ORIGINAL

SUPREME COURT
OF THE UNITED STATES

In the Matter of:	)	
	)	
RICHARD D. SHAPERO,	)	
	)	No.87-16
Petitioner,	)	
v.	)	
	)	
KENTUCKY BAR ASSOCIATION	)	

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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD D. SHAPERO,

Petitioner,

v. : No.87-16

FRANK P. DOHENY, JR.,

Respondent.

Washington, D.C.

Tuesday, March 1, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

DONALD L. COX, ESQ., Louisville, Kentucky, on behalf of the Petitioner.

FRANK P. DOHENY, JR., ESQ., Louisville, Kentucky, on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument this morning in No.87-16, Richard D. Shapiro versus the Kentucky Bar Association. Mr. Cox, you may proceed whenever you're ready.

ORAL ARGUMENT BY DONALD L. COX, ESQ.

ON BEHALF OF PETITIONER

MR. COX: Mr. Chief Justice, may it please the Court:

This is the third case in six years which has come to this Court from the various district courts and has involved absolute bans on various forms of written advertising by attorneys. In each of those cases, and they begin with R.M.J.; they go into the Zauderer case and now in the Shapiro case.

And in each of those cases there is no record evidence below which would justify the absolute ban which the Bar Association has advanced, and in which the various state supreme courts sought to impose.

We had thought that this Court had made it absolutely clear in the Zauderer decision when it said that an attorney may not be disciplined for giving out truthful and non-deceptive advice to specific clients about their legal rights. We thought that that had settled the matter, but apparently it has not; and we are here once again on another issue that has been imposed, an absolute blanket ban on attorney advertising speech.

The issue here today is something called targeted

direct mail solicitation, which basically involves a situation where an attorney sends out a written letter to a person whom he has identified has having a specific legal problem; and that letter contains some generalized legal advice similar to the advice, perhaps, that was given in the Zauderer advertisements.

The Kentucky court has upheld the actual ban, and that is why we are here today.

I would like to first go over just briefly the situation in Kentucky, the specific, what I would call all-encompassing rules regulating attorney advertizing, and then go hopefully into the facts, and then into the legal argument.

Kentucky probably has as all-encompassing regulation of attorney advertising as any state in this country. What Kentucky has done as gone through this Court's decisions, and has seen in those decisions where the Court has indicated various possible means of regulating attorney advertising. Kentucky has, without exception, adopted all of those; and then it's come up with some twists of its own.

As this Court suggested in R.M.J. and Central Hudson, first off, Kentucky has a strict pre-submission process. Under that process, advertisements of the type we're talking about here, and almost all advertisements, except very limited routine advertisements, are required to be pre-submitted to an agency of the State Bar Association comprised of three lawyers who are appointed by the State Bar Association.

Those three lawyers review the advertisements; they're given the power under the state regulation to conduct investigations; to subpoena witnesses; and in addition, under those regulations, are given the power to, in effect, edit the advertisement by suggesting disclaimers; by suggesting changes in the language.

And most importantly, I think from the standpoint of this case, under those regulations, an attorney has to wait at least 30 days before sending out any advertisement.

QUESTION: Mr. Cox?

MR. COX: Yes sir?

QUESTION: Let me look at this precise letter: it states, doesn't it, that "It has come to my attention that your home is being foreclosed on." Couldn't that be misleading? It certainly indicates familiarity with the precise piece of real estate.

MR. COX: Well, I think what it indicates, Justice Blackmun, is that Mr. Shapiro had gone to the court records and determined that, in fact, there was a foreclosure action pending. I don't think that it indicates any more than that.

And I think the important thing to note with respect to this particular advertisement is that it was submitted to three different state bodies, and in not one of those three, did anybody say anything about it being false, misleading, deceptive, or anything else. It was submitted to the state

advertising commission,who in the first instance, reviews all advertisements.

It was submitted to the ethics committee; again, no sta statement that there was any problem; it was submitted to the state supreme court; the state supreme court did not in any way base its decision --

QUESTION: But Mr. Cox, isn't it possible that all three of those agencies, while it's clearly banned by an existing rule, so we don't have to reach the question of whether the particular advertisement is misleading.

MR. COX: That is a possibility. But I do not --

QUESTION: And in fact, has anybody reviewed this particular letter under the rule that was promulgated after the letter was submitted?

MR. COX: The Kentucky supreme court did.

QUESTION: But they didn't tell us anything about whether it was misleading or not, did they?

QUESTION: The Kentucky supreme court simply said it was banned.

QUESTION: Banned by a broad regulation.

MR. COX: But they cited -- and I think it's important that the cited in their decision the fact that it had been reviewed by these lower court -- these lower bodies, and there had been no finding that it was false, misleading, or deceptive. I think we can't --

QUESTION: There is no finding that way, but there was no finding the other way either.

MR. COX: That's correct.

QUESTION: Well, Mr. Cox -- go ahead.

MR. COX: Would it not be more neutral if they said, started off by saying, "Is your home being foreclosed?"

There again, there would be no connotation of familiarity with this particular thing, and it would be much more like the I.U.D. case that we had some time ago.

MR. COX: But this letter is sent to people whose homes are being foreclosed on.

QUESTION: Well --

MR. COX: I mean, that's

QUESTION: -- I mean, that would be a mistake. That's what concerns me a little bit is there is a possibility of it being misleading.

QUESTION: Mr. Cox, do you think that the state is free to impose higher standards of truthfulness and honesty on advertising like this than would be the case for selling soap or vacuum cleaners, or something of that kind?

MR. COX: It is my view that the false, misleading, and deceptive rubric has to be judged in context; and we're talking in the context of a letter coming from an attorney, so obviously --

QUESTION: Yes. That's why I'm asking the question.

MR. COX: -- and I am suggesting that under those circumstances, a letter coming from an attorney might be judged somewhat differently than a letter coming from the soap company.

QUESTION: So you would concede that higher standards may be imposed?

MR. COX: Somewhat higher standards, depending upon what the context of the letter is.

QUESTION: Do you think the state can ban telephone-targeted advertising?

MR. COX: It is my view that that is not the issue before the Court here --

QUESTION: Yes, I know that.

MR. COX: -- in this case. But it is my view that the Ohralik decision involved a specific set of facts in that case, and telephone-targeted solicitation would depend on the facts. I do not believe, consistent with the First Amendment overbreadth doctrine that Ohralik means all types of in-person solicitation could be banned. I think it depends on the facts of the case, and that's what the Court has held in some of the other decisions. So I don't agree that there could be an absolute ban on telephone solicitation.

But I don't believe the Court gets to that point in this case. Our concern here today is that we have yet another example with a bar association without any fact-finding

whatsoever simply banning a written advertisement, and holding in the Zauderer case that that can't occur.

You have to look at the advertisement and determine whether it's false, misleading, or deceptive. We have a three-attorney panel that does that in Kentucky; and it should be left to them.

Let me point out one additional thing: the Kentucky rules make it very clear that even if there is a problem, as Justice Blackmun suggested, maybe Mr. Shapiro should have said, "Is your home being foreclosed upon?"

If that's the kind of problem with the Shapiro advertisements, first off, that's not a basis for banning all targeted direct mail advertisements; and second, it's not a basis for banning Mr. Shapiro's advertisement, because under the specific rule, before the advertising commission takes the -- goes to capital punishment, it's required, in essence, to consider modifications of the language of the advertisement, the insertion of disclaimers.

For example, to answer your concern, they might suggest a disclaimer that not all people's homes have been foreclosed upon. I mean, I can't --

QUESTION: I would think that you have that he has amended, saying "Is your home subject to foreclosure," that would be banned under this rule?

MR. COX: Yes, that would be a flat ban. Yes, the

rule -- yes, Justice White, the rule bans anything you say in writing that's in the mail targeted to a person that you know has a specific legal problem. So you still have the ban in place, which I thought was removed in the Zauderer decision.

QUESTION: Is the Kentucky rule based on an American Bar Association suggested rule?

MR. COX: Rule 7.3.

QUESTION: Did the ABA in working on its rule, and ultimately promulgating, did it make any factual inquiries that --

MR. COX: Those have not been brought to my attention. The kinds of factual -- in the comments to Rule 7.3, one of the prime reasons why the ABA rejected the pre-submission process appeared to have been the argument there that some were saying, "Well, wouldn't pre-submission address these problems?" And the ABA's comments say, "Well no, it's too difficult -- the agencies would be too busy and they wouldn't be able to go through these advertisments. That's certainly not been the experience in Kentucky.

This commission's been around for six years; and in their decision, now -- we've got to look at the advertising commission of the Kentucky Bar Association. They believed and recommended that the Kentucky Bar Association delete this rule they were enforcing because they felt it was unconstitutional under Zauderer; that, incidentally, that was the position of

the American Bar Association advertising commission; and the American Bar Association ethics commission; and the Department of Justice anti-trust division; and the Federal Trade Commission.

So all of the agencies that have looked at this, except the trade associations, the lawyer trade associations, have in essence come to the conclusion that this is unworkable. And unconstitutional.

QUESTION: Well, do they come to the conclusion that it's unworkable, or that, in their view, it's unconstitutional because of our decisions?

MR. COX: They came -- the advertising commission, I think, had two concerns. The Kentucky advertising commission -- remember, they were the people who administer this on a day-to-day basis -- it seems to me if they had a concern about the workability of the system, they would have expressed it.

But I will concede that, for the most part, those administrative agencies who looked at the issue have emphasized more this Court's what I think is clear holding in the Zauderer decision. Yes, that is correct.

But the important point is that the people who would be administering this have expressed no fact finding of any problem at all. The only fact finding that we've had in this case, the amici have come into this Court and in their briefs, I think they concede that this factual vacuum that we're acting

on a naked record; and so they have attempted to after-the-fact supply a factual basis for this rule which is unsupported in the record; and what they did is they went out and conducted what I can only call a "jack-leg survey." And presented the results of that survey to this Court.

The survey was actually conducted after this Court granted certiorari. But there's a nugget -- there's a real important nugget in the survey of the Florida Bar Association. And that nugget, I think really addresses the concerns that everybody has, and that is, what impact do these direct-mail advertisments have on the recipients?

And here's this one nugget, virtually -- this is the Florida Bar Association in their survey, virtually no one believes -- and these are the recipients now, virtually no one believes that direct mail advertisments they received from an attorney was either intimidating or frightening, or confusing.

So the only evidence we have in this case before you, is that. There is just no other evidence, and I think the Kentucky supreme court really realized that because in their decision they didn't purport to rely on evidence. Their decision was based on the following: the serious potential - serious potential, now -- that these kinds of advertisments have for the kinds of harm that this Court has said could be the basis for a ban, they said it was entirely possible that these harms would result; and they said it was full of "the

possibilities."

Well, I think, you know, it's possible the roof could fall here, but it's not the basis for our leaving the court room. And I don't think the possibility that someone may be overreached, or may be misled, is the basis for a blanket ban.

If there is a problem with an advertisement, we --

QUESTION: So you say the possibility of being overreached isn't a basis for a blanket -- supposing there were evidence showing that something more than a possibility -- a reasonable probability or something like that? Would you still say no blanket ban?

MR. COX: I would say that, as to written advertisments, you have to look at each individual advertisement. I do not conceded as a matter of fact or law, that written advertisments are inherently deceptive by their very nature.

Nor do I concede as a matter of fact or law that letters sent out to people who have legal problems, are inherently deceptive.

I think what this Court has said in its prior opinions is, "Let's look at them on a case-by-case basis."

QUESTION: Supposing the Florida survey that you refer to, which you say was taken after-the-fact and wasn't the base -- and really can't be the -- supposing it had shown that, you know, 30 percent of the people felt intimidated or misled,

and that had been the basis for Kentucky's rule -- would you say that the result was still the same?

MR. COX: No. I don't believe that we should get into the least common denominator situation. I don't concede that doing a survey -- how would you survey about advertisments, written advertisements in general?

QUESTION: You regard it as "nugget," I thought? So I thought perhaps you thought it was useful?

MR. COX: No. No, I think it is useful on the other side.

QUESTION: But I mean, what if it had come out the other way?

MR. COX: I think if it had come out the other way, then we'd be in a problem. But it says, "virtually no one." So if 99 percent of the Florida people had said they felt intimidated, overreached, and whatever, then maybe we'd have a problem.

But I don't believe that's even a remote possibility. I don't think that there's any way that you can design a survey which would survey for the -- to cover all possible written advertisments. I just don't think that's the case.

Our view is that, consistent with Zauderer; it's right there in writing, you have to look at each advertisement individually, and we've got a perfect process.

QUESTION: Well, I think that if you take it you

think that some targeted mailings could be forbidden?

MR. COX: If on their face are false, misleading, and deceptive.

QUESTION: Yes.

MR. COX: And some can't. Some cannot be.

QUESTION: So, if that's the case, what is the justification for declaring this rule invalid on its face? That's what you asked, isn't it?

MR. COX: Well, I think, well, as the first matter I asked that Mr. Shapiro be able to be permitted to send out this letter, but yes.

QUESTION: All right, then, all you're really asking is that, as applied to your case, this rule is unconstitutional?

MR. COX: Right. The problem --

QUESTION: Is that what you said?

MR. COX: Yes sir.

QUESTION: And that's all you ask?

MR. COX: That's all I can ask, because --

QUESTION: The overbreadth is not applicable in commercial speech?

MR. COX: Right. And that is what has caused the problems in the lawyer advertising area.

QUESTION: Mr. Cox, the Kentucky court did strike down the original rule, did it not?

MR. COX: Yes sir.

QUESTION: It withdrew it.

QUESTION: And do I understand -- pardon?

QUESTION: It withdrew it.

QUESTION: Withdrew it? DId it?

MR. COX: I thought it struck it down.

QUESTION: Oh, all right.

MR. COX: I believe it struck it down, although I don't understand the reason.

QUESTION: Well, I was going to ask next, did the Kentucky supreme court say why they struck that one down?

MR. COX: They said why, but I think they misspoke. They said they were striking it down in view of Zauderer. I think what they really meant was they were striking it down in view of Primus, because the old rule had prohibited targeted direct mail soliciting for both pecuniary and non-pecuniary gain -- that's Primus on all fours. In Primus.

QUESTION: But the rule you have brought before us now, as I understand it, is a precise counterpart of the ABA rule, is it not?

MR. COX: Yes sir. And it is precisely the same -- it may be more severe than the old Kentucky rule -- the only difference between this rule and the old Kentucky rule, is that the old Kentucky rule, a part of it was unconstitutional under Primus, but as applied to the facts of this case, there is no

difference between the application of 7.3 and the application of the old Kentucky rule.

QUESTION: Well, as to their reasons for striking down the first rule, do you suggest they just misspoke?

MR. COX: I believe they struck it down on purpose because they deleted -- they put in a pecuniary gain requirement. The only thing that could possibly explain that would be Primus.

But that's not what they said. They said in view of Zauderer, and that doesn't make any sense to me.

QUESTION: Mister --

QUESTION: The reason they looked -- you're the one -- it was the -- it was Mr. Shapiro that brought the Zauderer case before them, wasn't it?

MR. COX: Yes sir. The Zauderer, I mean, Zauderer says, I mean, I just don't see how it can be any clearer. Zauderer says that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients. That's what Dick Shapiro's doing. It's a written advertisement.

The Bar Associations have come back in with this word game about "It's not an advertisement at all. It's solicitation."

And this Court in Bigelow has made clear that there

is no difference. That the issue is not the label we put on it; the question is what is going on. And in that quote I just read, it says, "An attorney may not be disciplined for soliciting legal business through printed advertising."

We will concede that when we send out these letters we are soliciting legal business. We believe that any time you send out anything that's in the nature of an advertisement, you're soliciting legal business.

So the distinction is not the label you put on it; the question is, what is it in fact? And they keep going back to the Ohralik case, which is the same defense. You would have thought they would have come up with a new defense after it was so soundly rejected in Zauderer, that they go back and say, "Well, sending out letters is just like in-person solicitation.'

And that just doesn't fly. That was what was rejected in Zauderer. In Zauderer this Court said, "The distinction between Zauderer and in-person solicitation and the written advertisement in Zauderer is the fact that you don't have the trained advocate there. No immediate yes or no.

And most importantly from our standpoint, there is an opportunity in our case for the intervention of bar agencies. That's one of the factors in the Zauderer decision. We've got a three-day hold period -- three days before anything can happen. During that time this thing can be edited; disclaimed;

we can have hearings; and most importantly, this thing can go all the way to the Kentucky supreme court in one jump.

If the advertising commission thinks there's a problem here they can apply to the Kentucky supreme court for a restraining order to restrain publication.

QUESTION: Mr. Cox, how many states today do you think have this flat ban on targeted direct mail?

MR. COX: It's reported in our brief -- and our numbers differ from the numbers that they reported, but it's around perhaps half. I'm not sure -- we had gotten our figures out of the ABA service on attorney advertising, and so it's a little clearer, but there is a significant number that do have the ban, and I think most of it is due to the fact that it's contained in the ABA rules.

So whether it -- the question is, is this case like Ohralik or like Zauderer? I think it's clearly like Zauderer and R.M.J., and the other cases.

In Ohralik, one of the commentators said, "It's a lot easier to throw out -- " or one of the commentators talking about this problem with respect to Ohralik said it would be a lot easier to throw out a letter than it is a 200 pound lawyer sitting on your couch. And I think that's an important distinction.

We don't have Mr. Shapiro in their living room, or if we're going to make it like Ohralik, we don't have them in the

hospital room. We have a letter there which says right on its face, this is an advertisement. And it's been pre-reviewed; it's been pre-screened; everything's been checked out on it.

QUESTION: Well, I'm still a little puzzled about what you say, "everything's been checked out," because I'm not sure it was checked out in this case; and with respect to this letter, and you're really arguing that you want us to approve this particular letter -- you're not asking for the general ban to be struck down?

MR. COX: I would like -- I understand the overbreadth doctrine and its limited application in commercial speech, but for the future of attorney advertising, the ban ought to be struck down.

QUESTION: Now, in this case --

MR. COX: But I realize what the law says.

QUESTION: -- in this case there is no record or no fact-finding that explains things like Justice Blackmun raised -- how did it come to this person's attention? To whom would this letter be sent? Is it just people that he has factual knowledge about? Because he says, "If this is true," and suggests otherwise -- what is the 'free information" on how he can keep his home that he's offering? If you hire him maybe he can help? Or is he going to give him free legal advice? We don't know from the record in this case, do we?

MR. COX: We don't know other than -- all we have is

what's on the face of the letter, that's all we have.

QUESTION: So you quoted from Zauderer; said that written advertisement may include legal advice of some kind. But there's no legal advice in this letter.

MR. COX: No. I beg your pardon. But it does talk about the possibility of bankruptcy. And that would be the legal advice.

QUESTION: Where does it say anything about bankruptcy? Where would the layman know it said anything about bankruptcy? It says, "Federal law may allow you to keep your home," and so forth. And if I'm a layman, I'm not sure that means bankruptcy.

MR. COX: That's correct. But that's the legal advice: federal law may permit you to keep your home.

Also, this rule -- prohibiting targeted direct mail solicitation, doesn't make any sense. Take the Zauderer advertisement: we identify people, women, who have this potential problem, and we send that specific advertisement to them, and that's not permitted under this rule.

Take another step: if we take the Shapiro letter and we send it to everybody in Hart County, Kentucky, everybody in Hart County, Kentucky, even though there are only five people in Hart County, Kentucky who are interested in getting it, then that's okay.

What you're faced with is a situation where Dick

Shapiro can get his message across if he's willing to send out this letter to 4,995 people --

QUESTION: Well, Mr. Cox, may I interrupt there: you said it would be okay, but it would false as to all but five of those people. It says, "It has come to my attention that your home is being foreclosed on." And 99 percent of the recipients, it would be a false statement. Do you think that's a proper letter?

MR. COX: That's correct. He could modify it slightly in the way that Justice Blackmun suggested it. Or he could say, "If your home is being subjected to foreclosure, you may want to contact me."

QUESTION: But we're asked to approve this letter.

MR. COX: That's correct. That's correct, on a record where there's no fact finding going the other way; where there's nothing in the record which indicates that there is any problem with this letter --

QUESTION: Mr. Cox, you don't think it's at all misleading to say "Federal law may enable you to -- may allow you to keep your home by ordering your creditors to stop and give you more time to pay them," you don't think it would have been a little more forthright to tell the people you can take bankruptcy? Which seems a good deal less attractive than the federal law that allows you to keep your home by ordering your creditors to stop. Isn't this a little bit misleading?

MR. COX: I don't believe that that's misleading.

QUESTION: You don't think it's a close question that we might want to get the views of some state bar association, or some state authorities on before we say that it isn't?

MR. COX: It is my view that, if you -- another question that could be asked -- and I don't want to answer the question with a question; but shouldn't you say that -- ask, whether the people in there had been the district 180 days or whatever that number is for bankruptcy, and --

QUESTION: No, no, you miss my point: I'm saying bankruptcy is not as attractive to many people as a federal law that enables them to tell their creditors to stop.

MR. COX: And it's my view that there's -- that that's not demonstrably misleading. If you require every nit of the law to be set forth in every advertisement, then we won't have effective advertisments.

QUESTION: I don't think calling bankruptcy "bankruptcy" is every nit of the law.

MR. COX: Well, we also believe that eliminating the rule will provide a -- there are many good benefits from having this kind of advertising. You remember, we're talking about an advertising that has been pre-reviewed by a state regulatory agency that has been edited and will be sent out only after extensive bar association review.

Is it better for people to get legal advice on that

kind of information based -- is it better for people to find out about the availability of legal services under those circumstances, or from their next-door-neighbor; or in a bar; or who knows where?

We're talking about a situation where we're making legal advice and advertising legal services that are clearly regulated by the bar association.

The other alternatives provide information about lawyers under situations which are much less likely to be truthful and non-deceptive.

QUESTION: We certainly don't know in this case that Kentucky supreme court said this targeted solicitation is, has to be, banned under our rule, even though it is not deceptive, and even though it is truthful, and even though it is not misleading?

MR. COX: They didn't say that. All they said was that they recognized that that finding that there was no finding to that effect in the administrative agencies below, and then they dropped it.

QUESTION: Now, let's assume a court having read the cases that you brought before them, that no advertising by a lawyer can be banned; no advertising like this can be banned unless it's false, misleading, as long as it 's truthful; and then it just says, "We do not approve this letter."

MR. COX: Without saying why?

QUESTION: Yes. Here's a court that knows the rule and just says without any explanation, it just bans the letter. Don't we assume that the court applied the rule; I mean, that it knows is applicable and that it made, even though it didn't say so, that it made the right findings?

MR. COX: That would be my assumption. My assumption -- I mean, I think the clear -- if you read the Kentucky decision -- my time has expired.

CHIEF JUSTICE REHNQUIST: We will permit you to answer to Justice White's question.

MR. COX: If you read the Kentucky decision, it seems clear that the supreme court banned this advertisement because it didn't -- it was targeted direct mail advertisement. They didn't ban it because --

QUESTION: Even though it is not untruthful and not misleading?

MR. COX: I'm sorry?

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cox.

We'll hear now from you, Mr. Doheny.

ORAL ARGUMENT BY FRANK P. DOHENY, ESQ.

ON BEHALF OF RESPONDENT

MR. DOHENY: Thank you, Mr. Chief Justice, and may it please the Court:

There are two parts to the argument that I would like to present, and the first is a jurisdictional one, which was

touched on briefly by Justice Stevens in a question that he asked.

Listening to Petitioner's argument, the Court might conclude that what we had below was an attack on the entire Kentucky advertising process. That is not the case.

Justice Stevens asked, "Was the letter reviewed after Rule 7.3 was adopted?" And the answer to that is emphatically, "no."

The Kentucky supreme court opinion begins with these words: "This is a petition for review of supreme court rule 3.135, which has been interpreted by the advertising commission to prohibit targeted direct mail advertising by lawyers."

QUESTION: How does this disapprove this letter?

MR. DOHENY: The Kentucky supreme court did not as such disapprove this letter, Justice White.

QUESTION: Why it disapproved it?

MR. DOHENY: It did neither. What it said was that Rule 3.135 pertaining to advertising, was too broad. What Petitioner asked below was that Rule 3.135 be deleted; and what Kentucky did in referring to Zauderer three times in the opinion of the court, was specifically said, "It is the decision of this court that supreme court rule 3.135 be deleted." That is what they did.

QUESTION: Well, do you think that Shapiro was free to go ahead with his advertisement after the Kentucky supreme

court decision?

MR. DOHENY: No, Justice White, I do not.

QUESTION: Well, if he wasn't, then they must have applied some rule to ban it?

MR. DOHENY: They did.

QUESTION: And what did they apply?

MR. DOHENY: At the time they deleted Rule 3.135. They adopted a new rule, ABA Model Rule 7.3, which prohibited, was not -- I'm sorry sir?

QUESTION: Well, the claim is that Kentucky is not entitled under the First Amendment to require this particular letter.

MR. DOHENY: And that claim --

QUESTION: And that claim rejects it.

MR. DOHENY: If the Court please, I believe that claim was raised for the first time in this Court and that is the heart of our jurisdictional argument; that what Petitioner attacked in the trial court was Rule 3.135, which he asked be deleted.

QUESTION: Well, what he said, what he claimed was, that he is entitled to publish this -- to mail, this advertisement; he's entitled to under the First Amendment. That's his claim. As against any Kentucky rule.

MR. DOHENY: And that gets to the substantive issue, Justice White, as to whether Kentucky can constitutionally ban

the letter as proposed by Shapiro. I think the answer to that is again emphatically "Yes, it can be banned."

QUESTION: Isn't that the issue before us? And isn't it properly before us?

MR. DOHENY: I think the issue is not properly before you, Justice White, because it was not raised in the Kentucky supreme court. What was raised in the Kentucky supreme court was a challenge to Rule 3.135.

When the court adopted Model Rule 7.3, Petitioner had the right to seek rehearing or modification; or to begin a new proceeding. He did none of those. He simply sought certiorari from this Court.

So we contend that by his failure to raise that issue in the Kentucky courts, he has deprived this Court of jurisdiction.

QUESTION: But that seems rather strained to me, because he never knew about Rule 7.3 until the supreme court of Kentucky adopted it. And if 7.3 tracks in many respects the rule it was attacking, and during the course of the litigation, the authority -- the body with the authority to do so says, "Well, now this rule you're attacking is no longer in effect; but a new rule is," and he has the same complaint about that, doesn't strike you as rather highly a technical a thing to have to go back and start all over?

MR. DOHENY: Mr. Chief Justice, it does not for these

reasons: the old rule began, "A written advertisement may be sent."

The new rule begins, "A lawyer may not solicit professional employment." In other words, it is the distinction between advertising on the one hand and solicitation on the other.

This Court has said that a state can ban solicitation in Ohralik. Now, what Kentucky did was adopt without advance notice, admittedly, but what it did was adopt a new rule at the time Shapiro asked them to delete Rule 3.135.

QUESTION: Did the Kentucky supreme court disapprove this letter? It did, did it not?

MR. DOHENY: It did.

QUESTION: It disapproved it, did it not?

MR. DOHENY: Yes.

QUESTION: And did it not disapprove it on the basis of the new rule?

MR. DOHENY: Yes.

QUESTION: Well then, why is the case here? That's what he's bringing here.

MR. DOHENY: Well, our position is that that new rule should have first been challenged in the Kentucky supreme court rather than before this Court.

QUESTION: Well, what chance do you think a challenge would have had in the Kentucky supreme court after that court

had adopted the rule?

QUESTION: And applied it?

QUESTION: And applied it to this case?

MR. DOHENY: I can't get inside the mind of the Kentucky supreme court, but they, like other courts, are willing to listen and be educated; and if there was a challenge to the new rule, I think they would apply their wisdom and experience to it; and the facts that are presented to that court about the rule.

QUESTION: Mr. Doheny, it would be a different question if all the Kentucky Supreme Court did was to say, "You're right, the old rule is no good; we're adopting a new rule."

But it didn't just do that. You say that it went further, and in that situation, I can understand why you would say you would have to go back and see whether, under state law, this thing is banned under the new rule.

But the court didn't stop there. It said, "We're adopting this new rule and your letter is banned under the new rule."

MR. DOHENY: Well, perhaps I --

QUESTION: Did it say that or not? If it didn't say that, you have a different case.

MR. DOHENY: Well, perhaps I overstated it, Mr. Justice Scalia, because it does not say in the opinion that

they made a finding with respect to this letter. They simply say that, with respect to Rule 7.3, this is an appropriate rule which we now adopt as the law of this government.

QUESTION: Well, your response to one of the other Justice' questions was that, indeed, there has been a determination that this letter is no good.

Now you're saying there has not been?

MR. DOHENY: I believe I was in error when I said, that, Justice.

QUESTION: I don't think so. The next sentence says, "We affirm the decision of the ethics committee to deny the request." And the request is to mail out this letter.

So I think they not only set out the appropriate rule we should adopt as the law in the case, but they then go on and affirm the ruling.

And may I ask just one other procedural question?

MR. DOHENY: Sure.

QUESTION: Am I correct in recalling that you did not make this argument in your Response to the Petition for Certiorari?

MR. DOHENY: It is true. We were not counsel for the Kentucky Bar Association below. We came to this issue late; we did not make this argument.

QUESTION: Did you have a problem under the Tuttle opinion?

MR. DOHENY: We did make it late.

QUESTION: Mr. Doheny, it strikes me you'd be well-advised to spend time on the merits of the case, because I think your jurisdiction argument may be unpersuasive.

And on the merits, I'm wondering whether on the new rule, you would take the position that an advertisement like this, if it were deemed not misleading, could be published in the newspaper? Then copies of the ad could go directly to the targeted recipients?

MR. DOHENY: I think that, if the substance of the letter, Justice O'Connor, were deemed to be not misleading, without question, in Kentucky, it would appear in a newspaper. We have broad rules.

QUESTION: Yes, and then could the newspaper ad be mailed -- copies of it, to targeted recipients?

MR. DOHENY: No, not under the new rule. It could go to a mass -- a group of persons under the rule, with whom -- well, it could go to a group of persons as long as they were not targeted.

Some of those people may, under the rule, need the services that are offered.

QUESTION: Well, under the First Amendment analysis, why is it more of a concern by the state to protect the recipients from opening up the ad in an envelope than from reading it in their newspaper?

MR. DOHENY: I think that the distinction is that it has been touched upon by this Court; that it gets to the ability of a trained advocate to persuade on a personal basis. Admittedly, the letter is not as personal as the lawyer in your home or in your hospital, as was banned in Ohralik.

Nevertheless, as the Florida court observed in Stivers, a letter carries a special aura; and I would wager that, if all of us returned to our homes tonight and had a letter from a real estate agent or a lawyer, we'd open the lawyer's letter first.

QUESTION: If what's in the envelope is a copy of an ad clipped out of a newspaper, why isn't that -- why shouldn't it be treated like the newspaper?

MR. DOHENY: The newspaper ad is a generalized statement of advertising. And advertising is, by definition, going to a group of people, as opposed to solicitation, which goes to a more limited group.

Now, I see no harm that comes from a person receiving a newspaper ad which may or may not apply to him. It is very different from a target who has been identified as either facing foreclosure, or being the victim of an automobile accident or something else. There is a difference between the general nature of the advertisement as opposed to the in-person or the letter solicitation.

Which, Justice O'Connor, becomes as soon as that call

is returned, what this letter says, for example, is "Call now. Don't wait." and the minute that call is returned, we have in-person solicitation by the lawyer, which this Court has said a state could properly prohibit.

QUESTION: But you could say the same thing of a newspaper ad -- "Call now. Don't wait." And the same result would ensue. Really, the only difference I see between the two is that one is economically more efficient than the other. Is there some vice in economically more efficient advertising, instead of -- you have the same ad; it reads exactly the same; and you say you can put it in the newspaper, but you can't mail it specifically to certain individuals?

MR. DOHENY: To targeted individuals.

QUESTION: Well, you call it "targeted." I'll call it "specific."

MR. DOHENY: All right, sir.

QUESTION: You have to mail it to somebody.

MR. DOHENY: You could mail it generally to those who do not -- are not known to have the problems, some of whom may.

QUESTION: It's a rather odd First Amendment doctrine that we forbid ads only when they're targeted at people that are interested in them, which is the purport of your argument

MR. DOHENY: I'm trying, and am prepared to, draw a distinction between advertising on the one hand; and again, solicitation on the other.

I suggest respectfully that there is a fundamental difference, and what Mr. Shapiro chose to do here is solicitation, to a specific individual, which I believe a state can, under the rulings of this Court in Ohralik properly prohibit because of the ability of the lawyer to overreach.

QUESTION: So basically, you're saying you can't be too effective?

MR. DOHENY: I wouldn't word it that way, Justice Kennedy. I would say that some of the reasons against solicitations are -- there are numerous ones. We don't know if the person has a viable case; we don't know if the recipient has retained a lawyer; we don't know the mental or emotional state of the recipient when the solicitation arrives there.

I think there are valid reasons that can result in the prohibition against solicitation, and the possibility or probability, whichever term you choose to use, of overreaching, is far greater on a specific communication than it is in a newspaper or a television advertisement, which you are free to reject rather easily.

This Court has held -- and it's important to bear in mind that the Kentucky court did not reach its conclusion in a vacuum. It made a number of findings. It found in its opinion involving Shapiro, that dangers result from direct solicitation, whether in person or by mail. It stated that it was not unmindful of the potential for serious abuse with

direct solicitation.

It held that the submission of a blank form letter would not provide suitable protection for the public, and it stated that, under Kentucky rules, advertising was available to inform the public of the need for legal services, and the qualifications of those about to offer them without the risk that comes through impersonal solicitation.

We, this morning -- some new lawyers were admitted as members of this Bar, and the Chief Justice welcomed them as Officers of this Court.

This Court in Virginia Board of Pharmacy said "The state has a strong interest in maintaining professionalism among licensed pharmacists."

If that is true with dispensers of a product, and surely it is; how much more true it must be with officers of the court who can invoke the powers of the court for good and for evil? We suggest that Kentucky was within its rights in adopting Model Rule 7.3, and that the decision of the Kentucky supreme court should be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Doheny. The case is submitted.

(Whereupon, at 10:50 a.m., the case in the above-captioned matter was submitted.)

REPORTERS' CERTIFICATE

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LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the

Date:

Margaret Daly
Official Reporter

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