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Targeted, Direct-Mail Solicitation: *Shapero v. Kentucky Bar Association* Under Attack

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Dear Ms. Smith:

It is our understanding that you were injured in the recent South Shore train accident. You have the right to fair compensation for all accident and injury-related costs, including loss of earnings and damages for pain and suffering. Every insurance company has experienced lawyers and claims adjusters on its payroll to protect [its] interest[s]. . . . We would like to make certain that you are treated fairly. If you have not yet hired an attorney, we invite you to give us a call.[1]

I. INTRODUCTION

The vast majority of the public exhibits an alarming ignorance about the law and its impact on their lives.[2] People avoid consulting a lawyer even when they perceive a need to do so.[3] This tendency stems

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1. On January 18, 1993, two South Shore & South Bend Railroad ("South Shore") trains collided head-on in Gary, Indiana, killing seven and injuring dozens more. Although Ms. Smith is a fictitious person, the letter is authentic. A Lake County, Indiana law firm sent this letter on January 19, 1993—the day after the collision—to at least one of the persons purportedly injured in the accident. On that same day, another law firm ran the following advertisement in a local paper:

South Shore Accident Victims
KNOW YOUR RIGHTS

We had an investigator at the scene collecting evidence. Call for a FREE injury booklet and FREE consultation.

See South Shore Accident Victims, GARY POST TRIB., Jan. 19, 1993, at C3.

2. *See Legal Advertising: The Illinois Experiment*, 1985 A.B.A. COMM'N ON ADVERTISING 1 [hereinafter *Illinois Experiment*]. Various studies and surveys suggest that many Americans are generally ignorant of fundamental principles of the American legal system, such as which party bears the burden of proof in a criminal trial. *Id.* Additionally, many Americans do not understand the fundamental roles assumed by lawyers and are frequently unaware that in certain matters the assistance of an attorney may be necessary. *Id.*

3. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 370 nn.22-23 (1977) (citing various surveys and studies suggesting that members of American society are generally unaware of where and how to obtain competent legal services and often fear that services will not be affordable).

largely from two factors: the feared price of the attorney's services and an inability to locate competent counsel.[4] As the letter reprinted above demonstrates, targeted, direct-mail solicitation is one means of increasing the general public's access to legal services.[5]

Attorneys have been reluctant to take part in advertising and solicitation[6] since the United States Supreme Court specifically allowed their use sixteen years ago.[7] Of those attorneys who have advertised or solicited, most have used the traditional forms of advertising such as television, radio, and print media. Attorneys have been particularly averse to direct-mail solicitation, which may be the most effective form of advertisement.[8]

Prior to 1988, the scarcity of attorney solicitation could be explained by the unsettled nature of the governing law. In that year, however, the Supreme Court finally clarified the law regarding targeted, direct-mail solicitation by attorneys, or so it appeared. In *Shapero v. Kentucky Bar Ass'n*,[9] the Supreme Court held that a state may not "categorically prohibit" targeted, direct-mail solicitation by lawyers.[10] The Court emphasized that the relevant inquiry to determine the propriety of a particular direct-mail solicitation "is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."[11] Most lawyers and judges have correctly interpreted *Shapero* as holding that

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4. *Id.*

5. See Nomi N. Zomick, Note, *Attorney Solicitation of Clients: Proposed Solutions*, 7 HOFSTRA L. REV. 755 (1979), for a discussion of the effect of targeted, direct-mail solicitation.

6. *Report on the Survey on the Image of Lawyers in Advertising*, 1990 A.B.A. COMM'N ON ADVERTISING 2-3 (noting that only 32% of attorneys responding to a November 1987 A.B.A. survey reported that they had used advertising).

7. *Bates*, 433 U.S. at 383. For a detailed discussion of *Bates*, see *infra* notes 36-55 and accompanying text.

8. *See Illinois Experiment*, *supra* note 2, at 34, reporting that:

> The likelihood that an individual attorney's advertising campaign is effective can be increased if he or she adheres to the following suggestions: direct an ad to a specific target audience—tailor the content of the ad, the choice of medium, and how a medium is used; address a meaningful, unmet need of the target audience; focus on one key message rather than attempting to convey two or three messages; test to see that the ad actually communicates the intended message, and also that it creates positive reaction to that message.

Id.

9. 486 U.S. 466 (1988).

10. *Id.* at 471.

11. *Id.* at 474.

the First Amendment[12] protects written modes of solicitation that are neither false nor misleading.[13]

The lawyer who sent the letter reprinted above probably relied upon *Shapero* when concluding that it was both legal and ethical to send the letter to persons injured in the South Shore train collision. Such a conclusion reflects an entirely reasonable reading of *Shapero*. This lawyer—and probably most other lawyers, judges, and scholars—would be surprised to learn that despite the Supreme Court's holding in *Shapero*, some states still discipline attorneys for sending truthful, targeted, direct-mail solicitations. If the South Shore letter had been sent in New Jersey, Florida, Alabama, or Texas, this lawyer might be facing a reprimand, suspension,[14] or even incarceration.[15]

Over the last two years, state courts have begun to erode the constitutional protection afforded targeted, direct-mail solicitation in *Shapero*. In particular, three state supreme courts have held that targeted, direct-mail solicitation of victims or their families immediately after an accident does not deserve First Amendment protection.[16] In their zeal to punish what they perceive as distasteful conduct, these

12. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811 (1975); Schneider v. New Jersey, 308 U.S. 147, 160 (1939).

13. *See, e.g.*, Unnamed Attorney v. Attorney Grievance Comm'n, 545 A.2d 685, 691 (Md. 1988); Robert D. Peltz, *Legal Advertising—Opening Pandora's Box?*, 19 STETSON L. REV. 43, 44-45 (1989).

14. *See infra* note 16.

15. In June, the Texas legislature passed a law making certain types of solicitation by attorneys a felony punishable by up to 10 years in prison and a $10,000 fine. Mark Hansen, *Texas Makes Solicitation a Felony*, A.B.A. J., Sept. 1993, at 32. See *infra* note 167 for a more thorough discussion of the Texas legislation.

16. *See* Norris v. Alabama State Bar, 582 So. 2d 1034, 1036-37 (Ala. 1991) (holding that the attorney's act of sending flowers, a letter offering his firm's services, and his law firm's brochure to the funeral home where ceremonies for an accident victim were to take place constituted improper solicitation), *cert. denied*, 112 S. Ct. 417 (1991); The Florida Bar: Petition to Amend Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451, 459 (Fla. 1990) (upholding ban on sending direct-mail solicitations pertaining to personal injury and wrongful death claims less than thirty days after the accident or disaster); *In re* Anis, 599 A.2d 1265, 1271 (N.J. 1992) (holding that the attorney's act of sending a direct-mail solicitation to the family of a Lockerbie airplane crash victim one day after the victim's body had been identified violated New Jersey's ban on soliciting legal representation at a time when the attorney knew or should have known that the prospective client could not exercise reasonable judgment in employing an attorney), *cert. denied*, 112 S. Ct. 2303 (1992).

state courts have essentially ignored the plain meaning of *Shapero* and have instead concluded that the vulnerability of certain potential clients justifies a partial ban on targeted, direct-mail solicitation. Disturbingly, those who oppose granting First Amendment protection to direct-mail solicitation are beginning to rely upon these cases for precedent.[17] If this trend continues, the First Amendment protection that the *Shapero* Court intended to grant to targeted, direct-mail solicitation by attorneys will vanish.

Section II of this Article explores the impact that the First Amendment has had on the history of attorney advertising and solicitation, with particular emphasis on its impact on direct-mail solicitation. Section III analyzes the state court decisions that have limited this First Amendment protection. Finally, Section IV of this Article explains why these state court decisions are inconsistent with *Shapero* and therefore should not be followed.

II. EVOLUTION OF ATTORNEY ADVERTISING AND SOLICITATION

For generations, lawyers in Britain and the United States were forbidden to publicize the availability of their services.[18] Bans on client solicitation by lawyers were based upon long-standing traditions and beliefs, including "Greek law, Roman law, English common law, and the widespread belief in medieval society that law suits are inherently evil."[19] In England, for example, the legal community banned attorney advertising and solicitation of clients to protect the public from such abuses as barratry, champerty, and maintenance.[20]

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17. *See, e.g.*, McHenry v. Florida Bar, 808 F. Supp. 1543, 1547-48 (M.D. Fla. 1992) (noting that the Florida Bar relied upon *In re Anis* when defending its thirty day ban on targeted, direct-mail solicitation in personal injury and wrongful death cases).

18. STEPHEN GILLERS & NORMAN DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 31 (1985). There were a few minor exceptions to the blanket ban on attorney advertising. A lawyer could buy space in approved directories, such as Martindale-Hubbell Law Directory, purchase a line in local telephone books, or register with a bar association referral service. *Id.*

19. Zomick, *supra* note 5, at 757 (citations omitted).

20. Victoria J. Kratzer, Comment, Shapero v. Kentucky Bar Association: *First Amendment Protection for "Targeted" Advertisements by Attorneys*, 23 GA. L. REV. 545, 547 (1989). Blackstone defined "barratry" as "the offence of frequently exciting and stirring up suits and quarrels." *See* State v. Batson, 17 S.E.2d 511, 512 (N.C. 1941) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *134). "Champerty . . . consists of an agreement under which a person who has no interest in the suit of another undertakes to maintain or support it at his own expense in exchange for part of the litigated matter in the event of a successful conclusion of the cause." Schnabel v. Taft Broadcasting Co., 525 S.W.2d 819, 823 (Mo. Ct. App. 1975). "Maintenance" consists of "an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." *Id.* (quoting Moffett v.

The English prohibition on attorney advertising and solicitation did not initially take hold in this country. In the nineteenth century, advertising by American attorneys was commonplace. Abraham Lincoln, for example, used advertising and direct-mail solicitation to acquire clients during the 1850s.[21] Despite the use of advertising and direct-mail solicitation by an attorney such as Lincoln, well known for his high standards of professional ethics,[22] the ABA adopted the first prohibition on attorney advertising in 1908.[23] Canon 27 provided:

> It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.[24]

The Model Code of Professional Responsibility, adopted in 1969, continued the virtual ban on attorney advertising and solicitation.[25]

Commerce Trust Co., 283 S.W.2d 591, 596 (Mo. 1955), *cert. denied,* 350 U.S. 996 (1956)).

21. *See* Robert F. Boden, *Five Years After* Bates: *Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 548 (1982). The author notes that in the months preceding the litigation in Illinois Cent. R.R. v. County of McLean, 17 Ill. 291 (1855), Lincoln solicited professional employment from both parties by mail and was subsequently retained by the Illinois Central Railroad Company. *Id.*

22. *See* Boden, *supra* note 21, at 547.

23. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

24. *Id.* The ABA enacted Canon 27 "to reverse a perceived deterioration in the standards of the American bar resulting from widespread belief, in the latter part of the nineteenth century, 'that professions were undemocratic and un-American.'" Kratzer, *supra* note 20, at 548 n.15 (quoting John Ratino, Note, *In re R.M.J.: Reassessing the Extension of First Amendment Protection to Attorney Advertising*, 32 CATH. U. L. REV. 729, 733-34 (1983)).

25. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, -103, -104 (1976) [hereinafter MODEL CODE]. As amended in 1976, section 2-101(B) of the Model Code provided:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. at DR 2-101(B). Similarly, section 2-103(A) provided:

> A lawyer shall not recommend employment, as a private practitioner, of

Additionally, until the mid-1970s the Supreme Court's position that the First Amendment protected only political speech and not commercial speech tacitly supported the prohibitions on attorney advertising and solicitation that many states had enacted.[26] A shift in the standards governing attorney advertising did not begin until the mid-1970s, when the Supreme Court first held that commercial speech is entitled to First Amendment protection.[27]

In *Virginia State Board of Pharmacy*, a group of consumers challenged a Virginia statute that prohibited pharmacists from advertising the prices of prescription drugs, arguing that the advertising prohibition violated the First Amendment.[28] Justice Blackmun, writing for the majority, observed that the Court was confronted with an issue of first impression: Is purely commercial speech, such as a communication stating "'I will sell you the X prescription drug at the Y price,'" protected by the First Amendment?[29]

In addressing this question, the Court noted that the particular consumer's interest in the free flow of commercial information is "as keen, if not keener by far, than his interest in the day's most urgent political debate."[30] Moreover, the Court found that society as a whole has a strong interest in protecting commercial speech because commercial speech may assist consumers by furthering their interest in

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himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

Id. at DR 2-103(A). Finally, section 2-104(A) provided that, subject to three exceptions:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . .

Id. at DR 2-104(A).

26. Kratzer, *supra* note 20, at 549.

27. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

28. *Id.* at 749-50.

29. *Id.* at 760-761. The Court noted a number of decisions in which it had previously touched on this issue. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822, 825 (1975) (reversing a conviction for violation of statute that made the circulation of any publication to encourage or promote the procuring of an abortion illegal); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385, 387 (1973) (upholding an ordinance prohibiting newspapers from listing employment advertisements according to gender because such advertisements are merely commercial speech and thus are not entitled to First Amendment protection); Breard v. Alexandria, 341 U.S. 622, 641-45 (1951) (upholding conviction for violation of ordinance prohibiting door-to-door solicitation of magazine subscriptions); Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (upholding New York statute prohibiting the distribution of handbills, circulars and other advertising matter on streets).

30. *Virginia State Bd.*, 425 U.S. at 763.

the fullest possible dissemination of commercial information.[31] These interests, along with the acknowledgment that "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information,"[32] led the Court to conclude that purely commercial speech is indeed entitled to First Amendment protection.[33]

Accordingly, the Supreme Court narrowly defined the category of constitutionally permissible restrictions on commercial speech: only commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted in the service of a substantial government interest, and then only through means that directly advance that interest.[34] Furthermore, rules prohibiting commercial speech will not be upheld if the government's interest in suppressing the speech can be advanced by a more limited regulation.[35]

A. Attorney Advertising and In-Person Solicitation

Only one year after its decision in *Virginia State Bd. of Pharmacy*, the Supreme Court encountered a commercial speech dispute specifically addressing the issue of attorney advertising. In *Bates v. State Bar of Arizona*,[36] the Court invalidated an absolute prohibition on advertising by lawyers and held that lawyer advertising is a form of commercial speech that may not be subjected to blanket suppression.[37]

In *Bates*, two lawyers advertised their services and fees in a daily newspaper in violation of an Arizona disciplinary rule prohibiting

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31. *Id.* at 764. In emphasizing the strong societal interest in the free flow of commercial information and the necessity of protecting commercial information, the Court further observed: "Even an individual advertisement, though entirely 'commercial,' may be of general public interest . . . . To this end, the free flow of commercial information is indispensable." *Id.* at 764-65.

32. *Id.* at 765.

33. *Id.* at 770, 773. Although the Court made clear that its opinion was limited to commercial advertising by pharmacists, *Id.* at 773 n.25, its decision in *Virginia State Bd.* provided the foundation for its opinion in Bates v. State Bar of Ariz., 433 U.S. 350, 363-65 (1977), discussed *infra* section II.A., in which the Court overturned a blanket prohibition on advertising by attorneys. *See also* Peltz, *supra* note 13, at 48.

34. *Virginia State Bd.*, 425 U.S. at 771; *see also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (holding that the State's absolute ban on promotional advertising by electric utility companies violates the First Amendment).

35. *Central Hudson Gas*, 447 U.S. at 566.

36. 433 U.S. 350 (1977).

37. *Id.* at 383. Justice Blackmun, writing for the majority, specifically held that the advertising of fees charged for routine legal services was not inherently misleading and thus could not be flatly prohibited as long as the attorney performs the services at the advertised price. *Id.* at 372-73.

attorney advertising.[38] Following a complaint, a hearing was held before the Special Administrative Committee of the Arizona State Bar Association.[39] The State Bar's Board of Governors reviewed the committee's findings of fact and conclusions of law and recommended that each lawyer be suspended from the practice of law for one week.[40] Prior to the imposition of the sanction and pursuant to Arizona Supreme Court Rule 36(d), the matter was transferred to the Supreme Court of Arizona.[41] The Arizona Supreme Court reduced the sanction to a censure only.[42]

On appeal to the United States Supreme Court, the lawyers argued that their advertisements were protected commercial speech and that Arizona's blanket prohibition on attorney advertising violated their First Amendment rights.[43] The State Bar of Arizona advanced a number of justifications for the prohibition.[44] The Supreme Court considered and rejected each argument in turn.[45] The State Bar claimed, for example, that advertising would have an adverse effect on professionalism,[46] in part by commercializing the practice of law and thereby undermining the dignity of the profession.[47] In rejecting this argument, the Court observed that the ban on advertising originated as

38. *Id.* at 354-55. The Arizona rule governing attorney advertising provided in pertinent part:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. at 355 (quoting ARIZ. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976)).

39. *In re* Bates, 555 P.2d 640, 641-42 (Ariz. 1976).

40. *Id.* at 642.

41. *Id.*

42. *Id.* The Arizona Supreme Court reasoned that although the attorneys deliberately violated the Arizona disciplinary rules, they did so "in good faith as an earnest challenge to the validity of DR 2-101(B)." *Id.* at 646. The United States Supreme Court noted probable jurisdiction, and an appeal was taken. Bates v. State Bar of Ariz., 429 U.S. 813 (1976).

43. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 363 (1977).

44. *Bates*, 433 U.S. at 368-79. The State Bar argued that the ban was justified because attorney advertising: (1) adversely affected professionalism; (2) is inherently misleading in nature; (3) would tend to stir up litigation; (4) would ultimately lead to an increase in attorneys' fees; (5) adversely affected the quality of legal services; and (6) is too difficult to regulate with anything other than a complete ban. *Id.*

45. *Id.* at 379.

46. *Id.* at 368-72.

47. *Bates*, 433 U.S. at 368. The Court summarized the State Bar's argument: "The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth." *Id.*

a rule of etiquette and not as a rule of ethics,[48] and it concluded that etiquette must give way to First Amendment guarantees of free speech.[49] The State Bar also argued that the alternatives to a wholesale restriction on attorney advertising caused problems of enforcement.[50] Due to the number of lawyers, the public's lack of sophistication with regard to legal matters, and the potential for overreaching inherent in the system, the State Bar claimed that overseeing attorney advertising would be burdensome.[51] The Court rejected this argument as well, noting:

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system.[52]

Accordingly, the Court held that attorney advertising is protected commercial speech and may not be subjected to a blanket suppression.[53] However, the Court declined to rule that attorney advertising may not be constitutionally regulated in any way.[54] The court held that certain restrictions on attorney advertising, such as those prohibiting false, deceptive, or misleading advertising, are constitutionally permissible.[55]

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48. *Id.* at 371.

49. *Id.* at 379.

50. *Id.*

51. *Bates*, 433 U.S. at 379. The State Bar claimed that "[a]fter-the-fact action by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards." *Id.*

52. *Id.*

53. *Id.* at 383. Justice Powell, however, writing for the dissent, argued that the advertising of "routine" legal services is vastly different from price advertising of a standardized product such as the prescription drugs in *Virginia State Bd. Id.* at 390-91 (Powell, J., dissenting). According to Justice Powell, the advertising of professional services involves an increased potential for deception and an enhanced difficulty of effective regulation. *Bates*, 433 U.S. at 394, 395-97 (Powell, J., dissenting). Accordingly, Justice Powell opined that neither the First Amendment nor the public interest justified protecting attorney advertising. *Id.* at 389 (Powell, J., dissenting).

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

55. *Id.* For example, the Court noted that advertisements concerning the quality of a lawyer's services are so likely to be misleading that they may warrant restriction. *Id.* at 383-84. Likewise, the Court noted that similar objections might justify restraints on in-person solicitation. *Id.* at 384. As with other varieties of speech, the Court held that reasonable restrictions may be placed on the time, place and manner of attorney advertising. *Id.* The Court also noted that "some limited supplementation, by way of warning

During the following term, in *Ohralik v. Ohio State Bar Ass'n*[56] and *In re Primus*,[57] the Court defined with more particularity the scope of constitutionally permissible restrictions on attorney advertising. In *Ohralik*, an Ohio attorney solicited professional employment from two young women shortly after they had been injured in an automobile accident.[58] After the women protested to a local bar association, the Ohio State Bar Association filed a formal complaint with the disciplinary committee of the Ohio Supreme Court.[59] The disciplinary committee determined that the attorney, Ohralik, had violated two Ohio disciplinary rules[60] and rejected his defense that his conduct was protected by the First and Fourteenth Amendments of the United States Constitution.[61] The Ohio Supreme Court adopted the committee's findings and indefinitely suspended Ohralik's license to practice law.[62]

Before the United States Supreme Court, Ohralik contended that his in-person solicitation of two women was indistinguishable, for the purposes of constitutional analysis, from the constitutionally permissible advertisements in *Bates*.[63] The Court disagreed, noting that in-person solicitation poses unique dangers because it encourages speedy and uninformed decision-making by placing more immediate pressure upon the potential client.[64] Recognizing that states may have important interests in preventing possible "overreaching, overcharging, underrepresentation, and misrepresentation" that may occur when a client is personally solicited, the Court reasoned that in-person solicitation creates potential for attorney misconduct and may be subjected to

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or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." *Id.*

56. 436 U.S. 447 (1978).

57. 436 U.S. 412 (1978).

58. *Ohralik*, 436 U.S. at 449-54. Ohralik solicited one victim while she lay in traction in the hospital. *Id.* at 450. He then used the information that he had received from the first victim to solicit the second victim at her home on the day she was released from the hospital. *Id.* at 451.

59. *Id.* at 452-53.

60. *Id.* at 453.

61. *Ohralik*, 436 U.S. at 453.

62. *Id.* at 453-54. The committee had only recommended that Ohralik be subject to a public reprimand. *Id.* The United States Supreme Court noted probable jurisdiction, and an appeal was taken. Ohralik v. Ohio State Bar Ass'n, 434 U.S. 814 (1977).

63. *Ohralik*, 436 U.S. at 455. The Court noted that Ohralik did not bring a facial challenge to the Ohio disciplinary rules at issue, but simply argued that their use to discipline him violated his First and Fourteenth Amendment rights. *Id.* at 462 n.20.

64. *Id.* at 457. The Court also noted that the legal community has long regarded in-person solicitation of business as unprofessional and potentially harmful to the client. *Id.* at 454.

a blanket prohibition.[65]

The Court also noted that unlike the advertisement in *Bates*, in-person solicitation is not visible to regulators, and thus is not subject to public scrutiny.[66] Accordingly, short of a complete ban on in-person solicitation, the difficulty of obtaining reliable proof of an attorney's misconduct would render in-person solicitation "virtually immune" from state disciplinary action.[67] Thus, because the Court found that Ohio had a sufficient interest to discipline attorneys for the type of conduct in which Ohralik had engaged, the Court held that the Ohio State Bar did not violate Ohralik's constitutional rights by enforcing its ban on in-person solicitation.[68]

On the same day that it decided *Ohralik*, the Supreme Court reversed a South Carolina Supreme Court decision that had enforced state disciplinary rules against an attorney for offering her legal services to a potential client.[69] In *In re Primus*, a lawyer cooperating with the American Civil Liberties Union ("ACLU") sent a letter to a woman who had been sterilized as a condition of receiving public assistance, informing the woman that the ACLU would represent her *pro bono* in a lawsuit against the doctor who had performed the sterilization.[70] The South Carolina Supreme Court determined that the lawyer, Primus, by sending the letter to a prospective client, had violated the state's disciplinary rules[71] and should be publicly reprimanded.[72] In reversing this decision, the United States Supreme Court held that solicita-

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65. *Ohralik*, 436 U.S. at 461-64. The Court explained that "[t]he detrimental aspects of face-to-face selling . . . of ordinary consumer products have been recognized . . . and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Id.* at 464-65.

66. *Id.* at 466.

67. *Id.* The Court noted that evidentiary difficulties in proving a case against an attorney would be particularly difficult "if the layperson were so distressed at the time of the solicitation that he could not recall specific details at a later date." *Id.*

Since *Ohralik*, the Court has held that states may not place absolute bans on in-person solicitation by certain professionals other than attorneys. *See, e.g.*, Edenfield v. Fane, 113 S. Ct. 1792, 1798, 1802 (1993) (holding that Florida's absolute ban on in-person solicitation by accountants is inconsistent with the free speech guarantees of the First Amendment).

68. *Ohralik*, 436 U.S. at 467-68.

69. *In re* Primus, 436 U.S. 412, 416-19, 439 (1978).

70. *Id.* at 415-16.

71. The relevant South Carolina disciplinary rule provided in pertinent part that "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice." *In re Primus*, 436 U.S. at 418 n.11 (quoting S.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)).

72. *Primus*, 436 U.S. at 421.

tion by or for a non-profit organization such as the ACLU was a form of political expression entitled to the highest form of First Amendment protection.[73]

Finding that the nature of the state's interest at issue in *Primus* was different than that in *Ohralik*, the Court distinguished the latter case. The Court observed that unlike the political speech at issue in *Primus*, the communication in *Ohralik* involved in-person solicitation for pecuniary gain and under circumstances likely to harm the client.[74] The Court also emphasized that in *Primus*, the solicitation had been conducted by letter, rather than by face-to-face solicitation, as in *Ohralik*.[75]

During the 1980's, the Supreme Court continued to narrow the category of permissible restrictions on attorney advertising. In *In re R.M.J.*,[76] the Court struck down a Missouri rule[77] that prohibited attorneys from mailing professional announcement cards to anyone other than lawyers, clients, former clients, personal friends, and relatives.[78] The lawyer in *R.M.J.* had mailed cards announcing the opening of his new office to people who were not within the rule's permissible group of recipients.[79] In holding that the rule violated the First Amendment, the Supreme Court concluded that Missouri had failed to show that there were no less restrictive means of regulating general mailings by attorneys, such as requiring the filing of a copy of all general mailings with the state bar.[80]

Four years later in *Zauderer v. Office of Disciplinary Council of the*

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73. *Id.* at 428-31. The Court relied heavily upon its earlier opinion in NAACP v. Button, 371 U.S. 415, 444-45 (1963) (holding that the First Amendment protected a lawyer's solicitation of clients on behalf of the NAACP).

74. *Primus*, 436 U.S. at 434-36.

75. *Id.* at 435-36. The *Ohralik* court reasoned:

> The transmittal of this letter—as contrasted with in-person solicitation—involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct.

Id. (citations and footnote omitted).

76. 455 U.S. 191 (1982).

77. MO. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (1978).

78. *R.M.J.*, 455 U.S. at 206-07. The lawyer additionally challenged the constitutionality of another Missouri rule restricting lawyer advertising to certain categories of information and, in some instances, to certain specified language. *Id.* at 194-95. The Supreme Court also found this rule to be an unconstitutional restriction on free speech. *Id.* at 205-206.

79. *Id.* at 198.

80. *Id.* at 206.

Supreme Court of Ohio,[81] the Supreme Court again held that a state's disciplinary rules placing limitations on attorney advertising unconstitutionally restricted attorneys' free speech rights.[82] Zauderer was an attorney whom the Ohio Supreme Court had publicly reprimanded for running a newspaper advertisement publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive known as the Dalkon Shield.[83] The advertisement featured an illustration of the Dalkon Shield and stated that Zauderer's law firm was handling lawsuits against the Dalkon Shield's manufacturer on a contingent-fee basis.[84] The Office of Disciplinary Counsel filed a complaint against Zauderer, alleging, *inter alia*, that the attorney violated Ohio's disciplinary rules which:[85] (1) prohibited the use of illustrations in advertisements; (2) prohibited lawyers from accepting employment from persons to whom they have furnished unsolicited legal advice; and (3) prohibited false and deceptive statements in legal advertisements.[86]

The Supreme Court held that the application of these rules to Zauderer's Dalkon Shield advertisement violated Zauderer's First Amendment rights because the State did not have any substantial interest in prohibiting truthful advertising.[87] The Court declined to rely on its reasoning in *Ohralik*, emphasizing that whereas in-person solicitation, such as in *Ohralik*, is "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,"[88] print advertising, such as in *Zauderer*, does not pose as significant a threat to the consumer.[89] Accordingly, the court concluded that "[a]n attorney may not be disciplined for soliciting legal

81. 471 U.S. 626 (1985).

82. *Id.* at 639-49.

83. *Id.* at 629-36. The attorney also was disciplined for running a newspaper advertisement advising readers that his firm would represent defendants in drunk driving cases and that his clients' full legal fees would be refunded if they were convicted of drunk driving. *Id.* The Supreme Court of Ohio found this advertisement to be deceptive and publicly reprimanded the attorney. *Id.* at 635-36, 655. The United States Supreme Court upheld this portion of the judgment. *Zauderer*, 471 U.S. at 655-56.

84. *Id.* at 630-31. According to Zauderer's advertisement, "[i]f there is no recovery, no legal fees are owed by our clients." *Id.* at 631. The advertisement also stated that the Dalkon Shield had generated many lawsuits; that the lawyer's firm was willing to represent other women asserting similar claims; and that readers should not assume their claims were time-barred. *Id.* The Court found each of these statements to be truthful, and thus protected by the First Amendment. *Id.* at 645.

85. *Zauderer*, 471 U.S. at 631-33.

86. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)-(B), 2-104(A) (1982).

87. *Zauderer*, 471 U.S. at 639-49.

88. *Id.* at 641.

89. *Id.* at 642.

business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients."[90]

Collectively, the Supreme Court's decisions in *Bates*, *Ohralik*, *Primus*, *R.M.J.*, and *Zauderer* make it clear that states cannot place blanket prohibitions on the following types of advertising by attorneys: advertising the costs of certain routine legal services in the print media; advertising an accurate listing of the attorney's areas of practice, either through general mailings, announcements to specific targeted groups, newspaper ads, or telephone listings; advising target portions of the public of their rights to pursue particular types of cases; and directly soliciting prospective clients, either by mail or in-person, where the attorney is motivated by the desire to promote political and ideological goals, rather than for purely pecuniary gain.[91] These decisions do allow states to ban in-person solicitation, however, when the attorney is motivated solely by pecuniary gain.[92]

B. Targeted, Direct-Mail Solicitation Before Shapero

These Supreme Court decisions laid the groundwork for extending First Amendment protection to targeted, direct-mail solicitation by attorneys. Specifically, in *Primus,* the Court emphasized that the form of solicitation was by letter, which, in contrast to in-person solicitation, "involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion."[93] The Court further pointed out that "the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices" because such communications offer more reliable proof of possible attorney misconduct than does in-person solicitation.[94]

In *R.M.J.*, the Court extended First Amendment protection of attorney solicitation by mail, striking down a state statute that prohibited lawyers from sending any professional announcement cards, even those that were not misleading, to the general public.[95] These decisions, however, left unresolved a significant issue in the arena of

90. *Id.* at 647.

91. *See* Peltz, *supra* note 13, at 44; *see also*, Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 110 (1990) (holding that states may not ban a lawyer from advertising his or her certification as a trial specialist by a nationally recognized organization, but that states may require that warnings or disclaimers accompany such advertising).

92. *See* Peltz, *supra* note 13, at 44-45.

93. *Primus*, 436 U.S. at 435 (footnote omitted).

94. *Id.* at 435-36; *see also Ohralik*, 436 U.S. at 466-67.

95. *R.M.J.*, 455 U.S. at 206-07.

attorney direct-mail solicitation: whether the First Amendment protects direct-mail solicitation of clients known to have a particular legal problem.[96] The Supreme Court did not answer this important question until it rendered its opinion in *Shapero* in 1988.

Prior to *Shapero*, state and lower federal courts were split on whether targeted, direct-mail solicitation should receive First Amendment protection. A number of courts had held that the First Amendment protects the right of attorneys to send targeted, direct-mail solicitation to persons known to be in need of legal services in connection with the sale of real estate. For example, in *Koffler v. Joint Bar Ass'n*,[97] the Court of Appeals of New York held that New York's ban on direct-mail solicitation, as applied to an attorney who had sent letters to 7,500 individual property owners[98] offering his services in connection with the sale of their real estate, violated the First Amendment.[99]

In holding that the type of solicitation in which Koffler had engaged did not justify a complete ban, the court found that Koffler's solicitation activities did not have the potential for invasion of privacy and overreaching that might be present, for example, in telephone solicitation.[100] The Court thus distinguished the intrusiveness inherently present in other types of solicitation from the relatively non-intrusive nature of Koffler's direct-mail solicitation, noting:

> [A] recipient of a lawyer's letter "may escape exposure to objectionable material simply by transferring . . . [it] from envelope to wastebasket." It is not enough to justify a ban that in some situations (marital discord, a death in the family) a solicitation letter may be offensive to the recipient, or that some people may fear receiving a lawyer's letter, or to suggest that there may be some who by reason of frequent receipt of lawyers' solicitation letters may discard without opening a mailed summons.[101]

Likewise, in *Kentucky Bar Ass'n v. Stuart*,[102] the Supreme Court

96. *See* Adams v. Attorney Registration and Disciplinary Comm'n, 801 F.2d 968, 973 (7th Cir. 1986).

97. 412 N.E.2d 927 (N.Y. 1980), *cert. denied*, 450 U.S. 1026 (1981).

98. The attorney also sent letters to a number of real estate brokers asking the brokers to refer clients to him in connection with the purchase or sale of real estate. *Koffler*, 412 N.E.2d at 929.

99. *Id.* at 929, 934. The Court noted that Koffler could not raise a facial overbreadth challenge to the New York ban because overbreadth analysis does not apply to commercial speech. *Id.* at 930; *see also Ohralik*, 436 U.S. at 462 n.20.

100. *Koffler*, 412 N.E.2d at 933.

101. *Id.* at 933 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980)).

102. 568 S.W.2d 933 (Ky. 1978).

of Kentucky extended First Amendment protection to targeted direct-mail solicitation by attorneys in connection with the sale of real estate.[103] The lawyers in *Stuart* sent letters to two real estate agencies listing the prices that they charged for routine legal services.[104] The Kentucky Supreme Court concluded that such letters are a form of advertisement and do not constitute in-person solicitation.[105] In holding that the letters were advertisements and that the State had not demonstrated sufficient justification for its ban, the court noted that "[n]one of the evils are present here which exist in the case of 'in-person solicitation.' There is not even the danger of exertion of pressure or demands to encourage a person to make a speedy and possibly uninformed decision whether to seek an attorney's assistance with a problem."[106]

Similarly, in *Adams v. Attorney Registration and Disciplinary Comm'n*,[107] the United States Court of Appeals for the Seventh Circuit affirmed a federal district court order enjoining the Illinois Attorney Registration and Disciplinary Commission from enforcing a disciplinary rule[108] forbidding targeted, direct-mail solicitation by attor-

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103. *Stuart*, 568 S.W.2d at 934.

104. *Id.* at 933.

105. *Id.* at 933-34.

106. *Stuart*, 568 S.W.2d at 934. In an effort to distinguish direct-mail solicitation from newspaper advertising, the Kentucky Bar Association argued that "by permitting private mailings two evils may result which do not exist in the case of newspaper advertisement . . . . First, there is greater potential for over-reaching and deceptive practices by unscrupulous attorneys. Second, enforcement of ethical standards of attorney advertising will become difficult, if not impossible . . . ." *Id.* Rejecting these arguments, the court reasoned that because letters are in a written form, there is a record to protect against such abuses. *Id. See also* Grievance Comm. v. Trantolo, 470 A.2d 235, 239 (Conn. 1984) (concluding that "blanket prohibition of mailed solicitations to third parties violates the free speech provisions of the United States Constitution and the Connecticut Constitution").

107. 801 F.2d 968 (7th Cir. 1986).

108. ILL. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (1984) (amended 1987), which provided in pertinent part:

> (b) A lawyer may initiate contact with a prospective client in the following circumstances:
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> . . .
>
> (2) by written communication distributed generally to persons not known in a specific matter to require such legal services as the lawyer offers to provide but who in general might find such services to be useful and providing that such letters and circulars and the envelopes containing them are plainly labeled as advertising material.

Id. Illinois repealed this rule in 1990. Rule 7.3, which replaced DR 2-103, provides in pertinent part:

> (a) Except as provided in Rule 7.3(b), a lawyer may initiate contact with a prospective client for the purpose of solicitation in the following circum-

neys.[109] Adams and other attorneys specializing in bankruptcy law sent direct mailings to individuals whom they knew had debt problems.[110] The court found that the state's concerns in protecting consumers from harassment, overreaching, and duress are less pressing with targeted mailings than with in-person solicitation.[111] In contrasting the duress that in-person solicitation can create with the relative non-intrusive nature of direct mailings, the court noted that "[i]t is easier to throw out unwanted mail than an uninvited guest," and that letters do not "'involve pressure on the potential client for a yes-or-no answer.'"[112]

State and lower federal courts did not limit First Amendment protection of targeted, direct-mail solicitation to that of attorneys offering real estate and bankruptcy services. In *In re Von Wiegen*,[113] the New York Court of Appeals reversed an order disciplining an attorney for mailing solicitation letters to the victims and families of the 250 persons injured when the sky-walk collapsed at the Hyatt Regency Hotel in Kansas City.[114] The Committee on Professional Standards argued in part that a complete ban on targeted, direct-mail solicitation in personal injury cases was warranted because accident victims are especially susceptible to pressure from attorneys.[115] The court reasoned, however, that the relevant issue is not whether certain types

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stances:

. . .

(2) by letters or advertising circulars, providing that such letters and circulars and the envelopes containing them are plainly labeled as advertising material.

ILL. COMP. STAT. Supreme Court Rules of Professional Conduct, RPC 7.3 (1993) (amended 1990).

The exceptions listed in Rule 7.3(b) prohibit an attorney from soliciting clients where: (1) the lawyer reasonably should know that the person's physical or mental state makes it unlikely that they could exercise reasonable judgment; (2) the lawyer knows that the person does not wish to receive the communication; or (3) the solicitation involves coercion, duress, or harassment. ILL. COMP. STAT. Supreme Court Rules of Professional Conduct RPC 7.3 (1993) (amended 1990).

109. *Adams*, 801 F.2d at 974-75.

110. *Id.* at 969. The potential clients targeted, for example, were people who had been named as defendants in mortgage foreclosure and garnishment proceedings, and persons against whom tax liens had been filed. *Id.* at 969-70.

111. *Id.* at 973.

112. *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985)). The court found that printed mailings are also easier to police than in-person solicitation, and that although printed mailings may not be prohibited outright, more narrow methods of regulating direct-mail solicitation, such as requiring that copies of direct mailings be filed with the ARDC, are permissible. *Adams*, 801 F.2d at 974.

113. 470 N.E.2d 838 (N.Y. 1984), *cert. denied*, 472 U.S. 1007 (1985).

114. *Von Wiegen*, 470 N.E.2d at 839, 845.

115. *Id.* at 844.

of potential clients, such as accident victims or their families, are susceptible to undue influence, but "whether a particular method of advertising is inherently misleading."[116] Accordingly, the court concluded that a state may not absolutely ban a method of solicitation if the method allows information to be presented in a way that is not deceptive.[117] In the *Von Weigen* court's view, since targeted, direct-mail solicitation can be presented in a nondeceptive fashion, an absolute ban on direct-mail solicitation is unconstitutional.[118]

Although these decisions demonstrate that a number of courts had already extended First Amendment protection to targeted, direct-mail solicitation before *Shapero*, many courts had reached the opposite conclusion that direct-mail advertising was not entitled to constitutional protection.[119] In *Shapero* the Supreme Court resolved this split of authority in favor of extending First Amendment protection to all targeted, direct-mail solicitation, provided the mailings are not false or misleading.

C. Shapero v. Kentucky Bar Association

Richard Shapero petitioned the Kentucky Attorneys Advertising Commission (the "Commission") for approval of a letter he proposed to send to potential clients against whom foreclosure suits had been

116. *Id.* at 843; *see also In re* Discipline of Appert, 315 N.W.2d 204, 209, 215 (Minn. 1981) (upholding the right of an attorney to send direct-mail advertising that was not misleading to victims in a products liability case, and rejecting the argument that the type of case, such as complex tort litigation, may justify a ban on direct-mail solicitation).

117. *Von Weigen*, 470 N.E.2d at 843.

118. *Id.*

119. *See, e.g., In re* Frank, 440 N.E.2d 676, 677 (Ind. 1982) (upholding discipline of attorney for soliciting by mail persons he knew had been charged with driving under the influence of alcohol); State v. Moses, 642 P.2d 1004, 1005-07 (Kan. 1982) (upholding discipline of attorney who sent letters to people whose names he had gathered from the Realtors Multiple Listing Service, recommending that those people retain the attorney to assist them with the sale of their homes); *In re* Alessi, 457 N.E.2d 682, 683-84 (N.Y. 1983) (upholding discipline imposed on an attorney for sending 1,000 realtors a letter quoting fees for listed real estate transactions), *cert. denied*, 465 U.S. 1102 (1984); Greene v. Grievance Comm. (*In re* Greene), 429 N.E.2d 390, 391, 395-96 (N.Y. 1981) (holding that direct mailings sent to real estate brokers asking brokers to refer clients to attorney transgresses law prohibiting attorney solicitation, and that the statute was valid because (1) the State had a substantial interest in preventing conflicts of interest in attorney-client relationships, and (2) there was no less-restrictive means that could adequately redress the problem), *cert. denied*, 455 U.S. 1035 (1982); Dayton Bar Ass'n v. Herzog, 436 N.E.2d 1037, 1038 & n.9 (Ohio 1982) (holding that solicitation letters sent by attorney to defendants in municipal court cases were not protected by the First Amendment, and permanently disbarring attorney from the practice of law), *cert. denied*, 459 U.S. 1016 (1982).

filed.[120] Shapero's 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.[121]

Even though the Commission did not find Shapero's proposed letter false or misleading, it declined to approve the letter.[122] The Commission based its decision upon a then-existing Kentucky Supreme Court Rule prohibiting the dissemination of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."[123] The Committee on Legal Ethics (the "Committee") of the Kentucky State Bar Association similarly disapproved of Shapero's proposed letter, and the Kentucky Bar Association Board of Governors formally adopted the Committee's Advisory Opinion.[124] The Kentucky Supreme Court affirmed the Committee's Advisory Opinion, agreeing that Shapero's letter, because it was a direct, tar-

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120. *Shapero*, 486 U.S. at 469.

121. *Id.*

122. *Id.*

123. *Id.* at 469-470 (quoting KY. SUP. CT. RULE 3.135(5)(b)(i) (1988)). The Commission did, however, comment that it believed that the rule banning targeted, direct-mail advertising violated the First Amendment. *Shapero*, 486 U.S. at 470. Subsequently, the Kentucky Supreme Court replaced Rule 3.135(5)(b)(i) with Rule 7.3 of the Model Rules of Professional Conduct. *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 300-301 (Ky. 1987). At that time, Rule 7.3 provided:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Id. at 301 (quoting KY. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (1984)). Kentucky's adoption of Model Rule 7.3 did not change the status of Shapero's letter, however, because Model Rule 7.3, like Kentucky's prior rule, prohibited targeted, direct-mail solicitation. *Shapero*, 486 U.S. at 471 & n.3.

124. *Shapero*, 486 U.S. at 470.

geted mailing, inherently had the danger of "overreaching, intimidat[ing] or misleading" the public, risks that were not present with general mailings.[125] Accordingly, the court affirmed the Committee's Advisory Opinion denying Shapero's request for approval of the proposed letter.[126]

Before the United States Supreme Court, the Kentucky Bar Association argued that the Court should affirm the Kentucky Supreme Court's ruling upholding the ban against targeted, direct-mail solicitation because the *Shapero* case was nothing more than "*Ohralik* in writing."[127] Dismissing this argument, the Supreme Court reiterated two factors that distinguished targeted, direct-mail from the type of in-person solicitation that the Court had permitted states to ban in *Ohralik*. First, the Court noted that face-to-face solicitation is "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud."[128] Second, the Court reasoned that because in-person solicitation is not open to public scrutiny, enforcement of any regulation short of a complete ban would be impossible.[129]

The Court did not find either of these potential problems to be present in targeted, direct-mail solicitation, but instead concluded that like print advertising, targeted, direct-mail solicitation "poses much less risk of overreaching or undue influence" than does in-person solicitation.[130] Written communication, in the Court's view, does not involve "'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.'"[131] With regard to targeted letters, the Court noted that a targeted letter does not "invade the recipient's privacy any more than does a substantively identical letter mailed at large."[132]

Moreover, the Court found that unlike in-person solicitation, targeted, direct-mail solicitation is susceptible to effective regulation.[133]

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125. *Shapero*, 726 S.W.2d at 301.

126. *Id.*

127. *Shapero*, 486 U.S. at 475.

128. *Id.* at 475 (quoting *Zauderer*, 471 U.S. at 641).

129. *Shapero*, 486 U.S. at 475. See *supra* notes 64-67 and accompanying text for a more thorough discussion of this principle.

130. *Id.* at 475 (quoting *Zauderer*, 471 U.S. at 642).

131. *Shapero*, 486 U.S. at 475 (quoting *Zauderer*, 471 U.S. at 642). The Court observed that the nature of written communications is fundamentally different than face-to-face encounters, commenting that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Shapero*, 486 U.S. at 475-76.

132. *Shapero*, 486 U.S. at 476.

133. *Id.*

States can, for example, require lawyers to file solicitation letters with the local bar or mandate that each such letter bear a label identifying it as an advertisement.[134] Therefore, the Court concluded that because the State could have used means less-restrictive than an outright ban to regulate Shapero's targeted, direct mailings, the ban violated Shapero's First Amendment right to free speech.[135]

The Supreme Court also rejected the Kentucky Supreme Court's conclusion that a ban on targeted, direct-mail solicitation was justified because a particular client could become overwhelmed by his legal troubles and consequently be unable to exercise good judgment.[136] The Court declared that the state supreme court's analysis was off-target, noting:

> The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility . . . .
>
> In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference.[137]

By the Court's reasoning, targeted, direct-mail solicitation is not a mode of communication through which lawyers can easily exploit clients that may be more susceptible to undue influence.[138] Accordingly, the Court held that targeted, direct-mail solicitation by lawyers, if truthful and not misleading, is protected by the First Amendment.[139]

Subsequently, many courts have correctly read *Shapero* to stand for the principle that all modes of written solicitation enjoy First Amendment protection, regardless of the recipient's condition or vulnerability, as long as the communication is not false, misleading or

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134. *Id.* at 476-77.

135. *Id.* at 472, 476.

136. *Id.* at 474.

137. *Shapero*, 486 U.S. at 474-75 (citation omitted).

138. *Id.* at 475-76; *see also supra* notes 130-35 and accompanying text. The Kentucky Bar Association further argued that, even if the Court were to extend First Amendment protection to targeted, direct-mail solicitation, Shapero's letter was overreaching and therefore not entitled to First Amendment protection. *Shapero*, 486 U.S. at 478. According to the Kentucky Bar Association, two features of Shapero's letter constituted "high pressure solicitation": (1) Shapero's use of underscored, uppercase letters; and (2) the use of salesman-type language amounting to mere "puffery" (such as Shapero's assertion to his potential clients, "[i]t may surprise you what I may be able to do for you."). *Id.* Rejecting the contention that Shapero's letter was overreaching, the Court concluded that "a truthful and nondeceptive letter, no matter how big its type and how much it speculates" does not approach the risk of overreaching present in face-to-face solicitation. *Id.* at 479.

139. *Shapero*, 486 U.S. at 479.

overreaching.[140] In determining whether a given solicitation is constitutionally protected, courts have generally followed the Supreme Court's directive that it is improper to focus on the condition of the recipient.[141] At least three courts, however, have failed to honor this constitutional mandate.[142]

III. STATE COURT LIMITS ON *SHAPERO*

In *Shapero*, the Supreme Court made it clear that when deciding whether targeted, direct mailings by attorneys are entitled to constitutional protection, courts are not to consider the susceptibility of the recipient to undue influence. Rather, the Court held that the proper inquiry is "whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."[143] Nevertheless, at least three courts have held that the First Amendment does not protect targeted, direct-mail solicitation of persons who are unduly vulnerable because of a recent accident or disaster. Each of these cases is based upon a misreading of *Shapero*, and, collectively, they represent a dangerous trend and a serious threat to the constitutional protection afforded to targeted, direct-mail solicitation.

A. In re Anis

In *In re Anis*,[144] an attorney sent a solicitation letter to the family of a victim of the airplane crash of Pan American Flight 103.[145] The letter

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140. *See, e.g.*, Unnamed Attorney v. Attorney Grievance Comm'n, 545 A.2d 685, 691 (Md. 1988) (holding that solicitation letters sent by attorney to recently injured persons, some as soon as the day after the injury, are protected by the First Amendment).

141. *See, e.g., id.*

142. *See infra* part III.

143. *Shapero*, 486 U.S. at 474.

144. 599 A.2d 1265 (N.J. 1992), *cert. denied*, 112 S. Ct. 2303 (1992). The United States Supreme Court's denial of certiorari should not be read as an implicit approval of the decision in *Anis*. *See, e.g.*, Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1949) ("The one thing that can be said with certainty about the court's denial of [a certiorari petition] is that it does not remotely imply approval or disapproval of what was said by [the court below].").

145. *Anis*, 599 A.2d at 1267. The body of the letter provided:

> Initially, we would like to extend our deepest sympathy for the loss of your son, Mr. Alexander Lowenstein. We know that this must be a very traumatic experience for you, and we hope that you, along with your relatives and friends, can overcome this catastrophe which has not only affected your family but has disturbed the world.
>
> As you may already realize, you have a legal cause of action against Pan American, among others, for wrongful death due to possible negligent security maintenance. If you intend to take any legal recourse, we urge you to consider to retain our firm to prosecute your case.

was sent fourteen days after the disaster, but only one day after the victim's body was identified.[146] Eight days later, the victim's father, who had received Anis' letter, filed a complaint against Anis and his partner with the Office of Attorney Ethics ("OAE").[147] The OAE's Committee on Attorney Advertising (the "Committee") charged Anis with violating Rule 7.3(b)(1) of the New Jersey Rules of Professional Conduct, which prohibited a lawyer from sending a written communication to a prospective client if he "knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer."[148] For violating RPC 7.1(a)(1) and 7.3(b)(1), the Committee recommended a public reprimand for both attorneys.[149] The State's Disciplinary Review Board (the "Board"), which reviewed all attorney disciplinary matters, disagreed with the Committee's conclusion that Anis had violated RPC 7.3(b)(1).[150] The Board reasoned that it was "debatable" whether Anis could have known that within the hours and days following a tragic disaster, the victim's family would be particularly weak and vulnerable.[151] Thus, the Board found that Anis had not violated RPC 7.3(b)(1).[152]

> Both my partner and myself are experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants.
>
> We would also like to inform you that if you do decide to retain our services, you will *not* be charged for any attorneys fees unless we collect a settlement or verdict award for you.
>
> Before retaining any other attorney, it would be worth your while to contact us, since we will substantially reduce the customary one-third fee that most other attorneys routinely charge.
>
> Please call us to schedule an appointment at your earliest convenience. If you are unable to come to our office, please so advise us and we will have an attorney meet you at a location suitable to your needs.

Id.

146. *Id.*

147. *Id.* A complaint was also filed against Anis' partner (who happened to be his brother). *Id.* at 1268. The complaint against the partner was dismissed because there was no evidence that he had been involved in the decision to send the letter. *Id.*

148. N.J. RULES OF PROFESSIONAL CONDUCT RPC 7.3(b)(1) (1984). The OAE also charged Anis with engaging in false and misleading advertising in violation of RPC 7.1(a)(1). *Anis*, 599 A.2d at 1268.

149. *Anis*, 599 A.2d at 1268. Despite its conclusion that Anis should be reprimanded, the Committee noted that in the absence of misleading statements, Anis would have been protected from disciplinary action by the First Amendment. *Id.* (citing *Shapero*, 486 U.S. at 466).

150. *Anis*, 599 A.2d at 1268.

151. *Id.*

152. *Anis*, 599 A.2d at 1268. The *Anis* court noted that the Board's determination that Anis could not be disciplined under RPC 7.3(b)(1) did not stem from any constitu-

On review of the Board's decision, the New Jersey Supreme Court outlined the constitutional standard set forth in *Shapero* and concluded that Anis' conduct fell "within a window left open in *Shapero*."[153] The court defined the parameters of that "window" by the "common decency that should attend the usual affairs of mankind."[154] Thus, the court distinguished the non-intrusive nature of the communication in *Shapero* from the facts of *Anis*.

The New Jersey Supreme Court also concluded that Anis, in violation of Rule 7.3(b)(1), had solicited legal representation at a time when he knew or should have known that the prospective clients could not exercise reasonable judgment in employing an attorney.[155] According to the court, Anis' solicitation letter was not entitled to constitutional protection because it intruded upon the private grief of the victim's family and took advantage of their vulnerability.[156] Such a letter, the court stated, is "patently offensive to the common sensibilities of the community."[157]

The foundation upon which the *Anis* court's opinion rests is the notion that the First Amendment does not protect targeted, direct-mail solicitation sent to persons who, because of an accident or disaster, are in a vulnerable condition.[158] Indeed, the court went so far as to im-

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tional protection, as the Committee had concluded, but instead was based upon the Board's conclusion that Anis had not violated the Rule. *Id.* Although the Board found that Anis had not violated RPC 7.3(b)(1), it did find that Anis "had engaged in unethical conduct" and recommended that he receive a public reprimand. *Id.* at 1268.

153. *Anis*, 599 A.2d at 1269. The court stated that "[w]e have no doubt . . . that the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families." *Id.* at 1270.

154. *Id.* at 1269.

155. *Id.* at 1270.

156. *Anis*, 599 A.2d at 1270-71.

157. *Id.* at 1271. The court repeatedly expressed its belief that solicitation letters such as Anis' are not entitled to constitutional protection because they are "deplorable" and "beneath common decency." *Id.* at 1269, 1270. Not only is this an improper inquiry for assessing whether a direct-mail solicitation is entitled to constitutional protection, but, additionally, the examples of indecency given by the court were inapposite. For instance, the court made reference to a report that American lawyers had rushed to Bhopal, India after the Union Carbide disaster and further noted a report that a man posing as a priest had solicited victims at the scene of the Northwest Airline crash in 1987. *Id.* at 1266. Those incidents are not analogous to Anis' situation because they involve in-person solicitation rather than targeted, direct-mail solicitation.

158. *Anis*, 599 A.2d at 1271. Although the New Jersey Supreme Court additionally affirmed the Committee's finding on the ground that Anis' letter contained false and misleading statements, the court devoted only a very brief portion toward the conclusion of its opinion to this issue. *See id.* at 1272. That the court's basis for its decision was what it perceived as Anis' distasteful attempt to take advantage of vulnerable people is

pose an implicit ban on targeted, direct-mail solicitation within two weeks of an accident or disaster.[159] The court's focus on the vulnerability of potential clients is directly contrary to the Supreme Court's directive in *Shapero*.

B. The Florida Bar: Petition to Amend Rules Regulating the Florida Bar—Advertising Issues

The Florida Supreme Court has also upheld a partial ban on targeted, direct-mail solicitation of accident victims. In *The Florida Bar: Petition to Amend Rules Regulating the Florida Bar—Advertising Issues*,[160] the court was asked to approve certain amendments to Florida's rules regulating attorney advertising.[161] Among the rules that the Florida Bar Association asked the court to approve was a rule forbidding attorneys from sending targeted, direct-mail solicitation to prospective clients in personal injury and wrongful death cases.[162] Many objections to the Bar's proposed rules were filed, including assertions that such a ban was not in accordance with the United States Supreme Court's holding in *Shapero*.[163] The court declined to approve an absolute ban on targeted, direct-mail solicitation in personal injury and wrongful death cases, agreeing that a flat ban was inconsistent with *Shapero*.[164] The court reasoned, however, that the State could constitutionally restrict direct-mail solicitation by requiring a thirty day post-accident waiting period before any mail advertising pertaining to personal injury and wrongful death claims could be

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evidenced in part by the sheer amount of space that the court devoted to the vulnerable condition of the letter recipients. *See id.* at 1269-71.

159. *Id.* at 1271 ("[W]e shall not impose discipline for truthful letters of solicitation sent more than two weeks after such a disaster occurs and loss becomes known.").

160. 571 So. 2d 451 (Fla. 1990).

161. *Id.* at 452.

162. *Id.* at 454. The version of Rule 4-7.4(b)(1)(a) that the court finally adopted provided:

> A lawyer shall not send, or knowingly permit to be sent, on behalf of himself, his firm, his partner, an associate, or any other lawyer affiliated with him or his firm, a written communication to a prospective client for the purpose of obtaining professional employment if:
>
> (a) The written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.

Florida Bar, 571 So. 2d at 466.

163. *Id.* at 456.

164. *Id.* at 459.

mailed to victims or survivors.[165]

The court based its thirty-day ban on "the sensitized state of the potential clients, who may be either injured or grieving the loss of a family member."[166] Thus, like the New Jersey Supreme Court in *Anis*, the Florida Supreme Court approved a partial ban on targeted, direct-mail solicitation based on the vulnerable condition of certain potential clients. Both opinions are clearly inconsistent with *Shapero*.[167]

C. *Norris v. Alabama State Bar*

Finally, in *Norris v. Alabama State Bar*,[168] the Alabama State Bar Disciplinary Board suspended attorney Robert Norris from practice for two years for sending a solicitation letter along with flowers and a brochure describing his firm to a funeral home where the funeral for a 19 month-old accident victim was to take place.[169] According to Norris, an anonymous friend of the victim's family had asked him to send the flowers and brochure to the family.[170] Prior to sending the letter, Norris reviewed the Alabama Disciplinary Rules and concluded that they did not prohibit this type of communication.[171] A complaint was filed against Norris for violating, *inter alia*, Alabama Temporary Disciplinary Rule 2-103, which provided:

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165. *Id.* In addition, the Court approved several restrictions on attorney targeted, direct-mail solicitation, including, for example, rules requiring that both the letter and the envelope clearly be marked "advertisement"; that the mailings be filed with the Bar's Standing Committee on Advertising; that the mailings be sent only by regular U.S. Mail; and that the mailings conform to certain size restrictions. *Id.* at 467.

166. *Florida Bar*, 571 So. 2d at 468.

167. A federal district court recently held that Florida's thirty day ban on targeted, direct-mail solicitation in personal injury and wrongful death cases is unconstitutional. McHenry v. Florida Bar, 808 F. Supp. 1543, 1548 (M.D. Fla. 1992). Although the Florida Supreme Court's decision upholding the thirty-day ban is no longer the law in Florida, the willingness of the Florida Supreme Court, as well as state courts in other cases, to ignore the United States Supreme Court's directive in *Shapero* and instead focus on the recipient's condition, demonstrates a continued and serious threat to the First Amendment right of attorneys to engage in targeted, direct-mail solicitation.

This conclusion is bolstered by the recent passage of a law in Texas making written solicitation by attorneys within 30 days of an accident, arrest, or the filing of a lawsuit a misdemeanor punishable by a maximum of one year in prison and a $1,000 fine. A repeat offense, however, constitutes a felony that is punishable by a maximum of 10 years in prison and a $10,000 fine. *See* Mark Hansen, *Texas Makes Solicitation a Felony*, A.B.A. J., Sept. 1993, at 32. The Texas legislature's willingness to completely disregard a federal court's ruling and adopt precisely the type of law that the *McHenry* court struck down as unconstitutional shows just how little regard some states have for both federal law and attorneys' First Amendment rights.

168. 582 So. 2d 1034 (Ala. 1991), *cert. denied*, 112 S. Ct. 417 (1991).

169. *Id.* at 1035.

170. *Id.*

171. *Id.*

> A lawyer may not solicit nor cause to be solicited on his behalf professional employment from a prospective client, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person or by telephone.[172]

Neither Norris nor any of his representatives ever made contact with the victim's family, either by telephone or in person.[173] Nevertheless, the court found that Norris had violated DR 2-103.[174] The court reasoned that in-person and telephone contact were merely examples of the type of conduct that the term "solicit," as it was used in DR 2-103, was meant to prohibit.[175] Therefore, according to the court, the express reference to only two types of solicitation did not create an exhaustive list of prohibited conduct.[176] Reading DR 2-103 in conjunction with DR 2-102, the court concluded that although Norris' act of sending the flowers, letter, and brochure "were actions that a literal reading of the rule would not prohibit,"[177] sending such a communication "clearly violated the purpose and spirit of the rule."[178] Thus, in its effort to find that Norris had violated the disciplinary rules, the court had to go to considerable lengths to read into the rules a prohibition that they did not expressly include.

The court also rejected Norris' argument that his letter and brochure were forms of targeted, direct-mail advertisement protected by the First Amendment.[179] The court stated that Norris' act of sending flowers, a letter, and a brochure did not constitute an act of sending either direct mail or even mail at all; rather the court characterized the case as involving "other conduct undertaken in an effort to reach a prospective client."[180] Not surprisingly, the court failed to explain the difference between Norris' letter and targeted, direct-mail solicitation, summarily concluding that Norris' letter did not fall into the latter category. The reason for the court's failure to provide such a distinction is simple:

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172. *Norris*, 582 So. 2d at 1036 (quoting ALA. CODE OF PROFESSIONAL RESPONSIBILITY Temporary DR 2-103 (1986)). Alabama has since replaced Temporary DR 2-103 with Rule 7.3, which is substantially identical to the former rule. *See* ALA. CODE OF PROFESSIONAL RESPONSIBILITY Rule 7.3 (1990); *Norris*, 582 So. 2d at 1036 n.3.

173. *Norris*, 582 So. 2d at 1036.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1037.

178. *Norris*, 582 So. 2d at 1036.

179. *Id.*

180. *Id.*

there is no difference between Norris' conduct and that of the attorney in *Shapero*.

IV. THE LIMITS PLACED ON TARGETED, DIRECT-MAIL SOLICITATION IN *ANIS, FLORIDA BAR, AND NORRIS* ARE UNCONSTITUTIONAL

In *Shapero*, the United States Supreme Court held that the relevant inquiry into a targeted, direct-mail solicitation is not whether the targeted clients are in a condition which makes them susceptible to undue influence—as the *Anis*, and *Florida Bar* courts held—but whether the mode of communication used poses a serious risk that lawyers will exploit such susceptibility.[181] Employing that test, the Supreme Court has repeatedly held that advertising or solicitation in written form, such as targeted, direct-mail advertising, is constitutionally protected.[182]

In upholding bans on targeted, direct-mail solicitation, the courts in *Anis* and *Florida Bar* each focused on the vulnerability of certain types of prospective clients and concluded that victims of accidents or disasters are unusually susceptible to possible undue influence through letters from a trained advocate. The courts disregarded the clear holding of the Supreme Court in *Shapero* in ruling that this susceptibility warranted a partial ban on direct mailings. *Norris* further added to this alarming tendency of state courts to obviate the protection that *Shapero* gave to written communications from attorneys to potential clients.

Opponents of First Amendment protection for targeted mailings argue that *Shapero* is distinguishable from *Anis, Florida Bar*, and *Norris* for two reasons. First, as a federal district court in Florida noted, the restrictions placed on direct-mail solicitation in cases such as *Florida Bar* are limited, unlike the absolute prohibitions stricken by the Supreme Court in *Shapero*.[183] As support for the argument that these limited restrictions are permissible, opponents rely on a footnote in *Peel v. Attorney Registration & Disciplinary Comm'n*,[184] which states: "[T]hat a total ban [on advertising] is unconstitutional does not necessarily preclude less restrictive regulation of commercial speech."[185]

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181. *Shapero*, 486 U.S. at 474.

182. *See Shapero* and *In re R.M.J.*, discussed *supra* notes 76-80, 120-41 and accompanying text.

183. McHenry v. Florida Bar, 808 F. Supp. 1543, 1546-47 (M.D. Fla. 1992) (discussing opponents' attempts to distinguish *Florida Bar* from *Shapero*).

184. 496 U.S. 91 (1990).

185. *Id.* at 110 n.17. The Florida Bar Association raised this argument before the federal district court in Florida in support of its position that the State's newly adopted

As the Florida district court in *McHenry* pointed out, however, there is a flaw in this contention: The language in the *Peel* footnote appears in the context of the Court's discussion of disclosure requirements and the screening of advertisements to "ensure that the information is presented in a nonmisleading [sic] manner."[186] The Florida Bar's regulations, in contrast, addressed only the timing of the communication.[187] Thus, the district court reasoned that *Peel* does not support restrictions such as that sought by the Florida Bar because a delay in sending targeted, direct-mail solicitation to accident victims will not affect whether the letter is misleading any more than if the ban were not in effect.[188]

Opponents of extending First Amendment protection to direct-mail solicitations have also attempted to limit the application of *Shapero* on the ground that it did not involve solicitation in a personal injury or wrongful death case. In *Anis*, for example, the New Jersey Supreme Court discounted *Shapero* by noting that it involved direct-mail solicitation of parties facing foreclosure rather than accident victims or their families.[189] Solicitation in a foreclosure case such as *Shapero*, reasoned the *Anis* court, involved "none of the factors that concern us here."[190] A careful reading of *Shapero*, however, reveals that the *Anis* court's reading of *Shapero* as being inapplicable to personal injury cases is mistaken.

In *Shapero*, the Supreme Court cited with approval[191] *In re Von Wiegen*,[192] a case in which the New York Court of Appeals held that an attorney's targeted direct-mail solicitation of the victims of a disaster was protected by the First Amendment.[193] If the Supreme Court had not intended to extend First Amendment protection to targeted mailings in personal injury and wrongful death cases, it certainly would not have held that the condition of the recipient is not the proper focus of a court's inquiry, and it most likely would not have cited *Von Wiegen*.

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restrictions on attorneys' direct-mail solicitations passed constitutional muster. *See McHenry*, 808 F. Supp. at 1546-47.

186. *McHenry*, 808 F. Supp. at 1547 (quoting *Peel*, 496 U.S. at 111 (Marshall, J., concurring)).

187. *McHenry*, 808 F. Supp. at 1546.

188. *Id.* at 1546-47.

189. *Anis*, 599 A.2d at 1269.

190. *Id.*

191. *Shapero*, 486 U.S. at 479.

192. 470 N.E.2d 838 (N.Y. 1984), *cert. denied*, 472 U.S. 1007 (1985).

193. *Von Wiegen*, 470 N.E.2d at 843. See also *supra* notes 113-18 and accompanying text for a more thorough discussion of *Von Wiegen*.

V. CONCLUSION

In *Shapero*, the United States Supreme Court made clear that in cases assessing whether attorneys' targeted, direct-mail solicitations are entitled to constitutional protection, courts are not to ask whether an attorney has sent communications to potential clients "whose 'condition' makes them susceptible to undue influence."[194] Instead, in passing judgment on whether a communication is protected by the First Amendment, courts must inquire "whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."[195] Employing this test, the Court has declared that written forms of communication such as targeted, direct-mail solicitation are protected by the First Amendment. Nevertheless, several state courts have circumvented *Shapero* by permitting states to ban certain forms of written solicitation, concluding, in total disregard of *Shapero*, that the First Amendment does not protect targeted, direct-mail solicitation sent to persons who are unduly vulnerable because of a recent accident or disaster.

Over the last two years, state courts have begun to erode the protection afforded targeted, direct-mail solicitation in *Shapero*. Moreover, with the passage of the Texas law making targeted, direct-mail solicitation by attorneys a felony, it appears as though state legislatures are now willing to follow these courts' lead in infringing on attorneys' free speech rights.[196] Most troubling is that opponents of First Amendment protection of targeted, direct-mail solicitation are beginning to distinguish *Shapero* by using these cases in an effort to quash so-called "distasteful" conduct. The time is ripe to stop this erosion and to effectuate the guarantees of the First Amendment, starting with a refusal by other courts to follow *Anis*, *Florida Bar*, and *Norris*.

194. *Shapero*, 486 U.S. at 474.

195. *Id.*

196. *See supra* notes 15, 167.