The Life of Riley[1]: Complete First Amendment Protection Versus Deferential Commercial Speech Standards for Professional Fundraising Solicitors

I. Introduction

In 1986, contributions to charitable organizations totaled an estimated 87.22 billion dollars.[2] The amount of philanthropic donations given to various health, social service, cultural, and civic recipients each year has steadily increased.[3] Faced with budget cuts and economic hardship in general, charitable entities have become increasingly dependent upon donations from the private sector to meet their expenses.[4] Contributions from individuals in particular have risen to meet this demand, with individuals donating an estimated 71.72 billion dollars in 1986, or 82.2% of the total.[5] This apparent willingness on the part of American consumers to maintain and even increase the amount of income donated to charities, however, provides greater opportunities for those who employ fraud and misrepresentation to steer funds away from legitimate causes.[6] A majority of the states have recognized this danger, and as a result have enacted laws attempting to regulate, in some manner, the solicitation of charitable donations.[7]

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1. Riley v. National Fed'n of the Blind, 108 S. Ct. 2667 (1988).

2. American Association of Fund-Raising Council, Inc., Giving U.S.A., 1986 Annual Report 11 (1987) [hereinafter Giving U.S.A.].

3. The 1986 estimated total shows a 7.5 billion dollar increase over the 1985 estimated total, a gain of 9.4%. *Id.* at 12.

4. Steele, *Regulation of Charitable Solicitation: A Review and Proposal*, 13 J. Legis. 149, 150 (1986). *See also* Giving U.S.A., *supra* note 2, at 93.

5. Contributions by corporations accounted for 4.5 billion dollars, or 5.2% of the total; foundations accounted for 5.17 billion, or 5.9%; and bequests accounted for 5.83 billion dollars, 6.7% of the total. Giving U.S.A., *supra* note 2, at 11.

6. Steele, *supra* note 4, at 151. *See infra* text accompanying notes 95-110.

7. Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. Steele, *supra* note 4, at 154 n.31 (citing *The Philanthropy Monthly, Survey of State Laws Regulating Charitable Solicitation* (1985)). Since the date that survey was published, three states have enacted similar laws: Ala. Code §§ 13A-9-70 to -76 (Supp. 1989); Ind. Code §§ 23-7-8-1 to -9 (1988); Mo. Rev. Stat. §§ 407.450, .453, .456, .459, .462, .466, .469, .472 and .478 (Supp. 1989).

Some states attempting to regulate charitable solicitations have confined the scope of regulation to professional fundraisers.[8] Indiana is one such state.[9] In 1984, the Indiana legislature enacted the Professional Fundraiser Consultant and Solicitor Registration Act.[10] In a decision rendered on November 29, 1988, the United States District Court for the Southern District of Indiana found that sections of the Indiana Act requiring disclosure of a professional solicitor's fee arrangements were impermissibly overbroad restrictions of protected first amendment activities.[11] Three recent United States Supreme Court decisions which have dealt with state or local restrictions on charitable solicitors factored in the outcome of the Indiana case.[12]

In each of the Supreme Court decisions, the Court found that the statute or ordinance in question infringed upon protected speech, and was therefore, unconstitutional.[13] The most recent constitutional challenge to a charitable solicitation statute was made in *Riley v. National Federation of the Blind*.[14] The North Carolina statute at issue in *Riley* contained some similarities to the Indiana registration act.[15] The North Carolina statute addressed professional fundraisers specifically.[16] In affirming the judgment of the United States Court of Appeals for the Fourth Circuit, the Supreme Court found that provisions which regulated the amount which a professional fundraiser can charge a charity unconstitutionally infringed upon freedom of speech.[17] Also stricken was a provision which required professional fundraisers to disclose to potential donors the percentage of revenues retained for all charitable solicitations conducted in the state in the previous 12 months.[18]

In addressing the substantive issue, the Court refrained from deciding whether the solicitation for charitable contributions by a professional fundraiser came within the scope of that which is considered

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8. *See e.g.*, ARK. STAT. ANN. §§ 17-34-101 to -109 (1987); KY. REV. STAT. ANN. §§ 367.650, .655, .657, .660, .665, and .670 (Michie/Bobbs-Merrill 1987); OHIO REV. CODE ANN. §§ 1716.01 to .07 (Anderson 1985).

9. IND. CODE §§ 23-7-8-1 to -9 (1988).

10. *Id.*

11. Indiana Voluntary Fireman's Ass'n. v. Pearson, 700 F. Supp. 421 (S.D. Ind. 1988).

12. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); and Riley v. National Fed'n of the Blind, 108 S. Ct. 2667 (1988).

13. *Schaumburg*, 444 U.S. at 639; *Munson*, 467 U.S. at 970; *Riley*, 108 S. Ct. at 2681.

14. 108 S. Ct. 2667.

15. *See infra* notes 75, 134 & 162 and accompanying text.

16. N.C. GEN. STAT. § 131C-1 (1987).

17. *Riley*, 108 S. Ct. at 2671.

18. *Id.* at 2672.

"commercial speech."[19] The Court, however, refused to apply the more deferential commercial speech principles to the conduct of professional fundraisers, holding that even if such conduct was commercial, it loses its commercial nature when it becomes inextricably intertwined with otherwise fully protected speech.[20] This reasoning was first set forth in *Village of Schaumburg v. Citizens for a Better Environment*,[21] a case which did not involve professional fundraisers. The Supreme Court did, however, extend this rationale to situations involving professional fundraisers in *Secretary of State of Maryland v. Joseph H. Munson Co.*[22]

Prior to these decisions, the Court had set standards to identify commercial speech and to determine its application under the first amendment.[23] In the past, the Court has been willing to allow some restrictions on commercially motivated speech, one of which is to require the speaker to disclose information which would enable the listener to make an educated decision.[24] Required disclosures of information exist in Indiana's Professional Fundraiser Registration Act,[25] and were the focus of constitutional scrutiny in the recent decision by the district court in Indiana.[26]

The purpose of this Note is to analyze the commercial speech doctrine in its developmental stages and in its recent applications, particularly as it relates to the activities of paid professionals. In addition, the Note will examine the services provided by professional fundraising solicitors, with the emphasis on the realities and practices of the trade, and then will apply the appropriate protections accorded such activities under the first amendment.[27] Further, the Indiana statute regulating professional fundraising solicitors will be compared with other regulations which have been subject to constitutional scrutiny. The Note will conclude with an analysis of disclosure requirements for the purpose of determining whether the Indiana provisions are narrowly tailored enough to pass constitutional muster, once the threshold inquiry is made concerning the commercial speech doctrine. Under a proper commercial speech analysis, the Indiana statute should withstand such a challenge.

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19. *Id.* at 2677.
20. *Id.*
21. 444 U.S. 620 (1980).
22. 467 U.S. 947 (1984).
23. *See infra* note 93 and accompanying text.
24. *See infra* text accompanying notes 45-47.
25. IND. CODE § 23-7-8-6 (1988).
26. *See infra* notes 134 & 162.
27. U.S. CONST. amend. I.

II. The Commercial Speech Doctrine

A. Early Development and Application

An analysis of the commercial speech doctrine in conjunction with the activities of professional fundraising solicitors should be undertaken because the Supreme Court has held that the Constitution accords lesser protection to commercial speech than it does to other forms of constitutionally guaranteed expression.[28] Also, in recent decisions involving charitable solicitations by professional fundraisers, the Court did not apply the commercial speech doctrine in a manner consistent with prior rulings on the issue.[29] Adding to the complexity of the analysis is the less than precise definitions which the Supreme Court has given to "commercial speech." Commercial speech generally has been defined as "speech of any form that advertises a product or service for profit or for business purpose."[30] The United States Supreme Court first applied the commercial speech criterion in *Valentine v. Chrestensen*.[31] In that case, a business man distributing leaflets containing advertisements was convicted of violating a municipal ordinance prohibiting such distribution, despite the fact that a message which contained otherwise fully protected speech appeared on the opposite side of the handbill.[32] In affirming his conviction, the Court found that the businessman was merely pursuing "a gainful occupation in the streets,"[33] and as such, his commercial speech was as subject to regulation as any other purely commercial activity.[34] In subsequent cases, the Supreme Court applied the "primary purpose" test of commercial speech: if profit is the underlying motive for the solicitation, the speech in question is deemed commercial in nature, and is therefore not entitled to first amendment protection.[35]

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28. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)).

29. *See infra* text accompanying notes 64-72 & 77-78.

30. J. Nowak, R. Rotunda & J. Young, Constitutional Law 904 (1986).

31. 316 U.S. 52 (1942).

32. The handbill promoted the commercial exhibition of a decommissioned Navy submarine owned by the entrepreneur. The other side of the flyer contained no commercial advertising, but instead contained a protest against the New York City Dock Department's refusal to allow the businessman wharfage facilities at a city pier for the exhibition of the submarine. *Id.* at 53.

33. *Id.* at 54.

34. *Id.* at 54-55.

35. In Murdock v. Pennsylvania, 319 U.S. 105 (1943) a group of Jehovah's Witnesses were convicted of selling religious books without paying a license tax. The Supreme Court reversed the convictions, holding that profits from the books were "incidental" and "collateral" to their primary purpose of disseminating religious beliefs. In Breard v. Alexandria, 341 U.S. 622, *reh'g denied*, 342 U.S. 843 (1951), however, the Court upheld a local ordinance banning unsolicited door-to-door magazine sales, citing the profit motive underlying the transaction.

Although later Supreme Court decisions softened the application of the commercial speech doctrine, a comprehensive definition of commercial speech continued to prove elusive. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[36] the Court defined commercial speech as that which does "no more than propose a commercial transaction."[37] This definition was applied in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[38] where the Supreme Court held that a state could not completely suppress the dissemination of truthful information about lawful activity, despite the fear that such information would have a harmful effect upon its recipients.[39] Here, the "lawful activity" in question was the sale of prescription drugs, while the commercial speech involved was the advertisements for the drugs.[40]

In finding that it was clear that "speech does not lose its First Amendment protection because money is spent to project it,"[41] the Court implicitly overruled prior decisions exempting commercial speech from such constitutional protection.[42] However, the Court indicated that, though commercial speech is to be protected, some forms of "time, place and manner" restrictions are "surely permissible."[43] Further, if the commercial speech in question is not provably or wholly false, but only deceptive or misleading, the state may place appropriate restrictions on that activity also.[44]

The primary reason that the Supreme Court in *Virginia State Board* held that commercial speech is entitled to first amendment protection is that the consumer has a significant interest in the free flow of

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36. 413 U.S. 376 (1973).

37. The transaction at the heart of this case was a newspaper's acceptance of a help-wanted advertisement which allowed the prospective employer to make hiring decisions based on the gender of the applicant. In refusing to abrogate the distinctions between commercial speech and pure speech, the Court found that employment advertising was commercial activity, and discrimination in such advertising made the commercial activity illegal. *Id.* at 388.

38. 425 U.S. 748 (1976).

39. *Id.* at 774.

40. *Id.*

41. *Id.* at 761.

42. *Id.* at 770. The court expressly overruled the commercial speech exemption in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 n.7 (1980), holding that "[t]o the extent that any of the Court's past decisions discussed in Part II hold or indicate that commercial speech is excluded from First Amendment protection, those decisions . . . to that extent, are no longer good law."

43. *Virginia State Bd.*, 425 U.S. at 770-71. The Court noted that it approved of restrictions which were justified without reference to the regulated speech, so long as the regulations serve a significant governmental interest and leave open ample alternative channels for communication of the information. *Id.*

44. *Id.* at 771. *See infra* text accompanying notes 94-114.

commercial information.[45] The Court found it a matter of public interest that, in a free enterprise economy, those private economic decisions which allocate resources in large measure should be decisions which are made in an intelligent and well-informed manner.[46] The Court also reasoned that the free flow of commercial information is indispensable in formulating intelligent opinions as to how to apply appropriate regulations to matters relating to our free enterprise economy.[47]

It is significant that the Supreme Court retained the distinction between commercial speech and pure speech. If the activity of professional solicitors is commercial in nature, the state is clearly given more leeway to regulate the profession, albeit not in the sense that such activity is completely without substantial protection under the first amendment. Applying the definitions of commercial speech set forth by the Supreme Court to the activity of professional solicitors, it could readily be argued that professional solicitors are pursuing "a gainful occupation," as discussed in *Valentine*.[48] State legislatures generally define professional solicitors as those who solicit contributions for, or on behalf of, a charitable organization, and who are given financial consideration in return.[49] Although the entrepreneur in *Valentine* included with his advertisement non-commercial speech which would have otherwise been given complete protection under the first amendment, the Court found that his intent and purpose was to distribute his commercial message.[50] Thus, under the definition set forth by the Supreme Court in *Valentine*, "commercial speech" would encompass the activities of those who pursue a gainful occupation by soliciting donations for charitable organizations, despite the fact that their speech contained some elements of non-commercial, more fully protected speech. Other federal courts have come to the same conclusion, characterizing speech as commercial speech even when pure speech information is included.[51]

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45. The Court found that the consumer's interest in this information was "as keen, if not keener by far, then his interest in the day's most urgent political debate." *Id.* at 764.

46. *Id.*

47. *Id.*

48. 316 U.S. 52 (1942).

49. *See, e.g.*, IND. CODE § 23-7-8-1 (1986 & Supp. 1987) which states: "'Professional solicitor' means a person who for a financial consideration solicits contributions for, or on behalf of, a charitable organization, either personally or through agents or employees specifically employed for that purpose. The term does not include a charitable organization or an officer, employee, member, or volunteer of a charitable organization." *See also* GA. CODE ANN. § 43-17-2-10 (1988) (definition of "paid solicitor"); OHIO REV. CODE ANN. § 1716.01(E) (Anderson 1985 Repl. Vol.) ("professional solicitor" definition).

50. *Valentine*, 316 U.S. at 55.

51. *See e.g.*, Fox v. Board of Trustees of State University of N.Y., 649 F. Supp.

It can not be determined that the definition of commercial speech promulgated in *Valentine* was stricken when the Court overruled the commercial speech exclusion from first amendment protection in *Virginia State Board*.[52] In that decision, the Court implied that a profit motive is the hallmark of commercial speech, noting also that the desire to profit is powerful enough to withstand state regulation.[53] As a practical matter, professional solicitors are motivated to solicit contributions by the opportunity for financial gain. Profit may in fact be the primary motive for their activity. If this is the case, there is "little likelihood of [their commercial speech] being chilled by proper regulation. . . ."[54]

B. Recent Applications of the Commercial Speech Doctrine

Recent cases have not aided in the search for a precise definition of commercial speech. Drawing on the findings of *Virginia State Board* and *Bates v. State Bar of Arizona*,[55] the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[56] defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."[57] This would appear to narrow the scope of the commercial speech application to those instances where the information disseminated does not contain a single reference to any matter accorded full protection under the first amendment. Thus, communicated information of a generally commercial nature which contains even an insignificant portion of protected speech would be considered non-commercial speech. Yet, in regard to another opinion decided the same day,[58] the Court expressly held that, although utilities enjoy "the full panoply of First Amendment protections for their direct comments on public issues[,] [t]here is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions."[59] In the latter situation, reasonable state regulations would be permissible.[60]

In fact, the Court has indicated that the very nature of commercial speech prevents its inhibition by even overbroad legislation, because

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1393 (N.D.N.Y. 1986), *rev'd*, 841 F.2d 1207 (2nd Cir. 1988), *rev'd*, 109 S. Ct. 3028 (1989); American Future Sys. v. State University of N.Y., Cortland, 565 F. Supp. 754 (1983).

52. 425 U.S. 748 (1976).
53. *Id.* at 772 n.24.
54. *Id.*
55. 433 U.S. 350 (1977).
56. 447 U.S. 557 (1980).
57. *Id.* at 561.
58. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).
59. *Central Hudson*, 447 U.S. at 563 n.5.
60. *Id.*

commercial speech is the offspring of economic self-interest, a particularly "hardy breed of expression."[61] As indicated earlier, a primary motivator of a professional solicitor's conduct is economic self-interest, or profit. Further, the fact that a professional solicitor has extensive knowledge of the market and the product or service being offered, compared with the recipient of such information, is also indicative of commercial expression.[62]

Insofar as the recent Supreme Court decisions on charitable solicitations,[63] it appears that the Court has declined to apply previously set standards to distinguish commercial speech from "pure" speech. In *Village of Schaumburg v. Citizens for a Better Environment*,[64] the Court found, without any supporting authority, that charitable appeals for funds are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues. . . ."[65] In deciding that the speech in question was not a variety of "purely commercial speech," the Court reasoned that "charitable solicitation does more than inform private economic decisions, and is not primarily concerned with providing information about the characteristics and costs of goods and services. . . ."[66] Once the speech in *Schaumburg* was classified as not "purely" commercial speech, it was accorded full first amendment protection, and the ordinance which was the subject of the lawsuit was stricken as unconstitutional.[67]

Although the situation in *Schaumburg* involved solicitation by the charitable organization itself, the Court's rationale excluding the doctrine of commercial speech from the context of charitable appeals for funds was extended to the conduct of professional solicitors for the first time in *Secretary of State of Maryland v. Joseph H. Munson Co.*[68] In a five to four decision, the Court found that a statute similar to the ordinance in *Schaumburg*, which restricted the amount that a charity could spend on non-charitable purposes, such as administrative costs and fundraising, was unconstitutional because the statute created the unnecessary risk of chilling free speech.[69]

Except for a brief note relating that the fact that professional solicitors are paid to disseminate information does not in itself render

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61. *Id.* at 565 n.6 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977)).
62. *Bates*, 433 U.S. at 384 (1977).
63. *See supra* note 12.
64. 444 U.S. 620 (1980).
65. *Id.* at 632.
66. *Id.*
67. *Id.* at 639.
68. 467 U.S. 947 (1984).
69. *Id.* at 968.

their activity unprotected,[70] the Court did not address whether such activity was commercial in nature. Even if the *Munson* decision had addressed the issue and had found the professional solicitor's activity to be commercial speech, such activity would likely still be protected under the *Virginia State Board* and *Central Hudson* standards,[71] albeit to a lesser extent. Thus, in failing to address the issue, the commercial speech doctrine was not applied, and the statute was found to be insufficiently related to asserted state interests to justify the interference with free speech.[72]

On June 29, 1988, the Supreme Court handed down the decision in *Riley v. National Federation of the Blind*[73] The initial suit was brought by a coalition of charitable organizations, professional fundraising solicitors, and potential donors of charitable contributions, who alleged that the statute which regulated solicitation of charitable contributions was unconstitutionally overbroad to serve the state's interest in preventing fraud.[74] As in *Schaumburg* and *Munson*, the North Carolina statute contained limitations on the portion of contributions which could be spent on non-charitable purposes; in this case, specific limitations on the amounts which could be retained by the professional solicitor.[75] Unlike the regulations which were stricken in the prior two cases, however, the Court also struck down a provision which required professional solicitors to disclose, at the time of the solicitation, the percentage of

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70. *Id.* at 955-56 n.6. *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

71. *See supra* text accompanying notes 41-57.

72. *Munson*, 467 U.S. at 961-62.

73. 108 S. Ct. 2667 (1988).

74. *Id.* at 2672.

75. N.C. GEN. STAT. § 131C-17.2 (1986) formerly provided:

> (b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a particular charitable purpose is deemed to be reasonable and nonexcessive.
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> (c) For purposes of this section a fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.
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> (d) For purposes of this section only, a fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any fact by the party challenging the fund-raising fee.

charitable contributions collected during the previous twelve months that were actually turned over to charity.[76]

The Court addressed but did not decide the commercial speech issue, noting that even if a paid solicitor's speech is commercial, the speech does not retain its commercial character when it is "inextricably intertwined" with speech that is fully protected.[77] Therefore, the Court applied the test for fully protected speech. This rationale was the one invoked first in *Schaumburg*, a situation which did not involve a paid professional, and extended in *Munson*, which did concern the activities of professional solicitors.[78] In effectively deciding that the solicitation of charitable contributions by paid professionals is neither "pure speech" nor "purely commercial speech," the Court has departed from decisions which have established that a distinction exists between the two types of speech, and the distinction must be made in order to apply the appropriate first amendment test.

The Supreme Court has long recognized a distinction between commercially-motivated activity, which is subject to state regulation, and the first amendment rights of those involved in that activity.[79] The constant competition between these two interests is hardly unique to situations involving professional solicitors.[80] In his concurring opinion in *Thomas v. Collins*,[81] Justice Jackson illustrated this point by acknowledging that the state may regulate the medical profession, but the state could not

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76. N.C. GEN. STAT. § 131C-16.1 (1986) formerly stated:

> During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:
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> (1) His name; and,
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> (2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and,
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> (3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting funds for less than 12 months.

77. *Riley*, 108 S. Ct. at 2677.

78. *See supra* text accompanying notes 64-71.

79. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460-61 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 766 (1976); Goldfarb v. Virginia State Bank, 421 U.S. 773, 792 (1974).

80. *See* Thomas V. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

81. 323 U.S. 516 (1945).

prohibit speech which urges others to follow or reject any school of medical thought.[82] Justice Jackson noted:

> This wider range of power over pursuit of a calling than over speech-making is due to the different effects which the two have on interests which the state is empowered to protect. The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public.[83]

In *Ohralik v. Ohio State Bar Association*,[84] the Court rejected the suggestion to abandon the distinction between commercial speech and non-commercial speech, reasoning that failure to make such a distinction "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech."[85] This decision was reinforced in *Central Hudson*, where the Court refused to "blur further the line the Court has sought to draw in commercial speech cases."[86]

It could be inferred from these decisions that the Court, when confronted with a situation involving professionals, should first determine whether the expression sought to be protected is commercial in nature. In the past the Court has not been reluctant to separate a professional's commercial expression from those activities which are accorded full freedom of speech protections.[87] Yet in *Munson* and *Riley,* the Court did not find it necessary to make the distinction. In so doing, they created a "hybrid" expression by "intertwining" the commercial speech with elements of pure speech. These rulings do not preserve the earlier decisions' concern about the dilution of the first amendment, nor do they prevent a further "blurring" of the line between commercial and non-commercial speech.

If the distinction between commercial and non-commercial speech is to be treated as viable despite the *Munson* and *Riley* holdings, the Supreme Court must scrutinize the business of professional solicitation and determine if any "common-sense" distinctions exist between the transaction proposed by a professional solicitor and other varieties of speech.[88] Taking into account that the professional solicitor is pursuing

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82. *Id.* at 544 (Jackson, J., concurring).
83. *Id.* at 545.
84. 436 U.S. 447 (1978).
85. *Id.* at 456.
86. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980).
87. *See supra* text accompanying notes 79-83.
88. *Central Hudson*, 447 U.S. at 563.

"a gainful occupation" and is motivated by profit, it could be concluded that the expression at issue is commercial in nature. Further, the solicitation may indeed be "related solely to the economic interests of the speaker and its audience,"[89] for, as Justice Rehnquist noted in the dissent of *Munson*, "professional fundraisers . . . are not themselves engaged in advocating any causes."[90] The solicitation is certainly related to the economic interests of the listener, who is being asked to part with his money. Although this solicitation is not always related solely to the audience's economic interests, the inclusion of non-commercial elements into otherwise commercial speech will not automatically render such speech "pure," and thereby accord it the full protection under the first amendment.[91] Identification of some abstract, non-commercial value in commercial speech should not prevent the Supreme Court from making the "common-sense" distinctions required to prevent dilution of the first amendment.[92] Once a type of expression is deemed commercial, the statute purporting to regulate the expression must withstand the analysis of a test prescribed by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[93]

C. The Central Hudson Commercial Speech Test

In applying the four-part test outlined in *Central Hudson*, a court must first determine whether the expression is protected by the first amendment.[94] For commercial speech to come within that protection, the expression must at least concern lawful activity and not be misleading.[95] While the solicitation for charitable contributions by a professional solicitor who is registered as such with the state is a legal activity, there are many instances where much of the solicitation conducted is done so in a misleading manner.[96] Due to the fact that much solicitation occurs on a one-to-one basis, either in person or over the

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89. *Id.* at 562.

90. Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984) (Rehnquist, J., dissenting).

91. The Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* noted that, even an advertisement which is entirely commercial may be of general public interest; in fact, "[t]here are few [advertisements] to which such an element, however, could not be added." 425 U.S. 748, 764 (1976).

92. American Future Sys. v. State University of N.Y., Cortland, 565 F. Supp. 754, 762 (1983).

93. 447 U.S. 557 (1980).

94. *Id.* at 567.

95. *Id. Accord Virginia State Bd. of Pharmacy* 425 U.S. at 771 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464-65 (1978); Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights, 413 U.S. 376, 388, *reh'g denied*, 414 U.S. 881 (1973).

96. *See infra* text accompanying notes 102-04.

telephone, once the solicitor receives a donation there are no effective means of tracking the transaction.[97] A donor may contribute money and not even realize that his donation did not find its way to the intended charity.[98] Several commentators have acknowledged that in the area of charitable appeals for funds, consumers have been "abused, imposed upon, and defrauded because of the lack of adequate safeguards."[99] A report issued by the National Health Council (NHC) in 1965 recognized that fraudulent appeals not only victimized the public, but "siphon[ed] off millions of dollars from support for legitimate agencies."[100] Since the year that report was published, total charitable giving by individuals has increased six times.[101] The amount of funds misdirected or fraudulently obtained in recent years has most likely increased correspondingly.

Agencies which have examined the issue of regulation for charitable solicitations are by no means the only ones recognizing that fraudulent practices occur in the field of fundraising. American consumers are becoming increasingly skeptical of charitable appeals.[102] A Gallup poll conducted in 1987 showed that 40% of those asked thought that fundraising practices employed by charitable organizations were less than ethical.[103] Another survey, conducted by the Philanthropic Advisory Service of the Better Business Bureau, found that one-third of the 1,000 contributors who responded expected 80% of their donation to go to the charity, while the typical charity receives roughly 60%.[104] Given the history of deception employed by some fundraisers, and present public

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97. NATIONAL HEALTH COUNCIL, VIEWPOINTS ON STATE AND LOCAL LEGISLATION REGULATING SOLICITATION OF FUNDS FROM THE PUBLIC (1965) [hereinafter VIEWPOINTS]. *See also* Marx & Wark, *Faith. Hope and Chicanery*, 18 WASH. MONTHLY, January 1987, at 25-26.

98. *See e.g.*, Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489 (D. Minn. 1986), where a professional solicitor (Heritage) told prospective contributors that the calls were being made on behalf of the "Minnesota Child Abuse Program," although Heritage had been retained by the American Christian Voice Foundation.

99. VIEWPOINTS, *supra* note 96, at vii.

100. *Id.* at viii.

101. GIVING U.S.A., *supra* note 2, at 14.

102. *See generally* Marx & Wark, *supra* note 97, at 25-31 (discussing fundraising activities and disbursements of the Shrine Temple); Cryderman, *Why Do Americans Distrust Christian Fund Raisers?*, 31 CHRIST. TODAY, April 17, 1987, at 38 (public perception of fund raisers in light of Oral Roberts' highly publicized appeal for funds in January of 1987); Ostling, *A Really Bad Day at Fort Mill*, 129 TIME, March 30, 1987, at 70 (describing "backlash" that may hinder fundraising efforts due to the television evangelist Jim Baker scandal).

103. *Questioning Tactics*, 129 TIME, March 30, 1987, at 70. George Gallup Jr. noted: "There have been extravagances and questionable tactics, and surely this has soured people's attitudes toward giving. . . ." *See also* Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489, 1492 (D. Minn. 1986).

104. Marx & Wark, *supra* note 97, at 30.

perception of the practice, the Supreme Court may want to examine the conduct of professional solicitors as they have other professions.

In *Ohralik v. Ohio State Bar Association*,[105] the Court found that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" was so likely in the context of in-person solicitation that the solicitation could be regulated, and even prohibited.[106] The following year the Court upheld a Texas statute which regulated optometrists, citing the considerable history in Texas of deception and abuse worked upon the consuming public.[107] A recent federal court decision concerning the funeral service profession found that the profession does not have to actively mislead consumers, but if the evidence indicates that consumers are nonetheless being misled, the state may impose regulations to remedy the deception.[108] This finding has been reinforced by the Supreme Court decision of *In re R.M.J.*[109] In this case, the Court found that the state may impose appropriate restrictions when experience has proven that the commercial speech is subject to abuse, or where the content or method of commercial speech suggests that it is inherently misleading.[110]

Legislative findings also indicate that the practice of solicitation for charitable funds, by professionals in particular, has been beset by fraud and inefficiency.[111] It is in response to these conditions, which have a significant impact upon the well being of their citizens, that states have enacted legislation to regulate the charitable solicitation industry.[112] The

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105. 436 U.S. 447 (1978).

106. *Id.* at 462.

107. Friedman v. Rogers, 440 U.S. 1 (1979) (*quoted in In re* R.M.J., 455 U.S. 191 (1982)).

108. Harry & Bryant v. FTC, 776 F.2d 993, 1001 (1984).

109. 455 U.S. 191 (1982).

110. *Id.* at 204. Advertisements of attorneys, optometrists, and funeral directors are by no means the only instances where the Supreme Court has applied the "commercial speech" label to the communication in question: *See, e.g.*, Village of Hoffman Estate, Inc. v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) (display and sale of drug-related paraphernalia); Metromedia, Inc., v. City of San Diego, 453 U.S. 490 (1981) (billboard advertisements); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (promotional advertisements of utility); Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) (prescription drug advertisements by pharmacy).

111. Illinois Legislative Council, Report on Regulation of Charitable Fund-Raising (1954).

112. *See, e.g.*, Cal. Bus. & Prof. Code § 17510 (West 1987), which reads:

> (a) The Legislature finds that there exists in the area of solicitations and sales solicitations for charitable purposes a condition which has worked fraud, deceit and imposition upon the people of the state which existing legal remedies are inadequate to correct. Many solicitations or sales solicitations for charitable

District Court for the Southern District of Indiana, faced with the challenge to the Indiana Professional Fundraiser Consultant and Solicitor Registration Act, could have taken notice of legislative findings or based their analysis on recognized public perception of charitable solicitation practices to determine that solicitation for charitable donations is, in the least, potentially misleading to consumers in Indiana. Even if it is decided that such conduct is potentially misleading, the activities of professional solicitors would not be completely prohibited.[113] The state should, however, be entitled to place appropriate restrictions on the manner in which the solicitation is presented. As the Court in *Virginia State Board* noted, "[t]he First Amendment. . .does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."[114]

Assuming, however, that a court is not persuaded to find that the speech in question is misleading or illegal,[115] the second test in the *Central Hudson* analysis of commercial speech protection must be undertaken. The state must now assert a substantial interest to be achieved by restrictions on commercial speech.[116] Generally, the interest asserted by the state is the protection of its citizens from fraud and misrepresentation in the solicitation of charitable contributions.[117] The courts have not

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purposes have involved situations where funds are solicited from the citizens of this state for charitable purposes, but an insignificant amount, if any, of the money solicited and collected actually is received by any charity. The charitable solicitation industry has a significant impact upon the well-being of the people of this state. The provisions of this article relating to solicitations and sale solicitations for charitable purposes are, therefore, necessary for the public welfare.

(b) The Legislature declares that the purpose of this article is to safeguard the public against fraud, deceit and imposition, and to foster and encourage fair solicitations for charitable purposes, wherein the person from whom the money is being solicited will know what portion of the money will actually be utilized for charitable purposes. This article will promote legitimate solicitations and sales solicitation for charitable purposes and restrict harmful solicitation methods, thus the people of this state will not be misled into giving solicitors a substantial amount of money which may not in fact be used for charitable purposes.

113. *In re* R.M.J., 455 U.S. 191, 203-04 (1982).

114. 425 U.S. 748, 771-72 (1976).

115. For an application of statutory provisions regulating illegal conduct by professional solicitors, *see* Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489 (D. Minn. 1986), where the professional fundraiser solicited contributions in the state without being registered, in violation of MINN. STAT. § 309.52 (West 1969 & Cum. Supp. 1988).

116. *Central Hudson Gas & Elec. Corp.* 447 U.S. at 563 (1980).

117. *See e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 966 (1984); Riley v. National Fed'n of the Blind, 108 S. Ct. 2667, 2675 (1988); International

denied that this asserted state interest is compelling.[118] The Indiana law regulating professional solicitors, similar to laws in other states, was clearly enacted with this interest in mind. The consumer's interest in making a well-informed and intelligent economic decision goes hand-in-hand with the interest in the prevention of fraud and misrepresentation. This interest in the free flow of information is considered paramount in the context of commercial speech cases.[119] Although this interest has normally been associated with cases involving product advertising,[120] and advertisements for professional services,[121] this interest could easily be extended to appeals for charitable donations by professional solicitors. Being provided with a free flow of information from the solicitor enables the prospective donor to make an intelligent decision as to how to allocate his economic resources among the many worthy causes from which he has to choose.[122]

With the second requirement of the *Central Hudson* four-part test being met, a court should then ascertain whether the regulation directly advances the governmental interests asserted.[123] For example, in *Munson*, the statute in question contained a provision limiting the percentage of contributions which the charity could spend on fundraising activities.[124] Even if the speech of the professional solicitor in *Munson* was characterized as commercial expression, it is unlikely that the statute would have survived the third step in the four-part analysis of *Central Hudson*. A percentage limitation may restrict solicitation costs, but as the Court logically reasoned, restricted solicitation costs will not necessarily reduce the likelihood of fraud.[125] In *Riley*, however, the Court not only struck

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Soc'y for Krishna Consciousness v. City of Houston, Tex., 689 F.2d 541, 550 (5th Cir. 1982).

118. *Schaumburg*, 444 U.S. at 636; *Riley*, 108 S. Ct. at 2675.

119. *See supra* text accompanying notes 45-47.

120. *E.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985).

121. *E.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

122. It is estimated that there are more than 350,000 gift-supported organizations, institutions, and agencies in the United States today. GIVING U.S.A., *supra* note 2, at 6.

123. *Central Hudson Gas & Elec. Corp.* 447 U.S. at 566 (1980).

124. The *Munson* Court, quoted from MD. ANN. CODE art. 41, § 103D (1982), which read in part:

> (a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. . . .

467 U.S. 947, 950 n.2 (1984).

125. The Court observed: "That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous." *Id.* at 966-67.

down a provision similar to the one in *Munson*, but also found that a provision which required the professional solicitor to disclose certain information was unconstitutional.[126] The provision in the North Carolina statute being challenged called for professional solicitors to disclose, to all potential donors at the time of the solicitation, the percentage of charitable contributions collected during the previous twelve months that were turned over to charity.[127] The Supreme Court found this requirement burdensome and imprecise because, among other things, it concerned unrelated past fundraising campaigns whether or not they were similar to the solicitation made at the time of disclosure.[128] If the Court had found that the solicitor's speech in *Riley* was of a commercial nature, it is not certain that even the required disclosure provision would have been saved. Applying the *Central Hudson* test, the Supreme Court would probably still find the wording of the provision too imprecise to directly advance the state's asserted interests of prevention of fraud and a free flow of information to the consumer. As the Court observed, the disclosure requirement would include information pertaining to past, and possibly completely dissimilar fundraising campaigns. Fundraising costs will necessarily vary depending on the charitable organization involved. Thus, a potential donor would not actually be provided with information which would enable him to make an educated, well-informed decision.

Although the court in *Indiana Voluntary Fireman's Association* struck down the section of the Indiana statute pertaining to the disclosure of a solicitor's fee arrangements, that court acknowledged that there were fundamental factual distinctions between Indiana's statute and the North Carolina provision stricken in *Riley*.[129] The section pertaining to disclosures under Indiana's Professional Fundraiser Act required the solicitor to tell the potential donor "the percentage of charitable contributions which are to be received by the charitable organization or the fee or compensation received by the consultant and the charitable organization *under the contract with the charitable organization*."[130] Thus, the Indiana disclosure requirement was limited to the disclosure of the professional solicitor's fundraising fees for that particular campaign. In that respect, donors were presented with an accurate, free flow of information which made for an educated, well-informed economic decision, and the state's asserted interest was directly promoted. In addition, the Supreme Court has identified, in commercial speech cases, a correlation between required disclosures and the state's interest in preventing fraud and misrepresen-

126. Riley v. National Fed'n of the Blind, 108 S. Ct. 2667, 2679 (1988).
127. *See supra* note 76.
128. *Riley*, 108 S. Ct. at 2679 n.12.
129. 700 F. Supp. 421, 436 (S.D. Ind. 1988).
130. Ind. Code § 23-7-8-6(a)(3) (1988) (emphasis supplied).

tation.[131] In these respects the Indiana statute appeared to advance the asserted governmental interest directly; thus, the statute would have satisfied the third element of the *Central Hudson* test.

The final inquiry in the four-part test is whether the state interest asserted could be served by a more limited restriction on commercial speech.[132] If so, the excessive restrictions cannot survive. In *Riley*, one of the fatal flaws in the disclosure provision at issue was that it encompassed prior unrelated fundraising campaigns.[133] The Supreme Court seemed to indicate that this was an important distinction, and in so doing left open the possibility that a more refined disclosure requirement could withstand a constitutional challenge. The Indiana act contained a more refined requirement, but the District Court for the Southern District of Indiana found that the differences "would have had no impact upon the Court's decision in *Riley*."[134]

In *Riley*, the Supreme Court described some alternatives left open to the state which they considered as more limited forms of regulation than the provisions declared unconstitutional.[135] One option available was that the state could publish the disclosure information and communicate that information to the public.[136] However, this option would be impractical, as there would be no means of insuring that the specific segment of consumers who are targeted by a particular campaign would actually receive that information. As a practical matter, information on one fund drive being conducted by one particular solicitor will often be received by persons who will never be contacted by that solicitor. Conversely, many of those who would be contacted by a solicitor for a donation will have not received the information.

Another option proposed by the Supreme Court is that the state may vigorously enforce existing antifraud laws to prohibit professional solicitors from obtaining money on false pretenses.[137] This alternative would leave the state with no more authority to regulate the occupation then they had prior to the passage of any laws dealing with professional solicitors. Further, antifraud laws are of little value when the consumer

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131. *See infra* text accompanying notes 141-45.

132. *Central Hudson Gas & Elec. Corp.* 447 U.S. at 565 (1980).

133. *Riley*, 108 S. Ct. at 2679 n.12.

134. Indiana Voluntary Fireman's Ass'n. v. Pearson, 700 F. Supp. 421, 444 (S.D. Ind. 1988). The Indiana statute required the solicitor to disclose at the time of the solicitation: "[t]he percentage of charitable contributions which are to be received by the charitable organization or the fee or compensation received by the consultant and the charitable organization under the contract with the charitable organization." IND. CODE § 23-7-8-6(a)(3) (1988).

135. *Riley*, 108 S. Ct. at 2679.

136. *Id.*

137. *Id.*

does not realize he has been deceived; nor are they of any consequence when the fraudulently obtained funds cannot be traced to any particular transaction. Given that the alternatives to the required disclosures in *Riley* proposed by the Supreme Court are impractical and effectively eliminate regulation over a profession that, in the interest of consumer protection, needs to be regulated, the more refined disclosure requirements in the Indiana professional fundraiser registration act should pass the *Central Hudson* test. Certainly the Supreme Court has found that, whether in commercial speech situations or otherwise, appropriately tailored disclosure requirements can provide an effective means of regulating a profession.

III. Required Disclosures

In commercial speech situations, it has been observed that the profit motive contributes to the hardiness, or viability, of this kind of expression; therefore, it is less necessary to tolerate misleading statements for fear of violating the speaker's first amendment interests in free speech.[138] The profit motive may require that additional information is provided to insure that the commercial message is not deceptive.[139]

Even non-deceptive commercial speech may be restricted if the restriction is narrowly designed to achieve a substantial state interest.[140] The Court has pointed out that disclosure requirements applicable to advertisements mentioning an attorney's contingency fee arrangements serve the permissible goal of ensuring that potential clients are not misled regarding those terms.[141] A professional fundraiser engaged to solicit funds for private economic gain should be likewise compelled to disclose the terms upon which the donor's contribution will be distributed.

Federal courts at all levels have found disclosure requirements to be an acceptable restriction on the first amendment rights of professional fundraisers, even where the court has not identified the solicitor's activity as commercial in nature.[142] In the recent Supreme court fundraising cases, it was first recognized in *Village of Schaumburg v. Citizens for a Better Environment* that disclosures may assist in the furtherance of the state's interest in preventing fraud by informing the public of the manner in

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138. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 n.24 (1976).

139. *Id.*

140. Zauderer v. Office of Disciplinary Council, 471 U.S. 635, 637 (1985).

141. *In re* R.M.J., 455 U.S. 191, 207 (1983).

142. *See e.g.*, Bellotti v. Telco Communications, 650 F. Supp. 149 (D. Mass. 1986), *aff'd*, Shannon v. Telco Communications, 824 F.2d 150 (1st Cir. 1987); Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489 (D. Minn. 1986).

which their contribution will be distributed.[143] At that time the Court realized the substantial interest in insuring that contribution decisions are more informed, "leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses."[144]

The Court in *Secretary of State of Maryland v. Joseph H. Munson Co.* reinforced this observation, finding that "concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements. . . ."[145] Up to that time, it appears as if the Court, in even non-commercial speech cases, established a clear preference for required disclosures over broad prohibitions. In *Riley*, however, the Court found that, in the context of protected speech, the difference between compelled silence and compelled speech is without significance, finding that "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[146] The disclosure requirements seen by the Court in *Munson* and *Schaumburg* as permissible in non-commercial speech situations have now been rejected as a prophylactic, imprecise, and unduly burdensome rules.[147] In a situation dealing with commercial speech, however, a court should be able to make the distinction between prohibitions on speech and the statements of fact compelled by required disclosures.

In a case dealing with commercial speech, *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court observed that there are "material differences between disclosure requirements and outright prohibitions on speech."[148] In requiring attorneys who advertise on a contingent-fee basis to disclose potential costs in the event of an unsuccessful lawsuit, the Court acknowledged that the state had not attempted to prevent attorneys from conveying information to potential clients; rather, it had only required them to provide more information than they would have been otherwise inclined to present.[149] Although this decision concerned the activities of attorney advertising, the Court in *Zauderer* indicated that the expression sought to be protected in the instant case was of a lesser caliber than those forms of expression accorded complete

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143. 444 U.S. 620, 638 (1980).

144. *Id.*

145. 467 U.S. 947, 967-68 n.16 (1984).

146. Riley v. Nat'l Fed'n of the Blind, 108 S. Ct. 2667, 2677 (1988) (emphasis in original).

147. *Id.* at 2679.

148. 471 U.S. 626, 650 (1985).

149. *Id.*

first amendment protection.[150] Where the state has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein[,]"[151] disclosure requirements can provide a measure of reasonable restriction over the expression of a profession. Such is the case in the Indiana act, where the state has only prescribed the orthodox manner in which a solicitor, pursuing a "gainful occupation," may attempt to undertake what is essentially an economic transaction.

In another case involving advertisements by the legal profession, the Court in *Bates v. State Bar of Arizona*[152] observed that there was little worry that disclosure requirements would discourage protected speech when the speaker knows his product or service and has a commercial interest in its dissemination.[153] A court which identifies that professional solicitors are more knowledgeable about their service and have a commercial interest in their appeal for donations, should consequently frame their constitutional analysis of a disclosure requirement within the context of the commercial speech doctrine. In this context, the provisions of the Indiana statute requiring disclosures should be able to withstand a constitutional challenge. In the commercial speech approach, the provision appears to satisfy the standards set in *Central Hudson*. Further, federal courts have consistently found favor in the application of required disclosures over other restrictions imposed by the state in non-commercial speech cases.[154]

IV. Conclusion

In situations involving non-commercial speech, a court must apply the standard first amendment analysis: if the statute or ordinance is not narrowly tailored enough to serve the purported state's interest, the

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150. *Id.* at 651. *See generally* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which the content of a newspaper editorial page was given complete first amendment protection, and the statute compelling the paper to print editorial replies was deemed unconstitutional.

151. *Zauderer*, 471 U.S. at 652 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

152. 433 U.S. 350 (1977).

153. [A]ny concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

Id. at 383.

154. *See supra* text accompanying notes 142-45.

statute must be invalidated.[155] The Supreme Court in *Schaumburg* and *Munson* found that the solicitation for charitable donations was so intertwined with elements of non-commercial speech so as to render that expression "not purely commercial."[156] Therefore, the Court applied the standard first amendment analysis. In determining that charitable solicitations were not commercial speech, the Court in *Schaumburg* nonetheless observed that disclosure requirements would assist in preserving the substantial state's interest of preventing fraud.[157] In *Munson*, the Court noted that required disclosures are an example of measures which are "less intrusive" of first amendment rights.[158] The Supreme Court in *Riley* did not consider compelled statements of fact to be less intrusive of first amendment rights, finding no distinction between required disclosures and outright prohibitions on speech.[159] This apparent retreat from the aforementioned willingness of the Court to treat required disclosures as a viable alternative to outright prohibitions in the context of non-commercial speech may be traced, in part, to the concededly overinclusive information requirements in the disclosure.[160] Thus, the required disclosure stricken in *Riley* may have been too broadly tailored to serve the state's interest. In fact, the Court suggested that the requirement that the professional solicitor unambiguously disclose his or her professional status would be one example of a narrowly tailored requirement which would withstand first amendment scrutiny.[161] This provision is similar to one disclosure required under the Indiana statute,[162] yet the Supreme Court recognized that even this requirement may be open to misleading statements by the solicitor.[163]

Indiana's provision requiring disclosure of the compensation to be retained by the professional solicitor, or the amount actually forwarded to the charity, was unable to survive the recent challenge to its constitutionality. The district court's analysis of the statute, however, was made by applying the "pure" speech standard. Some factors would indicate that had the commercial speech doctrine been applied, the statute

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155. *See e.g.*, Riley v. National Fed'n of the Blind, 108 S. Ct. 2667, 2673-75 (1988).
156. *Schaumburg*, 444 U.S. at 632; *Munson*, 467 U.S. at 960.
157. *Schaumburg*, 444 U.S. at 638.
158. *Munson*, 467 U.S. at 961 n.9.
159. *Riley*, 108 S. Ct. at 2677.
160. *Id.* 108 S. Ct. at 2679 n.12.
161. *Id.* 108 S. Ct. at 2679 n.11.
162. The Indiana statute also requires the solicitor to disclose at the time of the solicitation: "(1) The charitable organization that is being represented; [and] (2) The fact that the person soliciting the contribution is, or is employed by, a professional fundraiser consultant or professional solicitor, and the fact that the professional fundraiser consultant or professional solicitor is compensated[.]" IND. CODE § 23-7-8-6(a) (1988).
163. *Riley*, 108 S. Ct. at 2679 n.11.

may have survived intact. For instance, the Supreme Court has left open the possibility that required disclosures, if narrowly tailored to serve a substantial state interest, are viable alternatives to more restrictive state regulations dealing with appeals for charitable contributions. The Indiana provision is certainly more narrowly tailored than the statute struck down in *Riley*,[164] and it does serve the substantial state interests of preventing fraud and promoting well-informed consumer decisions as to whether to contribute to organizations "that spend large amounts on [non-charitable] expenses."[165]

Given the nature of the for-profit business of professional fundraising, any court faced with the issue should first determine if the expression involved can be classified as commercial speech. The Supreme Court has distinguished between the protected activities engaged in by professionals and their commercial activities. It would be logical to allow that distinction to be made in the case of a professional solicitor. If the expression involved is characterized as commercial, a court must apply the more deferential commercial speech standards outlined in *Central Hudson*.[166] The Indiana provisions on required disclosures appear to comply with *Central Hudson*'s standards; therefore, the required disclosure provisions should not be declared to be unconstitutional. To apply different standards would allow the inconsistencies of recent Supreme Court decisions concerning commercial speech, charitable contributions, and required disclosures to thwart legitimate efforts by the state to regulate professional fundraisers for the sake of its citizens.

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164. *See supra* notes 73-76 and accompanying text.
165. Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 638 (1980).
166. *Central Hudson Gas & Elec. Corp.* 447 U.S. at 567-68 (1980).