court holdings in *In re R.M.J.* and *Zauderer* and ordered it deleted.[116] The decision was based on the requirement that regulations of commercial speech must be based on a substantial governmental interest that is directly served by prohibiting solicitation by direct mail targeted to persons with a specific legal problem.[117]

The court observed that a state has a governmental interest in prohibiting solicitation that is deceptive. It analogized this case to the *Ohralik* case in which the United States Supreme Court upheld the right of the state of Ohio to ban in-person solicitation. The court held that direct targeted mail may be prohibited for the same reasons in-person solicitations may be banned by states.[118]

On the other hand, the court distinguished targeted mailings aimed at a specific person from general mailings not addressed to a specific situation. Such letters struck the members of the court as less dangerous than targeted mailings.[119] It therefore affirmed the decision of the ethics committee. In place of Kentucky's rule on direct mail advertising the court adopted the American Bar Association's Rule 7.3.[120]

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116. Shapero v. Kentucky Bar Ass'n, 726 S.W.2d 299, 300 (1987). The court noted that the United States Supreme Court in *In re* Primus, 436 U.S. 412 (1978), had struck down a ban on targeted direct mail engaged in for *nonpecuniary* reasons.

117. *Id.* at 300.

118. *Id.* at 301. The court reasoned:

> This Court is not unmindful of the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

Id.

119. *Id.* The Kentucky Supreme Court rejected the idea that submission of a blank form letter to the Advertising Commission would protect the public from overreaching, intimidation, or misleading statements. *Id.*

120. *Id.* Rule 7.3 reads as follows:

> 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

The United States Supreme Court viewed the central issue in this case as whether a state may "categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems."[121]

Justice Brennan noted that the *Zauderer* decision makes it clear that because a lawyer has a constitutional right to advertise in a local newspaper, the lawyer consequently has a right to send the same information to the public by way of a general mailing. Justice Brennan rejected the analogy of the Kentucky Supreme Court to the decision in *Ohralik*, arguing instead that people will be overwhelmed by their personal problems whether they receive a general mailing or a targeted mailing. Consequently, the judgment of any such person would be impaired whether he or she received a specific

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matter, but who are so situated that they might in general find such services useful.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

The problem with adopting a rule that permits general mailings, but prohibits mailings targeted to the needs of a specific audience, is that one could reach exactly the same people simply by engaging in a mass mailing. The end product of this would be that the very same message would reach the targeted audience anyway. A rule prohibiting targeted mailings simply makes it more expensive to reach specific persons. This point was recognized by Justice Brennan in his decision in this case on appeal to the United States Supreme Court where he wrote:

> The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter, 726 S.W.2d at 301, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who *actually* "need legal services of the kind provided [and advertised] by the lawyer."

Shapero v. Kentucky Bar Ass'n, 108 S.Ct. 1916, 1921 (1988).

Furthermore, such a rule ignores the fact that many people with specific legal needs might be very interested in receiving such literature. Far from regarding such mailings negatively, it is quite likely that the recipients would be glad to know a particular attorney handles cases dealing with their legal problems.

121. Shapero v Kentucky Bar Ass'n, 108 S.Ct. 1916, 1919 (1988). The opinion was written by Justice Brennan. Justices White, Marshall, Blackmun, Stevens, and Kennedy joined in Parts I and II. Justices Marshall, Blackmun, and Kennedy joined in Part III. Justice White filed an opinion concurring and dissenting in part in which Stevens joined. Justice O'Connor wrote a dissent in which Chief Justice Rehnquist and Justice Scalia joined.

The proposed letter, to be sent to persons whose homes were being foreclosed, read as 'follows:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor [sic] to STOP and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.
>
> Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Id. at 1919.

or a general mailing. The relevant inquiry is whether "the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."[122] Letters do not involve the risk of overreaching and undue influence that are present when an attorney personally solicits business.[123] However, a personalized letter could be deceptive. Even so, the Court found that any possible abuses could be regulated by the state in a less restrictive manner than an absolute ban.[124] It might be more work for a state agency to review solicitation letters, but this is not a sufficient basis for banning them.[125]

In Part III of his opinion[126] Justice Brennan noted that the first amendment overbreadth doctrine does not apply to professional advertising cases, therefore he examined whether the letter in question was particularly overreaching.[127] Shapero's letter used underscored, uppercase letters. Secondly, it contained assertions such as "It may surprise you what I may be able to do for you," which in the eyes of the state bar association were pure puffery because they did not state an objective fact. Justice Brennan decided that the letter presented no comparable risk of overreaching to that of an attorney who personally solicits business. "[T]he State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient."[128] A state may not ban potentially misleading information if that information may be presented in a way that is not deceptive unless the state asserts a substantial state interest that such a restriction would directly advance.[129] A state must also be able to assert a substantial state interest that is directly advanced by any restriction on potentially misleading information.[130] No such substantial interest was asserted by the Kentucky Bar Association in this case. A letter may be misleading but the Kentucky Bar Association did not argue that point in this case.[131]

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122. *Id.* at 1922. Justice Brennan observed that the Court's decision in *Ohralik* turned on two factors. One was that a face-to-face solicitation could easily lead to overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457-58 (1978). Secondly, it would be virtually impossible to monitor in-person solicitation in the absence of a total ban. *Id.* at 466. 108 S.Ct. at 1922.

123. *Id.*

124. *Id.* at 1923. Justice Brennan suggested that a state could require a lawyer to file such letters with a state agency. *Id.*

125. *Id.* at 1924.

126. Justices White and Stevens did not join in this part of the decision. They thought that this matter should be left to the state courts. *Id.* at 1925 (White, J., concurring and dissenting in part).

127. *Id.* at 1924.

128. *Id.*

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

130. *Id.* at 1924.

131. *Id.* at 1925. Justice Brennan observed "To be sure, a letter may be misleading if it unduly emphasizes trivial or 'relatively uninformative fact[s]' . . . or offers overblown assurances of client satisfaction." *Id.*

Justice O'Connor wrote a dissent in which Chief Justice Rehnquist and Justice Scalia joined. Justice O'Connor's primary objection was not that the Court's decision is illogical in light of its prior decisions but that the prior decisions were incorrect in the first place.[132] Justice O'Connor thought there was a significant difference between the sale of professional services and the sale of standardized products and felt that merely receiving a letter from an attorney is intimidating to the average person. Furthermore, the use of personalized letters suggests that the sender possesses some special knowledge of the recipient, and such letters are difficult to police.[133]

Justice O'Connor believed that states should have considerable latitude in banning potentially misleading advertising. She viewed even the advertisement in the *Bates* case as inherently misleading because there is no such thing as a routine divorce or bankruptcy.[134] In O'Conner's view, the use of the word "free" in Shapero's letter was entitled to even less constitutional protection than the mere price advertising of legal services in *Bates*. On the whole, she found the American Bar Association's Model Rule of Professional Conduct 7.3 constitutional under the *Central Hudson* test.[135]

Justice O'Connor observed that lawyers are experts with respect to information that can not be made generally available to the public. In such a situation, an attorney might be tempted to manipulate the system for his or her own ends. One way is by engaging in overzealous representation of clients. The other way is by abuse of the client for the lawyer's benefit. It is unrealistic in light of a lawyer's special expertise that clients be expected to bargain for legal services as if they were purchasing automobiles.[136]

She concludes:

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132. *Id.* at 1925 (O'Connor, J., dissenting).

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

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

135. *Id.* (O'Connor, J., dissenting). Justice O'Connor saw the providing of legal services as something radically different from selling products.

> One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to the standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional 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 transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

Id. at 1929-30 (O'Connor, J., dissenting).

136. *Id.* at 1930 (O'Connor, J., dissenting).

> In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations.[137]

VI. DIRECT MAIL AS CONTRASTED TO GENERAL ADVERTISING

Shapero further clarifies the law with respect to promoting one's professional services. In *Zauderer*, the Court struck down state rules that prohibited an attorney from suggesting in newspaper advertising that people might have legal problems and then recommending himself or herself in the advertisement. A truthful, nondeceptive advertisement of this nature may not be prohibited by the states. *Shapero* merely follows up on the rule announced in *Zauderer* by declaring that a lawyer may recommend himself or herself either by newspaper advertising or by direct mail.

The doors are clearly open now to attorneys who wish to use Yellow Pages advertising, newspaper or magazine advertising, or direct mail. The only question left for attorneys is which medium they ought to use in order to promote their legal practices.

There are a number of advantages associated with direct mail that make it the most sensible alternative for attorneys to utilize.[138] Mass advertising in a newspaper of general circulation costs a great deal of money. Unfortunately, the advertiser must pay to reach a great number of persons who are not interested in the advertiser's message. This is a particularly acute problem if the advertising attorney wishes to advertise a specialized service or reach a group of persons with very particular legal needs. To reach these people through mass media advertising would require the attorney to transmit his message to vast numbers of people he or she does not want to reach.

To circumvent this problem, an attorney who wishes to advertise should utilize direct mail. The foremost advantage to it from the standpoint of a lawyer who wishes to advertise a very specific service is that the advertising message can be targeted to a very specific

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137. *Id.* at 1931 (O'Connor, J., dissenting). The problem with this position is that it fails to recognize the need of the public for information about specific lawyers and the anticompetitive aspects of rules designed to prohibit advertising by lawyers. Returning to the prior rules that prohibited lawyer advertising would simply increase consumer confusion and increase the costs of legal services. Quite a price for the public to pay.

138. *See* Whitman, *Direct Mail*, *supra* note 30, at 416-419.

audience.[139] In addition, it obviously costs less to send out a small number of letters to a select group of recipients than to take out an advertisement in a large metropolitan daily newspaper.

Other advantages associated with direct mail are: (1) the length, timing, and form of message can be better controlled with direct mail than other advertising media; (2) it is rather easy to determine if the advertisement is productive; and (3) mail order testing produces more accurate results than does the testing of other advertising methods.[140]

VII. CONCLUSION

With *Shapero*, the United States Supreme Court has taken yet another step toward clarifying the law with respect to attorney advertising. Just a decade ago attorneys found it impossible to advertise, but since that time the Court has gradually diminished the ability of the states to prohibit lawyers from engaging in advertising.

Zauderer clearly established the rule that attorneys may place advertisements which educate the public about specific legal services and also recommend that readers hire them. The Court expanded this rule in *Shapero* by stating that an attorney may utilize the same type of promotion through direct mail.

However, there are still some limitations on attorney advertising. An attorney may not use false, misleading, or deceptive statements in his or her advertising or direct mailings.[141] Some courts also have found a conflict of interest when an attorney asks others for referrals of specific types of clients.[142]

It remains unclear whether attorneys may use the telephone, telegraph, or fax machine to convey truthful advertising. It is possible that the Supreme Court may come to view these means of personal promotion as more intrusive on the recipients' privacy and therefore permit states to outlaw the use of these means of communication. With its ruling in *Shapero*, however, the Court has clearly moved the bar in the direction of permitting virtually all legal advertising that is neither false, deceptive, or misleading.

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139. Mail order marketers often compare direct mail to shooting a prospect with a rifle rather than a shotgun. *See* SIMON, HOW TO START AND OPERATE A MAIL ORDER BUSINESS 84 (3d ed. 1981).

140. *See* Whitman, *Direct Mail*, *supra* note 30, at 417-18.

141. *Shapero*, 108 S.Ct. at 1921.

142. *See, e.g.*, Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927 (1980).