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Professional Responsibility: *Shapero v. Kentucky Bar Association*: Guideline for a Constitutional Lawyer Solicitation Rule—Does *Shapero* Open the Door to In-Person Solicitation?

In *Bates v. State Bar of Arizona*,[1] the United States Supreme Court rendered the first of several rulings defining the scope of permissible state regulation of lawyer advertising. *Bates* refuted many of the well-established arguments against lawyer advertising. No longer would reputation alone be considered sufficient advertising for the lawyer.[2] Also, advertising was no longer contrary to lawyer professionalism.[3] States may not absolutely ban lawyer advertising.[4] States may, however, regulate advertising that is false, deceptive or misleading.[5] The public remains largely unsophisticated concerning legal services and is therefore generally unable to verify the truthfulness or the accuracy of lawyer advertising. Thus, the state is justified in regulating lawyer advertising to assure that the public is not misled and that the advertising flows freely and cleanly.[6]

The United States Supreme Court, however, has taken a fundamentally different approach to the issue of lawyer solicitation.[7] In *Ohralik v. Ohio State Bar Association*,[8] the Court held that a state may discipline a lawyer for in-person solicitation under circumstances likely to pose dangers that the state has a right to prevent.[9] *Bates* is distinguished from *Ohralik* in that advertising presents information without exerting any direct pressure on the recipient for action. In-person solicitation, however, pressures and demands the client to take immediate action.[10]

1. 433 U.S. 350 (1977).
2. *See* Brosnahan & Andrews, *Regulation of Lawyer Advertising: In the Public Interest?*, 46 Brooklyn L. Rev. 423, 423-24 (1980).
3. *See generally*, H. Drinker, Legal Ethics 210, 210-25 (1953).
4. The American Bar Association's (ABA) prohibition of lawyer advertising had been in effect since the inception of the ABA Code of Professional Responsibility in 1908. *See* ABA Cannons of Professional Ethics, No. 27 (1908).
5. *Bates*, 433 U.S. at 383.
6. *Id.* at 384.
7. Courts often have a difficult time distinguishing between "advertising" and "solicitation." In general, courts use "solicitation" to refer to direct, in-person contact and "advertisement" to describe contact through the media. *See* Note, *The Expanding Constitutional Protection of Commercial Speech: Attorney Advertising After Zauderer*, 1986 Det. C.L. Rev. 199, 204 n.46. Prior to *Shapero*, if the Court labeled the lawyer activity as "advertising," states could regulate it but not prohibit it. If the Court characterized the activity as solicitation, states could ban it. *See* Perschbacher & Hamilton, *Reading Beyond The Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. Colo. L. Rev. 255, 256 (1987).
8. 436 U.S. 447 (1978).
9. *Id.* at 449.
10. *Id.* at 457.

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Targeted, direct mail solicitation by lawyers presents an issue that does not uniformly qualify as either advertising or solicitation.[11] Targeted, direct-mail solicitation differs from advertising because targeted mail provides specific information to a recipient who the lawyer has reason to believe is in need of that information. Targeted, direct mail solicitation also differs from in-person solicitation because the lawyer is not physically present to pressure the recipient into a decision.

In *Shapero v. Kentucky Bar Association*,[12] the United States Supreme Court held that states may regulate, but cannot ban, targeted, direct mail solicitation ("targeted mail") by lawyers.[13] State rules prohibiting lawyers from participating in targeted, direct mail solicitation may now be challenged as unconstitutional. The American Bar Association, Model Rule of Professional Conduct 7.3, prevents lawyers from soliciting employment by mail.[14] Oklahoma adopted Rule 7.3 in March of 1988. In light of *Shapero*, the ABA, along with Oklahoma and twenty-three other states, must return to the drawing board to draft a constitutional rule.[15]

This note analyzes *Shapero* and delineates the scope of permissible state regulation of targeted mail. *Shapero* provided parameters for state regulation that were extensions of principles enunciated in previous lawyer advertising and solicitation cases. Additionally, this note will explore whether *Shapero* opens the door to some type of in-person solicitation for pecuniary gain and suggests methods for regulating solicitation. Finally, this note provides a proposed draft for a new Oklahoma Rule 7.3. Oklahoma should adopt a solicitation rule that will encompass the Court's well-established principle that states may only ban solicitation through the least restrictive means available to further a substantial governmental interest.

11. "Direct Mail" is mail usually containing advertising material that is sent to a large number of possible customers. RANDOM HOUSE DICTIONARY OF THE ENGLSIH LANGUAGE 559 (2d ed. 1983). "Targeted Direct Mail" is direct mail sent to a specific group of potential clients. *See* Adams v. Attorney Registration and Disciplinary Comm'n, 617 F. Supp. 449 (N.D. Ill. 1985), *aff'd*, 801 F.2d 968 (7th Cir. 1986).

12. 108 S. Ct. 1916 (1988).

13. *Id.* at 1923.

14. 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 service useful.

ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.3 (1984).

15. *See* 59 OKLA. B.J. 1725 (July 2, 1988). The Board of Governors requested that the Oklahoma Bar Association Model Rules Committee make the necessary modification to Oklahoma Rule 7.3 to comply with *Shapero*. *See also* Stewart & Nelson, *Hawking Legal Services* 74 ABA J. 44 (Aug. 1, 1988) (at least 24 states have adopted model rules similar to Rule 7.3).

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Background

Several federal and state courts had granted constitutional protection to targeted mail prior to *Shapero*.[16] *Shapero* flowed logically from the United States Supreme Court's earlier decisions concerning lawyer advertising and solicitation. Like other types of lawyer speech, targeted mail is constitutionally protected commercial speech.[17] States may ban commercial speech, including targeted mail, only if the restriction advances a substantial state interest through the least restrictive means available.[18]

Commercial Speech Framework

In *Bates v. State Bar of Arizona*,[19] the Court held that states may not prevent lawyers from advertising because advertising is a form of commercial speech.[20] States may not categorically restrict all commercial speech because it enjoys first amendment protection.[21] States may, however, rely on what has come to be known as the "commercial speech doctrine" to regulate lawyer advertising.[22]

The commercial speech doctrine recognizes that a state has an interest in assuring the truthfulness of commercial speech.[23] The doctrine balances the consumer's first amendment right to the free flow of commercial information against the state's interest in ensuring the truthfulness of the information.[24]

16. *See, e.g.*, Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 Hastings Const. L.Q. 487, 521 n.203.

17. 108 S. Ct. at 1923.

18. *Id.* at 1921.

19. 433 U.S. 350 (1977). Two lawyers advertised their prices in an Arizona newspaper. Arizona had a disciplinary rule which prohibited lawyers from advertising. The Court considered several arguments against allowing lawyers to advertise. These arguments included: 1) the adverse effect on professionalism; 2) the inherently misleading nature of lawyer 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. *Id.* at 368-79. The Court dismissed all of these arguments as unacceptable reasons for suppressing all lawyer advertising. *Id.* at 379.

20. Commercial speech is "speech of any form that advertises a product or service for profit or for business purpose." *See* Maute, *supra* note 16, at 494. For a general discussion of lawyer's commercial speech see Canby, *Commercial Speech of Lawyers: The Court's Unsteady Course*, 46 BROOKLYN L. REV. 40 (1980).

21. *Bates*, 433 U.S. at 383.

22. *Id.*

23. J. NOWAK, P. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 912-13 (1986).

24. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Pharmacists in Virginia advertised the prices of their perscription drugs. Virginia had a statute that prohibited pharmacists from advertising. The Court determined that the consumer's interest in the free flow of commercial information outweighed the state's interest in an absolute ban. The Court, however, recognized that the state did have a strong interest in maintaining a high degree of professionalism among its licensed pharmacists. States could regulate commercial speech by placing reasonable time, place, and manner restrictions on the speech, by prohibiting advertising which might be false, misleading, or illegal. For a more thorough discussion of the history of the commercial speech doctrine, see Stoltenberg & Whitman, *Direct Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381 (1984).

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Under the commercial speech doctrine, states may restrict lawyer advertising that is false, deceptive or misleading. Furthermore, states may also restrict the time, place and manner of lawyer advertising.[25]

The Court has applied this commercial speech framework to two cases involving in-person solicitation. In *Ohralik v. Ohio State Bar Association*,[26] the Supreme Court held that the state may discipline a lawyer for soliciting under circumstances likely to pose dangers or result in misconduct that the state has a right to prevent.[27] The Court recognized that in-person solicitation creates the likelihood of overreaching,[28] the exertion of undue influence[29] and the potential for invasion of privacy.[30] The Court held that the state has a substantial interest in regulating lawyer conduct to protect clients from these potential problems.[31]

In the second case, *In re Primus*,[32] the Supreme Court held that a lawyer's non-pecuniary solicitation, containing political association or expression, was not subject to regulation under the commercial speech doctrine.[33] Unlike commercial solicitation, political expression is subject to the full protection of the first amendment.[34] In *Ohralik*, the Court held that states may prohibit lawyers from conducting in-person commercial solicitation because of the potential for misconduct. Under *Primus*, however, states may not proscribe solicitation involving political expression because of the potential for misconduct. A state may discipline a lawyer only if the lawyer's political expression actually results in misconduct.[35]

25. *Bates*, 433 U.S. at 383-84.

26. 436 U.S. 447 (1978). Ohralik, a lawyer, personally solicited the business of a young woman who was the victim of a car accident while she lay in traction in the hospital. He also paid an uninvited call on another young woman who was injured in the accident. He used a concealed tape recorder in an attempt to bind the young women to their agreements to let him represent them. Both women eventually discharged Ohralik and informed the Ohio Bar Association about Ohralik's behavior.

27. See *supra* note 9 and accompanying text.

28. *See* Perschbacher & Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. Colo. L. Rev. 255, 260 n.33 (1987) ("Overreaching" is "aggressive competition among lawyers for clients, which leads to lawyers approaching clients at times when the clients are in no condition to properly consider retention of a lawyer, for example, immediately after an accident.").

29. *Id.* n.34 (Undue influence is "misuse of position of confidence or taking advantage of a person's weakness, infirmity, or distress to change improperly that person's actions or decisions.").

30. *Ohralik*, 436 U.S. at 460.

31. *Id.* at 461.

32. 436 U.S. 412 (1978). Primus, a cooperating lawyer for the American Civil Liberties Union (ACLU), conducted a meeting to inform three women that they could sue a doctor who had mistakenly sterilized them. Primus then sent a letter to one of the women informing her that the ACLU would represent the woman against the doctor. The South Carolina disciplinary rules prohibited such solicitation.

33. *Id.* at 434.

34. *See* Stoltenbert & Whitman, *supra* note 24, at 392.

35. *Primus*, 436 U.S. at 434. *See also* Rabin, *Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik*, 12 J.L. Reform 144, 154 (1978).

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Central Hudson Test

Although the Court applied the commercial speech doctrine to both *Ohralik* and *Primus*, these cases were so fact-specific that the Court's evaluation of permissible state regulation was essentially *ad hoc*.[36] In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[37] the Supreme Court developed a more structured framework for analyzing the scope of permissible state regulation of commercial speech. The *Central Hudson* test established the following criteria for determining a state's freedom to regulate: (1) whether the commercial speech was lawful and not misleading; (2) whether the state advanced a substantial interest in the regulation; (3) whether the state's regulation directly promoted the substantial interest; and (4) whether the state's regulation exceeded the bounds of necessity to serve its interest.[38]

The critical component of the test is the fourth question. If the state may use a less restrictive means of promoting a substantial governmental interest, then a ban of a particular type of commercial speech cannot survive.[39] In *Zauderer v. Office of Disciplinary Counsel*,[40] the Court applied the *Central Hudson* test to state proscription of targeted advertising. The state had failed to establish that its ban on the lawyer's truthful advertisement directed at a targeted audience directly advanced a substantial governmental interest through the least restrictive means possible.[41] The Court held that states may not restrict truthful, nondeceptive targeted advertising.[42] States may, however, regulate this advertising, but unlike restriction, regulation is not subject to "the least restrictive means" test. States may regulate targeted advertising in a manner that is "reasonably related to the state's interest in preventing deception of consumers."[43] Thus, the *Zauderer* Court modified the *Central Hudson* test. As long as the regulation reasonably relates to the state's interest in protecting the public from deception, overreaching, undue influence, or fraud, the regulation is permissible even if other means can be hypothesized.[44]

36. *See, e.g.*, Maute, *supra* note 16, at 501. ("Beginning with [the] solicitation cases, the Court embarked on fact-specific, essentially *ad hoc* evaluations of state regulations under the commercial speech doctrine.").

37. 447 U.S. 557 (1980).

38. *See* Ringleb, Bush & Moncriet, *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics, and Consumer Perceptions*, 17 PAC. L.J. 1199, 1209 (1986).

39. *Central Hudson*, 447 U.S. at 564.

40. 471 U.S. 626 (1985). Zauderer, a lawyer, advertised in a local newspaper his willingness to represent women who had been injured from the use of the Dalkon Shield Intrauterine Device. The advertisement told readers not to assume that it was too late to sue the manufacturer. The Ohio disciplinary rules prohibited such advertising.

41. *Id.* at 644-45. *See also* Maute *supra* note 16, at 505.

42. 471 U.S. at 647.

43. *Id.* at 651.

44. *Id.* at n.14.

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Shapero v. Kentucky Bar Association

In *Shapero v. Kentucky Bar Association*,[45] the United States Supreme Court addressed whether states may ban lawyers from conducting targeted mail solicitation for pecuniary gain. In a 6-3 opinion,[46] the Court held that targeted, direct mail solicitation is a mode of communication that states can regulate, but not ban.[47]

In 1985, Richard D. Shapero, a member of Kentucky's integrated Bar Association, sought approval from the Bar for a letter which was to be used by him for direct mail solicitation. The letter was to be sent to potential clients against whom a foreclosure suit had been filed. The letter read:

> 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.[48]

The Bar did not find the letter false or misleading. Nevertheless, it declined to approve the letter. The Bar based its disapproval on the then existing Kentucky Supreme Court Rule 3.135(5)(b)(i). The rule prohibited the mailing of any written advertisement precipitated by an occurrence or a particular event involving or relating to the potential client as distinct from the general public.[49]

The Bar determined that the rule violated the first amendment and the principles in *Zauderer*.[50] The Bar recommended that the Kentucky Supreme Court

45. *Shapero*, 108 S. Ct. at 1916.

46. *Id.* The opinion consists of three parts. Justice Brennan wrote the majority opinion with whom Justices Marshall, Blackmun, Kennedy, White, and Stevens join in Parts I and II. Justice White and Stevens dissented in Part III. Justice O'Connor wrote the dissenting opinion with whom Chief Justice Rehnquist and Justice Scalia joined.

47. *See Shapero*, 108 S. Ct. at 1923.

48. *Id.* at 1919.

49. *See Id.* at 1919 n.2. 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 addressees as distinct from the general public.

50. *Id.* at 1920. The opinion does not provide the principles from *Zauderer* on which the Bar relied. However, a thorough reading of *Zauderer* presents four principles on which the Bar may have grounded its recommendation. First, a state may only restrict commercial speech that is not false or deceptive if it can show a substantial governmental interest. 471 U.S. at 638. Second, lawyer advertising is a category of commercial speech which enjoys first amendment protection. *Id.* at 637. Third, regulation of commercial speech may not be broader than is

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amend the rule to conform to the holding in *Zauderer* that states may not ban truthful, targeted advertisements.[51] Heeding the recommendation, the Kentucky Supreme Court replaced the rule with ABA Rule 7.3. Both rules banned targeted mail solicitation for pecuniary gain without requiring a finding that the solicitation was false or misleading. The Kentucky Supreme Court, however, provided no explanation for how ABA Rule 7.3 corrected any deficiency in the previous rule.[52]

The United States Supreme Court granted certiorari to resolve the issue of whether a state's categorical prohibition of targeted mail was consistent with the first amendment. Because the Kentucky Supreme Court adopted ABA Rule 7.3 which prohibited lawyers from soliciting persons with known legal problems, the specific issue before the Court was whether ABA Rule 7.3 was constitutional.[53] The Court reversed the lower court's decision to ban Shapero's targeted letter.[54]

New Relevant Inquiry

In Part II of the *Shapero* opinion, the majority used the same framework and analysis found in previous lawyer advertising and solicitation cases.[55] This analysis stated that potential clients are susceptible to the possibility of abusive solicitation. However, these clients will feel equally overwhelmed by their legal troubles and have the same impaired capacity for good judgment, regardless of whether the lawyer solicits them by an untargeted or targeted letter, or a newspaper advertisement.[56] Whether the solicitation affects potential clients whose condition makes them susceptible to undue influence is no longer a valid question. The relevant inquiry is whether the mode of communicating the solicitation poses a serious danger that lawyers will exploit such susceptibility.[57]

Targeted, Direct Mail Solicitation v. In-Person Solicitation

The balance of the *Shapero* opinion compared in-person solicitation with targeted mail solicitation. The Court distinguished *Ohralik* from *Shapero*.

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reasonably necessary to prevent deception. *Id.* at 658. Finally, states may not discipline lawyers for using printed advertising containing truthful and nondeceptive information to solicit legal business from potential clients. *Id.* at 647.

51. *Shapero*, 108 S. Ct. at 1920.

52. *Id.*

53. ABA Rule 7.3 stated in part that a lawyer may not solicit for pecuniary gain any specific recipient.

54. *Shapero*, 108 S. Ct. at 1920.

55. *Id.* at 1921. First, lawyer advertising is a category of constitutionally protected commercial speech. Second, it is well established that the first amendment principle governing state regulations of lawyer solicitations for pecuniary gain is that states may only restrict truthful and nondeceptive commercial speech if it can show a substantial governmental interest. The state may only restrict such speech through means that directly advance the governmental interest. Finally, state regulation designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil. *Id.*

56. *Id.* at 1922.

57. *Id.*

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Ohralik's "categoric[al] ban" on all in-person solicitation resulted for two reasons. First, in-person solicitation is "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud."[58] Second, in-person solicitation is not visible or open to public scrutiny. Therefore, any attempt to regulate such solicitation, short of an absolute ban, would be futile.[59]

The Court acknowledged that, unlike print advertising or a targeted letter, in-person solicitation is coercive due to the physical presence of the lawyer. In-person solicitation demands an immediate yes-or-no answer.[60] On the other hand, a recipient of a targeted letter does not undergo such coercion. The recipient has time for reflection and the exercise of choice. A pestering advocate is not breathing down the recipient's neck. Ceasing to read the letter will avoid further attack on the recipient's sensibilities. The recipient is free to consider the letter or discard it.[61] Moreover, a targeted letter does not invade the recipient's privacy any more than a similar letter mailed at large. Rather, any invasion of privacy occurs when the lawyer learns about the recipient's legal affairs, not when the recipient is approached.[62]

A personalized letter to an individual with a specific legal problem also presents a risk of deception. The recipient may overestimate the lawyer's familiarity with his particular case. The letter might implicitly suggest that the recipient's legal problem is worse than the facts would otherwise indicate. Additionally, an inaccurately targeted letter could result in the recipient's believing that a problem exists where one does not. Finally, the letter may provide erroneous legal advice.[63]

Nevertheless, the opportunities for isolated abuses or mistakes do not justify an absolute ban on targeted mail. States can regulate targeted mail through more precise and far less restrictive means than a total ban.[64] A state agency may inherit increased responsibility in regulating targeted mail, but extra burdens on the state do not justify a ban. Commercial speech decisions are "grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the [cost of regulation]."[65]

No Deference to the State

In Part III of the *Shapero* opinion, a plurality considered whether Shapero's letter was overreaching and unworthy of first amendment protection.[66] Justice Stevens and Justice White did not concur with this portion of the decision. They argued deference to the state to make the initial determination of whether

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1922-23.
62. *Id.* at 1923.
63. *Id.*
64. *Id.*
65. *Id.* at 1924.
66. See *supra* note 45.

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an individual lawyer's solicitation letter violated the first amendment.[67] The issue was whether Shapero's letter was overreaching due to its liberal use of uppercase letters and use of assertions that amounted to "salesman puffery" rather than affirmative or objective fact.[68]

The Court held that a state has no substantial interest in regulating the pitch or the style of a letter's type.[69] Furthermore, the first amendment limits a state's authority to regulate what information a lawyer may provide in a letter. Regardless of the size of type or how much speculation it contains, a letter cannot shout at the recipient or grab the recipient by the lapels.[70] Examples of misleading information that would justify a state's restriction include undue emphasis on trivial or relatively uninformative facts and exaggerated assurances of client satisfaction.[71]

Methodology Incorrect

Justices O'Connor, Rehnquist and Scalia dissented from the entire opinion, urging the majority to reexamine the analytical framework for determining lawyer advertising and solicitation cases.[72] Justice O'Connor noted error in the Court's reasoning in lawyer advertising cases. The Court has concluded that states may not ban the advertisement of professional services because like consumer goods, the public has a right to a free flow of commercial information relating to professional services.[73] She concluded, however, that the analogy between professional services and standardized consumer products was defective. A profession is different from an occupation because it entails ethical obligations and standards of conduct that the market does not control. Lawyers have special expertise which gives them power and tempts them to manipulate the justice system for their own benefit. Lawyers are, however, public servants. Therefore, Justice O'Connor argued that the state had a particular interest in regulating lawyers that was different from regulating commercial information concerning consumer goods.[74]

Scope of Permissible Solicitation Regulation After Shapero

To determine the scope of permissible state regulation of lawyer solicitation, *Shapero* must be compared with *Primus, Zauderer* and *Ohralik*. These cases form a solicitation spectrum with *Ohralik* and *Primus* at opposite ends.[75]

67. *Shapero*, 108 S. Ct. at 1924 (White, J. and Stevens, J. concurring and dissenting in part).

68. *See Id.* at 1924. "Call NOW, don't wait"; "[I]t is FREE, there is NO charge for calling. . . . It may surprise you what I may be able to do for you."

69. *Id.*

70. *Id.*

71. *Id.* at 1925.

72. *Id.* at 1925 (O'Connor, J., Rehnquist, J., and Scalia, J. dissenting).

73. *Id.* at 1928-29.

74. *Id.* at 1928-30.

75. *Ohralik* is at one end of the solicitation spectrum because states may ban in-person solicitation for pecuniary gain under circumstances that are likely to result in overreaching, undue influence, invasion of privacy, or fraud. *Primus* is at the opposite end of the spectrum because

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Zauderer and *Shapero* fall in between.[76] The majority did not cite *Primus* in *Shapero* because *Shapero* did not involve political speech. Therefore, the *Primus* holding that in most cases states may not restrict lawyer solicitation involving political association or expression remains the law.

Change in Focus for Determining Substantial State Interest

Zauderer v. Office of Disciplinary Counsel[77] was the basis for the Supreme Court's reasoning in *Shapero*. In *Zauderer*, the Court held that the state failed the *Central Hudson* test.[78] The state could not prove that the prohibition of Zauderer's truthful and nondeceptive newspaper advertisement advanced a substantial state interest through the least restrictive means possible.[79] Likewise, in *Shapero* the Kentucky Bar Association could not demonstrate a substantial state interest in banning Shapero's letter. The Bar argued that targeted mail should be banned because it is directed to a potential client with a known legal problem, rather than to a person who *might* have the legal problem.[80] The Bar argued that a known audience raised the same concerns associated with in-person solicitation.[81]

The *Shapero* Court dismissed this argument and introduced a change in the way a state may determine its substantial interest. As discussed above, a state may no longer restrict lawyer solicitation based on the condition or vulnerability of the potential client.[82] The focus is whether the mode of solicitation exploits the client's susceptibility regardless of the client's condition.[83] If the mode of solicitation presents a serious danger of exploiting a potential client's susceptibility, the state may regulate the solicitation. Furthermore, the Court noted that targeted mail is more efficient than general mail advertising because it reaches individuals who actually need the legal services. The first

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states may not ban in-person solicitation if the solicitation is in the form of political expression or association.

76. *Zauderer*, which allowed targeted advertisements, and *Shapero* fall within these two extremes. Neither case concerned political expression or in-person solicitation for commercial gain.

77. 471 U.S. 626 (1985).

78. *Id.* at 647.

79. *Id.*

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

81. *Id.* at 1922.

82. See *supra* note 55 and accompanying text. *But cf.* OKLAHOMA MODEL RULE OF PROFESSIONAL CONDUCT 7.3(c):

> "[A] lawyer shall not contact or send a written communication to a prospective client for the purpose of obtaining professional employment if: (1) the lawyer knows or reasonably should know that the physical, emotional and mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer."

83. *Id. See also* Unnamed Attorney v. Attorney Grievance Commission, Md. Ct. App. No. 92, 8/10/88 (court interpreted *Shapero* to mean that the first amendment protects written modes of solicitation regardless of the recipient's condition, so long as such communication is neither false, misleading or overreaching.).

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amendment does not ban speech just because it is more efficient.[84] The Court concluded that a state may not prohibit lawyers from mailing a solicitation letter to those who might find it most useful any more than a state may ban targeted advertisements.[85]

Letters Subject to Regulation

States may regulate letters which exaggerate a lawyer's familiarity with the potential client's case.[86] A state may also regulate letters that suggest that the legal problem is worse than the facts may indicate. Also, a state may prohibit a lawyer from causing a potential client to believe that the client has a problem that does not exist, or from giving incorrect legal advice.[87] A lawyer may not unduly emphasize trivia or relatively uninformative facts. Additionally, a lawyer may not offer exaggerated assurances that the work will satisfy the client.[88] These examples of allowable state regulation have the common denominator of the lawyer's conduct posing a serious danger of exploiting a potential client's susceptibility to undue influence, deception, fraud or invasion of privacy.

Ambulance Chasing Still Banned

Of the cases on the solicitation spectrum, *Ohralik v. Ohio State Bar Association* represents the strongest justification for state regulation of lawyer solicitation. Attorney Ohralik's behavior was characteristic of ambulance chasing at its worst.[89] The Supreme Court cited *Ohralik* throughout *Shapero* to distinguish in-person solicitation from targeted mail. In-person solicitation is characterized by the potential dangers of overreaching, invasion of privacy, exercise of undue influence and outright fraud.[90] In *Shapero*, the majority restated the holding of *Ohralik* as allowing states to ban "all" in-person solicitation because it is not suitable for adequate regulation.[91] *Ohralik*, however, held that states may ban in-person solicitation under circumstances likely to pose such dangers.[92]

The *Shapero* majority's interpretation of *Ohralik* as banning "all" in-person solicitation creates an ambiguous atmosphere for the definitive state regulation of in-person solicitation. The critical inquiry for restriction is now whether the "mode of communication poses a serious danger that lawyers will exploit" a client's susceptibility to the dangers of overreaching, invasion of privacy, undue influence and fraud.[93] Notwithstanding the Court's use of "all,"

84. *Shapero*, 108 S. Ct. at 1921.
85. *Id.* at 1921-22.
86. *Id.* at 1923.
87. *Id.*
88. *Id.* at 1925.
89. See *supra* notes 8 and 25.
90. *Shapero*, 108 S. Ct. at 1922.
91. *Id.*
92. See *supra* note 9 and accompanying text.
93. See *supra* notes 55, 79 and accompanying text.

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its emphasis on whether the methods of solicitation will exploit client susceptibility indicates that it might be willing to consider in-person solicitation which does not take advantage of such susceptibility. The quoting in *Shapero* of the *Ohralik* holding as the banning of "all" in-person solicitation is also confusing because of the *Shapero* Court's immediate reference to Justice Marshall's concurrence in *Ohralik* and *Primus*.[94] Justice Marshall stated that Mr. Ohralik's behavior was objectionable because of the circumstances and means in which he performed the solicitation, not because he solicited business for himself.[95] Thus, the Court's citing of Justice Marshall's concurrence in *Shapero* might also be interpreted as a signal that the Court may allow in-person solicitation that does not contain the distasteful elements of the *Ohralik* solicitation.

The seemingly confusing statement of the *Ohralik* holding in *Shapero* may bewilder state bar associations attempting to redraft Rule 7.3. Apparently, in-person solicitation such as Ohralik's may be banned. Nevertheless, the inquiry as to whether the mode of solicitation has the potential for exploiting client susceptibility, and the favorable citation by the *Shapero* Court of Marshall's *Ohralik* concurrence, is significant. Based on the new inquiry, the Court could rule state restrictions on in-person solicitation that do not result in the exploitation of a potential client's susceptibility unconstitutional.

Permissible In-Person Solicitation

The juxtaposition in *Shapero* of the new focus for determining permissible regulation to the reference to Marshall's *Ohralik* concurrence could open the door for some type of "benign in-person solicitation."[96] Marshall defined "benign solicitation" as that which is "truthful and is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of reaching a rational decision."[97] The state has a substantial interest in regulating lawyers to protect the public from fraud, overreaching, undue influence and invasion of privacy. However, where "honest, unpressured commercial solicitation is involved,"[98] states may not have a compelling interest to proscribe the free flow of this solicitation.

One mode of in-person solicitation that may not result in undue susceptibility is the solicitation for business representation. A lawyer may solicit to represent a businessperson in a legal matter relating only to the business. A lawyer could not ask to represent the client in any legal problem unassociated with the business. A legal problem related to business may be of considerable concern to the businessperson. The nature of the business problem, however, is unlikely

94. The Court decided *Ohralik* and *Primus* on the same day. Justice Marshall wrote one concurring opinion for both cases.

95. *Shapero*, 108 S. Ct. at 1922.

96. *Id.* The majority's new relevant inquiry was followed immediately by the quotation from Marshall's concurrence in *Ohralik*.

97. *Ohralik*, 436 U.S. at 472 n.3. *See also* Wishcamper, *Benign Solicitation of Clients by Attorneys*, 54 WASH. L. REV. 671-92 (1979).

98. *Oralik*, 436 U.S. at 472 n.3.

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to overwhelm the businessperson such that the person is unable to make a reasonable decision on hiring a lawyer.[99] Typically, the businessperson has experience in dealing with lawyers. Business people also have more equal bargaining power with lawyers than the public at large. This expertise and bargaining power reduces the dangers of coercion and influence. The justification for banning, rather than regulating, in-person solicitation was that it was invisible, and therefore not susceptible to regulation.[100] As will be discussed below, however, in-person solicitation for business representation is visible and therefore may be regulated.

Methods of Regulation

Regulating Targeted, Direct Mail Solicitation

The *Shapero* Court suggested that states require lawyers to file targeted letters with the state so that the state has the opportunity to supervise and penalize actual abuses. The lawyer would be required to provide documents to verify both the truthfulness of the alleged legal problem and how the lawyer learned of the problems.[101] To prevent the potential for overreaching, the letter could bear a label stating that it is a solicitation.[102] Also, to protect against fraud and deception, the state could require that the lawyer provide information on how the recipient can report an inaccurate letter.[103] The Court failed to include one other possible regulation to guard against overreaching and undue influence. States could require a "cooling off" period before a lawyer could mail a letter. This "cooling off" period would prescribe a certain time period after a disaster or other traumatic event before a lawyer could mail the letter.[104]

State agencies, however, cannot be unreasonable in their regulation. *Zauderer* provided that the regulation must be reasonably related to the state's interest in preventing deception.[105] Moreover, the Court held in *In re R.M.J.*[106] that unless a state can assert a substantial governmental interest, it may not prohibit lawyer speech. The state may not prohibit certain types of potentially

99. *But cf. Shapero*, 108 S. Ct. at 1922 (lay person's capacity to make a decision concerning legal representation may be greatly impaired because the legal problem overwhelms the person).

100. *Id.*

101. *Id.* at 1924.

102. *Id.* The Court stated that a state could require the letter to bear a label identifying it as an "advertisement." By implication, however, it would seem that a state may require a citation letter to bear the label "solicitation."

103. *Id.*

104. *But cf.* McChesney, *Commercial Speech in the Profession: The Supreme Court's Unanswered Question and Questionable Answers*, 134 U. PA. L. REV. 45, 113 (1985) ("Cooling off" period is a time, perhaps three days, in which a consumer can rescind a contract for the purchase of a good.).

105. See *supra* note 42, 43 and accompanying text.

106. 455 U.S. 191 (1982). A lawyer sent cards announcing the opening of his law office to a list of selected addresses. A Missouri rule prohibited this mailing. The Court held that a state may not regulate an attorney's commercial speech unless the speech is inherently or demonstrably misleading or the regulation is narrowly drawn to prevent a specific and significant abuse.

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misleading information if the speech can be presented in a way that is not deceptive.[107]

The Kentucky Bar Association has refused to approve a dozen different solicitation letters submitted by Mr. Shapero subsequent to the *Shapero* decision.[108] The Kentucky Bar Association withheld approval because it found the "pitches" of the letters objectionable.[109] In one letter, Shapero informed individuals experiencing home foreclosure that he could put them into bankruptcy to prevent the foreclosure. The Bar denied approval based on the fact that bankruptcy might not be a viable option for some addressees.[110] Under *Shapero*, the denial would be valid because to some recipients this would be misleading. However, if Mr. Shapero can phrase the letter so that it is not misleading, the Kentucky Bar may not prevent its being distributed.

Criticism of the Methods of Regulation

Methods used by state bar associations to regulate lawyer advertising create some difficult questions. Most Bar Associations are short on funds and personnel to investigate specific complaints against lawyers.[111] Additionally, agency staff members are not trained to understand specific legal problems or to discern if a lawyer's letter is misleading.[112] Requiring state agencies to screen lawyer letters and rewrite them to correct deficiencies could require additional personnel, training, and funding.[113]

The *Shapero* majority discounted those well-established arguments that states do not have the resources to monitor lawyer mailings.[114] The Court stated that nothing in the record established that scrutiny of solicitation letters would be any more burdensome than scrutinizing advertisements.[115] Yet, in the same paragraph, the Court stated, "[t]o be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not."[116] Arguably the Court's position appears to be contradictory; more work would inevitably lead to higher costs and more burdens for the state agencies.

To comply with the Court's guidance that the free flow of information

107. *Shapero*, 108 S. Ct. at 1924.

108. *He Can Advertise—But Only in Principle*, Wall St. J., Aug. 30, 1988, at 21, col. 1.

109. *Id.*

110. *Id.*

111. *Shapero*, 108 S. Ct. at 1923. ABA House of Delegates in its comment to Rule 7.3 stated:

> State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading.

Id.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1924.

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justifies the costs of regulation,[117] states might require lawyers to pay a filing fee for the review of each targeted mail solicitation.[118] Suggesting the pre-screening of any solicitation letter raises the issue of prior restraint. Prior restraints are presumptively unconstitutional whenever they are used to ban fully protected speech.[119] Yet, lawyer solicitation has been defined as commercial speech which does not enjoy full protection under the first amendment.[120] The Supreme Court suggested in *Central Hudson* that the United States Constitution will permit prior restraints on lawyer solicitation.[121]

Regulation of In-Person Solicitation for Business Representation

In *Shapero*, the Court reiterated its opposition to in-person solicitation because neither the state nor the legal profession could effectively regulate the possibilities for overreaching, invasion of privacy, undue influence or fraud.[122] In-person solicitation for business representation, however, may be susceptible to regulation. A businessperson could regulate the conduct of a lawyer who displays any of the above-mentioned characteristics by spreading the word throughout the business community not to hire the lawyer.

A lay person may spread the word about a lawyer's conduct in the same fashion. Generally, however, the businessperson has more contact with people who have complex and expensive legal problems. The businessperson's negative revelations about a lawyer, therefore, could result in a substantial loss of business for the lawyer. Realizing that this informal network could lead to widespread knowledge about the solicitation practices of the lawyer could encourage the lawyer to comply with ethical standards.

Moreover, the state could regulate solicitation for business representation. A state can already regulate the time, place and manner of lawyer solicitation.[123] The state could specifically direct the lawyer to solicit the businessperson at the regular place of business and only during regular business hours. Although such strict regulation may interfere with the social aspect of soliciting business, the regulation would aid the state in protecting the businessperson from unethical solicitation. The state could also require the lawyer to provide the businessperson with a list of other local lawyers who handle similar legal problems. Finally, the state could require the lawyer to provide the business person with the state regulatory agency for reporting attorney misconduct.

Commentators have suggested some of these same safeguards in order to allow truthful, nondeceptive in-person solicitation of the general public.[124]

117. *Id.*

118. *See* Perschbacher & Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. COLO. LAW REV. 255, 276 (1987).

119. *Id.*

120. *Id.*

121. *Id.* at 278 n.153.

122. *Shapero*, 108 S. Ct. at 1922.

123. *Bates*, 433 U.S. at 383.

124. *See* Rabin, *Attorney Solicitation: The Scope of State Regulation After* Primus *and* Ohralik, 12 J. L. REFORM 144, 180-88 (1978).

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Although these safeguards may alleviate some of the dangers, the root of the problem is that the lawyer has more potential to exploit the susceptibility of a person with a personal legal problem than one with a business problem. In *Shapero*, the Court determined that a state must ascertain whether a lawyer's mode of communication poses a serious danger of exploiting a client's susceptibility.[125] Even though the *Shapero* Court restated its previous rule banning in-person solicitation, the change in focus away from whether the client's condition makes the client susceptible is critical. If a state cannot demonstrate that in-person solicitation for business representation exploits the businessperson's susceptibility to undue influence, then *Shapero* provides an argument for its constitutionality.

Proposed Rule

Shapero effectively held that Rule 7.3 is unconstitutional.[126] Oklahoma had already adopted Rule 7.3 and must now draft and adopt a new solicitation rule. To avoid the need for continued redrafting, the Oklahoma Bar Association should consider a broad solicitation rule based on *Shapero*. In addition, the Rule should allow in-person solicitation for business representation. Oklahoma should start with the *Shapero* opinion, the Kutak Commission's 1981 proposed final draft of Rule 7.3, the 1983 proposed draft of Rule 7.3, and the ABA's Ethics Committee's proposed amendment to Rule 7.3.[127] A possible rule is suggested as follows:

> A lawyer may initiate contact with a prospective client for the purpose of obtaining professional employment only as follows:
>
> (A) Written Contact—A lawyer may send a solicitation letter to a potential client with a known legal problem if:
>
> (1) The lawyer knows or has reason to belive that the client is not already represented by a lawyer.[128]
>
> (2) The letter contains only truthful, nondeceptive information that does not mislead the client.[129]
>
> (3) The letter makes no unreasonable claims about client satisfation.[130]
>
> (4) The letter cannot contain any unreasonable information which would cause the client to belive that the lawyer has more than a general understanding of what legal problem the client has.[131]

125. See *supra* notes 55, 79, 91 and accompanying text.

126. *Shapero*, 108 S. Ct. at 1925.

127. *See* Stewart & Nelson v. Hawking Legal Serv., 74 ABA J. 44, 48 (Aug. 1, 1984).

128. 4 ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, 381 (Nov. 23, 1988). Rhode Island adopted a new Rule 7.3 on November 1, 1988. The new rule is based on the *Shapero* decision.

129. *Shapero*, 108 S. Ct. at 1923.

130. *Id.* at 1925.

131. *Id.* at 1923.

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(5) The letter cannot contain any information which would lead the client to believe that the client has a more serious or different problem than the one known by the lawyer.[132]

(6) Form letters designed to be used after a disaster or trauma must be submitted to the Bar for approval. Complete letters referencing a particular event may be sent to the client no earlier than two weeks after the event. The completed letter must be filed with the Bar within three days of mailing.[133]

(7) The lawyer must submit verification of how the lawyer learned of the client's problem. If the lawyer includes facts relating to the circumstances of the legal problem, the lawyer must submit a statement explaining how the lawyer discovered and verified the accuracy.[134]

(8) The body of the letter must contain a statement directing the recipient to report inaccurate or misleading letters to the Oklahoma Bar Association.[135]

(9) The letter and the envelope must contain the words "This is a solicitation." These words must appear in a conspicuous location and be the same size print as the rest of the letter.[136]

(10) The lawyer sending such a letter must send a copy to the Oklahoma Bar Association within three days of mailing.

(B) In person or telephone contact—A lawyer may solicit legal business in-person and cover the telephone subject to the following provisions:

(1) If the potential client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client, the lawyer may solicit both personal and business representation.[137]

(2) If the legal service is provided under the auspices of a public or charitable legal service organization, the lawyer may solicit both personal and business representation.[138]

(3) If the legal service is provided under the auspices of

132. *Id.*
133. *Id.*
134. *Id.* at 1924.
135. *Id.*
136. See *supra* note 100.
137. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.3 (Proposed Final Draft 1981).
138. *Id.*

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a bona fide political, social, civic, fraternal, employee or trade organization where purposes include providing or recommending legal service, the lawyer may solicit representation if related to the principal purposes of the organization.[139]

(4) If the potential client does not fall under (B)(1) above, the lawyer may solicit only matters of business representation only at the recipient's usual place of business and only during regular working hours. The lawyer may only solicit the representation of personal legal business from these recipients in writing and subject to (A) above and Rules 7.1 and 7.2.

(C) Contact otherwise permitted by (A) and (B) above is not allowed:

(1) If the person has made known to the lawyer a desire not to receive communications from the lawyer;[140] or

(2) The communication involves coercion, duress, or harassment.[141]

Conclusion

Shapero is yet another United State Supreme Court pronouncement extinguishing a state's right to categorically ban a particular type of lawyer solicitation. No longer may a state claim a substantial governmental interest in restricting lawyer solicitation merely because the solicitation may reach a potential client whose condition makes the client susceptible to undue influence. A state may regulate a mode of solicitation only if the mode poses a serious danger of exploiting such susceptibility.

States may regulate targeted, direct mail solicitation using means far less restrictive and more precise than an outright ban. Similarly, states may regulate in-person solicitation for business representation through methods other than prohibition. The Supreme Court has consistently struck down bans on lawyer solicitation, emphasizing the importance of the free flow of lawyer information. This consistency suggests that the Court may rule indiscriminate bans on in-person solicitation unconstitutional. Oklahoma can avoid redrafting a new rule each time the Court narrows the state's interest in restricting solicitation. To accomplish this, Oklahoma should draft a rule which provides minimum regulation of targeted, direct mail solicitation and allows in-person solicitation for business representation.

Holly J. Harlow

139. *Id.*
140. See *supra* note 126.
141. *Id.*

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