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Lawyer Advertising and Solicitation - Justifying Restrictions on Lawyers' Speech - Florida Bar v. Went for It, Inc.

Mary R. Eikenberry

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LAWYER ADVERTISING AND SOLICITATION—Justifying Restrictions on Lawyers' Speech. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

Ten years after the United States Supreme Court first held that attorneys have a constitutional right to advertise,[1] the Florida Bar Association (Bar), in 1987, began a two-year study of lawyer advertising and solicitation.[2] After conducting hearings and commissioning a public opinion survey,[3] the Bar petitioned the Florida Supreme Court to change the state's advertising rules.[4]

During this same two-year period, the United States Supreme Court held in *Shapero v. Kentucky Bar Ass'n* that a state's categorical prohibition of attorneys' direct-mail solicitation of potential clients violates the First Amendment.[5] Nonetheless, the Bar proposed a categorical ban on targeted direct-mail solicitation of potential personal injury or wrongful death clients.[6] A number of parties filed objections to the proposed rules, maintaining that such a ban was not in accordance with *Shapero*.[7]

Notwithstanding precedent, the Florida Supreme Court decided that it could institute a thirty-day ban instead of a total ban on targeted direct-mail solicitation.[8] In February 1991, the Florida Supreme Court adopted the new rules.[9] An attorney's letters offering his legal services to accident victims or their survivors within thirty days of the accident now were forbidden.

1. *See* Bates v. State Bar of Arizona, 433 U.S. 350, *reh'g denied*, 434 U.S. 881 (1977). *See infra* notes 36-39 and accompanying text.

2. Petitioner's Brief at 3, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) [hereinafter Brief of Petitioner].

3. *Id.* A copy of the summary, which was before the Florida Supreme Court at the time it adopted the new rules, was introduced in the trial court. *Id.*

4. The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990) [hereinafter Petition to Amend].

5. 486 U.S. 466, 471 (1988).

6. Petition to Amend, 571 So. 2d at 454.

7. *Id.* at 456. Interested parties included the Citizens Against Censorship and a number of individuals, including John T. Blakely who was later added as a plaintiff-appellee.

8. *Id.* at 459. The enactment of advertising and solicitation rules follows a pattern: the United States Supreme Court makes a decision; states amend their rules, not giving up more of the restrictions on advertising than necessary; then the Court makes another decision, invalidating the restrictions and the rules are amended again. Ann B. Stevens, *Wyoming Rules of Professional Conduct: A Comparative Analysis*, 23 LAND & WATER L. REV. 463, 513-17 (1988) (citing Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1070-71 (1978)).

9. PETITION TO AMEND, 571 So. 2d at 452.

In March 1992, G. Stewart McHenry, a Florida attorney, and his wholly owned lawyer referral service, Went For It, Inc. (WFI), filed suit[10] in federal district court[11] challenging Rules 4-7.4(b)(1)[12] and 4-7.8(a)[13] of the Rules Regulating the Florida Bar. McHenry[14] alleged that he regularly sent targeted solicitations to accident victims or their survivors within thirty days after accidents and that he wished to continue doing so in the future.[15] WFI said it wanted to conduct business via direct-mail advertising, contacting accident victims or their survivors within thirty days of accidents and referring potential clients to Florida lawyers.[16] WFI alleged that a thirty-day ban was an unconstitutional restriction on commercial speech.[17] The Bar maintained that a thirty-day ban serves substantial state interests justifying the restriction on speech.[18]

The district court referred the parties' cross motions for summary judgment to a magistrate judge. The magistrate concluded that the state had substantial interests in protecting the privacy and tranquility of recent accident victims and preventing undue influence or overreaching by attor-

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10. McHenry v. Florida Bar, 808 F. Supp. 1543 (M.D. Fla. 1992), *aff'd*, McHenry v. Florida Bar, 21 F.3d 1038 (11th Cir. 1994), *rev'd sub nom*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

11. The suit was filed in the United States District Court for the Middle District of Florida.

12. Rule 4-7.4(b)(1), Rules Regulating the Florida Bar, provides in pertinent part:

> 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 30 days prior to the mailing of the communication.

Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2374 (1995). The rule applies indirectly to lawyer referral services through the Bar's prohibition on lawyers accepting referrals from services that contact potential clients in a manner that would violate the rules if the contact was made by a lawyer. *Id.*

13. Rule 4-7.8(a), Rules Regulating the Florida Bar, provides:

> 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.

14. In October 1992, McHenry was disbarred for reasons unrelated to this suit. *See* Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992). Another Florida lawyer, John T. Blakely, was added as a plaintiff-appellee during the pendency of the appellate proceedings. Brief for Respondents at ii n. 3, Florida Bar v. Went For It, Inc., 115 S. Ct. 2374 (1995) [hereinafter Brief of Respondent]. WFI continued as a plaintiff because it alleged injury in fact from the indirect application of the thirty-day ban to it through Rule 4-7.8(a). *Id.* at 2.

15. *Florida Bar*, 115 S. Ct. at 2374.

16. *Id.*

17. Brief of Respondent, *supra* note 14, at 5.

18. Brief of Petitioner, *supra* note 2, at 17.

neys and recommended that the district court grant the Bar's motion for summary judgment.[19]

The district court, however, rejected the magistrate judge's report and recommendations.[20] The court concluded that the restrictions "substantially impair and impede the availability of truthful and relevant information which can make a positive contribution to consumers in need of such legal services."[21] Relying on *Bates v. State Bar of Arizona*[22] and subsequent cases,[23] the district court granted summary judgment in favor of WFI, holding that the rules violated constitutional protections of free speech.[24] The Eleventh Circuit affirmed on similar grounds.[25]

In *Florida Bar v. Went For It., Inc.*, the United States Supreme Court reversed the Eleventh Circuit Court of Appeals. The Court held that state rules which prohibit lawyers from sending targeted direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster do not violate the First and Fourteenth Amendments of the Constitution.[26]

This casenote examines the scope of First Amendment protection for lawyer advertising and solicitation. This note traces the history and development of the principles that govern commercial speech, particularly as applied to attorneys. In addition, the note suggests that the Court did not apply the commercial speech test as rigorously to invalidate restrictions on lawyer solicitation as it has to restrictions on other forms of commercial speech. Furthermore, this casenote suggests that the Court effectively overruled *Shapero*. Then, the note predicts how far state regulation of lawyer advertising may be allowed to go. Finally, this casenote evaluates the impact of the decision on the rules of professional conduct in Wyoming.

BACKGROUND

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of

19. *Florida Bar*, 115 S. Ct. at 2374.
20. *McHenry*, 808 F. Supp. at 1548.
21. *Id.*
22. 433 U.S. 350 (1977). *See infra* notes 36-39 and accompanying text.
23. *See McHenry*, 808 F. Supp. 1543.
24. *Id.* at 1546.
25. *McHenry*, 21 F.3d at 1043-44.
26. *Florida Bar*, 115 S. Ct. at 2374.

speech . . . ."[27] The United States Supreme Court has held the First Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment.[28] Although freedom of speech has been recognized as the "touchstone of individual liberty,"[29] the Court has held that freedom of speech is not absolute.[30]

A. Commercial Speech and Lawyer Advertising and Solicitation

Until the mid-1970s, First Amendment freedom of speech protection was not afforded speech categorized as "commercial" in nature[31] (i.e., speech that advertises a product or service for profit or for business purpose).[32] Consequently, commercial speech was substantially regulated.[33] Since 1976, however, commercial speech has received a measure of constitutional protection.[34]

In 1976, the United States Supreme Court struck down as violative of the First Amendment a state statute that prohibited pharmacists from advertising prescription drug prices.[35] Although the Court limited the protection to commercial advertising by pharmacists, one year later, in *Bates v. State Bar of Arizona*, the Court invalidated a state statute that prohibited advertising by lawyers,[36] placing lawyer advertising in the category of constitutionally protected commercial speech.[37] In *Bates*, the Court held that the state may not suppress truthful newspaper advertising

27. U.S. CONST. amend. I.

28. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811 (1975); Schneider v. State, 308 U.S. 147, 160 (1939).

29. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.2, at 934 (4th ed. 1991).

30. *Id.* § 16.7, at 943.

31. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 891-892 (2d ed. 1988).

32. BLACK'S LAW DICTIONARY 271 (6th ed. 1990).

33. NOWAK & ROTUNDA, *supra* note 29, § 16.27, at 1011. The Supreme Court has upheld such regulation saying that although the First Amendment does guard against abridgment of the freedom of speech, "the Constitution imposes no such restraint on government as respects purely commercial advertising." Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (refusing to enjoin enforcement of ordinance against distribution of commercial advertising matter in the streets, as applied to distribution of a leaflet urging visitors to attend exhibition of a former Navy submarine for a fee).

34. TRIBE, *supra* note 31, § 12-15, at 892.

35. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Supreme Court rejected the argument that speech which does "no more than propose a commercial transaction, is so removed from any 'exposition of ideas' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.* at 762 (citations omitted).

36. 433 U.S. 350 (1977).

37. *Id.*

of routine legal services.[38] The Court reasoned that the free flow of commercial information serves substantial individual and societal interests in assuring informed and reliable decisionmaking and that commercial speech is entitled to First Amendment protection.[39]

Direct in-person solicitation of clients by attorneys or their agents presented questions the *Bates* Court expressly reserved and the Court addressed one year later in *Ohralik v. Ohio State Bar Ass'n*.[40] The *Ohralik* Court held that the First Amendment does not preclude the state from disciplining an attorney for in-person solicitation in circumstances where the state has a right to prevent harm to the public.[41]

In *Ohralik*, the appellant, an Ohio attorney, solicited a contingent fee arrangement from two eighteen-year old auto accident victims, one in a hospital room where she lay in traction and the other on the day she arrived home from the hospital.[42] The Court found that, under the circumstances,[43] the two potential clients were incapable of making informed judgments to protect their interests.[44] The facts of that case, the Court said, demonstrated the potential for overreaching and undue influence inherent in person-to-person solicitation and the state's need to avert harm to the public by prohibiting solicitation in circumstances where such harm is likely to occur.[45]

B. *The Central Hudson Standard for Reviewing Restrictions on Attorney Commercial Speech*

The Supreme Court has granted limited protection to commercial speech "commensurate with its subordinate position in the scale of First Amendment values."[46] Restrictions on commercial speech are analyzed under a three-part test synthesized from modern commercial speech cases[47] and set forth in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*.[48]

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38. *Id.* at 384.

39. *Id.* at 364 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-765 (1976)).

40. 436 U.S. 447, 449 (1978).

41. *Id.*

42. *Id.* at 449-50.

43. The record indicates the appellant used information he obtained from one woman to induce the other to orally assent to representation, secretly tape recorded her assent, and tempted both women with what appeared to be a cost-free offer. *Id.* at 449-451.

44. *Id.* at 467.

45. *Id.* at 468.

46. NOWAK & ROTUNDA, *supra* note 29, § 16.31, at 1034. *See* Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

47. NOWAK & ROTUNDA, *supra* note 29, § 16.31, at 1035.

48. Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). The

A court adhering to the *Central Hudson* standard must first determine whether the speech in question concerns a lawful commercial activity and is truthful and non-misleading.[49] States may freely regulate misleading commercial speech or commercial speech that concerns unlawful activity. Commercial speech which falls into neither of those two categories may be regulated, if the state satisfies a three-prong test: first, the state must assert a substantial interest to be achieved by its regulation; second, the state must demonstrate that the regulation directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'[50]

A government regulation which restricts commercial speech will be held unconstitutional if the interest sought to be protected is not substantial enough to justify a restriction on speech.[51] A restriction on commercial speech will be invalidated if the means used do not directly advance the asserted government interest or unnecessarily burden communication of the message.[52]

In 1985, the *Zauderer*[53] Court struck down an Ohio rule[54] that prohibited attorneys from soliciting business through printed advertisements containing truthful, non-deceptive information about a specific legal problem.[55] In *Zauderer*, the Court, applied the *Central Hudson*[56] test to lawyer solicitation.[57]

Distinguishing written advertisements from the in-person solicitation at issue in *Ohralik*, the *Zauderer* Court held that dangers of overreaching,

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Central Hudson Court struck down a ban on advertising promoting the use of electricity. *Id.* at 571. The state's asserted interest was supporting the country's policy of energy conservation. *Id.* at 568. Applying the four-part test, the Court said: promotional advertising is lawful commercial speech; the state's interest in conservation is substantial; the ban on advertising advances this interest; but the state's total suppression of speech was too extensive. *Id.* at 566-571.

49. NOWAK & ROTUNDA, *supra* note 29, § 16.31, at 1034-35.

50. *Florida Bar*, 115 S. Ct. at 2376 (citing Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-565 (1980)).

51. *Id.*

52. NOWAK & ROTUNDA, *supra* note 29, § 16.31, at 1035.

53. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

54. The complaint alleged that the appellant had violated the state's rule prohibiting a lawyer from accepting employment after giving unsolicited advice to a layman to obtain counsel or take legal action. *Id.* at 632-33.

55. *Id.* at 646-647. The appellant, an Ohio attorney, ran a newspaper advertisement indicating his willingness to represent women injured by the Dalkon Shield Intrauterine Device. *Id.* at 630. The information and advice in the advertisement was not found to be false, fraudulent, misleading, or deceptive. *Id.* at 634. The appellant initiated 106 lawsuits on behalf of women who responded to his advertisement. *Id.* at 631.

56. *See supra* notes 46-52 and accompanying text.

57. *Zauderer*, 471 U.S. at 638.

invasion of privacy, undue influence, and outright fraud inherent in person-to-person solicitation are not present in written advertising.[58] In addition, the Court said in-person solicitation presents "unique regulatory difficulties because it is 'not visible or otherwise open to public scrutiny.'"[59] The Court concluded that the substantial interests justifying the ban on in-person solicitation upheld in *Ohralik* cannot justify a ban on truthful, non-deceptive written advertising regarding the legal rights of potential clients.[60]

In 1988, the Court granted First Amendment protection to targeted direct-mail in *Shapero v. Kentucky Bar Association*.[61] Shapero, a Kentucky attorney had sought approval for a letter to potential clients facing foreclosure. The Kentucky ethics rule in question was identical to Rule 7.3 of the American Bar Association (ABA) Model Rules of Professional Conduct. Rule 7.3[62] categorically prohibited truthful, non-misleading, targeted, direct-mail solicitation by lawyers for pecuniary gain and had been adopted by the Kentucky Supreme Court.[63] In *Shapero* the United States Supreme Court invalidated blanket prohibitions against truthful, non-deceptive letters sent by attorneys to potential clients known to face particular legal problems,[64] holding that a blanket prohibition is violative of the First Amendment.[65]

The *Shapero* Court reasoned that the recipient of targeted, direct mail, like the recipient of a newspaper advertisement or mass mailing, can readily put the unwanted letter in a drawer to be considered later or in a waste basket.[66] Advertising through mass mailing is constitutionally protected, the Court said, and the state's prohibition of targeted mailing,

58. *Id.* at 641-642. "It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to invade the privacy of those who read it. More significantly, appellant's advertisement—and print advertising generally—poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate." *Id.*

59. *Id.* at 641 (quoting Ohralik Gas & Electric Corp. v. Ohio State Bar Ass'n, 436 U.S. 447, 466 (1978)).

60. *Zauderer*, 471 U.S. at 642.

61. 486 U.S. 466 (1988).

62. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984). ABA Rule 7.3 was identical to Wyoming's current Rule 7.3. *See infra* notes 137-138.

63. *Shapero*, 486 U.S. at 470-471.

64. *Id.* Justice O'Connor dissented and was joined by Chief Justice Rehnquist and Justice Scalia. Justice White filed an opinion concurring in part and dissenting in part, in which Justice Stevens joined.

65. *Id.* at 471.

66. *Id.* at 475-76. The Court observed that it had never distinguished among modes of written lawyer advertising. *Id.* at 473.

which is a more efficient form of advertising than mass mailing, is illogical. An attorney, the Court concluded, would wisely mail a letter only to those whom it would most interest.[67]

Commercial speech now seems to enjoy extensive constitutional protection.[68] During the 1992-93 term, the Court decided three commercial speech cases: *Edenfield v. Fane*, *U.S. v. Edge Broadcasting Co.*, and *City of Cincinnati v. Discovery Network, Inc.* In *Edenfield*, with only Justice O'Connor dissenting, the Court struck down a prohibition by the Florida Board of Accountancy against in-person solicitation of clients.[69] The *Edge Broadcasting* majority considered the government's control of gambling to be a substantial interest and upheld a federal statute that prohibits broadcasters in a non-lottery state from advertising another state's lottery.[70] In *Discovery Network*, a city prohibition against commercial newspaper dispensing boxes failed because the city did not demonstrate a reasonable fit between the restriction and the city's interest in encouraging safety and aesthetics.[71]

In the only commercial speech case of 1993-94, *Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy*, the Court held that the Florida Board of Accountancy could not discipline a certified public accountant, who was also an attorney, for using "CPA" and "CFP" on advertisements, business cards and law firm stationary.[72] During the 1994-95 term, the Supreme Court heard two commercial speech cases, *Rubin, Secretary of Treasury, v. Coors Brewing Co.* and the principal case on lawyer advertising and solicitation, *Florida Bar v. Went For It, Inc.* Applying intermediate scrutiny, the *Rubin* Court struck down government restrictions on beer advertising.[73]

PRINCIPAL CASE

A sharply divided United States Supreme Court, in *Florida Bar v. Went For It, Inc.*, reversed the Eleventh Circuit Court of Appeals and held that a thirty-day ban of lawyers' targeted, direct-mail solicitation of

67. *Id.* at 473. The Court was distinguishing between a mass mailing opening "[I]s your home being foreclosed on?" and a targeted mailing opening "[I]t has come to my attention that your home is being foreclosed on." *Id.*

68. NOWAK & ROTUNDA, *supra* note 29, § 16.26.

69. 113 S. Ct. 1792, 1798 (1993).

70. 113 S. Ct. 2696, 2703 (1993).

71. 113 S. Ct. 1505, 1514 (1993).

72. 114 S. Ct. 2084, 2086-87 (1994).

73. 115 S. Ct. 1585, 1591 (1995). *See infra* notes 107-118 and accompanying text.

accident victims did not violate the First and Fourteenth Amendments.[74] Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Scalia, Thomas, and Breyer joined.[75] Justice Kennedy filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.[76]

The Court began by reaffirming that lawyer advertising is commercial speech and, as such, is accorded a "limited" measure of First Amendment protection.[77] The facts of the case were then scrutinized under an "intermediate" standard within the framework of *Central Hudson*.[78]

Applying the three-part test, the Court held that the state's asserted interests in protecting the privacy of personal injury victims[79] and in preserving the dignity of the legal profession were substantial.[80] States have a "compelling interest in the practice of professions within their boundaries," and states have "broad power" to establish standards and regulate practitioners in the interest of public health and safety.[81]

Considering the second prong, the Court reiterated that the state must demonstrate that the harm is real.[82] The Court held that the record substantiated that the harm was real.[83] In view of the statistical and anecdotal data provided by the Bar[84] and not refuted by the respondents, the Court decided that the public finds direct-mail solicitations immediately following an accident to be an invasion of privacy reflecting poorly on the legal profession.[85] In light of the data prepared by the Bar, the Court found that the thirty-day ban on direct-mail solicitation satisfies the second prong by targeting a concrete, non-speculative harm.[86]

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

75. *Id.*

76. *Id.* at 2381.

77. *Id.* at 2375. "There are circumstances," the Court said, "in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment." *Id.* at 2381 (citations omitted).

78. *Id.* at 2375-81. *See supra* notes 46-52 and accompanying text.

79. *Id.*

80. *Id.* at 2381.

81. *Id.* at 2376.

82. *Id.* at 2377.

83. *Id.* The Florida Bar submitted 106 pages to the district court summarizing its two-year study of lawyer advertising and solicitation. *Id.*

84. *See infra* notes 112-118 and accompanying text.

85. *Florida Bar*, 115 S. Ct. at 2377.

86. *Id.* at 2378.

Turning to the third prong, the Court examined the relationship between the state's interests and the means used to advance those interests. The Court required a reasonable "fit" between the state's ends and the means chosen to accomplish those ends.[87] WFI argued that the regulation precluded a victim from receiving important information about legal options, at a time when defense attorneys and insurance adjusters are not prohibited from contacting that person.[88] In response to that argument, the Court said those concerns are mitigated by limiting the ban to a brief thirty-day period during which potential personal injury clients may obtain information about the availability of legal representation in many other ways.[89] The Court concluded that the regulation, narrow both in scope and duration, survives the third part of the test.[90]

The dissenting justices agreed with the majority that a three-part inquiry derived from *Central Hudson* is appropriate in commercial speech cases.[91] The dissent cautioned against oversimplification, however, noting the complex nature of expression and the risk of suppressing vital information.[92] It is "imperative" to apply the test with "exacting care and fidelity to our precedents," the dissent said.[93]

First, the dissent addressed whether the state's asserted interests are sufficiently substantial. The dissent found that the state's interest in protecting the privacy and tranquility of the victim does not justify restrictions on speech.[94] Turning to the state's second interest, protecting the dignity of the legal profession, the dissent viewed the result as censorship, "pure and simple."[95]

The regulation also failed the second prong of the test, in the dissent's opinion, because the state did not demonstrate that the dangers it seeks to eliminate are real.[96] The dissent found the Bar's 106-page sum-

87. *Id.* at 2380-81.

88. *Id.* at 2380.

89. *Id.* The Court specifically mentioned newspapers, radio, prime-time television, billboards, and untargeted letters to the general public. *Id.*

90. *Id.* at 2381.

91. *Id.* at 2382.

92. *Id.*

93. *Id.*

94. *Id.* at 2382-83. The dissenting justices said the "substantial concern is that victims or their families will be offended by receiving a solicitation during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener." *Id.* at 2383.

95. *Id.* at 2383. "There is no authority," said the dissent, "for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects." *Id.* at 2386.

96. *Id.* at 2383-84.

mary of its two-year study of lawyer advertising and solicitation to be "self-serving and unsupported" and inadequate to demonstrate the existence of a real harm.[97] In addition, the dissent observed that the Court had not cited to any material in the record to support the state's claim that the regulation advances its interest in protecting victims' privacy.[98]

Moreover, the dissent decided that the relationship between the state's ends and the means chosen to advance those ends was not a reasonable fit.[99] The restriction applies to "far more" speech than necessary, the dissent observed.[100] Four justices found the majority opinion to be a "serious departure" from precedent.[101]

ANALYSIS

For nearly twenty years, cases have built upon the foundation laid by *Bates*.[102] Now the Court has changed course. In *Florida Bar*, the majority said it sought to bolster the dignity of the legal profession. To this end, vital First Amendment guarantees for attorney speech have been sacrificed.

The most troubling aspect of the *Florida Bar* decision is that, although the majority set forth the correct analysis,[103] it did not apply that analysis rigorously. Intermediate scrutiny is required by existing precedent,[104] but the Court gave it only lip service. By abandoning the correct analytical framework,[105] the Court has established a separate standard for solicitation by attorneys.[106]

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97. *Id.* at 2384. *See infra* notes 112-118 and accompanying text.

98. *Florida Bar*, 115 S. Ct. at 2384.

99. *Id.*

100. *Id.* In support of its position the dissent pointed out that the thirty-day ban applies to all accidental injuries, no matter how serious; prompt legal representation is essential in many cases; and other means of regulation have not been tried. *Id.*

101. *Id.* at 2386.

102. *Id.* at 2375. *See supra* notes 36-67 and accompanying text.

103. The consideration of attorneys' communications, like the ones in this case, as more than mere commercial speech is beyond the scope of this casenote.

104. *See, e.g.*, *Rubin*, *infra* notes 107-118 (applying intermediate scrutiny to strike down government restrictions on beer advertising).

105. *Cf.* LOUISE L. HILL, LAWYER ADVERTISING 63 (1993) (noting that non-advertising forms of promotion by professionals receive less constitutional protection than other categories of commercial speech).

106. *Compare* Edenfield v. Fane, 113 S. Ct. 1792 (1993) (an accountant's direct, in-person solicitation of accounting business may not be suppressed by the state) *with Ohralik*, 436 U.S. 447 (1978) (an attorney's direct, in-person solicitation of personal injury business may be suppressed by the state). *See also* Moore v. Morales, 63 F.3d 358 (5th Cir. 1995) (remanding for consideration of constitutionality of a thirty-day ban on targeted, direct-mail solicitation by physicians, surgeons, other

A. An irrational regulatory scheme does not materially advance the state's asserted interest.

Two months prior to its *Florida Bar* decision, the Supreme Court reaffirmed the stringent requirements of *Central Hudson*.[107] The *Rubin* opinion emphasized that the *Central Hudson* test applies equally to all categories of commercial speech, even to commercial speech involving vices such as alcohol consumption and gambling.[108] Astonishingly, the very same Court set aside this precedent and did not apply these criteria to protect attorney speech.

Writing for a unanimous Court, Justice Thomas said in *Rubin* that an irrational regulatory scheme cannot materially advance a government interest.[109] *Rubin* involved a federal statute that prohibited the disclosure of alcohol content on beer labels. The Court concluded that the government's failure to go a step further and prohibit such disclosure in brewer's advertisements, "which would seem to constitute a more influential weapon" in any strength war, "makes no rational sense."[110]

Similarly, because the Bar's rule falls only on plaintiff's lawyers, the scheme is irrational. The state allows defendants, their attorneys, investigators, and insurance adjusters to contact unrepresented victims to gather evidence or offer settlement, even in their homes, even if they are vulnerable.[111] If the state's true aim is to protect the privacy of accident victims, prohibiting contact by both defense lawyers and plaintiff's lawyers would seem to be more effective. The state's failure to do so makes no rational sense. If the *Florida Bar* Court had adhered to the precedent established two months earlier in *Rubin*, the restriction on attorney speech would have been struck down.

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licensed health care professionals, chiropractors and private investigators but upholding constitutionality of restriction on lawyers).

107. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1995). *See supra* notes 68-72 and accompanying text.

108. *Rubin*, 115 S. Ct. at 1589.

109. *Id.* at 1592.

110. *Id.*

111. *Florida Bar*, 115 S. Ct. at 2381-82 (Justices Kennedy, Stevens, Souter, and Ginsburg dissenting).

B. The state did not meet its burden of showing that the asserted harm is real.

Discounting anecdotal evidence, the *Rubin* Court held that the state "must demonstrate that the harms it recites are real."[112] Acknowledging that precedent requires the state to carry this burden, the *Florida Bar* Court inexplicably determined that the record was substantial enough to confirm the harm.[113]

Two months earlier, the Court had reasoned in *Rubin* that "mere speculation and conjecture" do not satisfy the state's burden.[114] The *Florida Bar* Court, however, allowed the state to justify a restriction on attorney speech with nothing more than self-serving, unsupported data prepared by one of the adverse parties.[115] The Bar's 106-page, two-year study included "no actual surveys, few indications of sample size or selection procedures," and "no explanations of methodology . . . ."[116] Only thirty-four of those pages arguably discussed direct-mail solicitation. Only two pages contained a synopsis of a study of the attitudes of Floridians towards direct-mail solicitation.[117] If the *Florida Bar* Court had followed established precedent, the Bar's evidence would not have been sufficient to justify its rule.

Moreover, the Bar's claims are contradicted in a recent study by the ABA Commission on Advertising. In March, 1995, the ABA Journal reported that the legal profession's public image problems are not the fault of lawyer advertising. "While the legal profession strongly believes that advertising contributes to the decline of the profession's image," according to the report, "the public rarely mentions advertising as a factor." Instead, research shows that "those who dislike lawyers believe they are dishonest, selfish and too expensive."[118]

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112. *Rubin*, 115 S. Ct. at 1592 (citing Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

113. *See infra* note 117.

114. *Rubin*, 115 S. Ct. at 1592.

115. *Florida Bar*, 115 S. Ct. at 2384 (Justices Kennedy, Stevens, Souter, and Ginsburg dissenting). "The majority describes this anecdotal matter as 'noteworthy for its breadth and detail,' but when examined it is noteworthy for its incompetence." *Id.*

116. *Id.* at 2384.

117. *Id.*

118. James Podgers, *Sorting Out Image, Ads, Ethics*, 81 A.B.A. J. 94 (1995).

C. The state's interest in protecting the image of attorneys is not a substantial interest.

Traditionally, established segments of the legal profession have condemned advertising and solicitation.[119] The debate becomes heated when an attorney's conduct is labeled "ambulance chasing." Such solicitation often is met with outrage by members of the legal profession, the media, and the public.[120] The Supreme Court granted certiorari in *Florida Bar* because the case presented the perfect vehicle for, in the words of the dissenting justices, a "latent protectionism of the established bar."[121] The five justices in the majority knew that the ruling would be more palatable cloaked in a purported protection of vulnerable, personal injury victims.

The Court held that the Bar's interest in protecting the "flagging reputations of Florida lawyers" was substantial, substantial enough to satisfy the *Central Hudson* test and substantial enough to warrant regulation of attorney speech.[122] This determination, however, contradicts a previous ruling that a state's interest in protecting the image of attorneys is, in fact, not a substantial interest. The *Zauderer* Court held that attorney speech may not be suppressed merely because some members of the bar find advertising and solicitation beneath their dignity.[123] The *Florida Bar* majority failed to acknowledge, let alone distinguish, the *Zauderer* ruling.

By upholding the non-solicitation rules in this case, the Supreme Court has perpetuated a historic bias. Today's non-solicitation rules copy century-old rules promulgated by well established lawyers.[124] With this

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119. The roots of prohibitions against lawyer advertising lie in thirteenth century England where rich, young men studied law, looking to a life of public service. Economic competition did not exist at this level of society. Young American men educated in England brought back with them a bias against practicing law as a trade. Katherine A. Laroe, Comment, *Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct-Mail Solicitation*, 25 ST. MARY'S L.J. 1513, 1519-20 (1994). The ABA Model Code of Professional Responsibility, adopted in 1969, and the ABA Model Rules of Professional Conduct, which replaced the Model Code in 1983, reflected this anti-solicitation stance. *Id.* at 1522. Currently, all states follow either the Model Code or the Model Rules in regulating targeted, direct-mail solicitation. *Id.* (listing each state's provisions regulating targeted direct-mail solicitation by attorneys). An attorney who violates these ethics rules may be disciplined by the bar. *Id.* at 1522-1523.

120. Modern ambulance chasers solicit accident and wrongful death clients in the aftermath of airplane crashes, factory explosions, and school-bus accidents. Laroe, *supra* note 119, at 1514.

121. *See Florida Bar*, 115 S. Ct. at 2385 (Justices Kennedy, Stevens, Souter, and Ginsburg dissenting).

122. *Florida Bar*, 115 S. Ct. at 2376 (citing Petitioner's Brief at 28, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995)).

123. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985).

124. *See* Louise L. Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*,

decision, the *Florida Bar* Court has placed solo practitioners and small law firms at a decided disadvantage.[125]

D. The asserted privacy interest does not justify suppressing attorney speech.

The Supreme Court has never expressly overruled *Shapero*.[126] Disturbingly, the *Florida Bar* majority opinion obscured the *Shapero* holding in order to circumvent its precedential value. In *Shapero*, the Court set out the test for determining whether attorneys' solicitations will be accorded constitutional protection.[127] Working within the *Central Hudson* parameters, courts are not to inquire whether there exist potential clients who are vulnerable, but rather, "whether the mode of communication" poses a serious danger that lawyers will exploit a vulnerability.[128] The *Shapero* Court found that targeted, direct-mail solicitation and other modes of written communication do not pose a serious danger of such exploitation.[129]

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5 GEO. J. LEGAL ETHICS 393, 421 (1991) (citing MONROE E. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 250 (1990)). *See supra* note 119.

125. *Id.* In his concurring opinion in *Ohralik*, Justice Marshall said that non-solicitation rules are "discriminatory with respect to the suppliers as well as the consumers of legal services. Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society, so the disciplinary rules against solicitation fall most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms. Indeed, some scholars have suggested that the rules against solicitation were developed by the professional bar to keep recently immigrated lawyers, who gravitated toward the smaller, personal injury practice, from effective entry into the profession." 436 U.S. at 475-6 (Marshall, J., concurring) (citations omitted).

126. 486 U.S. 466 (1988). In fact, the appeals court in this case said that *Shapero* was controlling. McHenry v. The Florida Bar, 21 F.3d 1038, 1042-43 (11th Cir. 1994), *rev'd sub nom*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2378 (1995). Furthermore, as recently as April 19, 1995, in the commercial speech case that immediately preceded *Florida Bar*, the Court reaffirmed the *Central Hudson* test for scrutinizing restrictions on commercial speech. Rubin, Secretary of Treasury v. Coors Brewing Co., 115 S. Ct. 1585, 1591 (1995).

127. 486 U.S. at 472.

128. *Id.* at 474. The Court observed that a potential client "will feel equally 'overwhelmed' by his legal troubles and will have the same 'impaired capacity for good judgment' regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter." *Id.* Comparing targeted, direct-mail to the in-person solicitation permissibly banned under *Ohralik*, the Court added that targeted, direct-mail solicitation "poses much less risk of overreaching or undue influence than does in-person solicitation." Written communication does not involve the "coercive force of the personal presence of a trained advocate or the pressure on the potential client for an immediate yes-or-no answer to the offer of representation." *Id.* at 475 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985)).

129. 486 U.S. at 476. The Court said isolated abuses or mistakes occurring with targeted, direct-mail solicitations do not justify a categorical prohibition because the state can regulate through less restrictive means. Requiring the attorney to file a letter with a state agency, requiring the letter to

Yet, in *Florida Bar* the Court declined to adhere to its own rule. In light of existing precedent, the relevant inquiry should have focused on the mode of communication. Instead, the Court focused on a privacy interest.[130]

In its efforts to distinguish *Shapero*, the majority said that a different privacy interest was at stake because a different kind of intrusion was involved.[131] The potential clients in that case were facing foreclosure and their privacy was invaded when the lawyer learned the details of their legal affairs, perhaps by reading the newspaper. In this case, the Court said that the intrusion occurred at the moment the lawyer used information he had acquired, to send a letter to a vulnerable person traumatized by recent injury. Unlike the privacy interest in *Shapero*, the majority said, this privacy interest is inherent in the home, a place afforded great protection.

This line of reasoning fails, however, because even if the majority does see a different privacy interest, under Supreme Court precedent, this privacy interest does not outweigh the First Amendment guarantees afforded commercial speech. Virtually all direct mail invades the tranquility of the recipient's home, yet is protected by the First Amendment.[132] Some victims may be offended by an attorney's letter, but the Court has said that the "mere possibility" that some people may find advertising offensive cannot justify suppressing it.[133] Furthermore, even though potential personal injury or wrongful death claimants may be suffering impaired judgment, a letter, especially one labeled 'advertising' in red, poses little danger of overreaching or undue influence.[134] Direct-mail solicitation does not pose a serious danger of overreaching, even if the potential client is vulnerable.

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be labeled as an advertisement, and other less restrictive regulations, while imposing some burden on state agencies, are preferable because of the importance of the free flow of commercial information. *Id.* at 476-78.

130. *See supra* notes 79-81 and accompanying text.

131. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2379 (1995). To support its holding, the majority said that in *Shapero* the state did not use privacy interests to justify its regulation, and that the treatment of privacy had been perfunctory and of little help in addressing restrictions on targeted, direct mail in the immediate aftermath of accidents. *Id.* at 2379.

132. *McHenry*, 21 F.3d at 1044.

133. The Court has applied this principle to advertising in general, holding that the First Amendment protects the right to use the mail. *See* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 76 (1983) (Rehnquist, J., concurring). In *Bolger*, the Court found that shielding recipients from mail they might find offensive furthered an interest of "little weight." *Id.* at 71.

134. *McHenry*, 21 F.3d at 1042-43. The *Shapero* Court suggested that such labeling is a permissible state regulation. 486 U.S. at 477. That Court added that the state may regulate through means far less restrictive and more precise than a total ban. The most obvious of which, the Court observed, is to "require the lawyer to file any solicitation letter with a state agency, giving the state ample opportunity to supervise mailings and penalize actual abuses." *Id.* at 476 (citations omitted).

Nonetheless, the Supreme Court has effectively overruled *Shapero*. *Florida Bar* involves a narrower prohibition than *Shapero*, forbidding direct-mail contact during the thirty days when a victim is most vulnerable following an accident, rather than totally banning such contact. Even so, a thirty-day ban will "effectively deprive" many accident victims of information about available legal assistance "precisely when they need it most."[135] During the initial period following a serious accident, victims must face "an unintelligible legal tangle and demands to waive or compromise their rights. It is during this time that informed decisionmaking is crucial."[136] By forbidding direct-mail contact by plaintiff's lawyers during this critical period, the Court has negated, in many instances, the value of such contact at a future time.

Wyoming and states with strong established bar associations may look to the *Florida Bar* decision as support for a move back to the pre-*Bates* era when all forms of lawyer advertising and solicitation were anathema. Rule 7.3 of the Wyoming Rules of Professional Conduct is unconstitutional under existing precedent.[137] Rule 7.3 regulates direct contact between a lawyer and a potential client,[138] placing a total ban on lawyers' targeted direct-mail solicitation of employment.[139] Indications are that the Wyoming State Bar Association, within the next year, will propose changes to Rule 7.3 in order to bring the rule into line with the United States Supreme Court's holding in *Florida Bar*.[140]

As long as the makeup of the United States Supreme Court remains unchanged, the possibility exists that *Bates* could be overruled.[141] Justice

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135. Petition to Amend, *supra* note 4, at 474 (Shaw, C.J., concurring in part and dissenting in part).

136. *Id.*

137. The United States Supreme Court held, in *Shapero v. Kentucky Bar Ass'n*, that the categorical prohibition of attorneys' direct-mail solicitation of potential clients violates attorneys' free speech rights. 486 U.S. 466, 471 (1988). *See generally* John F. Wagner, Jr., Annotation, *Restrictions on Attorneys' Advertisements Regarding Legal Services as Violating Federal Constitution's First Amendment—Supreme Court Cases*, 110 L.Ed.2d 688 (1995).

138. WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 7.3 (1994). Rule 7.3 provides in pertinent part:

> 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.

Id.

139. *Id.* Rule 7.3 defines 'solicit' to include contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful. *Id.*

140. Telephone Interview with Kermit C. Brown, immediate past president of the Wyoming State Bar Association (Oct. 12, 1995).

141. In a statement that may foreshadow the future of *Bates*, Justice O'Connor has said, "[A]s soon as one steps into the realm of prices for 'routine' legal services such as uncontested divorces and

O'Connor has consistently opposed attorney advertising and solicitation.[142] Chief Justice Rehnquist has opposed constitutional protection for all forms of commercial speech. Justice Scalia joined O'Connor and Rehnquist in *Florida Bar* and in the *Shapero* dissent. Justice Thomas and Justice Breyer have now indicated, in *Florida Bar*, their willingness to support restrictions on commercial speech as applied to attorneys.

CONCLUSION

In *Florida Bar v. Went For It, Inc.*, the United States Supreme Court upheld a state regulation prohibiting lawyers' direct-mail solicitation of potential clients within thirty days of an accident. In reaching its decision, the Court applied the three-part *Central Hudson* test. The Court's flexible application of parts one and two of the test and cursory consideration of part three led to an incorrect result. Inconsistent applications of the test result in unconstitutional restrictions on free speech. The public deserves protection from oppressive conduct, but attorneys' free speech rights should not be trampled in the process. The challenge facing the Court was to balance these conflicting interests. Unconstitutional restrictions on lawyer solicitation are not the solution. An exacting application of the *Central Hudson* test would have suggested narrower limitations and rigorous enforcement of the ethics rules that really matter.

The biggest loser is the consuming public. This case is about truthful, non-misleading letters to persons who may need an attorney. The United States Supreme Court seems willing to make society pay the price of keeping people ignorant.

MARY R. EIKENBERRY

personal bankruptcies, however, it is quite clear to me that the States may ban such advertising completely. The contrary decision in *Bates* was in my view inconsistent with the standard test that is now applied in commercial speech cases." *Shapero*, 486 U.S. 466, 485 (1988) (O'Connor, J., Rehnquist, C.J. and Scalia, J. dissenting). She added, "[U]nder the *Central Hudson* test government has more than ample justification for banning or strictly regulating most forms of price advertising." *Id.* at 486.

142. Dissenting in *Shapero*, Justice O'Connor said that "fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession." 486 U.S. 466, 491 (1988). Chief Justice Rehnquist and Justice Scalia joined Justice O'Connor in dissent. *Id.* at 480.