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Direct Mail Solicitation by Attorneys

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SURVEY OF PROFESSIONAL RESPONSIBILITY

INTRODUCTION

The *Journal of Legal Commentary* is pleased to present this first edition of the *Survey of Professional Responsibility*. The *Survey* will review annually national developments in the area of legal ethics.

The 1988 *Survey* includes two articles that analyze recent United States Supreme Court decisions. The first article concerns *Shapero v. Kentucky Bar Association*, in which the Court held that a blanket prohibition of direct mail solicitation by attorneys unconstitutionally restricted speech. The second article concerns *Supreme Court of Virginia v. Friedman*, in which Virginia's residency requirements for admission to the bar on motion were struck down by the Court as violative of the Constitution's privileges and immunities clause.

The *Survey* also contains an article that compares the different tests used by courts and bar associations to determine which employees of a corporation are shielded from *ex parte* interviews.

It is the hope of the Editors that this *Survey* will assist attorneys faced with these issues in the practice of law.

DIRECT MAIL SOLICITATION BY ATTORNEYS

Historically, advertisement of services by lawyers and direct solicitation of clients have been viewed with suspicion and have been thought to lead to an undignified commercialization of the legal profession.¹ The American Bar Association has promulgated spe-

¹ See *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1930 (1988) (O'Connor, J., dissenting) (restrictions on lawyer advertising historically have been reminder that lawyering

cial restrictions on these practices.³ Restrictions and prohibitions

is not "trade or occupation like any other"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-72 (1977) (lawyer advertising and solicitation have historically been banned); Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L.REV. 677, 677-78 (1954) (historical condemnation of solicitation stems from prohibitions on barratry, champerty and maintenance). See generally, H. DRINKER, *LEGAL ETHICS* 210-73 (1953) (historical background on prohibitions against legal advertising and solicitation).

There have been traditional justifications for this aversion to advertising and solicitation by lawyers. See *Shapiro*, 108 S. Ct. at 1930 (O'Connor, J., dissenting) ("lawyers are subjected to heightened ethical demands on their conduct towards those they serve"); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985) (lawyer solicitation "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence and outright fraud"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Id.* See also Note, *Attorney Solicitation of Clients: Proposed Solutions*, 7 HOFSTRA L. REV. 755, 757 (1978) (dignity of profession damaged by advertising and solicitation); Note, *Advertising, Solicitation and the Professional's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1184 (1972) (advertising and solicitation weakens legal profession by encouraging "overreaching, overcharging, underrepresentation and misrepresentation"); Note, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 675-81 (1958) (solicitation may lead to fraudulent claims, corruption of public officials and discrediting of legal profession). But see J. BOSWELL, *LIFE OF JOHNSON*, 608 (1936) (Dr. Johnson thought lawyer should "insert a little hint now and then, to prevent his being overlooked"); Hazard, Pearce and Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1089 (1983) (legal services are market commodity and information about commodity should not be restricted). It has been argued that the legal profession is enhanced by competition and the free flow of information to clients. *Id.* See generally BLACK'S LAW DICTIONARY (5th ed. 1979). The common law roots of prohibitions on lawyer advertising are found in the words barratry, champerty and maintenance. *Id.* All were punishable by fine and imprisonment. *Id.* Barratry is defined as "[t]he offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." *Id.* at 137. Champerty means "[a] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds . . ." *Id.* at 209. Maintenance is "[a]n 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.* at 860.

Courts have distinguished "advertise" and "solicitation" from each other. See *State v. Cusick*, 248 Iowa 1168, 1172, 84 N.W.2d 554, 556 (1957) (quoting *Carter v. State*, 81 Ark. 37, 98 S.W. 704 (1936)). The *Cusick* court wrote:

"Advertise" is . . . : "The act or practice of bringing anything, as one's wants or one's business, into public notice, as by paid announcement in periodicals, or by hand bills, placards, etc., as to secure customers by advertising." "To solicit" is thus defined: "To importune, entreat, implore, ask, attempt, try to obtain" . . . "None of the uses of this term embrace advertising, although advertising is a method, in a broad sense, of soliciting the public to purchase the wares advertised. But soliciting is a well-known and defined action, and advertising is an equally well-known and defined action, and they are not identical. It is true they are intended to reach the same result, the sale of the wares, but different routes are traveled in reaching that end. One is legislated against, and the other is not . . ."

Id. (citations omitted).

³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984) provides: "A lawyer may not

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on lawyer advertisement or solicitation of clients have created the constitutional issue of whether the state has the right to restrict or prohibit this form of commercial speech.³

In *Bates v. State Bar of Arizona*,⁴ the United States Supreme Court addressed the issue of the degree of constitutional protection to be afforded advertising by attorneys.⁵ The Court held that attorney advertisements are commercial speech, that they are subject to reasonable time, manner and place restrictions, and their content can be restricted if deceptive or misleading.⁶ Subsequent Supreme Court decisions have attempted to balance the first amendment right of lawyers to advertise and solicit clients in vari-

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" *Id.*

The older Model Code of Professional Responsibility states that a "lawyer shall not . . . recommend employment as a private practitioner, of himself, his partner, or associate to a lay-person who has not sought his advice regarding employment of a lawyer." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1980). See also Perschbacher and Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. COLO. L. REV. 255, 257-58 (1987) (despite challenges, ABA "reaffirmed its support for the absolutist approach of Rule 7.3"); Brosnahan and Andrews, *Regulation of Lawyer Advertising: In the Public Interest?* 46 BROOKLYN L. REV. 423, 423 (1980) (ABA's formal ban on lawyer advertising and solicitation goes back as far as 1908).

³ U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or the press . . ." *Id.*

The Supreme Court did not decide a commercial speech case until 1976. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 753-54 (1976). The Court, in *Virginia State Board*, considered the validity of a Virginia statute that declared price advertising by pharmacists to be unprofessional conduct and therefore restricted. *Id.* at 749-50. Advertisements were determined to be commercial speech, meriting less first amendment protection than political speech. *Id.* at 760-61. The Court observed that both the consumer and society as a whole maintain a strong interest in the free flow of commercial information in order to be able to make the best informed decisions. *Id.* at 763-64. "It could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.* at 764. Permissible restrictions, however, would be allowed. *Id.* at 770. The Court stated that the Constitution "does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely." *Id.* at 772. It was determined that commercial speech would be subject to reasonable time, manner and place restrictions. *Id.* at 771. There could be, however, no absolute prohibition based on the content of the advertisement. *Id.* See generally Canby, *Commercial Speech of Lawyers: The Court's Unsteady Course*, 46 BROOKLYN L. REV. 401, 401 (1980) (noting that same elements of individual and social value used in *Virginia State Board*, used also by court in lawyer advertising cases).

⁴ 433 U.S. 350 (1977).

⁵ *Id.* at 355. In *Bates* two lawyers had put an advertisement in a newspaper stating the availability of, and the prices for, their services. *Id.* at 354. The Arizona State Bar Association claimed this was in violation of disciplinary rules prohibiting lawyers from advertising in newspapers or other media. *Id.* at 355-56.

⁶ *Id.* at 383-84.

ous ways against the state's interest in protecting the layman from undue influence and overreaching.⁷ The Court has addressed the issues of in-person solicitation,⁸ mail and in-person solicitation for non-profit, politically based organizations⁹ and ordinary newspaper advertisements.¹⁰ For the first time, in *Shapero v. Kentucky Bar*

⁷ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637-38 (1985) (advertising by attorneys may be restricted to advance governmental interest of preventing overreaching); *In re R.M.J.*, 455 U.S. 191, 203-04 (1982) (state may impose restrictions on attorney advertising when misleading or abused). See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454-55 (1978) (interests of attorneys in advertising outweighed by society's interests in regulating); *In re Primus*, 436 U.S. 412, 422-25 (1978) (improper solicitation of legal business not constitutionally protected).

⁸ *Ohralik*, 436 U.S. at 454-55. In *Ohralik*, a lawyer personally visited two accident victims in the hospital directly after their accident and offered his services. *Id.* at 450-51. One accident victim signed a contingent-fee contract, the other made an oral agreement. *Id.* Both victims eventually discharged the attorney, but he succeeded in getting a share of the insurance recovery in settlement of a breach of contract suit he had brought against the victim who signed the agreement. *Id.* at 449-52. In determining that *Ohralik* had violated the Disciplinary Rules of the Ohio Code of Professional Responsibility, the Court held that in-person solicitation by a lawyer for remunerative employment is a commercial transaction in which speech is a subordinate element. *Id.* at 457. The *Ohralik* court observed that the State's interest in preventing undue influence and pressure from an uninvited lawyer is greater than the lawyer's interest in using commercial speech to accomplish his goal. *Id.* at 465-67. Thus, the commercial speech by the attorney received a lower level of protection. *Id.* at 457.

⁹ *Primus*, 436 U.S. at 414. A grievance committee of the Supreme Court of South Carolina filed a complaint against *Primus* for sending letters on behalf of the American Civil Liberties Union to women who were required to undergo sterilization procedures in order to receive Medicaid assistance. *Id.* The letters informed the women of the availability of free legal services to oppose the requirement. *Id.* at 415-16 and n.7. *Primus* was a practicing lawyer and also an officer of the ACLU. *Id.* at 415-17. The court concluded that the South Carolina Disciplinary Rules were being applied overbroadly if they prohibited offers of litigation assistance by non-profit organizations. *Id.* at 426, 430-33. The court recognized the state's legitimate goal of preventing overreaching, fraud and misrepresentation. *Id.* Cf. *NAACP v. Button*, 371 U.S. 415 (1963). The NAACP was charged with soliciting cases for lawyers in violation of a Virginia statute. *Id.* at 423. The Court concluded that NAACP activities were protected modes of political expression and that ensuring high professional standards was not a sufficiently compelling state interest to curtail first amendment rights. *Id.* at 419-25.

¹⁰ *R.M.J.*, 455 U.S. at 199-200. The Advisory Committee for the Supreme Court of Missouri charged a lawyer with violating the court's Rule 4. *Id.* at 197-98. The Committee claimed he failed to list areas of practice in an advertisement in ways prescribed by the rule, failed to include the required disclaimer and made a general mailing of his announcement cards, presumably to solicit business. *Id.* at 196-98. The court reasoned that commercial speech in professions cannot be absolutely suppressed even if potentially misleading but held that, even where not misleading, the state can regulate the speech as long as the state shows a substantial interest and such regulation is in proportion to the interest served. *Id.* at 203-04. The court subsequently reaffirmed its position taken in *R.M.J.* See *Zauderer*, 471 U.S. 637-38 (1985). Although the court found that *Zauderer's* advertisements were misleading, it recognized the strong consumer interest in receiving information concerning legal services. *Id.* at 639-40.

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Association,¹¹ the Supreme Court resolved the issue of direct targeted mail solicitation — the mailing of advertisements or letters to people known to be in need of legal assistance. In an opinion handed down on June 14, 1988 the Court held that to deny use of targeted mailings by lawyers is an unconstitutional restriction of free speech.¹² This article will review the *Shapero* decision, state what the law in New York has been and where it stands after *Shapero* and examine certain trends as reflected in decisions of other jurisdictions.

I

In 1985 Richard Shapero, a member of the Kentucky Bar, applied to the Kentucky Attorneys Advertising Commission for approval of a letter he wanted to send directly to potential clients whom he knew to be facing foreclosure.¹³ Neither the Commission and the Bar's Committee on Legal Ethics found the letter to be false or misleading, but each upheld the state court rule that prohibited such mailings.¹⁴ On review, the Kentucky Supreme Court deleted Court Rule 3.135(5)(b) in light of *Zauderer v. Office of Disciplinary Counsel*¹⁵ and replaced it with the similar Rule 7.3

¹¹ 108 S. Ct. 1916 (1988).

¹² *Id.* at 1924-25.

¹³ *Id.* at 1919. The text of the 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 to keep your home by ORDERING your creditor [sic] to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Id.

¹⁴ *Id.* at 1919-20. Kentucky Supreme Court Rule 3.135(5)(b)(i) provided:

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

Id. at 1919 n.2.

¹⁵ *Id.* at 1920. In *Zauderer*, it was held that attorney advertising was commercial speech which, if not false or deceptive, could not be prohibited but could be restricted in light of a substantial government interest by means that will directly further that interest. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637-38 (1985).

of the American Bar Association's Model Rules of Professional Conduct.¹⁶

After granting *certiorari*, the United States Supreme Court reaffirmed in *Shapiro v. Kentucky Bar Association* that, under *Bates v. State Bar of Arizona*, lawyer advertising is commercial speech and is entitled to qualified first amendment protection.¹⁷ The Court also noted that in *Zauderer*, which had permitted newspaper advertisements by lawyers, the Court had distinguished written targeted advertisements from in-person solicitation, but the Court had never distinguished between different modes of written advertisements.¹⁸ The majority observed that, by contrast, ABA Model Rule 7.3 does distinguish between prohibited mailings targeted at those with particular legal needs and permissible mailings to the broad general public who may find the services useful.¹⁹ Justice Brennan, writing for the Court, strongly implied that the reasoning behind such a distinction is not sound and contended that mailing to a group among the general public will invariably reach those with specific legal needs.²⁰ This essentially meaningless distinction, according to Justice Brennan, encourages the view that direct mailing is "somehow inherently objectionable."²¹

In observing, however, that the Kentucky Court concerned itself with the potential for abuse of direct mailing, Justice Brennan stated: "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."²² The *Shapiro* Court, in recognizing the potential for abuse in both direct mailing and in-person solicitation, found direct mailing distin-

¹⁶ *Shapiro*, 108 S. Ct. at 1920. See *supra* note 2 (Rule 7.3 quoted in part).

¹⁷ *Id.* at 1921.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* Justice Brennan stated:

The only reason to disseminate an advertisement of particular legal services among those persons who are 'so situated that they might in general find such services useful' is to reach individuals who *actually* 'need legal services of the kind provided [and advertised] by the lawyer.' But the First Amendment does not permit a ban on certain speech merely because it is more efficient

Id. (quoting from ABA Rule 7.3).

²¹ *Shapiro*, 108 S. Ct. at 1921.

²² *Id.* at 1922.

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guishable by its very nature as less likely to be used to overreach and more easily monitored for other possible abuses.²³ The Court delineated, in broad terms, the limits of permissible direct mailing by warning against mailed advertisements emphasizing trivial, uninformative facts that result in misleading recipient or giving overblown assurances of client satisfaction.²⁴

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented, contending that the *Zauderer* decision, so much depended upon by the majority, was the product of flawed reasoning and that the potential for abuse outweighed the interest in free expression of speech.²⁵ The dissenters asserted that it should be left to the states to balance the substantial government interest in promoting high ethical standards in the law profession against the interest in free speech.²⁶

II

The New York Court of Appeals had resolved the issue of direct mail solicitation sometime before the United States Supreme Court by structuring its own formal approach rooted in analogous Supreme Court decisions concerning commercial speech.²⁷

In *Koffler v. Joint Bar Association*,²⁸ the court held that a statute

²³ *Id.* at 1922-23. "The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency . . . giving the State ample opportunity to supervise mailings and penalize actual abuses." *Id.* at 1923.

²⁴ *Id.* at 1925.

²⁵ *Shapiro*, 108 S. Ct. at 1925 (O'Connor, J., dissenting).

²⁶ *Id.* at 1927-28 (O'Connor, J., dissenting). The dissent provided a thought provoking insight concerning lawyer advertising speech, fundamentally at odds with the majority: "The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations." *Id.* at 1928-29 (O'Connor, J., dissenting).

²⁷ See *infra* notes 28-38 and accompanying text. See also Note, *Mail Advertising by Attorneys and the First Amendment*, 46 ALB. L. REV. 250, 263 (1981) [hereinafter Note, *Mail Advertising by Attorneys*] (noting that New York's *Koffler* decision had already addressed what Supreme Court was to address in *R.M.J.* and that *Koffler* rationale should be adopted by Supreme Court); Note, *Three Years Later: State Court Interpretations of the Attorney's Right to Advertise and the Public's Right to Information*, 45 MO. L. REV. 562, 574-76 (1980) [hereinafter Note, *Three Years Later*] (observing that *Koffler* decision and Kentucky case *Stuart* provide basis for proposed balancing test).

²⁸ 51 N.Y.2d 1240, 412 N.E.2d 927, 432 N.Y.S.2d 872, *cert. denied*, 450 U.S. 1026 (1980).

could not constitutionally prohibit the mailing of advertisements to potential clients.²⁹ The court announced that it recognized no difference between "advertisement" and "solicitation".³⁰ It appears the court implied that mail solicitation will get the commercial speech protection afforded lawyer advertising in *Bates v. State Bar of Arizona*.³¹ The *Koffler* court supported its holding by fashioning a test, drawn from *Central Hudson Gas and Electric Corp. v. Public Service Commission*,³² to determine the constitutionality of restricting direct mail solicitation by lawyers.³³ Subsequent cases addressed the permissible alternative of restricting the manner in

²⁹ *Id.* at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 873. Koffler and his partner, both lawyers, had put an advertisement in a widely distributed Long Island newspaper stating their fee, phone number and availability for real estate closings. *Id.* at 143-44, 412 N.E.2d at 929, 432 N.Y.S.2d at 873-74. They also mailed letters to homeowners and real estate brokers, with the homeowners also receiving a copy of the advertisement. *Id.* The Grievance Committee claimed this was misconduct in violation of Disciplinary Rule DR 2-103(A) of the New York Code of Professional Responsibility and Section 479 of the New York Judiciary Law. *Id.*

³⁰ *Koffler*, 51 N.Y.2d at 146-47, 312 N.E.2d at 931-32, 432 N.Y.S.2d at 875-76. The *Koffler* court noted the semantical difference between the two words, but stated that no matter what label is used to characterize speech, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* (quoting *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)) at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875.

³¹ *See id.* at 146-47, 412 N.E.2d at 931-32, 432 N.Y.S.2d at 875-76. The court may have taken its cue from Justice Powell's concurring-in-part opinion in *Bates*:

The Court speaks specifically only of newspaper advertising but it is clear that today's decision cannot be confined on a principled basis to price advertisements in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means — for example, magazines, signs in buses and subways, posters, handbills, and *mail circulations*.
433 U.S. 350, 402 n.12 (emphasis added).

³² 447 U.S. 557, 566-71 (1980).

³³ *See Koffler*, 51 N.Y.2d at 147, 412 N.E.2d at 932, 432 N.Y.S.2d at 876. Judge Meyer of the New York Court of Appeals suggested that the necessity of restriction could be determined by asking: (1) whether the speech is misleading or related to an unlawful activity and therefore not protected; (2) whether the government interest sought to be protected is substantial; (3) how directly does the restrictive regulation advance that interest; (4) whether there is a less restrictive alternative? *Id.* The court of appeals determined that *Koffler's* mailings were not misleading and that, although the state interest of preventing deception could be effected by absolute prohibition, a less restrictive alternative could be adopted such as a requirement to file all advertisements or letters with the Bar Association. *Id.* at 147-50, 412 N.Y.2d at 932-34, 432 N.Y.S.2d at 876-78.

For further discussion of *Koffler*, see *Survey of New York Practice: Judiciary Law*, 56 ST. JOHN'S L. REV. 604, 606-08 (1982) (succinct summary of majority and dissenting opinions); Note, *Three Years Later*, *supra* note 27, at 568-71 (*Koffler* used in comparisons to illustrate confusion concerning advertising-solicitation distinction); Note, *Mail Advertising by Attorneys*, *supra* note 27 at 257-61 (*Koffler* decision "is consistent with the spectrum of constitutional protection given for attorney advertising by the Supreme Court").

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which lawyers advertise or solicit in order to guard against possible abuse and to further the state's interest in protecting the public.³⁴

In *Matter of Von Wiegen*,³⁵ the New York Court of Appeals determined that letters sent by an attorney to known accident victims were deceptive, but stated, portending the *Shapero* Court's similar view, that direct mailing, in and of itself, does not possess factors of intimidation or pressure and is not inherently misleading.³⁶ The Court once again resorted to the *Central Hudson* four

³⁴ See, e.g., *Greene v. Grievance Comm.*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981). *Greene* mailed fliers announcing his services directly to real estate brokers, hoping that the brokers would recommend him to their clients. *Id.* at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 883. The court characterized this as a kind of indirect solicitation through third parties. *Id.* at 125, 429 N.E.2d at 393, 444 N.Y.S.2d at 886. The state interest sought to be protected in *Greene* was the prevention of a conflict of interest in that the lawyer might be overly concerned with making the deal successful for himself and his broker contact. *Id.* at 127-29, 429 N.E.2d at 394-96, 444 N.Y.S.2d at 888-89. This state interest, the court stated, warrants a reasonable manner-restriction. *Id.* at 126-27, 429 N.E.2d at 394, 444 N.Y.S.2d at 887. The court in *Greene* expressly limited its ruling to third party mailings to brokers, but noted that § 479 of the Judiciary Law prohibits all third party mailings. *Id.* at 126, 429 N.E.2d at 394, 444 N.Y.S.2d at 887 (citing N.Y. JUD. LAW 479 (McKinney 1967)). It should be noted that the *Greene* court used the *Koffler* version of the *Central Hudson* test in its analysis. *Id.* at 127-28, 429 N.E.2d at 394-95, 444 N.Y.S.2d at 887-88.

The New York Court of Appeals solidified its holdings in *Koffler* and *Greene* in *In re Alessi*, 60 N.Y.2d 229, 457 N.E.2d 682, 469 N.Y.S.2d 577 (1983), *cert. denied*, 465 U.S. 1102 (1984). In *Alessi*, lawyers sent letters to real estate agents soliciting work in real estate closings and were charged with misconduct. 60 N.Y.2d at 231, 457 N.E.2d at 684, 469 N.Y.S.2d at 579. Judge Meyer narrowed his holding in *Greene* by stating that Judiciary Law § 479 only prohibits third party mailings that would potentially cause a conflict of interest. *Id.* at 234, 457 N.E.2d at 686, 469 N.Y.S.2d at 581. The prohibition, therefore, extends only to the mailing to those who may have interests "more closely intertwined with those of the attorney than with those of the client." *Id.* at 234-35, 457 N.E.2d at 686, 469 N.Y.S.2d at 581.

³⁵ 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985).

³⁶ *Id.* at 172, 470 N.E.2d at 843, 481 N.Y.S.2d at 45. *Von Wiegen*, a lawyer, had sent letters directly to victims and the families of victims of the Hyatt Regency Hotel disaster in Kansas City, Missouri, in which a "sky-walk" terrace structure had collapsed and two hundred and fifty people were injured. *Id.* at 166-67, 470 N.E.2d at 839-40, 481 N.Y.S.2d at 41-42. The letter stated that a "litigation committee" had been formed to assist the victims or their families and that some victims and families had already retained *Von Wiegen*. *Id.* In reality, the "litigation committee" consisted of *Von Wiegen* and his former secretary, and no victims or families had retained *Von Wiegen*, although some had been in contact with him. *Id.* at 175-76, 470 N.E.2d at 848, 481 N.Y.S.2d at 47. Judge Simons stated the issue as whether there was anything unique about direct solicitation of accident victims as opposed to real estate clients which warrants a result different from the *Koffler* case. *Id.* at 169, 470 N.E.2d at 841, 481 N.Y.S.2d at 43. The *Von Wiegen* court, in reviewing the *Greene* decision, noted that it only had restricted the manner of solicitation, that is,

part test with its newly given gloss from the *Koffler* court³⁷ and held that blanket prohibition of mail solicitation of accident victims violates a lawyer's First Amendment rights.³⁸ The New York Court of Appeals suggested that a requirement to file letters or fliers with a bar association was an alternative to absolute prohibition sufficient to protect the public.³⁹ The *Von Wiegen* court's decision neatly comports with the *Shapero* Court's view that bar associations can require that letters by attorneys be filed in advance, and that patently deceptive letters can constitutionally be prohibited.⁴⁰

III

Until the United States Supreme Court addressed the issue of directed mail solicitation by lawyers in *Shapero*, the high courts of each state were left to decide the issue as best they could, using the commercial speech and lawyer advertisement and solicitation cases of the Supreme Court.⁴¹ The various interpretations of *Bates v. State Bar of Arizona* and *Ohralik v. Ohio State Bar Association*, in particular, created discernible trends reflecting each jurisdiction's view as to whether mail solicitation was more akin to permissible advertising or impermissible solicitation.⁴² It appears that the Su-

through third party brokers. *Id.* at 172, 470 N.E.2d at 843, 481 N.Y.S.2d at 45. In *Von Wiegen*, the violation was asserted because Von Wiegen had sought to solicit accident victims — clearly a content-based restriction. *Id.* at 172, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.

³⁷ *Id.* at 173-75, 470 N.E.2d at 843-45, 481 N.Y.S.2d at 45-47. The court noted four substantial governmental interests in regulating attorney advertising: (a) the overcommercialization of the legal profession; (b) the invasion of privacy and possible undue pressure; (c) stirring up litigation; (d) the potential for deception. *Id.* at 173-75, 470 N.E.2d at 843-45, 481 N.Y.S.2d at 46-47.

³⁸ *Id.* at 170, 470 N.E.2d at 841, 481 N.Y.S.2d at 43.

³⁹ See *Von Wiegen*, 63 N.Y.2d at 175, 470 N.E.2d at 844-45, 481 N.Y.S.2d at 47. The court candidly admitted that complete suppression advances the state's interests but that a less drastic alternative exists in the filing of solicitation letters with the Bar Association. *Id.*

⁴⁰ See *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1923-24 (1988).

⁴¹ See *supra* notes 4-10 and accompanying text (cases cited outline Supreme Court's approach to commercial speech).

⁴² *Bates v. State Bar of Arizona*, 433 U.S. 340 (1977); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). See Perschbacher and Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. COLO. L. REV. 255 (1987). The authors noted: "Applying the Supreme Court's framework, lower federal and state courts have decided targeted mail cases using an advertising-solicitation dichotomy. Courts label mailings as either 'advertising' or 'solicitation' and allow the label to determine whether

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preme Court created, in *Bates* and *Ohralik*, two poles to which state courts have been attracted.⁴³

Some courts have characterized mailing as impermissible "solicitations," emphasizing the vulnerability of recipients who may have been involved in accidents or legal difficulties, the invasion of the recipient's privacy, and the personal intrusion into people's private affairs.⁴⁴ Courts which have asserted that mailings are similar to permissible "advertisements" have accented the impersonal aspect of circulars or letters, the fact that a recipient can choose to ignore letters, and that letters by their nature are incapable of pressuring recipients.⁴⁵

regulation or ban is appropriate." *Id.* at 264. *See also* note, Recent Developments, *Attorney-Advertising*, 4 AM. J. TRIAL ADVOC. 119, 122 (1980) ("[v]arious states tend to use their own subjective opinions in proceeding to balance first amendment rights to advertise against state's rights to regulate").

⁴³ *See* Note, *Direct Mail Solicitation By Attorneys: Bates to R.M.J.*, 33 SYRACUSE L. REV. 1041, 1071-72 (1982) ("The [Supreme] Court does not appear to have been entirely successful . . . in reconciling the advertising and solicitation elements of direct mail . . .").

⁴⁴ *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489, 496 (La. 1978). In *Allison*, the court viewed the mail offer of "package" basis legal services for a monthly fee as direct solicitation partly because the offer had been privately made, "not in the public domain like the advertisement approved in the *Bates* case, for all to see . . ." *Id.* *Eaton v. Supreme Court of Arkansas*, 270 Ark. 573, 580, 607 S.W.2d 55, 59 (1980), *cert. denied*, 450 U.S. 966 (1981). Lawyer advertisement fliers, sent out with coupon packages were seen as not "[facilitating] an informed choice by allowing fee comparison, but rather [urging] a group of specific potential customers to seek petitioner's services and therefore this constituted solicitation." *Id.* *Florida Bar v. Schreiber*, 407 So. 2d 595, 600 (Fla. 1981) (lawyer's letter recommending his services, received by trade company, perceived in terms of undue influence and invasion of privacy). *Id.* *State v. Moses*, 231 Kan. 243, 246, 642 P.2d 1004, 1007 (1982) (public receiving attorneys' letters to those known to be selling homes described as "extremely vulnerable to a suggestion of employment that may or may not be advantageous to the individual homeowner"). *But see* Canby, *Commercial Speech of Lawyers: The Court's Unsteady Course*, *supra* note 2, at 416 (author noted that evils of *Ohralik*-type solicitation not applicable to mail solicitation; prohibition would be "reversion to old habit - one clearly predating the discovery of the first amendment interest in commercial speech").

⁴⁵ *In re Appert*, 315 N.W.2d 204, 212 (Minn. 1981) (court observed that recipients of advertisements soliciting clients harmed by Dalkon Shields "could have easily discarded them . . . as they could have ignored a billboard or newspaper advertisement"); *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978) (court noted that only difference between *Bates*-style advertisement and mailed letter was in form used and letter form does not increase likelihood of deception and overreaching); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 149, 412 N.E.2d 927, 933, 432 N.Y.S.2d 872, 877 (1980) (recipients of letters "'may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket.'") (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980)), *cert. denied*, 450 U.S. 1026 (1981); *Leoni v. State Bar of California*, 39 Cal. 3d 609, 623-24, 704 P.2d 183, 192, 217 Cal. Rptr. 423, 432 (1985) (court concluded that letters sent to known debtors were indistinguishable from advertisements because of specific services offered and economic motive and therefore permissible), *appeal dismissed*,

The *Shapero* Court has clarified which factors are relevant to determine whether mailing is permissible. The chosen manner of communication will be examined to determine whether it lends itself to abuse by lawyers, not whether the recipients of the communication are susceptible to undue influence, overreaching and pressure by lawyers.⁴⁶ It is suggested that the labeling of a communication as an "advertisement" or as "solicitation" is no longer an appropriate consideration in lawyer direct mail solicitation cases.⁴⁷

Conclusion

The Supreme Court, in addressing the issue of lawyer direct mail solicitation, has put to rest one of the last remaining questions concerning lawyer advertisement and solicitation. State courts will now have less leeway for subjective interpretation of this freedom of speech issue. They must now look to *how* the offer of services is presented — whether the manner of presentation may be used by lawyers to deceive or mislead recipients of their letters, irrespective of whether the recipients are susceptible to influence through ignorance or emotional and financial circumstances. New York case law has anticipated the Supreme Court's

475 U.S. 1001 (1986); *In re Von Wiegen*, 63 N.Y.2d 163, 174, 470 N.E.2d 838, 844, 481 N.Y.S.2d 40, 46 (1984), *cert. denied*, 472 U.S. 1007 (1985). The *Von Wiegen* court noted that mail solicitation is not a substantial invasion of privacy, undue pressure or intrusion. *Id.* "It is not enough to justify a ban upon solicitation that in some situations . . . the letter might be offensive." *Id.*

⁴⁶ *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1922 (1988).

⁴⁷ See *Koffler*, *supra* note 30 and accompanying text. It should be noted once again that the *Koffler* court presaged the end of this distinction. *Id.* Commentators, too, had seen the distinction as misdirected reasoning. See, e.g., Perschbacher and Hamilton, *supra* note 2. The authors noted: "The advertisement - solicitation dichotomy breaks down when lawyers seek business through targeted mailings. Courts have classified targeted mailings variously as advertising and solicitation; thus different courts reach different conclusions on virtually indistinguishable facts." *Id.* See also comment, *Three Years Later*, *supra* note 27, at 570 (author noted that *Koffler* and *Stuart* cases had identical facts, yet different results based on advertising - solicitation distinction).

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decision in *Shapiro* and stands as firmly as ever on this issue.⁴⁸

Philip Franke

RESIDENCY REQUIREMENTS FOR ADMISSION TO THE BAR

A state has a legitimate interest in assuring that only qualified attorneys are admitted to practice law.¹ To further this policy, states have established criteria for admission to the bar.² Generally, admission has been conditioned upon a lawyer's knowledge of state law, a showing of "good moral character," and proof of state residency.³ However, the long-standing residency requirements for admission to practice have been challenged as violative of the privileges and immunities clause of the United States Constitution.⁴ This article will review the most significant of such chal-

⁴⁸ See *Koffler*, *supra* notes 30-33 and accompanying text.

¹ See *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (states have power and strong interest in controlling state's legal profession); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872) (power to regulate and control practice of law is province of state not federal government). See also *In re Griffiths*, 413 U.S. 717, 722-23 (1973) (state has interest "to assure the requisite qualifications of persons licensed to practice law"); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 159 (1971) (Court affirmed New York requirement that attorneys "possess . . . character and general fitness"); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (state can require high standard of qualifications to admit applicant to bar). See generally *Brakel & Loh, Regulating Multistate Practice of Law*, 50 WASH. L. REV. 699, 708 (1975) (state has interest in assuring that attorneys who practice are competent and skilled in local practice); Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change*, 56 CORNELL L. REV. 831, 832-33 (1971) (purpose of residency requirement is to guard citizens from inept practice of law).

² See *Schware*, 353 U.S. at 239 (states may impose qualifications which have a "rational connection with the applicant's fitness or capacity to practice"). See, e.g., *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 273, 397 N.E.2d 1309, 1313, 422 N.Y.S.2d 641, 645 (1979) (states have created criteria for admission to bar through exercise of their police power); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (qualifications required should be "appropriate to the calling or profession").

³ See *Brakel & Loh, supra* note 1, at 707 n.28 (residency requirement is prime issue in multi-state practice); Note, *supra* note 1, at 833-837. Knowledge of the local laws and customs is usually tested through a bar examination. *Id.* at 833. Moral character is important in protecting not only the public but the "character and integrity of the bar . . ." *Id.* at 834-35. Residency requirements have been characterized as the "most patently unreasonable and discriminatory requirement[s], in terms of both theory and practical consequences." *Id.* at 836.

⁴ U.S. CONST. art. IV, § 2, cl. 1. "The Citizens of each State shall be entitled to all Privi-