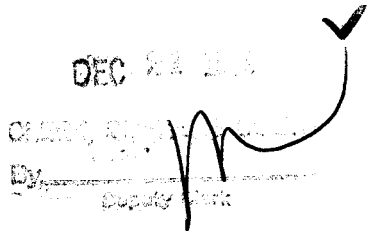
IN THE SUPREME COURT



THE FLORIDA BAR REGARDING AMENDMENTS TO RULES REGULATING THE FLORIDA BAR (ADVERTISING ISSUES)

CASE NO. 74,987

COMMENTS

There is a notion that if the United States Supreme Court had before it the information which the Florida Bar now offers adverse to direct-mail solicitation, then the United States Supreme Court's decision protecting an attorney's First Amendment right in Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1989), would be entirely different. That if the Supreme Court had the benefit of the Florida Bar's reasoning, studies, surveys and committee recommendations which show, in the Florida Bar's opinion, a valid substantial interest in banning direct-mail solicitation, then the Supreme Court's decision protecting direct-mail solicitation as commercial speech, would not have been handed down.

This notion is false.

This notion is false because the United State Supreme Court, in fact, had before it and rejected the essential facts and opinions and arguments the Florida Bar now presents to the Florida Supreme Court in support of a ban on direct-mail solicitation of potential personal injury clients,

w/call no o.a.

On December 19, 1987, the Florida Bar filed an amicus brief with the United States Supreme Court, following the December 11,

199

1987 amicus brief filed by the Academy of Florida Trial Lawyers, in hope of influencing the outcome of Shapero. Both briefs presented the same arguments now before the Florida Supreme Court. The briefs contained essentially the same information now before the Court and expressed the same concerns for the image of the plaintiff's trial bar and the impact of direct-mail solicitation on the public. Not being satisfied with the United States Supreme Court decision in Shapero, the Florida Bar now asks the Florida Supreme Court to review and overrule that decision.

The Academy of Florida Trial Lawyers stressed that it was "uniquely situated to provide the Court with important factual data regarding the impact of the Court's holding in this case" because a **1987** Florida Rule allowed direct-mail solicitation of personal injury cases which, it alleged, resulted in abuses. Academy's Motion for Filing Amicus at 2. Shapero v. Kentucky Bar Association, **108 S**. Ct. **1916 (1988)**.

The brief maintained that personalized mail solicitation could not be effectively regulated. It advised the United States Supreme Court in **1987**:

There is "no meaningful way to determine whether the recipient's physical, mental or emotional state will result in the exertion of undue influence, overreaching or unwanted invasion of privacy (particularly if the recipient is injured or otherwise the victim of severe personal stress due to the event precipitating the solicitation). Brief for Academy at 2, id.

Similarly, the Florida Bar argued:

"Targeted solicitation is directed at individuals who have suffered a recent personal or business setback... A letter from an attorney directed at the specific circumstances that led to the stress presents the prospect of both the invasion of privacy and the exercise of undue influence over a person not capable of rendering an objective opinion,"

Moreover, attached to the briefs was the "Final Report of the Special Committee on Solicitation of the Florida Bar" which advised the United States Supreme Court that direct-mail solicitation infringes on the recipient's right to privacy, that direct mail had severe negative impact on the public's confidence in the civil justice system and that more than one attorney encountered hostility or cynicism on the part of prospective jurors during voir dire, which suggested to the committee at least that plaintiffs may be injured by direct-mail solicitation. The committee also gleaned newspaper editorials opining that direct mail caused public respect and confidence in the court system to plummet, Brief for the Academy at 7-9, id..

The Florida Bar reiterated this concern:

"Finally, targeted direct-mail solicitation has a clear impact upon the professionalism of the Bar." Brief for the Bar at 7, id.. "A loss of the respect of the dignity of the legal profession would inevitably result in a loss of confidence in our system of justice as a whole." Brief for the Bar at 8, id.

The Supreme Court recognized that direct-mail solicitation

presents lawyers with opportunities for isolated abuse or mistakes but held that this does not justify a total ban on that mode of protected commercial speech in view of the existence of screening and other forms of regulation. Shapero, 108 S. Ct. at 1923.

It held that the potential for undue influence and overreaching was not great enough to justify a ban because the State can regulate such abuses by review of the written matter. Shapero, 108 S. Ct. at 1922.

It held that written material could be sufficiently regulated because the problems of solicitation that is not visible or otherwise open to public scrutiny, such as in-person solicitation, do not apply to written solicitations which are open to public scrutiny. Shapero, 108 S.Ct. at 1923.

It held that the invasion of privacy from targeted direct-mail solicitation does not justify a ban because it was no more intrusive than a substantially identical letter mailed at large. That the invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery. Shapero, 108 S. Ct. at 1923,

Nor did the Supreme Court overlook concerns with the Bar's image of professionalism. In fact, the minority's dissenting opinion addressed this very issue. Shapero, 108 S. Ct. at 1927. But this was already familiar ground for the Supreme Court. Its holding prohibiting a ban on targeted direct-mail solicitation was entirely consistent with its holding in Virginia Pharmacy

Board v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748, (1976), where the Court weighed the interest in maintaining professionalism against the interest in maintaining the free flow of information and upheld the free flow of information.

In that case, the Virginia Pharmacy Board argued that advertising prices of prescription drugs hurt the professional image of pharmacists. The United States Supreme Court's reply went directly to the heart of the matter and is applicable now:

"Virginia is free to require whatever professional standards it wishes, it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. The justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the the First Amendment, have reinforced our view that it is." Virginia State Board, 425 U.S. at 1829.

The opinion in Virginia State Board of Pharmacy is particularly instructive because it recognized that the Board's true desire was to eliminate competition, despite its arguments for professionalism.

Despite the Supreme Court having already rejected these arguments, they now reappear to support the Florida Bar's proposed ban on direct-mail solicitation to potential personal injury clients. Notice how closely the Bar's comments purporting the need for the rules compare with the concerns already

presented and rejected by the United States Supreme Court:

The Florida Bar maintains the ban on direct mail solicitation is necessary because of the "potential for abuse" existing in the present rule. That presently the clients feel overwhelmed and may have impaired capacity for reason. There is the possibility of undue influence, intimidation and overreaching that justifies the prohibition, that direct-mail solicitation subjects the lay person to private importuning and is not subject to third party scrutiny. Comments to proposed Rule 4-7.4, Florida Bar News, October 1, 1989.

The Florida Bar'asked the United States Supreme Court to do two things in Shapero, 108 S. Ct. 1916. (1) To ban the practice of direct mail solicitation absolutely or, (2) at least "not close the door to such regulations in the event they are sustained by facts such as those developed by Florida." Brief for the Bar at 1.

With this plethora of information and argument and opinion and committee report before it, the United States Supreme Court decided Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988). It did not ban direct-mail solicitation nor did it make allowance for the State of Florida to ban direct-mail even though the briefs claimed a pattern of abuse already existed.

The relatively small community of monied interests which support these restrictions on competition can afford the millions of dollars of television advertising recouped in tax write-offs, unlike the majority of their competitors. It stands to reason

they do not want their competitors placed in parity for the price of a twenty-five cent stamp.

But the Florida Bar would allow television solicitation into the homes of the injured victims to which it would deny direct-mail solicitation. The specter of the anti-competitive effect of this proposed rule rises to cast a shadow on the Florida Bar's motivation and taints all the Bar's proposals. What is the valid substantial governmental interest for the proposed rule requiring a notice on permissible direct-mail solicitation for the recipient to "disregard this advertisement if you already have a lawyer" if not to eliminate competition?

If the Florida Supreme Court consents to the restrictions proposed by the the Florida Bar, it will not only abridge the First Amendment right of attorneys already delineated by the United States Supreme Court but, to the detriment of the citizens of the State of Florida, will also eliminate competition, which even the dissent in Shapero concedes is among the best arguments for attorney advertising.

The arguments before this Court have been already considered by the United States Supreme Court. After being fully advised, the Supreme Court held that targeted direct-mail solicitation was protected by the First Amendment.

"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."

Shapero, 108 S. Ct. at 1924.

It is inappropriate for this matter to be re-adjudicated. The Florida Bar asks the Florida Supreme Court to give it what the United States Supreme Court would not. Like a urchin, it comes to this door knocking for what it was denied at the last.

For the above reasons it is respectfully submitted that the proposed rules banning direct-mail solicitation and requiring notice to disregard the advertisement should be denied.

Respectively submitted.

DATED this 18th day of December, 1989.

George W. Salter
703 East Pine Street
Orlando, Florida 32801
(407) 425-1572
Bar No. 0486337

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail, this 19th day of December, 1989, to: Paticia J. Allen, 650 Appalachee Parkway, Tallahasee, Fl 32399-2300, John Blakely, Esq., P.O. Box 1368, Clearwater, Fl 24617, Thomas Hall. Ste 700 1899 L St. N.W., Washington D.C. 20036, Bruce Rowgow, 2441 S.W. 28th Ave. Ft. Lauderdale, FL 33312 and Allen C. Sundberg, Esq., Drawer 190, Tallahassee, Fl 32302.

George W. Salter, Esq.
703 E. Pine St.
Orlando, FL 32801
(407) 425-1572
FL Bar No. 0486337