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## Is Advertising Necessarily the Death of a Profession

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## NOTES

# IS ADVERTISING NECESSARILY THE DEATH OF A PROFESSION?

### *Shapero v. Kentucky Bar Association*<sup>1</sup>

Lawyers occupy a particular position in society as members of a “learned profession”.<sup>2</sup> While the concept of a “learned profession” has often been criticized as being rooted in self-serving romanticism,<sup>3</sup> it is more accurately based upon the special ethical standards governing lawyers. It serves as a means of restraining lawyers in the exercise of the unmatched power they wield in the American judicial system.<sup>4</sup> The training and specialization process of the legal profession allows its members to operate within the efficient and equitable constraints of the American legal system.<sup>5</sup>

*Shapero v. Kentucky Bar Association*<sup>6</sup> addresses attorney advertising; a practice not easily reconciled with the great ethical demands which the legal profession requires of attorneys in their conduct towards both individual clients and society as a whole.<sup>7</sup>

In *Shapero*, the Supreme Court announced that attorney advertising, in the form of direct-mail solicitation to potential clients known to face particular legal problems, cannot be categorically prohibited by a state, so long as the solicitation is truthful and non-deceptive.<sup>8</sup>

The legal profession’s secondary identity as an economic entity has been treated like the ugly step sister throughout the years. Nonetheless the legal practice is a creature of economic self-interest and is subject to the

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1. 108 S. Ct. 1916 (1988).

2. *Id.* at 1930. See generally R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953).

3. 108 S. Ct. at 1930.

4. *Id.*

5. *Id.*

6. 726 S.W.2d 299 (Ky. 1986), *cert. granted*, 108 S. Ct. 64 (1987), *rev’d*, 108 S. Ct. 1916 (1988).

7. See, e.g., *People ex rel. Maupin v. MacCabe*, 18 Colo. 186, 188, 32 P. 280, 280 (1893) (suggesting that “[t]he ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares”).

8. 108 S. Ct. at 1917.

basic mechanical effects of supply and demand.<sup>9</sup> Its growing sophistication has made these effects an even more pressing reality.<sup>10</sup>

While the legal community is uneasy with the introduction of advertising into the legal marketplace,<sup>11</sup> economists recognize that advertising and self-promotion have a great effect on the mechanics of supply and demand.<sup>12</sup> Generally speaking, advertising plays a beneficial role in lowering prices and stimulating competition in a particular market.<sup>13</sup> Conversely, restriction in truthful advertising, which artificially interferes with transmission of price information to consumers, reduces the efficiency of the free market.

Courts and the legal community are striving to balance concepts of the "learned profession" and the harsh realities of an increasingly complex and competitive legal market. This Note will discuss the legal analysis surrounding attorney advertising and the practical ramifications of *Shapero*.

In 1985, Richard D. Shapero, a Louisville attorney and member of the Kentucky Bar Association,<sup>14</sup> applied to the Kentucky Attorneys Advertising Commission<sup>15</sup> for approval of a letter<sup>16</sup> he desired to mail to

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9. See 108 S. Ct. at 1930.

10. *Id.*

11. Antiquated ethical considerations bearing on attorney advertising have evidently retained vitality, at least among the legal community. A 1978 survey indicated that a vast majority of attorneys oppose lawyer advertising (89%). Victor, *A Commentary on Legal Advertising*, 66 *WOMENS L.J.* 6, 6 (1980) (citing Murphy, *A.B.A.'s Ad Guidelines Expanded to Allow T.V.*, Editor & Publisher, at 16 (Aug. 19, 1978)).

12. See, e.g., Stigler, *The Economics of Information*, 69 *J. POL. ECON.* 213 (1961).

13. See, e.g., J. CADY, *RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS* (1976); A. MAURIZI & T. KELLY, *PRICES AND CONSUMER INFORMATION: THE BENEFITS FROM POSTING RETAIL GASOLINE PRICES* (1978); Benham & Benham, *Regulating Through the Professions: A Perspective of Information Control*, 18 *J. L. & ECON.* 421 (1975); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 *J. L. & ECON.* 337 (1972); Cady, *An Estimate of the Price Effects of Restrictions on Drug Advertising*, 14 *ECON. INQUIRY* 493 (1976).

14. 726 S.W.2d at 300.

15. Ky. Sup. Ct. Rule 3.135(3)(a) provided in full:

There shall be created an Attorney Advertising Commission (hereafter Commission) which shall perform such functions in regulating attorney advertising as prescribed in this rule. The purposes of the Commission are to aid lawyers to ethically advertise and protect the public.

16. The proposed letter 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 keep your home by ORDERING you [sic] creditor 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 you [sic] 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.

potential clients who had a foreclosure suit filed against them.<sup>17</sup> The Advertising Commission ruled that Shapero's proposed letter violated Kentucky Supreme Court Rule 3.135(5)(b)(i) in that "it is a letter precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."<sup>18</sup> On November 26, 1986, Shapero petitioned the Kentucky Supreme Court for a review of the advisory opinion regarding the propriety under Kentucky Supreme Court Rule 3.135(5)(b)(i) of proposed direct targeted mail to a person with specified legal problems.<sup>19</sup>

The Kentucky court, after finding the Kentucky rule unconstitutional,<sup>20</sup> turned to the American Bar Association Model Rule of Professional Conduct 7.3<sup>21</sup> as an effective form by which the state may exercise its authority to regulate legal advertising.<sup>22</sup> Using Model Rule 7.3, the Kentucky Supreme Court did not believe that Shapero's form letter protected the public from "overreaching, intimidation or misleading private targeted mail solicitation."<sup>23</sup> The court viewed the letter's specific nature as a form of direct solicitation and therefore potentially ripe for abuse.<sup>24</sup> The Kentucky court affirmed the decision of the ethics and advertising committees and denied Shapero's request to utilize the form letter. Yet the court did not enunciate clearly how Rule 7.3 cured the infirmities of the state rule.<sup>25</sup>

17. *Id.*

18. Ky. Sup. Ct. Rule 3.135(5)(b)(i) provided in full:

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.

The Commission specifically proclaimed the principles in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) and recommended the Kentucky Supreme Court amend its rules. Shapero petitioned the Ethics Committee of the Kentucky Bar for an advisory opinion as to the Rule's validity. *See KY. SUP. CT. RULE 3.530 n.1*. The Ethics Committee, in a formal opinion adopted by the Board of Governors, did not find the letter misleading or fraudulent, but upheld Rule 3.135(5)(b)(i) "on the grounds that it was consistent with Rule 7.3 of the American Bar Association (ABA) Model Rule of Professional Conduct (1984)." 108 S. Ct. at 1920.

19. *See* 726 S.W.2d at 300.

20. *Id.* at 299. The court held, citing *In re R.M.J.*, 455 U.S. 191 (1982) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), that a state can prohibit non-misleading attorney advertising only when it asserts a substantial interest in so doing and the abridgement of the commercial speech is proportionate to that interest. Here, the court felt that the state had not asserted such an interest. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 301.

25. 108 S. Ct. at 1917.

The United States Supreme Court granted certiorari and on June 13, 1988, reversed and remanded the findings of the Kentucky Supreme Court.<sup>26</sup> Justice Brennan penned the majority opinion which held that a state could not, consistent with the first and fourteenth amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems.<sup>27</sup>

### LEGAL BACKGROUND

The history of ethical and judicial restraints on attorney advertising is deeply rooted in American history. Over a century ago, the Alabama bar became the first state bar association to adopt a code of ethical standards for attorney behavior.<sup>28</sup> The Alabama code provided the ethical precepts of present day state bar associations. Conceptually, the code provided a framework designed to maintain the dignity of the legal profession and to protect consumers from questionable professional practices.<sup>29</sup> It permitted attorneys to provide useful information about legal services but did not allow attorneys to solicit particular clients.<sup>30</sup>

In 1908, the American Bar Association (ABA) first published its "Canon of Professional Ethics".<sup>31</sup> The ABA adopted thirty-two canons that were very similar to the Alabama Code, and in 1922 began to issue formal opinions interpreting the canons. The first of these formal opinions dealt with attorney advertising and stated in part; "any conduct that tends to commercialize or bring 'bargain counter' methods into the practice of law lowers the profession in public confidence and lessens its ability to render efficiently that high character of service to which the members of the legal community are called."<sup>32</sup>

Prior to 1975, bar associations were free to regulate conduct and uphold the philosophical mandates mentioned in the formal opinions. However, in 1975, the United States Supreme Court for the first time rejected bar

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26. *Id.* at 1916.

27. *Id.*

28. ALABAMA STATE BAR ASSOCIATION CODE OF ETHICS, 118 Ala. xxiii (1899, first adopted by Alabama State Bar Association in 1887) (1887) (cited in C. WOLFRAM, MODERN LEGAL ETHICS 53-54 nn.20 & 21 (1986)).

29. ALABAMA STATE BAR ASSOCIATION CODE OF ETHICS, 118 Ala. xxiii (1887).

30. Canon 16 of the Alabama Code allowed attorney advertising in newspapers, but called for restraint in the form and manner of presentation. ALABAMA STATE BAR ASSOCIATION CODE OF ETHICS, 118 Ala. xxvii (1887).

31. See CANONS OF PROFESSIONAL ETHICS Canon 27 (1908) (quoted in American Bar Foundation, Opinions of the Committee on Professional Ethics 74-75 (1967)).

32. ABA Comm. on Professional Ethics and Grievances, Formal Op. 1 (1924).

restraints on the commercial practices of the legal professional. In *Goldfarb v. Virginia State Bar*,<sup>33</sup> the Court held that the Virginia State Bar Association could be sued for violations of the Sherman Act's proscription against price fixing.<sup>34</sup> This was the first time the Supreme Court subjected the organized bar to the strictures of the federal antitrust laws.

The legal profession also has predicated regulation of advertising upon the assumption that such regulation did not constitute a violation of the first amendment.<sup>35</sup> Courts reasoned that advertising was economically rather than politically motivated, thereby outside the scope of first amendment protection. *Valentine v. Christensen*<sup>36</sup> gave authority to the notion that "commercial speech"<sup>37</sup> does not deserve first amendment protection. The Court in *Valentine* upheld a ban on street distribution of advertising notices.<sup>38</sup> In so deciding, the Court pronounced that "the Constitution imposes no . . . restraint on government as respects to purely commercial advertising."<sup>39</sup>

The Supreme Court formulated the modern commercial speech doctrine in 1976 with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>40</sup> At issue was a Virginia statute banning drug price

33. 421 U.S. 773 (1975).

34. *Id.* at 791-92; see 15 U.S.C. § 1 (1974).

35. See *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935).

36. 316 U.S. 52 (1942).

37. The Supreme Court has characterized commercial speech as that which does "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). For an in-depth discussion of the development of commercial speech, see Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VAND. L. REV. 1 (1979).

38. *Id.* at 54.

39. *Id.* See *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Bigelow*, the Court reversed a conviction of a newspaper publisher from printing, in violation of a Virginia statute, an advertisement publicizing the availability of legal abortions in New York. *Id.* at 825-26. The *Bigelow* court announced a modification of the commercial speech doctrine by distinguishing "purely commercial speech" from constitutionally protected communications that conveyed information or rendered an opinion and explained that the *Valentine* decision related only to "a reasonable regulation of the manner in which commercial advertising could be distributed." *Id.* at 819.

40. 425 U.S. 748 (1976). In *Virginia Board of Pharmacy*, a consumer group challenged a Virginia statute prohibiting the advertising of prescription drug prices. *Id.* at 749-52. In fact, the Court stated that "the notion of unprotected 'commercial speech' all but passed from the scene" with the *Bigelow* decision. *Id.* at 759. Still most commentators credit to *Virginia Board of Pharmacy* the unambiguous rejection of the concept of commercial speech as not having first amendment protection. See, e.g., Fuchsberg, *Commercial Speech: Where It's At*, 46 BROOKLYN L. REV.

advertisements.<sup>41</sup> The Court identified three major first amendment justifications for permitting prescription drug price advertising. First, it noted that even a speaker delivering a "purely economic" message is deserving of some degree of first amendment protection.<sup>42</sup> Secondly, the Court stated that consumers have a keen interest in receiving commercial information with which to make informed economic decisions.<sup>43</sup> Finally, and somewhat more generally, the Court found that the freedom to advertise played an essential part in the free enterprise system in that it promotes competition.<sup>44</sup>

Such was the state of the doctrine of commercial speech, when in 1979 in *Bates v. State Bar Association*,<sup>45</sup> the Court faced a direct challenge to a state's restrictions on attorney advertising.<sup>46</sup> In *Bates*, two lawyers had been disciplined for placing a newspaper advertisement, which included a fee schedule for routine matters, for their legal clinic.<sup>47</sup>

The Court held that the "[s]tate may [not] prevent the publication in a newspaper of appellants' truthful advertisement covering the availability and terms of routine legal services."<sup>48</sup> The Court deliberated over the state interest supporting continued prohibition of attorney advertising and concluded: "[W]e are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys."<sup>49</sup>

Interestingly, the *Bates* Court relied heavily upon the reasoning of *Virginia Board of Pharmacy*.<sup>50</sup> In particular, the Court emphasized that

389, 395-97 (1980).

Since *Virginia Board of Pharmacy*, the Court's treatment of commercial speech has become perhaps more sophisticated, and more methodical. See Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980) in which Justice Powell articulated a "four-part analysis" to be employed in commercial speech cases:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the 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.

*Id.* at 566.

41. 425 U.S. at 748.

42. *Id.* at 762.

43. *Id.* at 757, 763-64.

44. *Id.* at 764-65.

45. 433 U.S. 350 (1977).

46. *Id.* The advertised services included uncontested divorces, uncontested adoptions, simple personal bankruptcies, and name changes. *Id.* at 354.

47. *Id.* at 355-56.

48. *Id.* at 384.

49. *Id.* at 379.

50. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). As a matter of fact, the *Bates* Court explained: "We have set

the benefits that would inure to consumers from the free flow of commercial information outweighed the interests of the government in regulating attorney conduct. Society in general has an overwhelming interest in the free flow of truthful commercial information.<sup>51</sup>

A year after *Bates*, the Court examined the propriety of a classic case of "ambulance chasing" or "in-person solicitation" in *Ohralik v. Ohio State Bar Association*.<sup>52</sup> In this case, the United States Supreme Court affirmed the judgment of the Ohio Supreme Court imposing disciplinary sanctions on an attorney for in-person solicitation of clients.<sup>53</sup> In reaching its decision, the Court reaffirmed the state's role in maintaining standards among members of licensed professions.

The controversy of attorney conduct then shifted in *In Re R.M.J.*, to a discussion of attorney direct-mail communications.<sup>54</sup> Following the *Bates* decision, the Missouri Supreme Court attempted to forge a balance between the prohibition of attorney advertising, and unlimited permissibility.<sup>55</sup> Richard M. Jacobs, a Clayton, Missouri lawyer, issued a number of letters announcing the opening of his new office.<sup>56</sup> The letters contained a list of areas in which Jacobs practiced. The designations of the practice areas on that list deviated from those prescribed by the Missouri rule.<sup>57</sup> One of the letters was inadvertently mailed to a married couple with which he had no personal or professional ties.<sup>58</sup> In subsequent disbarment proceedings, the Missouri Supreme Court reprimanded Jacobs for violating the state's advertising rule.<sup>59</sup> But the Missouri court declined to disbar him, because it was aware that this was "a 'test' case, and that respondent's violation . . . [was] minimal."<sup>60</sup> The Missouri court articulated that it had exercised good faith in announcing the disciplinary rules pursuant to *Bates*.<sup>61</sup> The

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out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it." 433 U.S. at 365.

51. 433 U.S. at 368-77.

52. 436 U.S. 447 (1978). *Ohralik* involved an attorney who obtained contingent fee arrangements from two young women who had been injured in an automobile accident; he solicited the case in person - one of the women was actually approached while hospitalized and in traction. *Id.* at 448-52.

53. *Id.* at 455-57.

54. 455 U.S. 191 (1982).

55. See Mo. R. Ct. DR-2-101(A)(2) (1978). The rule provided that an attorney may send a "brief professional announcement card stating new or changed associates or addresses, change of firm name or similar matters . . . sent only to lawyers, clients, former clients, personal friends and relatives." See, e.g., *In re R.M.J.*, 609 S.W.2d 411, 412 (1980).

56. 455 U.S. at 196.

57. *Id.* at 197.

58. *Id.* at 198, 206 n.20.

59. See *In re R.M.J.*, 609 S.W.2d 411 (Mo. 1980).

60. *Id.* at 412.

61. See *id.* at 411-12.



court, however, did not express a view as to the continued validity of the advertising rules under the prevailing commercial speech analysis.<sup>62</sup>

The United States Supreme Court unanimously reversed the Missouri judgment. Justice Powell,<sup>63</sup> writing for the majority, held that a state may not regulate a lawyer's commercial speech unless the speech is inherently or demonstrably misleading, or the regulation is narrowly drawn to prevent specific and significant abuse.<sup>64</sup> Applying these principles, Justice Powell found that the state's prohibition on the use of certain terms to describe areas of legal practice such as "real estate" but not "property," did not serve a substantial governmental purpose.<sup>65</sup>

The Court also focused on the allegation that the attorney had impermissibly mailed cards to persons other than former clients. The Court found nothing in the record that would support a substantial governmental purpose to prevent such mailings, or a finding that they were inherently misleading.<sup>66</sup> In short, the Court forced the state to lift the absolute ban on direct mail solicitation unless it could prove that the ban was absolutely necessary.<sup>67</sup> Most recently, in *Zauderer v. Office of Disciplinary Counsel*,<sup>68</sup> the Supreme Court restated that an attorney's advertising was commercial speech and entitled to the constitutional protection of the first amendment.

In *Shapero*,<sup>69</sup> the Court discussed the categorical prohibition of solicitation of legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems.<sup>70</sup> Justice Brennan, writing for the majority, laid the fundamental suppositions that attorney advertising is "in the category of constitutionally protected commercial speech."<sup>71</sup>

The concepts of *Zauderer* and *Central Hudson Gas* framed the level of state regulation of commercial speech that is constitutionally permissible, such that regulation may extend only as far as the state's interest in preventing potential deception and confusion.<sup>72</sup> Brennan pointed out that

62. See *id.* "If he . . . obtains a favorable [decision on appeal to the Supreme Court], we can then decide whether we will honor our duty to exercise 'superintending control over all courts' in Missouri (Mo. CONST. art. V, § 4) or will order DR-2-101 excised from Rule 4 of this Court." *Id.*

63. Justice Powell's influence in this area of constitutional law has proven to be considerable, having written the majority opinions in *Ohralik*, 432 U.S. 447 (1978) and *Central Hudson*, 447 U.S. 557 (1980).

64. See 455 U.S. at 204-05.

65. *Id.*

66. *Id.*

67. *Id.*

68. 471 U.S. 626, 637 (1985).

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

70. *Id.*

71. See generally *id.* at 1919-24.

72. *Id.* at 1921; see 726 S.W.2d at 301.

the categorical ban of attorney advertisement has been limited to "in-person solicitations by lawyers for profit."<sup>73</sup>

The Court undertook a thorough analysis of the area of written direct solicitations. The Court pointed out that there must first be a contextual analysis of the advertisement.<sup>74</sup> Shapero's letter contained no false or misleading information.<sup>75</sup> Rather, the Kentucky court objected to the fact that the proposed letter targeted persons "known to need [the] legal services" offered in his letter.<sup>76</sup> The *Shapero* Court dismissed the distinction between general mail solicitation versus direct mail solicitation.<sup>77</sup>

Justice Brennan concluded that a prudent advertiser would not want his resources to be scattered freely, but rather his goal would be efficient distribution of his materials to a broad, yet targeted audience.<sup>78</sup> As a result, Brennan stated, "the First Amendment does not permit a ban on certain speech merely because it is more efficient . . . on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable."<sup>79</sup>

The Court also addressed the fictitious assumption that a potential client with legal problems will always be overwhelmed and emotionally vulnerable to direct-mail solicitation.<sup>80</sup> Justice Brennan illustrated that this overly paternalistic attitude is unwarranted. It is natural for a client to feel overwhelmed by his legal troubles, and his ability to make decisions concerning those problems will be the same regardless of his receipt of a targeted letter from an attorney.<sup>81</sup> "The relevant inquiry is not whether there exists potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."<sup>82</sup>

Here the Court distinguished the difference between direct mailings and in-person solicitations, which are categorically banned.<sup>83</sup> The Court stated that Shapero's letter lacked "the coercive force of the personal presence of a trained advocate or the pressure on the potential client for an immediate yes-or-no answer to the offer of representation."<sup>84</sup> The targeted direct-mail recipient enjoys the ability to disseminate the content of the letter under

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73. 108 S. Ct. at 1921.

74. *Id.*

75. *See* letter cited *supra* note 16.

76. *Id.* at 1922.

77. *Id.* at 1921.

78. *Id.*

79. *Id.* at 1921-22.

80. *Id.* at 1922-23.

81. *Id.* *See Zauderer*, 471 U.S. at 642.

82. 108 S. Ct. at 1922-23.

83. *Id.* at 1923.

84. *Id.* at 1922.

his own terms and surroundings such that he can "avoid the bombardment of [his] sensibilities simply by averting [his] eyes."<sup>85</sup>

Brennan also conceded that a direct mail letter could be deceptive. He suggested, however, that rather than a categorical ban, the state would be better served if a state agency screened the letter/advertisement and thereby restricted and punished any such abuses.<sup>86</sup> While Brennan realized that there are some practical problems of such inspections, and that they will require additional state or bar resources,<sup>87</sup> he concluded that these administrative burdens should not frustrate the protection of accurate and informative commercial speech.<sup>88</sup> The majority further reasoned that the letter's use of underscored, uppercase letters and marketing language<sup>89</sup> are not sufficient reasons for state prohibitions. This conclusion relied upon the Court's underlying belief that if the contents of the letter are not false and misleading, then alleged misinformation is not present.<sup>90</sup>

Justice O'Connor, writing for the dissent, argued that the Court should "give greater deference to the States' legitimate efforts to regulate advertising by their attorneys."<sup>91</sup> This legitimate effort is couched in a vital distinction between professional services and "standardized consumer products."<sup>92</sup> Justice O'Connor pointed out that the quality and nature of legal services are more difficult for the average person to discern, and as a result, potential mistaken assessments by the consumer have more serious consequences. "[T]he practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than . . . ordinary consumer goods."<sup>93</sup>

The dissent also recognized that unsolicited advice is highly likely to be colored by the attorneys' economic motives, and these purely capitalistic motives are "sure to undermine the professional standards that States have a substantial interest in maintaining."<sup>94</sup> Further, the dissent was not convinced that Shapero's letter necessarily falls under commercial speech protection. It views government intervention as justified when attorney advertising is either "potentially" or "demonstrably" misleading, or when truthful advertising "undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."<sup>95</sup>

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85. *Id.*

86. *Id.* at 1923.

87. *Id.* at 1924.

88. *Id.*

89. *Id.* at 1924-25.

90. *Id.*

91. *Id.* at 1925.

92. *Id.*

93. *Id.*

94. *Id.* at 1928.

95. *Id.*

Along this line of reasoning, the dissent criticized as inherently misleading the characterization of some legal problems as "routine."<sup>96</sup> Until all of the facts are disclosed, a legal problem cannot be confidentially claimed to be "routine." Such a claim in an advertisement undercuts professional standards in that it encourages attorneys to accept the economic risk of binding themselves to a level of fees that could prove inadequate for the complexity of the work actually involved.<sup>97</sup> In the face of this problem, the dissent nonetheless conceded that "it may be possible to devise workable rules that would allow something more than the most minimal kinds of price advertising by attorneys."<sup>98</sup> It felt, however, that this is an issue of state concern rather than constitutional adjudication and concluded that Rule 7.3 "sweeps no more broadly than is necessary to advance a substantial governmental interest."<sup>99</sup> Accordingly, the dissent would not deem Kentucky's prohibition of Shapero's letter unconstitutional.

#### LIFE AFTER SHAPERO

The *Shapero* decision directly invalidated ABA Model Rule of Professional Conduct 7.3 and will effect at least twenty-four states that adopted the rule in some form.<sup>100</sup> The ruling effectively places large scale direct-mail marketing techniques at the disposal of lawyers. In light of *Zauderer*,<sup>101</sup> it is not difficult to have foreseen *Shapero*'s result. *Zauderer* stood for the proposition that generally distributed, written advertising materials offering non-deceptive legal advice are not coercive or intimidating in nature.<sup>102</sup>

In *Shapero*, therefore, the Court reached the logical conclusion that an advertisement conveying legal advice and suggesting an attorney's services should not lose its first amendment protection simply because it is mailed to a particular individual rather than published in a newspaper. As the Court stated, "the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable."<sup>103</sup> The dissent conceded that prior caselaw supported the majority's *Shapero* decision; unfortunately the ABA lacked this insight and is now forced to rectify Rule 7.3 in light of the *Shapero* decision. This forced reformation is the real impact of the *Shapero* decision.

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Advertising and Solicitation*, LAW. MAN. PROF. CONDUCT (ABA/BNA), at 81:2003-06 (Sept. 28, 1988).

101. 471 U.S. 626 (1985).

102. *Id.* at 642.

103. 108 S. Ct. at 1921-22.

Interestingly, the Missouri Supreme Court Rules of Professional Conduct 7.2<sup>104</sup> and 7.3<sup>105</sup> seem to contain the analysis the *Shapero* Court was

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104. Mo. Ct. R. 4(7.2). Rule 7.2 provides in full:

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

105. Mo. Ct. R. 4(7.3). Rule 7.3 states:

(a) Subject to the requirements of paragraph (c), a lawyer may initiate written communication, not involving personal or telephone contact, with persons known to need legal services of the kind provided by the lawyer in a particular matter, for the purpose of obtaining professional employment.

(b) A lawyer may initiate personal contact including telephone contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (c):

(1) if the prospective client is a close friend, relative or former client, or one whom the lawyer reasonably believes to be a client;

(2) under the auspices of a public or charitable legal services organization; or

(3) under the auspices of a bona fide political, social, civic, fraternal employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(c) a lawyer shall not initiate a written communication under paragraph (a) or personal contact, including telephone contact under paragraph (b) if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer;

(2) the person has made known to the lawyer a desire not to receive a communication from the lawyer; or

(3) the communication involves coercion, duress, or harassment.

The Missouri Supreme Court Rule of Professional Conduct 7.3 also contains the following supplemental comment, "This Rule does not permit unrestrained direct mail solicitation. The restrictions contained in paragraphs (c)(1), (2), and (3) are designed to respond to lawyer mail appeals directed to a 'known or calculated

seeking. Missouri Rule 7.3 focuses on the content of the written communication, as well as any "known or calculated weakness"<sup>106</sup> of the potential client, in its standard for deciding whether to allow or ban written solicitations.

Rule 7.2 sets out the essential proposition that legal advertising must provide accurate information. The rule recognizes that although advertising involves an "active quest" for clients, the public needs information about legal services. The rule specifically mentions the appropriate mediums, including direct mail advertisement to those not known to need legal services of the kind provided by the lawyer.<sup>107</sup>

Rule 7.3 deals specifically with direct contact with prospective clients.<sup>108</sup> This is where the Missouri rule illustrates a prophetic interpretation of *Shapero*. The rule recognizes that there is a potential for abuse inherent in direct soliciting by a lawyer of prospective clients.<sup>109</sup> In harmony with *Ohralik*, the rule prevents personal telephone solicitations by attorneys except in very limited circumstances. However, it does permit direct mail solicitations as long as the attorney does not direct a letter to an individual having a known or calculated weakness such that the direct mail solicitation would prove to be unduly coercive in nature.

Here the Missouri Supreme Court Rule reflects the thrust of *Shapero*: a potential client known to have a specific problem does not make the direct mail solicitation unconscionable. Instead, the unconscionability hinges upon the attorney's knowingly abusing the situation and emotional handicaps of the potential client. The Missouri rule, however, is not without fault. The "attorney knowledge" standard is difficult to administer. It requires individual bar associations to inquire extensively into the subjective intent and reasoning behind the attorney's direct-mail solicitation.<sup>110</sup> Unfortunately, the funding realities of some bar associations would not allow this type of in-depth investigation of all direct-mail requests.<sup>111</sup>

## CONCLUSION

Do *Shapero* and rules like Missouri's signal a willingness to abandon professionalism and principles for profit and commercialism?<sup>112</sup> Notice that

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106. *Id.*

107. Mo. Ct. R. 4(7.2), *supra* note 104.

108. Mo. Ct. R. 4(7.3), *supra* note 105.

109. Mo. Ct. R. 4(7.3) comment (1988).

110. *Id.*

111. *Id.*

112. See generally American Bar Association, Commission of Professionalism, "In The Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, reprinted in 112 F.R.D. 243 (1986) (Report to the ABA Board of Governors and House of Delegates, New York, N.Y., Aug. 1986). For a critical commentary, see Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 Loy.

this question presupposes that professionalism can be equated with principle but not profit, and commercialism with profit but not principle. The question also implies that a person who conforms to professional principles is likely to engage in different conduct than a person who does not.

It is not proven that there is any inherent evil between the coexistence of "professionalism" and "commercialism" in the legal community.<sup>113</sup> Nor is it fair to assume that the implementation of commercial advertising strategies adversely affects attorney's professional ethics.<sup>114</sup> But if this is the case, the concern may better be stated that if attorney ethics are so easily influenced, is there not something woefully wrong with the criteria for becoming a member of the "learned profession"?

In addition, society now places an enormous emphasis upon the value of consumer education. If the legal profession is unwilling to loosen its grip upon the antiquated concepts of advertising, it must be prepared to provide the necessary information that the public not only seeks, but has a right to know about legal services. In other words, if consumer education cannot take place in advertising, the legal profession must provide forums, such as seminars and lectures, for the general public. Unfortunately, the various bar associations have proven to be extremely ineffective and unwilling to provide these settings for consumer inquiry into the various aspects of legal services and fees.

In many respects lawyers are different from individuals engaged in other occupations. These differences are found in many attributes, including education, standards of admission, average income, type of work, and so on. However, attaching the "profession" label to legal work, or separating lawyers from other segments by labelling the latter "business," does not help in defining an attorney's duty to clients and members of the public.

Instead, it may be more accurate to read the term "profession" as a type of occupation engaged in the application of "theoretical and complex knowledge to the practical solution of human and social problems;"<sup>115</sup> and the term "business" as an enterprise conducted for profit. Thus, a law firm can be regarded as a business that engages in the profession of practicing law. It is along these lines that *Shapero* seems to state that an attorney's commercialism is not the demise of his professionalism.

ALEX C. CHAE

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113. Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 758 (1988).

114. McChesney & Meers, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503, 1506 (1979).

115. Bowie, *supra* note 113, at 743; see Flexner, *Is Social Work a Profession?*, quoted in Metzger, *What is a Profession?*, 52 C. & U. 42-45 (1976) (cited in Bowie, *supra*, note 113, at 743 n. 10).