U.S. Supreme Court

SHAPERO v. KENTUCKY BAR ASSN., 486 U.S. 466 (1988)

No. 87-16.

Argued March 1, 1988
Decided June 13, 1988

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court as to Parts I and II and an opinion as to Part III in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY join.

This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. [486 U.S. 466, 469]

I

In 1985, petitioner, a member of Kentucky's integrated Bar Association, see Ky. Sup. Ct. Rule 3.030 (1988), applied to the Kentucky Attorneys Advertising Commission 1 for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The proposed letter read as follows:

> "It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you 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."

The Commission did not find the letter false or misleading. Nevertheless, it declined to approve petitioner's proposal on the ground that a then-existing Kentucky Supreme Court Rule prohibited the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct [486 U.S. 466, 470] from the general public." Ky. Sup. Ct. Rule 3.135(5)(b)(i). 2 The Commission registered its view that Rule 3.135(5)(b)(i)'s ban on targeted, direct-mail advertising violated the First Amendment - specifically the principles enunciated in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) - and recommended that the Kentucky Supreme Court amend its Rules. See App.

to Pet. for Cert. 11a-15a. Pursuing the Commission's suggestion, petitioner petitioned the Committee on Legal Ethics (Ethics Committee) of the Kentucky Bar Association for an advisory opinion as to the Rule's validity. See Ky. Sup. Ct. Rule 3.530; n. 1, supra. Like the Commission, the Ethics Committee, in an opinion formally adopted by the Board of Governors of the Bar Association, did not find the proposed letter false or misleading, but nonetheless upheld Rule 3.135(5)(b) (i) on the ground that it was consistent with Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (1984). App. to Pet. for Cert. 9a.

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II

Lawyer advertising is in the category of constitutionally protected commercial speech. See Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Zauderer, supra, at 638 (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980)). Since state regulation of commercial speech "may extend only as far as the interest it serves," Central Hudson, supra, at 565, state rules that are designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil. In re R. M. J., 455 U.S. 191, 203 (1982).

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The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter, 726 S. W. 2d, at 301, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. 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; the State may not constitutionally ban a particular letter on the [486 U.S. 466, 474] theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

The court below did not rely on any such theory. See also Brief for Respondent 37 (conceding that "targeted direct mail advertising" - as distinguished from "solicitation" - "is constitutionally protected") (emphasis in original). Rather, it concluded that the State's blanket ban on all targeted, direct-mail solicitation was permissible because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." 726 S. W. 2d, at 301. By analogy to Ohralik, the court observed:

> "Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation." 726 S. W. 2d, at 301.

… 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….

Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation, Zauderer, 471 U.S., at 642 . Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Ibid. Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can `effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,'" Ohralik, supra, at 465, n. 25 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). A letter, like a printed advertisement (but unlike a lawyer), can [486 U.S. 466, 476] readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." Zauderer, supra, at 642. Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. See Brief for ABA as Amicus Curiae 9. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice. See, e. g., Leoni v. State Bar of California, 39 Cal. 3d 609, 619-620, 704 P.2d 183, 189 (1985), summarily dism'd, 475 U.S. 1001 (1986).

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. See In re R. M. J., 455 U.S., at 203 . 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, id., at 206, giving the State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer

solicitation … do not apply to written solicitations. The court below offered [486 U.S. 466, 477] no basis for its "belie[f] [that] submission of a blank form letter to the Advertising Commission [does not] provid[e] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." 726 S. W. 2d, at 301. …

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. See Ohralik, 436 U.S., at 463 -464, 466. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, see Bates, 433 U.S., at 379 -381, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. Id., at 381. …First, respondent asserts that the letter's liberal use of underscored, uppercase letters (e. g., "Call NOW, don't wait"; "it is FREE, there is NO charge for calling") "fairly shouts at the recipient . . . that he should employ Shapero." … Second, respondent objects that the letter contains assertions (e. g., "It may surprise you what I may be able to do for you") that "stat[e] no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing." Brief for Respondent 20. [486 U.S. 466, 479]

The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and non-deceptive letter, no matter how big its type and how much it speculates can never "shou[t] at the recipient" or "gras[p] him by the lapels," id., at 19, as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive," unless the State "assert[s] a substantial interest" that such a restriction would directly advance. In re R. M. J., 455 U.S., at 203 . Nor may a State impose a more particularized restriction without a similar showing. Aside from the interests that we have already rejected, respondent offers none.

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The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[Footnotes omitted]

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

I agree with Parts I and II of the Court's opinion, but am of the view that the matters addressed in Part III should be left to the state courts in the first instance.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Relying primarily on Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985), the Court holds that States may not prohibit a form of attorney advertising that is potentially more pernicious than the advertising at issue in that case. I agree with the Court that the reasoning in Zauderer supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

I

… Today's decision … wraps the protective mantle of the Constitution around practices that have even more potential for abuse. First, a personalized letter is somewhat more likely "to overpower the will and judgment of laypeople who have not sought [the lawyer's] advice." Zauderer, supra, at 678 (O'CONNOR, J., concurring in part, concurring in judgment in part, and dissenting in part). For people whose formal contacts with the legal system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and their officers, may therefore find it much more difficult to ignore [486 U.S. 466, 482] an apparently "personalized" letter from an attorney than to ignore a general advertisement.

Second, "personalized" form letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient. Such letters are reasonably transparent when they come from somebody selling consumer goods or stock market tips, but they may be much more misleading when the sender belongs to a profession whose members are ethically obliged to put their clients' interests ahead of their own.

Third, targeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer. Even if such mailings are reviewed in advance by a regulator, they will rarely be seen by the bar in general. Thus, the lawyer's professional colleagues will not have the chance to observe how the desire to sell oneself to potential customers has been balanced against the duty to provide objective legal advice. An attorney's concern with maintaining a good reputation in the professional community, which may in part be motivated by long-term pecuniary

interests, will therefore provide less discipline in this context than in the case of general advertising. …

II

Attorney advertising generally falls under the rubric of "commercial speech." Political speech, we have often noted, is at the core of the First Amendment. See, e. g., Boos v. Barry, 485 U.S. 312, 318 (1988). One reason for the special status of political speech was suggested in a metaphor that has become almost as familiar as the principle that it sought to justify: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Cf., e. g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 -51 (1988). Traditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation.

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A standardized legal test has been devised for commercial speech cases. Under that test, such speech is entitled to constitutional protection only if it concerns lawful activities and is not misleading; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. See Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980). Applying that test to attorney advertising, it is clear to me that the States should have considerable latitude to ban advertising that is "potentially or demonstrably misleading," In re R. M. J., 455 U.S. 191, 202 (1982) (emphasis added), as well as truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession.

Some forms of advertising by lawyers might be protected under this test. Announcing the price of an initial consultation might qualify, for example, especially if appropriate disclaimers about the costs of other services were included. Even here, the inherent difficulties of policing such advertising suggest that we should hesitate to interfere with state rules designed to ensure that adequate disclaimers are included and that such advertisements are suitably restrained.

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III

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One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct [486 U.S. 466, 489] that could not be enforced either by legal fiat or through the discipline of the market.

…Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a subclass of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

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