ATTORNEY ADVERTISING AND SOLICITATION IN VIRGINIA

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Since the mid-1970s, when the modern commercial speech doctrine was born, attorneys throughout the United States have turned in increasing numbers to advertising and solicitation in order to attract clients. States have struggled with such efforts, striving on the one hand to protect the public from abusive advertising and solicitation practices while on the other to respect attorneys' first amendment rights. The Virginia rules governing advertising and solicitation, adopted in 1983 in the revised Code of Professional Responsibility, are considerably more permissive than the rules of most other states and those recommended by the ABA. This article surveys the major United States Supreme Court decisions on advertising and solicitation, the ABA Model rules, and the Virginia disciplinary rules. Following this article is an interview with the President of the Virginia State Bar Association, Phillip B. Morris, concerning efforts by the association to place greater restrictions on in-person solicitation of prospective clients.

CONSTITUTIONAL DEVELOPMENT: FROM *BATES* TO *SHAPERO*

For nearly a century since Alabama first addressed the issue of ethical standards for attorney behavior in 1887, the United States Supreme Court considered absolute prohibitions on attorney advertising and solicitation constitutional.[1] In 1976 the

[1] The Alabama State Bar Association adopted the first Code of Professional Ethics in 1887, permitting attorneys to provide useful information about legal services to the general public. The courts, however, did not look favorably on attorney self-promotion in any form. *See* Calvani, Langenfeld & Shuford, *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 762-74 (1988) (containing a discussion of the history of ethical and judicial restraints on attorney advertising and solicitation). *See also* Bowers & Stephens, *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 MEM. ST. U.L. REV. 221 (1987).

Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[2] formulated the modern commercial speech doctrine, affording commercial speech limited first amendment protection.[3] The recognition of advertising as commercial speech forced the courts to reevaluate the constitutionality of prohibitions on attorney advertising and solicitation.[4]

The following year, in *Bates v. State Bar of Arizona*,[5] the Court extended first amendment protection to certain forms of attorney advertising. In *Bates*, two attorneys listed their fees for routine legal services in local newspaper advertisements.[6] The Court found that the public interest in receiving information outweighed the state's interest in suppressing attorney advertising.[7] The Court held that although a state could prohibit false, deceptive or misleading advertising, it could not impose an absolute ban on all attorney advertising.[8]

The Court clarified this standard in *In re R.M.J.*[9] by ruling that absent a finding that the advertising in question was false or misleading, restrictions on attorney advertising "may be no broader than reasonably necessary to prevent . . . deception."[10] Accordingly the Court held a regulation prohibiting the mailing of professional

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[2] 425 U.S. 748 (1976).

[3] *Id.* at 770. *See also* Recent Developments, Shapero v. Kentucky Bar Association: *Regulating Lawyers' Targeted Direct-Mail Advertising -- A Constitutional Standard For An Ethical Dilemma*, 63 TUL. L. REV. 724, 726-27 n.13 (1989).

[4] *See* Note, *Professional Ethics -- Direct Mailings by Attorneys to Target Audiences*, 16 MEM. ST. U.L. REV. 409, 410 (1986).

[5] 433 U.S. 350 (1977).

[6] *Id.* at 354.

[7] *Id.* at 379.

[8] *Id.* at 383-84.

[9] 455 U.S. 191 (1982).

[10] *Id.* at 203. *See also* Recent Developments, *supra* note 3, at 728.

announcement cards by attorneys to persons other than family, friends, other attorneys, clients and former clients overly restrictive and in violation of the first amendment.[11]

The Supreme Court also considered the extension of first amendment protection to different forms of client solicitation by attorneys in the companion cases of *Ohralik v. Ohio State Bar Association*[12] and *In re Primus*.[13] These two cases represented opposite ends of the solicitation spectrum. In *Ohralik*, an attorney personally solicited the business of two young automobile accident victims.[14] The Court upheld the state's prophylactic rule against in-person solicitation for pecuniary gain, finding that the potential for undue pressure, overreaching and other forms of misconduct inherent in in-person solicitation went beyond the constitutional protection enunciated in *Bates*.[15] In *Primus*, however, the Court ruled that solicitation by direct-mail letter informing a potential client of free legal assistance available from the A.C.L.U. was worthy of constitutional protection.[16] The Court distinguished this case from *Ohralik* by characterizing the solicitation as politically rather than financially motivated and determining that the potential adverse consequences of in-person solicitation were not shown to be present in this direct-mail solicitation.[17]

The Supreme Court again confronted the issue of attorney advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[18] which involved a newspaper advertisement directed towards a specific class of potential clients.

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[11] R.M.J., 455 U.S. at 206-07.

[12] 436 U.S. 447 (1978).

[13] 436 U.S. 412 (1978).

[14] Ohralik, 436 U.S. at 449-50.

[15] *Id.* at 465-68.

[16] Primus, 436 U.S. 439.

[17] *Id.* at 434-36.

[18] 471 U.S. 626 (1985).

The advertisement targeted women who had suffered injuries from the use of the Dalkon Shield Intrauterine Device.[19] The Court found the advertisement to be truthful and that the public interest in the free flow of information outweighed the justifications for regulation proffered by the state.[20] The Court reasoned that print advertisements posed less risk of overreaching or undue influence than in-person solicitation,[21] and held that states are not permitted to restrict truthful, non-deceptive attorney print advertising for any reason.[22]

Though *Zauderer* presented a factual situation falling just short of direct-mail solicitation, the Supreme Court addressed the classic direct-mail scenario in *Shapero v. Kentucky Bar Association.*[23] This case presented the question of whether a state could prohibit an attorney from engaging in truthful and nondeceptive targeted direct-mail solicitation of potential clients known to face particular legal problems.[24]

The Kentucky Supreme Court adopted the American Bar Association's Model Rule of Professional Conduct 7.3,[25] which prohibited targeted direct-mail solicitation by lawyers for pecuniary gain, to support its decision disallowing the proposed

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[19] *Id.* at 630-31.

[20] *Id.* at 639-42. The state advanced the traditional arguments, advanced in Ohralik, 436 U.S. at 465-68, that an absolute ban was necessary to prevent overreaching, undue influence, invasion of privacy, and fraud. Zauderer, 471 U.S. at 641.

[21] Zauderer, 471 U.S. at 642.

[22] *Id.* at 646-47.

[23] 486 U.S. 466 (1988).

[24] *Id.* at 468. Mr. Shapero, a member of the Kentucky Bar, requested a ruling from the State's Attorneys Advertising Commission on a proposed letter offering his legal services "to potential clients who have had a foreclosure suit filed against them." *Id.* at 469.

[25] Model Rules of Professional Conduct (1983) [hereinafter cited as Model Rules]. The rules applicable to advertising and solicitation are Rule 7.1 through 7.5. The American Bar Association has amended Model Rule 7.3 in light of the *Shapero* decision; *see infra*, note 34.

solicitation.[26] The United States Supreme Court reversed.[27]

The Court equated the permissible targeted newspaper advertisement in *Zauderer* to a targeted mass-mailing of the type found in *Shapero*.[28] The Court also distinguished *Shapero's* targeted mass-mailing solicitation from the prohibited in-person solicitation found in *Ohralik*, finding targeted direct-mail posed less risk of abusive practices than did in-person solicitation.[29] The Court held that states could not categorically prohibit targeted direct-mail solicitation which is neither false nor misleading, but that certain forms of regulation were indeed permissible.[30] The Court also reiterated the principle that a total ban of in-person solicitation for pecuniary gain is permissible.[31]

THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

The *Shapero* decision extended first amendment protection to all forms of non-

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[26] Shapero v. Kentucky Bar Association, 108 Ky. 1916, 1920, *rev'd* 486 U.S. 466 (1988).

[27] Shapero, 486 U.S. 466, 480 (1988).

[28] *Id.* at 473-74.

[29] *Id.* at 475-76. "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference . . ." and in this respect "targeted, direct-mail solicitation is distinguishable from in-person solicitation . . . ." *Id.* at 475.

[30] *Id.* at 475-78. States may promulgate regulations that are "far less restrictive and more precise" than a total ban in order to minimize abuses and mistakes. *Id.* at 476. Examples of permissible regulations include: the filing of direct-mail advertisements with an appropriate state agency; identification of the letter as an advertisement; inclusion of additional information or disclosures in every mailing; inclusion of information on how to report inaccurate or misleading letters. *Id.* at 476-78. *See also*, Wechsler, *Direct Mail Solicitation By Attorneys: A Pragmatic Approach To A New Rule*, 39 SYR. L. REV. 973, 987-88 (1988).

[31] Shapero, 486 U.S. at 472, 475. The Court reviewed the factors justifying a prophylactic restriction of all in-person solicitation: in-person solicitation is a "practice rife with possibilities of overreaching, invasion of privacy, the exercise of undue influence, and outright fraud" and "unique difficulties" adhere to state regulation of in-person solicitation because it is "not visible or otherwise open to public scrutiny." *Id.* at 475 (citing Ohralik, 436 U.S. at 457-58, 466).

deceptive solicitation except in-person solicitation.[32] The decision also directly invalidated the old ABA Model Rule 7.3.[33] The ABA has amended Model Rule 7.3 to comply with constitutional standards.[34] The new ABA Model Rule prohibits lawyers from using direct-mail to contact potential clients who have made known their desire not to receive such communications and from engaging in conduct that involves coercion, duress or harassment. The rule also requires that targeted direct-mailings include the words "Advertising Material" on the envelope.[35] The rule retains the complete prohibition on in-person solicitation for pecuniary gain of persons with whom the attorney has no family or prior professional relationship.[36]

THE VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY

The revised Virginia Code of Professional Responsibility was adopted in 1983. The Virginia Code deviates from the ABA Model Code in its standards for advertising, placing fewer restrictions on Virginia lawyers than the ABA recommended.[37] The rules governing attorney advertising and solicitation are set forth in Canon 2 of the Virginia Code.[38]

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[32] *See* Recent Developments, *supra* note 3, at 732-33.

[33] *See supra* note 25.

[34] *See* Law. Man. on Prof. Conduct (ABA/BNA) ¶ 81: 601-608 (Sept. 27, 1989) (contains text of amended The Model Rule 7.3).

[35] *Id.*; Model Rule 7.3(b)(c) (as amended Feb, 7, 1989).

[36] *Id.*; Model Rule 7.3(a) (as amended Feb. 7, 1989).

[37] *See* Comment, *The Status of Lawyer Advertising in Virginia: What Is Good Taste*, 19 U. RICH. L. REV. 629, 634 (1985).

[38] Virginia Code of Professional Responsibility, Canon 2, DRs 2-101 through 2-104 (1983) [hereinafter cited as VCPR]. Further guidelines to assist attorneys to determine when an advertisement or personal communication goes beyond the scope permitted by Virginia law are given in the Ethical Considerations which follow the Disciplinary Rules, ECs 2-1 through 2-17.

DR 2-103, which concerns solicitation, reads, in part:

(A) A lawyer shall not, by in-person communication, solicit

Advertising

The advertising rule prohibits a lawyer from using a form of "public communication" which "contains a false, fraudulent, misleading or deceptive statement or claim."[39] The rule also requires that public communication for which a lawyer gives value must be so identified unless it is apparent from the context of the communication.[40] Public communication is defined as "all communication other than 'in-person' communication."[41]

Solicitation

The solicitation rule prohibits only "in-person" communication - defined as "face to face communication and telephonic communication"[42] - which is false or deceptive, or involves the use of, or the potential for, "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching or vexatious or harassing conduct."[43] Factors to be considered include "the sophistication regarding legal

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> employment as a private practitioner for himself, his partner, or associate or any other lawyer affiliated with him or his firm from a nonlawyer who has not sought his advice regarding employment of a lawyer if:
> (1) Such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or
> (2) Such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made. In person communication means face-to-face communication and telephonic communication.

Id.

[39] *Id.* at Canon 2, DR 2-101.

[40] *Id.*

[41] *Id.*

[42] *Id.* at Canon 2, DR 2-103.

[43] *Id.*

matters, the physical, emotional, or mental state of the person to whom the communication is directed and the circumstances in which the communication is made."[44]

The Virginia regime for regulating attorney advertising and solicitation provides a wide range of freedom for attorneys, particularly in the areas of direct-mail and in-person solicitation.

All forms of direct-mail solicitation, including targeted direct-mail, are considered "public communication" subject only to the prohibition against false or deceptive statements.[45] Virginia has declined to adopt the alternative regulations suggested by the Court in *Shapero* and by the ABA in its amended Model Rule 7.3.[46]

In-person solicitation of a nonlawyer who has not requested advice regarding employment is permissible if the solicitation is not false or misleading, or if it does not have the potential for coercion or duress, taking into account the recipient's mental, physical and emotional condition.[47] Virginia has declined to adopt the stricter standard proposed by the ABA in its amended Model Rule 7.3, prohibiting in-person solicitation for pecuniary gain.[48]

Enforcement and New Initiatives in Virginia

The Virginia rule concerning solicitation, DR 2-103, is considerably more permissive than the solicitation rules in most other states. As noted above, this rule permits in-person solicitation which is not accompanied by threats, intimidation, overreaching or other forms of vexatious conduct.

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[44] *Id.*

[45] *Id.* at Canon 2, DR 2-101.

[46] *See supra* notes 29 and 34.

[47] VCPR at DR 2-103.

[48] *See supra* note 35.

Last year, the Virginia State Bar Association received numerous complaints from attorneys in the personal injury field concerning in-person solicitation of prospective clients by other attorneys. In June of 1989, the President of the Virginia State Bar Association, Philip B. Morris, appointed a special committee to investigate in-person solicitation by personal injury lawyers in Virginia. The committee was charged with drafting a proposed modification to DR 2-103. On March 30, 1990, *The Colonial Lawyer* interviewed Mr. Morris about advertising and solicitation in Virginia and the status of the special committee's efforts to modify DR 2-103.

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On March 30, 1990, Peter Jordan and Steve Nachman, Research Editors for *The Colonial Lawyer*, conducted an interview with State Bar President Philip B. Morris on attorney advertising and solicitation in Virginia:

CL: As we were looking through the Virginia Disciplinary Rules (DRs) and the ABA Model Rules, we noticed that the Virginia rules provide more freedom for attorneys in the areas of advertising and solicitation, and in particular in the targeted direct-mail and in-person solicitation fields. How has this affected advertising and solicitation in Virginia?

PM: Well, I can give you my thoughts on the application of the in-person solicitation rule in Virginia . . . . The rule in Virginia, which is DR 2-103, is clearly more permissive than the anti-solicitation rules in most other states. Under our rule solicitation itself is not a violation. In most cases, [the solicitation] must include vexatious or harassing conduct [in order to violate the rule].

CL: We understand that a commission has been formed to look into DR 2-103 and look into possible modifications [to the rule] in the area of in-person solicitation [in personal injury cases]. Could you give us some background on the committee?

PM: It came to my attention that there was an increase in the many areas of the state of lawyers soliciting personal injury cases in hospital rooms and private homes. I found that lawyers who do that argue that it is permitted under DR 2-103 unless the solicitation is accompanied by threats, intimidation, overreaching or other forms of vexatious conduct. What really brought it home to me was [one instance] where I was advised that a personal injury lawyer lecturing at a state approved CLE [continuing legal education] program on marketing told the audience that direct solicitation in personal

injury cases was permitted in Virginia under DR 2-103. He told the audience it was an effective business development tool. My view of that is that it is ambulance chasing. It never has, never will and never should be accepted practice of any kind in Virginia. In any event, my concern was that not only was the practice clearly being engaged in, but that lawyers were, based on the . . . looseness of our rule, encouraging other lawyers to do that.

CL: How was this problem otherwise brought to your attention?

PM: A number of lawyers who practice primarily in the plaintiff's field and lawyers that I have great respect for . . . came to me and gave me some examples that they knew of in their practices or actual cases that they were aware of where this had occurred. They were very concerned about it because they felt it was not appropriate for Virginia . . . . They felt that it was doing damage to the profession and they also felt that lawyers not engaging in those practices were at a competitive disadvantage. I received a number of examples, one being a contact in a funeral home which was characterized as being very similar to the scene in the movie [The Verdict]. I suspect that the person would have been reported and disciplined even under the Virginia rules. There are a whole lot of examples that fall short of that that allow lawyers, much as door-to-door salesmen knock on doors, to sit down in a living room with people involved in accidents . . . and solicit business without doing it in an overreaching or vexatious manner, and who . . . refrain from the kinds of activities that are described under our rule that would be proscribed. It is clear in Virginia, even though I'm counting that the drafters never intended to do so, that direct contact with strangers to solicit personal injury cases in person is permitted under our rule as long as it is not accompanied by those forms of intimidation or vexatiousness that are described in the rule.

CL: Do you take the position that in those situations where a lawyer shows up at a funeral parlor or scene of an accident there is an implied coercion?

PM: I suppose there would be circumstances that would be, in and of themselves, coercive, and I think showing up at the funeral parlor would fall into that category. You can infer from those circumstances that this was in violation of the rule, but that's not where the problem is. Those people will be turned in, found out, and they probably will be convicted. Same thing with an accident scene, and the same thing with somebody laying up in a body cast on medication within days of an accident. But where the practice is being promoted by other lawyers is later on when you go by and see people in the home or go by the hospital when someone is not drugged up and present them with your portfolio and convince them that you are the proper person to represent them in a personal injury case. That practice is not permitted in many states - Ohio, for example. I know that you must be familiar with the *Ohralik* case. This is not permitted in Ohio. It is not permitted in most other states, and it is permitted in Virginia. I have appointed a committee of lawyers to study the issue and requested that they come up with a legal, constitutionally sound rule change that will curtail this particular practice in Virginia.

CL: When was the committee started and what are they currently working on?

PM: I took office in June [1989] and appointed the commission shortly thereafter. The chairman is [S. D.] Roberts Moore [of Roanoke], who has a broad-based trial practice, and there are eight or nine more people. It was my intent to balance [the commission] with plaintiffs' lawyers, people who normally represent defendants, and other people who are not in the personal injury field at all but have kept up with the constitutional issues [and other developments in this field] . . . . It is an extremely good committee.

They are having difficulty reaching a consensus because they are coming from different perspectives, and that's good. The [Virginia State Bar] Council itself is going to be acting on this issue at the June meeting. Whether the committee comes up with a consensus or not, the question will be put to the Bar Council to make a judgment as to whether or not [to approve a rule change] - assuming we can come up with a legally and constitutionally permissible rule change based on *Ohralik*.

CL: Will the special committee be meeting in June?

PM: No, that will be a meeting of the [State Bar] Council . . . . [Any rule changes] which we submit to the Supreme Court for action would have to come from the Council. An issue like this, once it is properly developed through study, and a proposal is made, will be presented to Council. It will be debated in Council, and Council will either vote it up or down. If we come up with a rule change which the Council votes up, then it will go to the Virginia Supreme Court and [the Court] could either approve the rule change or disapprove it.

CL: Will the new rule focus only on personal injury cases?

PM: I hope we will get alternate proposals that will allow people to pick the solution that they like best. The one that I like best and the one that I think . . . would pass the legal test necessarily would be one that is applicable to personal injury litigation. I make that statement based on the various statements of Mr. Justice Powell in the majority opinion in the *Ohralik* case. He gave us a great deal of guidance as to what would be permissible. I think it can be done. I don't think it is necessary in the commercial setting to do away with all solicitation. If the proposal to do away with in-person solicitation in personal injury cases fails, then I believe . . . that the damage

[such solicitation] is doing professionally is sufficiently important that I would support an across-the-board ban on in-person solicitation . . . . In my judgment, that would not be the best way to go. But if we have a choice between allowing wholesale solicitation in personal injury cases, or abolishing in-person solicitation across the board - which used to be the rule - then I think the damage being done is so great that it would justify an across-the-board ban.

CL: Do the problems with in-person solicitation go beyond the personal injury area?

PM: I'm not aware of problems in other areas. I know that it is certainly common practice for lawyers to contact business executives in formal and informal settings . . . . Most county and city attorneys have [been approached] by members of the bar to work with them. Solicitation of that type where sophisticated people are hustling sophisticated people - it seems to me that that's different from the situation we are talking about here.

CL: Have there been problems with lawyers contacting prospective clients by direct mail, for example in DUI, divorce or foreclosure proceedings where the attorneys get a hold of a list of people who are in trouble and send them a letter?

PM: I think there is a potential for overreaching and a potential for harm [to the public] in that area. I think the same applies to some forms of advertising . . . . But, as Justice Powell said, the potential for overreaching is significantly greater when a lawyer solicits [in-person a prospective personal injury client]. That to me is hands-down unreasonable for the State to permit.