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CONSTITUTIONAL LAW—SUPREME COURT UPHOLDS THIRTY-DAY MORATORIUM ON LAWYERS' DIRECT MAIL SOLICITATION OF ACCIDENT VICTIMS. *FLORIDA BAR V. WENT FOR IT, INC.*, 115 S. Ct. 2371 (1995).

I. INTRODUCTION

Few would argue that the legal profession has been subjected to increasing criticism in the recent past.¹ In an effort to remedy some of this dissatisfaction, the Florida Bar Association proposed several new regulations concerning attorney advertising. In *Florida Bar v. Went For It, Inc.*,² the United States Supreme Court upheld Florida's restriction on truthful direct mail solicitation of accident victims by lawyers.³ In a five to four decision, the Court rejected a lawyer's First Amendment challenge to a rule restricting client solicitation for the first time since the mid-1970s.⁴

The practice of lawyer advertising has ebbed and flowed throughout American history.⁵ For the majority of the twentieth century, questions regarding lawyer advertising did not arise because the American Bar Association strictly prohibited client solicitation in 1908.⁶ However, the Supreme Court ruled this restriction unconstitutional in 1977 when it held that two young lawyers had a First Amendment right to advertise their legal services in a local newspaper.⁷ Since the 1977 decision, lawyer advertising in both print and television has increased steadily.⁸ Accompanying this

1. See A.B.A. COMM'N ON ADVERTISING, *LAWYER ADVERTISING AT THE CROSSROADS* 7 (1995) (stating that "the legal community has a strong and increasing sense that over the past several years the image of the profession has declined dramatically in the eyes of the public"); Paul L. Stevens, *Good Client Relations Are Essential to Restoring Public Confidence in Lawyers*, PA. LAW., July 1994, at 4 (finding that the legal profession absorbs more criticism today than any time in the past).

2. 115 S. Ct. 2371 (1995). Stewart McHenry owned *Went For It, Inc.*, a lawyer referral service, when this suit began. *Id.* at 2374.

3. *Id.* at 2381.

4. Richard C. Reuben, *Florida Bar's Ad Restriction Constitutional*, 81 A.B.A. J., August 1995, at 20.

5. See discussion *infra* part III.B.

6. CANONS OF PROFESSIONAL ETHICS Canon 28 (1908). "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit It is disreputable to . . . breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients." *Id.*; see also Whitney Thier, *In a Dignified Manner: The Bar, The Court, and Lawyer Advertising*, 66 TUL. L. REV. 527 (1991) (tracking the history of the organized bar).

7. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding that a state could not restrain a lawyer from publishing a truthful advertisement concerning the availability and terms of routine legal services).

8. Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 741 (1994) (stating, "[L]awyers' ads increasingly target personal matters involving deep-seated emotions, in which the potential client most needs a friend and a counselor."); see also Genevieve Lynn, *States Attack Lawyers Ads, and Public is the Loser*, USA TODAY, Nov. 2, 1995, at 10A (charting the growth in lawyer advertising since 1980).

increase have been numerous challenges to state bars' authority to restrict lawyer advertising.⁹ Consistently, these conflicts have been resolved in favor of protecting attorneys' First Amendment rights and restricting states' abilities to regulate "commercial speech."¹⁰

This casenote begins with a brief description of the facts involved in *Florida Bar v. Went For It, Inc.* It traces the development of the commercial speech exception, emphasizing lawyer-advertising jurisprudence. The note continues by analyzing the reasoning of the *Florida Bar* Court, and concludes with a discussion of the significance of the Court's decision to restrict a lawyer's freedom to advertise.

II. FACTS

In 1989, only twelve years after the United States Supreme Court ruled that lawyers had the constitutional right to advertise,¹¹ the Florida Bar concluded a two-year study of lawyer advertising and solicitation.¹² Believing that the study supported its argument that direct mail solicitation of accident victims by lawyers disturbed the public and reflected poorly upon the legal profession,¹³ the Bar submitted the study to the Florida Supreme Court in support of its petition to amend the Rules Regulating the Florida Bar.¹⁴ Together, as proposed by the Bar, Rules 4-7.4(b)¹⁵ and 4-

9. See, e.g., *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447 (1978) (challenging Ohio Bar regulation prohibiting lawyers from accepting employment from a client to whom they gave unsolicited advice); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (challenging a regulation that prohibited targeted direct mail advertising by attorneys).

10. Roederick White, Sr., *Constitutional Ethics: Lawyer Solicitation*, 22 S.U. L. REV. 275 (1995). "Prior decisions by the Supreme Court have held firmly to the concept of favoring lawyer free speech in the form of commercial advertising." *Id.* at 275-76.

11. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See *supra* note 7 for the holding in *Bates*.

12. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2374 (1995). See John DeVault, *Lawyer Ads Weaken Confidence*, USA TODAY, Nov. 2, 1995, at 10A. The Bar began the study in 1987 following Bar leaders' outrage at the practices of Florida lawyers following a school bus accident that killed five handicapped children and the driver. *Id.* One attorney called one of the victim's family within two hours of the accident; another stopped a family member on a public street the next day; and other families received letters from lawyers soliciting their business. *Id.*

13. *Florida Bar*, 115 S. Ct. at 2377. The survey found that 54% of the population surveyed felt that direct mail solicitation of accident victims was an invasion of privacy. *Id.* Of those Floridians surveyed who had actually received direct mail solicitations from lawyers: "45% believed that direct mail solicitation is designed to take advantage of gullible or unstable people; 34% found such tactics annoying or irritating; 26% found it an invasion of your privacy; and 24% reported that it made you angry." *Id.* (internal quotations omitted). Furthermore, 27% said "that their regard for the legal profession and for the judicial process as a whole was 'lower' as a result of receiving the direct mail." *Id.* (citation omitted).

14. *Id.* at 2374, 2377. The Bar also submitted several actual letters from citizens

7.8(a)¹⁶ created a complete ban on attorneys directly or indirectly soliciting accident victims with a potential personal injury or wrongful death claim.¹⁷ In 1990, the Florida Supreme Court adopted the Bar's rules affecting lawyer advertising with little variation.¹⁸ Based on United States Supreme Court decisions regarding complete bans on attorney advertising, the Florida Supreme Court tempered the Bar's proposal by placing a thirty-day restriction on direct mail solicitation of potential personal injury and wrongful death claimants.¹⁹ Relying on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²⁰ the court concluded that the nature of attorney advertising warranted reasonable time, place, and manner restrictions.²¹ Of course, the new regulations were not welcomed by all Florida lawyers.

In March 1992, Stewart McHenry and his lawyer referral service, Went For It, Inc., filed an action seeking declaratory and injunctive relief, claiming that Rules 4-7.4(b) and 4-7.8(a) violated a lawyer's First Amendment right to free speech.²² McHenry sought to continue his routine practice of sending letters to potential plaintiffs within thirty days of an accident.²³

complaining about direct mail tactics by lawyers. *Id.* at 2377-78.

15. FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.4(b)(1) (1990) states: A lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if (a) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, *unless the accident or disaster occurred more than thirty (30) days prior to the mailing of the communication.*

Id. (emphasis added because this portion was not included in the Bar's proposal).

16. FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.8(a) (1990) states: A lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

Id.

17. The Florida Bar: Petition to Amend Rules Regulating the Florida Bar-Advertising Issues, 571 So. 2d 451 (Fla. 1990).

18. *Id.* at 459-60.

19. *Id.* at 459 (citing *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) and *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)). See also Julie Gannon Shoop, *Florida Supreme Court Approves New Rules for Lawyer Advertising*, 27 TRIAL 20 (April 1991) (reporting several changes made by the Florida Supreme Court).

20. 425 U.S. 748 (1976).

21. *Petition to Amend Rules*, 571 So. 2d at 457-58.

22. *McHenry v. Florida Bar*, 808 F. Supp. 1543 (M.D. Fla. 1992), *rev'd*, 66 F.3d 270 (11th Cir. 1995). McHenry also challenged the new rules under the Fifth and Fourteenth Amendments to the Constitution. *Id.* at 1544-45.

23. Brief for Petitioner at 2, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (No. 94-226).

On September 24, 1992 the Florida Supreme Court disbarred McHenry for an unrelated matter,²⁴ and the case continued under the name of Went For It, Inc.²⁵ Both parties submitted motions for summary judgment, and the district court referred the case to Magistrate Judge Charles Wilson.²⁶ Judge Wilson concluded that the new rules did not violate a lawyer's constitutional rights because they were narrowly drafted. Therefore, he recommended the district court enter summary judgment in favor of the Florida Bar.²⁷ However, the district court abandoned the magistrate's recommendation and entered summary judgment in favor of Went For It.²⁸

On appeal, the United States Court of Appeals for the Eleventh Circuit begrudgingly affirmed the lower court's decision in favor of Went For It.²⁹ The United States Supreme Court granted certiorari³⁰ and reversed the Eleventh Circuit in a five-to-four decision, holding that Rules 4-7.4(b) and 4-7.8(a) satisfied the constitutional requirements of a state regulation of commercial speech.³¹

III. BACKGROUND OF COMMERCIAL SPEECH LAW

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech"³² Although the Constitution makes no express distinction, in 1942 the United States Supreme Court distinguished commercial advertising from other forms of speech.³³ The Court's

24. *Florida Bar v. McHenry*, 605 So. 2d 459 (Fla. 1992) (disbarring McHenry after finding him guilty of two counts of sexual misconduct in front of clients).

25. Petitioner's Brief at 5, *Florida Bar* (No. 94-226).

26. *McHenry*, 808 F. Supp. at 1544.

27. *Id.*

28. *Id.* at 1548. The court held that the thirty-day ban on direct mail solicitation of personal injury and wrongful death claimants violated a lawyer's rights to First Amendment freedom of speech, Fifth Amendment due process, and Fourteenth Amendment due process and equal protection. *Id.*

29. *McHenry v. Florida Bar*, 21 F.3d 1038 (11th Cir. 1994). The court stated, "We are disturbed that *Bates* and its progeny require the decision we reach today. We are forced to recognize there are members of our profession who would mail solicitation letters to persons in grief, and we find The Florida Bar's attempt to regulate such intrusions entirely understandable." *Id.* at 1045.

30. 115 S. Ct. 42 (1994).

31. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

32. U.S. CONST. amend. I. The First Amendment restriction is extended to the states by the Fourteenth Amendment, which states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" U.S. CONST. amend. XIV., § 1.

33. *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (upholding the constitutionality of a New York City ordinance which prohibited the distribution of advertising handbills on the street). Backed by no precedent, the *Valentine* Court found that the First Amendment

definition of commercial speech has changed over time, and it now generally involves speech that is entered into for the economic benefit of the speaker.³⁴

A. Constitutional Evaluation and Commercial Speech

When faced with a challenge to the constitutionality of a government regulation of speech, whether commercial or ordinary, a court examines the value of the questioned speech as it pertains to the advancement of our democratic ideals of self-government.³⁵ In order to properly consider such a challenge, the court must determine what level of scrutiny to apply.³⁶ Central to this decision is whether the regulation is content-neutral or content-based.³⁷ The distinction is important because it results in content-

did not extend to speech concerning commercial transactions and that the government could freely regulate this type of speech. *Id.* This distinction has come to be known as the "commercial speech" exception. *But see* *Schneider v. State*, 308 U.S. 147, 159 (1939) (making a passing reference to the concept of the "commercial speech" exception).

34. *See* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (defining commercial speech as an "expression related solely to the economic interests of the speaker and its audience"). *See also* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (defining commercial speech as that "which does 'no more than propose a commercial transaction'") (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1972)).

35. *See* Thomas W. Merrill, Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 225-26 (1976) (citing *Miller v. California*, 413 U.S. 15, 34-35 (1973)).

36. *Id.* at 225. Courts apply either strict, intermediate, or rational basis scrutiny. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 3.02[1] [a]-[b] (1994). For a regulation to survive strict scrutiny the government must have a compelling interest at stake, and the regulation must be "narrowly tailored" to serve that interest. *Id.* § 3.03[1][a]. Intermediate scrutiny lessens the burden on the government by requiring only a substantial government interest, and not requiring that the least restrictive means be used to protect this interest. *Id.* § 12.01[3][a]. Finally, under rational basis scrutiny, the government must only show it is conceivable that the regulation bears a rational relation to a legitimate end not prohibited by the Constitution. *Id.* § 3.02[1][b] (citing JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991)).

37. SMOLLA, *supra* note 36, § 3.02[1][a]-[b]. Content-neutral regulations limit speech without regard to the content of the speech and are typically evaluated under the intermediate level of scrutiny. SMOLLA, *supra* note 36, §§ 3.01[2][b][1], 3.02[1] [b]. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding a time, place, and manner regulation that prohibited citizens from making noise that disturbed peace and order on grounds adjacent to school buildings, regardless of the source of the noise). Content-based regulations, which are subject to strict scrutiny, seek to restrict the actual words and messages of speech. SMOLLA, *supra* note 36, § 3.01[2][b][1]. *See, e.g.*, *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 106 (1991) (invalidating New York's "Son of Sam" law which required accused or convicted criminals to deposit all income from commercial works describing their criminal act into a crime victims compensation fund because this law only

based regulations being overturned more frequently than content-neutral regulations.³⁸

The Supreme Court set forth the present standard for evaluating commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.³⁹ The Court applied the intermediate level of scrutiny to commercial speech.⁴⁰ Relying on the definition of commercial speech used in *Virginia Board*,⁴¹ the Court reasoned that common sense should be used to determine whether the speech at issue proposed a commercial transaction.⁴² In its analysis, the Court developed a four-prong test to determine the constitutionality of a government regulation of commercial speech.⁴³ First, the court must determine whether the regulated speech is false, misleading, or proposing an illegal activity, because the First Amendment never protects these categories of speech.⁴⁴ Second, the court must examine whether the government is protecting a substantial societal interest by its regulation of the commercial speech.⁴⁵ Third, the court must determine whether the restriction on commercial speech "directly advances the governmental interest asserted."⁴⁶ Fourth, the court must determine if the regulation is overbroad and encompasses too much speech.⁴⁷

addressed speech with specific content). Rational-basis scrutiny is generally used in modern equal protection cases. SMOLLA, *supra* note 36, § 12.01[3][b]. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (upholding a New York City traffic ordinance that restricted advertisements on the side of vehicles stating that "the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection").

38. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 134 (1981).

39. 447 U.S. 557 (1980).

40. *Central Hudson*, 447 U.S. at 562-63. See Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 791 n.57 (1993). See *supra* note 36 and accompanying text for a discussion of intermediate scrutiny criteria.

41. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). See *supra* note 34 for definition of commercial speech.

42. *Central Hudson*, 447 U.S. at 562. The "common sense" analysis has been relied upon in many of the Court's decisions following *Central Hudson*. See, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981).

43. *Central Hudson*, 447 U.S. at 564-66.

44. *Id.* at 564.

45. *Id.*

46. *Id.*

47. *Id.* at 566, 569-70. This standard requires a "reasonable fit" between the regulation and the asserted interest. See also *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The *Fox* Court held that simply because a regulation did not follow the "least restrictive means" method, it was not invalid, even if the state interest could be achieved with less speech being

Although the Supreme Court had finally established a test to evaluate regulations of commercial speech, confusion still remained as to how to apply the test and exactly what the prongs of the test meant.⁴⁸

B. Lawyer Advertising and the Commercial Speech Exception

In colonial America attorneys did not advertise, even though no professional associations prohibited the practice.⁴⁹ During that period, the public considered law an elite and honorable profession, and early American lawyers were continuing the traditions of the English lawyers under whom they trained.⁵⁰ But in the mid-to-late nineteenth century, the American political climate changed and the public began to distrust the legal profession. The organized bar lost its tight control on the legal profession, standards of the profession declined,⁵¹ and more and more lawyers began to advertise their services.⁵²

By the late nineteenth century, the legal profession had lost much of its dignity.⁵³ Organized bars began raising the standards for admission to the bar and passing ethical guidelines in an effort to regain the honor lost by the profession.⁵⁴ As part of this effort, the American Bar Association passed

burdened. *Id.* at 480.

48. See Frederick Shauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (1988) (proclaiming the irreconcilability of *Pasadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)). Although some questions may remain, the Court reaffirmed its reliance on *Central Hudson* during the 1994 term in both *Florida Bar* and *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (disallowing a ban on specifying alcohol content on beer labels).

49. See HENRY S. DRINKER, *LEGAL ETHICS* 210-12 (1953); see also LORI B. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING & SOLICITATION* 1 (1980). This idea traces its roots to ancient Greece and Rome. The Greeks and Romans prohibited lawyer solicitation for fear that it would lead to "vexatious suits or domination of society by the rich." *Id.*

50. See generally Paul H. Francis & Jennifer J. Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 WILLIAMETTE L. REV. 221 (1977). "Competition for clients was repugnant to this group [English lawyers] because it would render impossible the intimacy they had known and also reduce their professional calling to the status of a trade." *Id.* at 224. See also DRINKER, *supra* note 49, at 211 (explaining that American lawyers did not advertise and solicit clients even though they were not as "intimate a fraternity" as their English counterparts).

51. Francis & Johnson, *supra* note 50, at 224-25 (explaining that "educational as well as other standards for admission to the practice of law were minimal or nonexistent").

52. *Id.* See Roger Parloff, *Hard Sell*, AM. LAW., June 1995, at 62 (1995) (discussing early advertising, including a 1852 newspaper advertisement for Abraham Lincoln which read, "Lincoln & Lamon, ATTORNEYS AT LAW, . . . all business entrusted to them will be attended to with promptness and fidelity").

53. DRINKER, *supra* note 49, at 20.

54. DRINKER, *supra* note 49, at 20. Addressing lawyer advertising, Drinker wrote, "A

ethical guidelines in 1908 that, in part, completely banned all commercial advertising by lawyers.⁵⁵ American courts simply discounted lawyer advertising as unprotected commercial speech until the 1970s when the *Valentine* Court's decision began to erode.⁵⁶

Advertising within the legal profession began to change dramatically with the *Bates v. State Bar of Arizona* decision.⁵⁷ In *Bates*, two young attorneys, John R. Bates and Van O'Steen, sought to provide modestly priced legal services to people who made too much money to qualify for free legal aid, but who certainly did not have adequate income to pay normal attorney fees.⁵⁸ Because their targeted clientele was unlikely to have broad access to information about legal representation, Bates and O'Steen decided to advertise their services in the local newspaper,⁵⁹ in direct violation of Arizona's code of professional ethics.⁶⁰ In defense of his action, Bates argued that the Arizona rule violated his First Amendment right to free speech.⁶¹

lawyer who advertises, solicits or steals another's clients is regarded by his brethren at the bar as one with whom it is not pleasant to associate . . ." DRINKER, *supra* note 49, at 211 n.6.

55. CANONS OF PROFESSIONAL ETHICS Canon 28 (1908). See *supra* note 6 for text of Canon 28. See also Thier, *supra* note 6, at 532. "[T]he Canons' thrust was to prevent 'the shyster, the barratrously inclined, the ambulance chaser from reducing the profession to a mere money-grasping venture.'" Thier, *supra* note 6, at 532 (quoting A.B.A. COMM. ON CODE OF PROFESSIONAL ETHICS, *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 601 (1906)).

56. See *supra* note 33 for discussion of *Valentine* decision. See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (demonstrating the shift from the use of the term "advertising" to "commercial speech"); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756-57 (1993) (explaining the erosion of the *Valentine* decision and that the term "speech" suggests the possibility of First Amendment protection).

57. 433 U.S. 350 (1977). In *Bates*, the Court "dramatically liberalized the regulation of advertising by professionals." SMOLLA, *supra* note 36, § 12.03 [1][a][i]. Please note, however, that the Court carefully limited its decision by holding, "The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services." *Bates*, 433 U.S. at 384.

58. *Bates*, 433 U.S. at 354.

59. See *id.* The advertisement included the flat fee they charged for various basic legal services, including uncontested divorces, uncontested adoptions, and simple personal bankruptcies. *Id.*

60. The Bar contended that Bates violated Disciplinary Rule 2-101(B), incorporated in Rule 29(a) of the Supreme Court of Arizona, 17A ARIZ. REV. STAT., p.26 (Supp. 1976), which stated in relevant part, "A lawyer shall not publicize himself . . . through newspaper or magazine advertisements . . ." *Bates*, 433 U.S. at 355-56.

61. *Bates*, 433 U.S. at 356.

In an effort to justify the rule, the State argued that lawyer advertising had a negative effect on professionalism,⁶² a "misleading nature,"⁶³ an "adverse effect on the administration of justice,"⁶⁴ an "undesirable economic effect,"⁶⁵ and a detrimental effect on the quality of legal services.⁶⁶ The Court rejected these arguments,⁶⁷ and ruled that such a blanket ban on lawyer advertising, which had essentially been accepted since 1908, was overinclusive and violative of the First Amendment.⁶⁸ Following the *Bates* ruling, the American Bar Association revised its Model Code of Professional Responsibility, allowing only the simple advertising upheld by the *Bates* Court.⁶⁹

One year after *Bates*, the Court addressed in-person solicitation in *Ohralik v. Ohio State Bar Association*.⁷⁰ With *Ohralik* and its companion case, *In re Primus*,⁷¹ the Court began to define the constitutional limits of state regulation of attorney solicitation.⁷²

In *Ohralik*, the Court ruled that a state could prevent a lawyer from soliciting clients in-person for pecuniary gain when the solicitation posed a legitimate danger to the potential client.⁷³ *Ohralik*, an attorney, had obtained a representation contract in-person from an accident victim, while she lay in traction in the hospital.⁷⁴ After leaving the hospital, the victim fired *Ohralik* as counsel, and *Ohralik* sued her for breaching the representation

62. *Id.* at 368-72.

63. *Id.* at 372-75.

64. *Id.* at 375-77.

65. *Id.* at 377-78.

66. *Id.* at 378-79.

67. *Id.* at 379. *Bates* only addressed lawyer advertising of prices, and did not speak to in-person solicitation or advertisement of quality of legal services. *Id.* at 366-67.

68. *Id.* at 383.

69. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 2-101 (1977), reprinted in, *House of Delegates Adopts Advertising D.R. and Endorses a Package of Grand Jury Reforms*, 63 A.B.A. J. 1234, 1235-36 (1977) (permitting simple print media and radio advertising and later amended to include simple television advertising). See also Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1086 (1983). The A.B.A. hesitated to expand its rule any further than required, as evident by its rejection of a proposal to allow all "advertising that was not false, fraudulent, or misleading." *Id.* (citation omitted).

70. 436 U.S. 447 (1978).

71. 436 U.S. 412 (1978).

72. SMOLLA, *supra* note 36, § 12.03[1][ii].

73. *Ohralik*, 436 U.S. at 449, 459. This must be a danger the state has an interest in protecting. *Id.*

74. *Id.* at 449-50.

contract.⁷⁵ Responding to the victim's complaint,⁷⁶ the Grievance Committee of the local bar and the Ohio Supreme Court agreed that Ohralik's conduct violated Ohio's solicitation rules.⁷⁷

On appeal, the United States Supreme Court held that Ohio's rule did not violate Ohralik's First and Fourteenth Amendment rights.⁷⁸ It reasoned that while lawyer advertising deserved some protection, that protection must be tempered in light of the state's interest.⁷⁹ Interestingly, Justice Powell, writing for the majority, accepted as substantial the Ohio Bar's argument that lawyer advertising adversely affected the reputation of the legal profession.⁸⁰ The Court had expressly rejected this justification only one year earlier in *Bates*.⁸¹ The Court also agreed with the State's argument that in-person solicitation is more likely than other forms of advertising to pressure accident victims into making an immediate decision.⁸² Furthermore, the Court rejected Ohralik's argument that the State must prove actual harm to the client before sanctions can be imposed.⁸³ Through *Ohralik*, the Court further demonstrated how commercial speech receives less protection than other forms of speech.⁸⁴

The Court slightly tempered its *Ohralik* holding in *In re Primus*,⁸⁵ when it ruled that South Carolina had gone too far in regulating lawyer advertising.⁸⁶ The Court reversed a South Carolina ruling imposing a public reprimand on Edna Primus for violation of solicitation rules.⁸⁷ Primus wrote

75. *Id.* at 452. Ohralik had proof of the agreement because he had a hidden tape recorder during his visit to the hospital. *Id.* at 450. The young lady settled the suit by giving Ohralik one-third of her award, which the original contract required. *Id.* at 452.

76. *Id.* at 452.

77. Ohio State Bar Ass'n v. Ohralik, 357 N.E.2d 1097 (Ohio 1976), *aff'd*, 436 U.S. 447 (1978). The rules at issue prohibited a lawyer from accepting employment from a layman when the lawyer gave unsolicited advice recommending legal action unless that layman was a close friend, relative, former client of the same nature, or one who the lawyer reasonably believed was a client. OHIO CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rules 2-103(A) & 2-104(A) (1970).

78. *Ohralik*, 436 U.S. at 468.

79. *Id.* at 459.

80. *Id.* at 454-56, 460-61.

81. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977).

82. *Ohralik*, 436 U.S. at 457-58. In-person solicitation provided no time for intervention or education from the bar or others. *Id.*

83. *Id.* at 464. The Court stated that the rules prohibiting solicitation were prophylactic in nature and were there to prevent lawyers from engaging in conduct "likely to result in the adverse consequences the State seeks to avert." *Id.*

84. Clyde D. Stoltenberg & Douglas Whitman, *Direct Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381, 393 (1984).

85. 436 U.S. 412 (1978).

86. *Id.* at 439.

87. *In re Smith*, 233 S.E.2d 301 (S.C. 1977), *rev'd sub nom. In re Primus*, 436 U.S. 412 (1978). South Carolina Disciplinary Rules 2-103(D)(5)(a) and 2-104(A)(5) stated that a

a letter to an indigent woman explaining that the ACLU would provide free legal services if she wished to bring suit for the sterilization she underwent as a condition of receiving public medical assistance.⁸⁸ The Court distinguished this case from *Ohralik* and noted that Primus solicited his client by letter, not in-person.⁸⁹ Furthermore, the Court reasoned that Primus's actions were not taken in expectation of pecuniary gain; rather, they were taken as a form of political association and expression.⁹⁰

In 1982, the Court found it necessary to reemphasize the *Bates* Court's protection of attorney advertising in *In re R.M.J.*⁹¹ State bar associations had responded to *Bates* and its progeny by eliminating their complete bans and passing new ethical rules that allowed "minimal advertising."⁹² While the states were complying with the letter of the *Bates* Court ruling, they were not adhering to the spirit of the law.⁹³ After the Court's ruling in *Bates*, the state of Missouri passed a rule specifically limiting the content of lawyer advertising⁹⁴ and the ability of lawyers to mail announcements of changes of address, or like matters.⁹⁵ Charges were brought against R.M.J. before the Missouri Supreme Court claiming that he violated these ethical rules after he ran an advertisement stating, in capital letters, that he was admitted to practice before the United State Supreme Court, listing areas of practice not approved by the court, and not containing the appropriate disclaimer.⁹⁶

lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote use of his services. *Id.* at 304-05.

88. *Primus*, 436 U.S. at 416-17 & n.6.

89. *Id.* at 422.

90. *Id.* at 422. The Court found that the letter was sent "to express [Primus's] political beliefs" and held that the regulation must be drawn narrowly to prevent "any unnecessary abridgement of associational freedom." *Id.* at 422, 432-33.

91. 455 U.S. 191 (1982).

92. *Stoltenberg & Whitman*, *supra* note 84, at 381-82.

93. *Stoltenberg & Whitman*, *supra* note 84, at 381-82. "[S]ome rules so restrict[ed] effective advertising that attorneys might find it economically unfeasible to advertise, thus depriving the public of any information whatsoever." *Stoltenberg & Whitman*, *supra* note 84, at 381-82 n.5 (citation omitted).

94. *Id.* at 193-96. MO. REV. STAT., Sup. Ct. Rule 4, Disciplinary Rule 2-101(B) (1978) (Index Vol.), provided that a lawyer could only list the following information in a newspaper, periodical, or Yellow Pages advertisement: name, address, telephone number, areas of practice, date and place of birth, schools attended, foreign languages spoken, office hours, fee for an initial consultation, availability of a schedule of fees, credit arrangements, and the fixed fee to be charged for routine services. *In re R.M.J.*, 455 U.S. at 194. Furthermore, the Rule enumerated limited areas of specialty that could be included in the advertisement. *Id.* at 194-95. In addition, any use of an area of specialty must be followed by a disclaimer stating that the lawyer "does not indicate any certification of expertise" in that area of the law. *Id.* at 195-96 n.4 (quoting Rule 4, Addendum III (Adv. Comm., Nov., 13, 1977)).

95. *Id.* at 196.

96. *Id.* at 197-98 (citing *Matter of R.M.J.*, 609 S.W.2d 411 (Mo. 1980), *rev'd*, 455 U.S.

On appeal, a unanimous Supreme Court accepted R.M.J.'s argument that the rules violated the First and Fourteenth Amendments and further expanded its protection of lawyer advertising.⁹⁷ The Court ruled that, while states may prohibit all misleading advertising, they may not put a blanket ban on all *potentially* misleading advertisements.⁹⁸ In reaching this conclusion, the Court found that the State failed to assert any substantial interests protected by the regulation.⁹⁹ Writing for the Court, Justice Powell acknowledged that certain limitations, short of a complete ban, could be appropriate.¹⁰⁰

The Court continued to dismantle the traditional ban on attorney advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*.¹⁰¹ Zauderer's law firm ran an advertisement in Ohio newspapers stating that the Dalkon Shield Intrauterine Device (IUD) apparently had caused numerous health complications in women.¹⁰² The advertisement stated that Zauderer's law firm was willing to represent women who suffered injuries from the Dalkon IUD.¹⁰³ The Court rejected the State's argument that this advertisement posed the same kind of risk as the in-person advertising in *Ohralik*.¹⁰⁴ The Court held unequivocally that a state could not discipline a lawyer for "soliciting legal business through printed advertising containing truthful and nondeceptive information."¹⁰⁵ Returning to its position in *Bates*,¹⁰⁶ the Court rejected the State's argument that a ban

191 (1982)). The charges also alleged R.M.J. sent this advertisement to unsanctioned members of the public. *Id.* Faced with R.M.J.'s challenge, the Missouri Supreme Court held that the rule was constitutional and that R.M.J. did violate it. *R.M.J.*, 609 S.W.2d at 412.

97. *In re R.M.J.*, 455 U.S. at 206-07.

98. *Id.* at 203. "Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *Id.*

99. *Id.* at 207.

100. *Id.* at 206. Powell reasoned that a rule could limit the type size, require an explanation of United States Supreme Court admission, or require that an attorney send any advertisement or written communication to the state bar to be kept on file, similar to Rule 7.2(b) of the proposed Model Rules of Professional Conduct of the American Bar Association. *Id.* at 206 & n.19.

101. 471 U.S. 626 (1985). For a thorough discussion of *Zauderer*, see Horace E. Johns, *How the Zauderer Decision Impacted Case-Specific Solicitation in Lawyer Advertising*, 26 COMP. JURID. REV. 107 (1989).

102. *Zauderer*, 471 U.S. at 631.

103. *Id.* This representation would be based on a contingency fee. *Id.*

104. *Id.* at 642.

105. *Id.* at 647.

106. See *supra* notes 57-67 and accompanying text for a discussion of the *Bates* Court's decision.

on attorney advertising is needed to maintain the dignity of the legal profession.¹⁰⁷

Nonetheless, the Court did uphold a portion of the challenged regulations. The Court concluded that Ohio's regulation requiring disclosure of fees, costs, and potential liability for litigation costs, did not unnecessarily burden or restrict lawyers.¹⁰⁸ Thus, the Court failed to give the State a broad brush but also held that the State did not have to follow the "least restrictive means" in implementing its rule.¹⁰⁹

In *Shapero v. Kentucky Bar Ass'n*,¹¹⁰ the Court struck down a state regulation on targeted, direct mail advertising by attorneys.¹¹¹ The Court held that the state did not have a substantial interest in preventing direct mail solicitation of clients, because a recipient could be free of any potential harassment by simply throwing the letter in the trash.¹¹² Shapero drafted a letter to send to people named in pending foreclosure actions and sent a copy of the proposed letter to the State's Attorney Advertising Commission for approval.¹¹³ The letter stated that if the recipients would contact Shapero's office he might be able to stop their creditors' actions and allow them to keep their homes.¹¹⁴ The Commission declined approval,¹¹⁵ and

107. *Zauderer*, 471 U.S. at 641, 647-48. "[W]e are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights." *Id.* at 648.

108. *Id.* at 653 n.15. *Zauderer's* advertisement stated, "If there is no recovery, no legal fees are owed by our clients." *Id.* at 631. While it is true that no *legal fees* would be owed, the Court found that the potential for deception existed because many readers would not know the difference between legal "fees" and litigation "costs." *Id.* at 652-53.

109. *Id.* at 651 & n.14.

110. 486 U.S. 466 (1988).

111. *Shapero*, 486 U.S. at 470. A.B.A. Model Rule of Professional Conduct 7.3 (1984), as used by Kentucky, stated, "A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain" *Shapero*, 486 U.S. at 470-71 (citing 726 S.W.2d 299, 301 (Ky. 1987)). The Court ruled that such a "blanket prohibition" violated the First Amendment. *Id.* at 471. The Court dismissed the idea that this case was "*Ohralik* in writing" by stating, "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Id.* at 475 (emphasis added).

112. *Id.* at 475-76, 479. The Court stated, "[S]o long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient." *Id.* at 479.

113. *Id.* at 469.

114. *Id.*

115. *Id.* The Commission found the letter truthful, but still in conflict with the rules. *Id.* at 469, 473.

Shapero appealed the constitutionality of the ethical rule on which the Commission's decision rested to the United States Supreme Court.¹¹⁶

On appeal, the State argued that under *Ohralik v. Ohio State Bar Ass'n*¹¹⁷ it could completely ban all advertising it felt would unreasonably influence recipients.¹¹⁸ The Court did not agree, however, and found that written solicitations did not present the same dangers as the in-person solicitations at issue in *Ohralik*.¹¹⁹ The Court reasoned that it is much easier for a recipient of a letter, or any printed advertisement, to avoid the harassment and invasion of privacy often associated with in-person solicitation.¹²⁰ Even though the Court acknowledged that targeted direct mail solicitation could have some ill effects,¹²¹ it held that measures were available short of a complete ban to police this practice.¹²² Following *Shapero*, states' efforts to curb client solicitation by lawyers have focused on imposing waiting periods instead of complete bans.¹²³

Two years later, in *Peel v. Attorney Registration & Disciplinary Commission*,¹²⁴ the Court struck down yet another attempt to limit client solicitation.¹²⁵ The Illinois statute in question prohibited lawyers from including any "certified" specialties on their letterhead.¹²⁶ In his letterhead,

116. *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299 (Ky. 1987), *cert. granted*, 484 U.S. 814 (1987).

117. 436 U.S. 447 (1983). See *supra* notes 70-84 and accompanying text for a discussion of *Ohralik*.

118. *Shapero*, 486 U.S. at 474-75.

119. *Id.* at 475. The Court stated that there were two factors in *Ohralik* that distinguish in-person and direct mail solicitation. First, in-person solicitation is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud," and second it could not be effectively regulated "short of an absolute ban" as the practices of attorneys were "not visible or otherwise open to public scrutiny." *Id.* (quoting *Ohralik*, 436 U.S. at 457-58, 464-66).

120. *Id.* at 475-76. "A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.*

121. *Id.* at 476. These problems include: (1) the recipient overestimating the lawyer's familiarity with the case, (2) the recipient believing the legal problem is more dire than it really is, and (3) erroneous legal advice provided in letters. *Id.*

122. *Id.* The Court suggested that states set up evaluation committees to monitor lawyer mailings and only punish those who actually violate their right to advertise. *Id.*

123. Joanne Pitulla, *The Ethics of Common Decency*, 80 A.B.A. J., August 1994, at 96 (1994). Nevada, New Mexico, Iowa, Georgia, Mississippi, and Arkansas have either passed or currently are considering regulations imposing waiting periods or outright bans on targeted direct mail solicitation of accident victims or their families. *Id.*

124. 496 U.S. 91 (1990).

125. *Id.* at 111.

126. *Id.* at 97. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY Rule 2-105(a)(3) provides: "Except as set forth in Rule 2-105(a) [exceptions made for patent, trademark, and admiralty lawyers], no lawyer may hold himself out as 'certified' or a 'specialist.'" *Peel*, 496 U.S. at 97 & n.8.

Peel truthfully stated that he was a "Certified Civil Trial Specialist."¹²⁷ The Administrator of the Attorney Registration and Disciplinary Commission of Illinois argued that the terms "certified" and "specialist" suggested to a recipient that Peel was more qualified than other lawyers in trial work.¹²⁸ Contending that the general public cannot distinguish between a legitimate legal association and a "fly-by-night" organization, the Commission wanted all such claims ruled misleading.¹²⁹ Justice Stevens, writing for the majority, rejected the assumption that the public was gullible or naive enough for Peel's letterhead to be deceptive.¹³⁰ The Court did not rule that states cannot prohibit lawyers from advertising the quality of their services; rather, it held that a claim of certification is "verifiable" and not a proclamation of quality.¹³¹

Thus, lawyer advertising through print and electronic media has acquired more and more protection over the past two decades. Nevertheless, as the Court entered 1995, several of the former proponents of lawyer advertising no longer remained on the Court.¹³² Accordingly, the reasoning of *Florida Bar* differed.

127. *Peel*, 496 U.S. at 96. The National Board of Trial Advocacy (NBTA) listed Peel in its 1985 Directory of "Certified Specialists and Board Members." *Id.*

128. *Id.* at 97.

129. *Id.* at 109-10.

130. *Id.* at 104-05. The Court stated:

[I]t seems unlikely that petitioner's statement about his certification as a specialist by an identified national organization necessarily would be confused with formal state recognition [O]ne can readily think of numerous other claims of specialty from air conditioning specialist . . . to foreign car specialist . . . that cast doubt on the notion that the public would automatically mistake a claim of specialization for a claim of formal recognition by the State.

Id. at 104-05 (citation and internal quotations omitted).

131. *Id.* at 101. Just because a "consumer may or may not draw an inference of the likely quality of an attorney's work" by a claim of certification does not provide sufficient grounds for a prophylactic ban. *Id.*

132. Justices Blackmun, Brennan, and Marshall all joined the majority in *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977), and consistently voted to expand First Amendment protection of lawyer advertising. See *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (all three joined the majority with Marshall concurring); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (Brennan wrote the majority opinion, and Marshall and Blackmun joined); *Zauderer v. Office of Disciplinary Counsel for the Supreme Court of Ohio*, 471 U.S. 626 (1985) (all three joined in the portion of the majority opinion which extended First Amendment protection); *In re R.M.J.*, 455 U.S. 191 (1982) (all three joined the majority); *In re Primus*, 436 U.S. 412 (1978) (Blackmun and Marshall concurred separately, with Brennan taking no part).

IV. REASONING OF THE COURT

In *Florida Bar*, the Court upheld, under a *Central Hudson*¹³³ analysis, Florida Supreme Court's rules of professional conduct barring lawyers from inundating accident victims and their families with direct mail solicitations within thirty-days of an accident.¹³⁴ Through its reliance on the study submitted by the Florida Bar, the Court demonstrated how important actual research and data is to a state's regulation of lawyer advertising.¹³⁵ The Court continued to acknowledge that commercial speech receives less First Amendment protection than other forms of speech as it applied an intermediate level of scrutiny.¹³⁶ Justice O'Connor, who consistently dissented in previous lawyer advertising cases,¹³⁷ wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and Breyer.¹³⁸

In its application of *Central Hudson*,¹³⁹ the Court continued to hold that the government could indiscriminately regulate false or misleading commercial speech.¹⁴⁰ Having no difficulty finding that the speech in question was not unlawful or misleading, the Court quickly moved on to the remaining three prongs of the *Central Hudson* test.¹⁴¹ The majority found that the Florida Bar was, in fact, protecting a substantial state interest in its regulation of direct mail solicitation by lawyers.¹⁴² Second, the Court found that the thirty-day ban "directly and materially" affected the interest the Bar sought to protect.¹⁴³ Completing its analysis, the Court found that the

133. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

134. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

135. *Id.* at 2378, 2381. See H. Ritchey Hollenbaugh, *From the Chair*, LAWYER ADVERTISING NEWS (A.B.A. Comm. on Advertising), August 1995, at 1. See also Gary Blankenship, *Panel to Take Fresh Look at Ad Rules*, THE FLORIDA BAR NEWS, July 15, 1995, at 1. "It [the *Florida Bar* decision] tells us we must have a study and the rules have to be consistent with the results of that study." *Id.* (quoting John DeVault, Florida Bar president).

136. *Florida Bar*, 115 S. Ct. at 2375.

137. *Id.* at 2371. Justice O'Connor had led a vocal minority of the Court arguing that lawyer advertising harmed the professionalism and dignity of the legal field. See Thier, *supra* note 6, at 544; see also *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 490 (1988) (O'Connor, J., dissenting); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 678 (1985) (O'Connor, J., dissenting).

138. *Florida Bar*, 115 S. Ct. at 2371.

139. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). See also *supra* notes 43-47 and accompanying text for discussion of test.

140. *Florida Bar*, 115 S. Ct. at 2376. See P. Cameron DeVore, *Commercial Speech Redux in the 1994 Term*, COMMUNICATIONS LAWYER, Fall 1995, at 12.

141. *Florida Bar*, 115 S. Ct. at 2376.

142. *Id.* at 2376.

143. *Id.* at 2376, 2378.

restriction only banned that speech necessary to protect the state's interest.¹⁴⁴

With regard to the second prong of the *Central Hudson* test, the Florida Bar asserted that there were two state interests at hand, one being the reputation of the legal profession and judicial system,¹⁴⁵ and the other being the privacy interest of accident victims.¹⁴⁶ The Court agreed with the Florida Bar on both assertions, holding that a state often has a direct interest in both regulating the professions within its borders and protecting its citizens' privacy and safety.¹⁴⁷

The Court proceeded to consider whether the regulations directly and materially advanced the government's interest.¹⁴⁸ In the majority's evaluation, it considered *Edenfield v. Fane*¹⁴⁹ in which the Court struck down a Florida regulation prohibiting in-person solicitations by accountants, in part, because the Board of Accountancy, who advocated the regulation, failed to present research and facts showing actual harm to Floridians.¹⁵⁰ Proclaiming the thoroughness of the Florida Bar study, the Court held that the Florida Bar did not have the same problem as the Board of Accountancy because the bar submitted a one-hundred-six page study surveying how direct mail solicitation by lawyers following an accident actually harmed Floridians.¹⁵¹ Justice O'Connor emphasized that, in the past, the Court had

144. *Id.* at 2380-81.

145. *Id.* at 2376. But see *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), when the Court ruled that the state may not prohibit citizens from hearing truthful advertising simply to maintain the professional standards among pharmacists. *Id.* at 773. Regarding other professions, the Court stated; "Physicians and lawyers . . . do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.* at 773 n.25.

146. *Florida Bar*, 115 S. Ct. at 2376.

147. *Id.* at 2376. "States have a compelling interest in the practice of professions within their boundaries, and . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* (quoting *Goldfarb v. Virginia Bar*, 421 U.S. 773, 792 (1975)). "Our precedents also leave no room for doubt that the 'protection of potential clients' privacy is a substantial state interest." *Id.* (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993)).

148. *Id.* at 2377.

149. 113 S. Ct. 1792 (1993).

150. *Florida Bar*, 115 S. Ct. at 2377. See *Edenfield*, 113 S. Ct. at 1795 (asserting that in-person solicitation by CPAs created the dangers of fraud, overreaching, and independence compromising). See also Hollenbaugh, *supra* note 135, at 1 ("It is clear, then, that research has become a paramount element of the formula necessary to create constitutionally permissible limits on lawyer advertising.").

151. *Florida Bar*, 115 S. Ct. at 2377. "[W]e are satisfied that the ban on direct mail solicitation in the immediate aftermath of accidents, unlike the rule at issue in *Edenfield*, targets a concrete, nonspeculative harm." *Id.* at 2378. See *supra* note 13 and accompanying text for discussion of the study results.

permitted litigants to justify speech restrictions by introducing studies which covered locations unrelated to the case being considered.¹⁵²

In reaching its decision, the Court rejected the Eleventh Circuit's application of *Shapero v. Kentucky Bar Ass'n*.¹⁵³ The majority pointed out that in *Shapero* the State argued that targeted solicitation by attorneys constituted overreaching but failed to make a citizens' privacy interest argument.¹⁵⁴ To further distinguish *Shapero*, the Court noted that the advertising restriction in *Shapero* was a complete ban while the one in *Florida Bar* involved only a waiting period.¹⁵⁵ Finally, and perhaps most importantly, in *Shapero*, the State presented no data proving "actual harm" to its citizens.¹⁵⁶

The Court also failed to find its decision in *Bolger v. Youngs Drug Products Corp.*¹⁵⁷ controlling.¹⁵⁸ The *Bolger* Court had ruled that the inconvenience placed upon recipients of direct mail advertising simply did not rise to a level sufficient to justify a restriction on commercial speech.¹⁵⁹ The majority distinguished *Bolger* from *Florida Bar*, in that the outrage caused by a lawyer's direct mail solicitation of accident victims could not be remedied by the short trip to a trash can to discard such letters.¹⁶⁰ Given the conclusions of the uncontested study¹⁶¹ and the differences between the

152. *Florida Bar*, 115 S. Ct. at 2378. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986) (allowing the City of Renton to rely on a study conducted in Seattle, Washington when upholding a Renton city ordinance restricting adult film theaters). See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991) (upholding an Indiana regulation without the state presenting localized proof that its public indecency law actually prevented crime within that community).

153. 486 U.S. 466 (1988). For a discussion of *Shapero*, see *supra* notes 110-23 and accompanying text.

154. *Florida Bar*, 115 S. Ct. at 2378-79. The privacy interest at stake is not whether the attorney knows that an accident has taken place, but rather the fact that the attorney is soliciting business during the time of personal grief. *Id.* at 2379.

155. *Id.* *Shapero's* complete bar only pertained to direct mail solicitation. *Id.*

156. *Id.* at 2378.

157. 463 U.S. 60 (1983) (holding that the government could not ban potentially "offensive" and "intrusive" direct mail advertisements for contraceptives).

158. *Florida Bar*, 115 S. Ct. at 2379.

159. *Bolger*, 463 U.S. at 72. The *Bolger* Court reasoned that the "recipients of objectionable mailings [contraceptive advertisements] may 'effectively avoid bombardment of their sensibilities simply by averting their eyes.'" *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). Furthermore, the "'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.'" *Id.* (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967), *summarily aff'd*, 386 F.2d 449 (2d Cir. 1967)).

160. *Florida Bar*, 115 S. Ct. at 2379 ("The Bar is concerned not with citizens' 'offense' in the abstract . . . but with the demonstrable detrimental effects that such 'offense' has on the profession it regulates.").

161. Even though *Went For It*, failed to challenge the validity of the study, Justice

cases cited by the dissent,¹⁶² the majority held that the Florida Bar proved that an actual harm existed and, therefore, satisfied this prong of the *Central Hudson* test.¹⁶³

Next, the Court determined whether the means chosen by the Bar sufficiently addressed this harm.¹⁶⁴ Following the holding in *Board of Trustees v. Fox*,¹⁶⁵ the Court found that the State did not have to use the least restrictive means to accomplish its goal, but instead, the means need only be reasonable.¹⁶⁶ The Court rejected Went For It's arguments that the regulation kept legal advice from those with the greatest need¹⁶⁷ and that it was overinclusive,¹⁶⁸ noting that it would be very difficult to draft a rule based on the severity of the accident.¹⁶⁹

The Court instead stressed that the ban is only in place for thirty days, and it left many other methods through which Floridians can learn of the legal services available.¹⁷⁰ Furthermore, the Court recognized that Went For It failed to present any evidence of a Floridian not receiving legal counsel due to this regulation.¹⁷¹ This shortcoming, coupled with the numerous

Kennedy did so in dissent. *Florida Bar*, 115 S. Ct. at 2384 (Kennedy, J., dissenting). He wrote, "This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information" *Id.* (Kennedy, J., dissenting). Furthermore, Kennedy pointed out that only two pages of the study summarized actual survey results dealing with direct mail solicitation. *Id.* (Kennedy, J., dissenting).

162. See *infra* note 183 and accompanying text.

163. *Florida Bar*, 115 S. Ct. at 2378.

164. *Id.* at 2380.

165. 492 U.S. 469 (1989); see *supra* note 47 for discussion of appropriate means.

166. *Florida Bar*, 115 S. Ct. at 2380.

167. *Id.* at 2381. Went For It argued that accident victims want and need a lawyer's advice during this thirty-day period when defense attorneys and insurance adjusters are free to contact them to collect information and offer settlements. Respondent's Brief at 3, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (No. 94-226). In dissent, Justice Kennedy agreed and argued that the ban was harmful in all situations because prompt legal service is essential following a serious accident, and victims of small accidents might receive no compensation because they felt no lawyer would be interested in their claims. *Florida Bar*, 115 S. Ct. at 2385 (Kennedy, J., dissenting).

168. *Florida Bar*, 115 S. Ct. at 2380. Went For It argued that the ban was too broad because it did not differentiate between accident victims suffering great grief from a major accident and those with minor grief from a relatively small accident. *Id.*

169. *Id.* at 2380. In the dissent, Justice Kennedy pointed out the criminal justice system routinely makes such distinctions, as with the degree of bodily harm. *Id.* at 2385 (Kennedy, J., dissenting).

170. *Id.* at 2380-81 (majority opinion). Some of the methods available are prime-time television, radio, billboards, newspapers, Yellow Pages, and untargeted letters sent to the general population. *Id.*

171. *Id.* at 2381.

alternatives available, led the Court to find that the Florida Bar regulation satisfied the final prong of the *Central Hudson* test.¹⁷²

In finding the thirty-day ban constitutional, the Court reaffirmed that pure commercial speech receives a lesser degree of First Amendment protection than other forms of speech.¹⁷³ The Court ruled that attorneys have traditionally been subject to many state bar regulations, therefore, when advertising as attorneys, they should not expect as much First Amendment freedom as they would receive if speaking under different circumstances.¹⁷⁴ Of course, four justices did not agree with the majority's conclusion and chose to join in a dissent.¹⁷⁵

The foundation for Justice Kennedy's dissent lies in the fact that the Court chose to protect lawyer advertising in 1977,¹⁷⁶ and the majority's decision jeopardizes legal services to those with the greatest need for them.¹⁷⁷ Kennedy maintained that the financial interests of accident victims were at stake in this case as well as the financial interests of the lawyers sending the direct mail solicitations.¹⁷⁸ Kennedy asserted that *Shapero v. Kentucky Bar Ass'n*¹⁷⁹ should control because the burden to citizens is the same in both instances.¹⁸⁰ He argued that instead of focusing on the current emotional state of recipients of lawyer advertising, which the *Shapero* Court ruled irrelevant, the majority should have focused on the actions taken by the Florida lawyers.¹⁸¹ Kennedy claimed that the majority only tried to protect Floridians from speech they may find offensive,¹⁸² which was an inadequate concern according to the Court's previous holdings.¹⁸³

172. *Id.*

173. *Id.*; see, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that purely commercial, or for-profit, speech was entitled to *some* First Amendment protection on its own merits).

174. *Florida Bar*, 115 S. Ct. at 2381. "[I]t is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the 'subordinate position' of commercial speech in the scale of First Amendment values." *Id.* (citation omitted).

175. *Florida Bar*, 115 S. Ct. at 2381 (Kennedy, J., dissenting). Justice Kennedy was joined by Justices Stevens, Souter, and Ginsburg.

176. *Id.* (Kennedy, J., dissenting). This constitutional protection originated in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

177. *Florida Bar*, 115 S. Ct. at 2381 (Kennedy, J., dissenting).

178. *Id.* at 2382 (Kennedy, J., dissenting) (reasoning further restriction of commercial speech might result in a lack of knowledge causing unfair compensation to injured persons).

179. 486 U.S. 466 (1988).

180. *Florida Bar*, 115 S. Ct. at 2382 (Kennedy, J., dissenting). See *supra* note 119 for the *Shapero* Court's reasoning.

181. *Florida Bar*, 115 S. Ct. at 2382 (Kennedy, J., dissenting) (stressing the significance of the fact that the solicitation in question came through the mail).

182. *Id.* at 2382-83 (Kennedy, J., dissenting).

183. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648 (1985) ("[T]he mere possibility that some members of the population might find

Furthermore, Kennedy argued that a thirty-day ban on commercial speech was not the proper way for the Bar to protect the reputation of lawyers and concluded that the ban was simply a form of censorship.¹⁸⁴ Through this censorship, Kennedy wrote, the majority did a great injustice to the field of commercial speech¹⁸⁵ and, in fact, actually harmed the reputation of the legal profession through its actions as a censor.¹⁸⁶

V. SIGNIFICANCE

In *Florida Bar*, the Supreme Court seemed to speak for that segment of the legal community who believes that lawyer advertising only harms the legal profession.¹⁸⁷ Although the Court's decision is fairly limited,¹⁸⁸ it is a step toward allowing states more authority to police advertising by the

advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) ("[W]e have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) (holding that advertisements that citizens find embarrassing or offensive "are classically not justifications validating the suppression of expression protected by the First Amendment").

184. *Florida Bar*, 115 S. Ct. at 2383 (Kennedy, J., dissenting) ("[T]he State is doing nothing more than manipulating the public's opinion by suppressing speech that informs us how the legal system works. . . . This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.").

185. *Id.* at 2386 (Kennedy, J., dissenting) ("It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism.").

186. *Id.* Justice Kennedy stated,

If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor By validating Florida's rule, today's majority is complicit in the Bar's censorship.

Id.

187. Chief Justice Warren Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949 (1995). Chief Justice Burger illustrated this sentiment by stating: "The law is not and never has been a 'business.' But we are well on the way to making it less than a profession. . . . I see disturbing evidence that there has been a broad decline in professionalism over the past twenty to twenty-five years" *Id.* at 949.

188. See DeVore, *supra* note 140, at 12. One commentator believes that Justice Breyer's surprising vote with the majority had a "powerful chastening effect on the majority opinion." According to this commentator, Breyer apparently forced O'Connor to distinguish *Shapero* and place great significance on the short-term character of the ban. DeVore, *supra* note 140, at 13.

legal profession.¹⁸⁹ There is little doubt that some members of the legal profession will welcome such a movement.¹⁹⁰

With several states sure to follow the Florida Bar's lead, one must consider whether the results of the Florida Bar's survey can be transferred from Florida to other parts of the nation. The Court has allowed such imputation in *Renton v. Playtime Theatres, Inc.*¹⁹¹ and *Barnes v. Glen Theatres, Inc.*¹⁹² In the earlier case, the City of Renton defended its anti-adult theater ordinance by relying on a study conducted in the nearby city of Seattle, Washington.¹⁹³ The Court allowed Renton to rely on the study, holding that the First Amendment does not mandate that a city conduct an independent study.¹⁹⁴ The Court relied upon the same rationale in *Barnes* to uphold the State of Indiana's anti-nude dancing statute.¹⁹⁵ Based on this reasoning, Arkansas, or any other state, could argue that the study conducted by the Florida Bar is not location specific and should be imputed to voice the opinions of citizens across the nation.

With the Court's restriction on targeted direct mail solicitation, it seems logical that lawyers, who chose to advertise in this manner, will increase their efforts on other forms of advertising.¹⁹⁶ The question then arises as to

189. Reuben, *supra* note 4, at 20. "While most experts agree the Court's ruling was fairly narrow—perhaps limited to the 30-day 'cooling off' period at issue—some say it could still open the door for more such regulations." Reuben, *supra* note 4, at 20.

190. Burger, *supra* note 187, at 950. "Within our profession we now condone advertising and solicitation of clients, activities that were formally unethical and unprofessional. . . . One wonders whether we will continue to move away from our established traditions and canons of professional ethics." Burger, *supra* note 187, at 950 (quoting John J. Yanas, *The President's Message*, N.Y. St. B. J., May 1990, at 3).

191. 475 U.S. 41 (1986).

192. 501 U.S. 560 (1991).

193. *Renton*, 475 U.S. at 51 ("We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema* opinion . . ."). In *Northend Cinema* the facts stated that the Seattle City Council heard a report from the Department of Community Development finding that adult theaters led to the "attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children." *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153, 1155 (Wash. 1978). This decision lacks any empirical data to substantiate these claims, whereas the Florida Bar study presented such data. See *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2377 (1995); see *supra* note 13 for findings of the study.

194. *Renton*, 475 U.S. at 51. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52.

195. *Barnes*, 501 U.S. at 584 (Souter, J., concurring) (allowing Indiana also to impute the results of the study conducted in Seattle).

196. See Blankenship, *supra* note 135, at 6. Bruce Rogow, who represented Went For It, Inc., along with Beverly Pohl, claims that lawyers will increase other forms of advertising

whether the Court's decision only applies to targeted direct mail or whether it can be transferred to allow restrictions on other areas of lawyer advertising.¹⁹⁷

As stated above,¹⁹⁸ other states have been awaiting the outcome of *Florida Bar* to impose their own thirty-day ban or similar measures.¹⁹⁹ On March 3, 1993, the Arkansas Bar Association and its Professional Ethics and Grievances Committee petitioned the Arkansas Supreme Court to revise its Rules of Professional Conduct to include a thirty-day ban on direct mail solicitation of accident victims and their families.²⁰⁰ The court held the petition in abeyance pending the outcome of *Florida Bar*.²⁰¹

Following the *Florida Bar* Court's decision, the Arkansas Bar decided to withdraw its petition in order to gather empirical data through a study.²⁰² The Arkansas Bar Association commissioned Miller Research Group to conduct a public opinion survey in March 1996.²⁰³ If rule changes are found to be necessary, the Arkansas Bar is more concerned with protecting the privacy interest of Arkansans than with enhancing the reputation of lawyers.²⁰⁴

Although questions still remain as to how far state bars will be allowed to go in limiting lawyers' speech, there is no doubt that the Court has specified a starting point.²⁰⁵ The Court also affirmed, for the first time,

such as billboards, radio, and television. Blankenship, *supra* note 135, at 6.

197. See Blankenship, *supra* note 135, at 6 (quoting Barry Richard, who argued the Florida Bar's case before the Supreme Court) ("I think the thirty-day rule could be added to other areas of advertising without any new proof."). See also Marcia Coyle, *Ad Decision Could Spur a Rollback*, NAT'L L.J., July 3, 1995, at A1 (speculating that the Court's decision could not only lead to more thirty-day bans, but also to regulation of jingles and slogans, Yellow Pages advertisements, and billboards).

198. See *supra* note 123 and accompanying text.

199. *The Florida Bar Case Stimulates State Action*, LAW. ADVERTISING NEWS (A.B.A. Comm. on Advertising), Aug. 1995, at 1. These states include Alabama, Colorado, New York, Michigan, Illinois, and New Hampshire. *Id.*

200. Lucinda McDaniel, *Saving Ourselves: How will Arkansas Lawyers Respond to the Advertising Ban Upheld in Florida Bar v. Went For It, Inc.*, ARK. LAW., Summer 1995, at 30, 32.

201. *Id.*

202. Interview with William A. Martin, Executive Director, Arkansas Bar Association, in Little Rock, Ark. (Oct. 30, 1995). Mr. Martin stated that the Arkansas Bar needed to conduct its own study as "Arkansans have not been subjected to the excesses [in lawyer advertising] other states have, so there may not be as much public disgust as other states." *Id.*

203. William A. Martin, *Another Revisit to Lawyer Advertising, prepared for Arkansas Bar Ass'n & Arkansas Judicial Council Joint Meeting*, June 14, 1996. "No amount of logic on the part of lawyers, courts or legislatures will substitute for a soundly conducted study to establish the effect of advertising by lawyers on the public." *Id.*

204. *Id.*

205. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2381 (1995) (referring to the

"protection of the legal profession's reputation" as a substantial state interest to justify a state's regulation.²⁰⁶ As states begin to test the limits of the *Florida Bar* decision, it will be interesting to see exactly how much control the Court is willing to allow state bar associations in their efforts to curb lawyer advertising, while it also keeps a watchful eye on the First Amendment.

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thirty-day ban). See also *Van Bergen v. Minnesota*, 59 F.3d 1541, 1546 (8th Cir. 1995) (applying *Florida Bar* and reaffirming that the *Central Hudson* test is to apply to restrictions on commercial speech).

206. *Florida Bar*, 115 S. Ct. at 2376. See *The Florida Bar Case Stimulates State Action*, *supra* note 199, at 1. If interpreted broadly the language could allow sweeping regulations of lawyer advertising. See *In re Lassen*, 672 A.2d 988, 998 (De. 1996) (citing *Florida Bar*, 115 S. Ct. at 2380) (stating, "[T]he public's perception of the legal profession and its ability to regulate itself is essential to the proper functioning of the Bar as a whole.").