

Louisiana Law Review

Volume 57 | Number 2
Winter 1997

Louisiana Went For It: A New Thirty-Day Waiting Period for Targeted Solicitation of Clients

N. Gregory Smith
Louisiana State University Law Center

Repository Citation

N. Gregory Smith, *Louisiana Went For It: A New Thirty-Day Waiting Period for Targeted Solicitation of Clients*, 57 La. L. Rev. (1997)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol57/iss2/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Louisiana Went For It: A New Thirty-Day Waiting Period for Targeted Solicitation of Clients

N. Gregory Smith*

I. INTRODUCTION

On March 1, 1996, Louisiana lawyers became subject to a new rule on targeted solicitation of clients. Prior to March 1, it was perfectly ethical for a Louisiana lawyer to mail a written solicitation to an accident victim immediately after the accident. No longer. As a result of the Louisiana Supreme Court's recent amendment to Rule 7.2 of the Rules of Professional Conduct,¹ a lawyer must now wait thirty days before mailing such a solicitation.²

For nearly twenty years, the trend has been to expand the ability of lawyers to engage in advertising and forms of solicitation. The trend did not arise out of enthusiasm for advertising and solicitation on the part of bar governors or disciplinary authorities. It arose out of decisions of the United States Supreme Court. In a series of cases, the United States Supreme Court ruled that lawyers who advertise or engage in certain forms of solicitation enjoy a significant level of First Amendment protection. Thus, the Court has permitted lawyers to engage in truthful advertising of basic services,³ to hold themselves out as specialists in different areas of the law,⁴ and to send targeted advertisements to persons known to be in need of particular legal services.⁵ Ethics rules in Louisiana, and around the nation, were modified to reflect the new constitutional wisdom.⁶

The amendment to Louisiana Rule 7.2 represents a retreat from the recent trend of permissibility in lawyer advertising and solicitation, but is a retreat that parallels constitutional developments. In *Florida Bar v. Went For It, Inc.*,⁷

Copyright 1997, by LOUISIANA LAW REVIEW.

* Associate Professor of Law, Louisiana State University; B.A., 1975, Yale University; J.D., 1978, Brigham Young University. I am grateful to my colleagues, Joseph T. Bockrath, Jay S. Bybee, and Warren L. Mengis, for reading and commenting on prior drafts of this article. I would also like to thank my research assistants, Jayme Fishman and Marc Zametto, for their valuable assistance.

1. La. R.S. 37, Ch. 4, App., art. 16 (1988 and Supp. 1996) (hereinafter Louisiana's Rules of Professional Conduct will be referenced as "Rule ____").

2. Rule 7.2 (Supp. Sept. 1996).

3. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, *reh'g denied*, 434 U.S. 881, 98 S. Ct. 242 (1977).

4. See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 110 S. Ct. 2281 (1990).

5. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S. Ct. 1916 (1988).

6. See, e.g., Wood Brown, *Lawyer Advertising: Where We Were, How Far We've Come, Where We're Going*, 39 La. B.J. 453, 457 (1992) (Louisiana rules on advertising and solicitation were drawn with the Supreme Court cases in mind).

7. 115 S. Ct. 2371 (1995).

a 1995 decision, the United States Supreme Court upheld a Florida rule that prohibited attorneys from mailing targeted advertisements to accident victims within thirty days of the accident. The Court concluded that the rule did not impermissibly abridge the free speech rights of Florida lawyers.⁸ Only a few months after the *Went For It* decision, the Louisiana Supreme Court approved the change to Rule 7.2.

This article examines the text and scope of amended Rule 7.2. It discusses the constitutionality of Louisiana's new thirty-day waiting period. And it speculates on the impact of the new rule on lawyer behavior.

II. RULES OLD AND NEW

A. *The Context of the Rule*

Rule 7.2, entitled "Direct Contact With Prospective Clients," is located in a section of the Rules of Professional Conduct entitled "Information About Legal Services." The other rules in this section are 7.1, entitled "Communications Concerning A Lawyer's Services," 7.3, entitled "Firm Names and Letterheads," and 7.4, entitled "Communications of Fields of Practice."

The most important of these rules is Rule 7.1. It sets forth the general proposition, relevant to each of the other rules, that a "lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the services of the lawyer's firm." Rule 7.1, then, regulates the content of communications about lawyer services. In contrast, Rule 7.2 deals mainly with the form of the communication itself. It is hostile to some forms of "solicitation."

B. *The Old Rule*

Prior to its 1996 amendment, Louisiana Rule 7.2 generally prohibited "in-person" solicitation or "person to person" telephone solicitation by the lawyer or by individuals acting for the lawyer, where a significant motive for the solicitation was the lawyer's pecuniary gain. However, the rule did permit a lawyer to solicit family members or individuals with whom the lawyer had a prior professional relationship. It also allowed a lawyer to solicit potential clients by sending written or recorded communications to persons known to be in need of legal services of a particular kind. If the lawyer followed the applicable rules, he or she could actually "target" individuals who were known to need legal services.

The prior rule stated in its entirety:

- (a) A lawyer shall not solicit professional employment in person, by person to person verbal telephone contact or through others acting at his

8. 115 S. Ct. at 2381.

request or on his behalf from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not initiate targeted solicitation, in the form of a written or recorded communication, of a person or persons known to need legal services of a particular kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment unless such communication complies with the requirements set forth below and is not otherwise in violation of these rules:

(i) A copy or recording of each such communication and a record of when and where it was used shall be kept by the lawyer using such communication for three (3) years after its last dissemination.

(ii) Such communication shall state clearly the name of at least one member in good standing of the Association responsible for its content.

(iii) In the case of a written communication:

(A) such communication shall not resemble a legal pleading, notice, contract, or other legal document and shall not be delivered via registered mail, certified mail or other restricted form of delivery; and

(B) the top of each page of such communication and the lower left corner of the face of the envelope in which the communication is enclosed shall be plainly marked "ADVERTISEMENT" in print size at least as large as the largest print used in the written communication, provided that if the written communication is in the form of a self-mailing brochure or pamphlet, the "ADVERTISEMENT" mark shall appear above the address panel of the brochure or pamphlet.

(iv) In the case of a recorded communication, such communication shall be identified specifically as an advertisement at the beginning of the recording, at the end of the recording and on any envelope in which it is transmitted in accordance with the requirements of subparagraph (iii)(B) above.

(v) If the communication is prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member of the intended recipient, such communication shall disclose how the lawyer obtained the information prompting the communication.

(c) Notwithstanding anything herein to the contrary, a lawyer shall not solicit professional employment from a prospective client through any means, even when not otherwise prohibited by these rules, if:

(i) the prospective client has made known to the lawyer a desire not to be solicited; or

(ii) the solicitation involves coercion, duress, harassment, fraud, overreaching, intimidation or undue influence.

(d) A lawyer shall not give anything of value to a person for recommending the lawyer's services; provided, however, that a lawyer may pay the reasonable and customary costs of an advertisement or communication not in violation of these rules.⁹

C. *The New Rule*

The 1996 amendment to Rule 7.2 focused only on part (b) of the rule, which deals with targeted solicitation of clients by means of written or recorded communications. All other portions of the rule remain in effect. The revisions to part (b) are as follows:

(b) In instances where there is no family or prior professional relationship, a lawyer shall not initiate targeted solicitation, in the form of a written or recorded communication, of a person or persons known to need legal services of a particular kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment unless such communication complies with the requirements set forth below and is not otherwise in violation of these rules.

.....
 (iii) In the case of a written communication:

.....
 (C) if the 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, such communication shall not be initiated by the lawyer unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.¹⁰

The key change, of course, was the addition of subpart (C), which sets forth the new thirty-day waiting period for targeted solicitation letters.

D. *The Scope of the New Rule*

Although Rule 7.2(b) is concerned with both recorded and written solicitations, the new thirty-day waiting period applies, by its terms, only to "written communications." Moreover, it applies only to a limited category of written communications: those that are directly targeted at victims of accidents or disasters or the relatives of those victims. Accordingly, lawyers may still engage in a variety of targeted solicitations without waiting for any particular period of time to pass. For example, if a lawyer learns that a debtor has recently been sued in a foreclosure action, the lawyer may immediately send a targeted

9. Rule 7.2 (Supp. 1996).

10. Rule 7.2 (Supp. Sept. 1996).

solicitation letter, or recording, to the debtor. If a lawyer learns that a consumer has recently been defrauded by a merchant, the lawyer may immediately send a targeted letter or recording to the consumer. It would seem, too, that a lawyer could also immediately send a targeted solicitation letter to the victim of an intentional crime,¹¹ and might well do so if the suspected perpetrator is someone who could pay civil damages.

One of the purposes of the new rule, no doubt, is to shield accident victims and their relatives from unseemly solicitations by lawyers during a time of distress or grief.¹² But the rule does not bar all lawyer contacts with these victims during the thirty-day period. It does not, for example, prohibit a lawyer from an insurance company from contacting an accident victim, within thirty days of the accident, in an effort to persuade the victim to accept an insurance settlement. And, as will be discussed later in this article,¹³ the rule does not actually prohibit all solicitations by personal injury lawyers within the thirty-day period.

III. THE UNITED STATES SUPREME COURT AND TARGETED SOLICITATION

A. Preliminary Developments

Not many years ago, it was unethical for American lawyers to engage in most forms of advertising for clients.¹⁴ Indeed, the tradition of the bar was that lawyers belonged to a profession, not a money-grubbing trade, and that it was inconsistent with professional norms for lawyers to announce their availability to potential clients other than through business cards, legal directories, business letterheads, and dignified signs on their office doors.¹⁵

Those traditions were challenged in *Bates v. State Bar of Arizona*,¹⁶ a 1977 decision by the United States Supreme Court. In that case, some Arizona lawyers were disciplined for running a newspaper advertisement offering "legal

11. The results of an intentional crime might seem "disastrous" to the victim, but, at least in most cases, would probably not amount to the type of "disaster" the rule is intended to address. However, some criminal acts, such as acts of terrorism or arson, might well bring about a qualifying "disaster."

12. Florida has a similar 30-day waiting period rule. In arguments over the rule in *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), the Florida Bar contended that the rule was supported by "a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers." *Id.* at 2376.

13. See *infra* part V.

14. Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 957-58 (2d ed. 1994). Canon 27 of the ABA Canons of Professional Ethics (1908) declared: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

15. See Hazard, *supra* note 14, at 957. See also ABA Canons of Professional Ethics, Canon 27 (1908). Louisiana's rules were stricter than the rules in some other states. See Brown, *supra* note 6.

16. 433 U.S. 350, 97 S. Ct. 2691, *reh'g denied*, 434 U.S. 881, 98 S. Ct. 242 (1977).

services at very reasonable fees," and listing the fees for several routine services.¹⁷ The Court concluded that the advertisement constituted commercial speech, and was entitled to First Amendment protection.¹⁸ While advertising that is "false, deceptive, or misleading" may be subject to restraint,¹⁹ and, as with other speech, would be subject to reasonable "time, place, and manner" restrictions,²⁰ the Court said that the State could not "prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services."²¹

Advertising was now acceptable. But what about direct, in-person solicitation of clients? The Court took a look at that issue in 1978, in *Ohralik v. Ohio State Bar Association*,²² and concluded that the traditional prohibitions against such solicitation would survive a First Amendment attack. Ohralik, the attorney in that case, had visited one accident victim in the hospital, and another in her home, and had directly solicited representation engagements. He was suspended from the practice of law by order of the Ohio Supreme Court. The United States Supreme Court affirmed the decision of the Ohio Supreme Court, stating:

In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment . . . it lowers the level of appropriate judicial scrutiny.

. . . .

[U]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.²³

Mr. Ohralik conceded that the State had a compelling interest in preventing aspects of solicitation that involved "fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct."²⁴ The Court, however, thought that the "efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in circumstances like those of this case, the State were required in addition to prove actual injury."²⁵ Accordingly, the Court concluded that it was not unreasonable,

17. 433 U.S. at 385, 97 S. Ct. at 2710.

18. *Id.* at 365, 381, 384, 97 S. Ct. at 2700, 2708-09.

19. *Id.* at 383, 97 S. Ct. at 2709.

20. *Id.* at 384, 97 S. Ct. at 2709.

21. *Id.*

22. 436 U.S. 447, 98 S. Ct. 1912, *reh'g denied*, 439 U.S. 883, 99 S. Ct. 226 (1978).

23. 436 U.S. at 457, 98 S. Ct. at 1919.

24. *Id.* at 462, 98 S. Ct. at 1921.

25. *Id.* at 466, 98 S. Ct. at 1924.

or unconstitutional, for a State to devise a "prophylactic rule" against in-person solicitation.²⁶

Bates permitted lawyers to engage in truthful advertising. *Ohralik* confirmed that states could prohibit direct, in-person solicitation by attorneys, at least where the motive for doing so was the lawyer's pecuniary gain. Between the holdings of those cases was an unresolved issue: to what extent could states prohibit lawyers from engaging in written solicitation of potential clients who were known to be in need of particular legal services? That issue was addressed in *Shapero v. Kentucky Bar Association*.²⁷

B. *Shapero and Targeted Solicitation*

Richard Shapero asked Kentucky's Attorney Advertising Commission to approve a letter that he wished to send to potential clients. He thought that the potential clients needed representation in residential foreclosure actions. Although there was nothing false or misleading about Shapero's letter, the commission rejected the letter because a Kentucky rule prohibited attorneys from sending written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."²⁸ Shapero also asked the Kentucky Bar Association's Committee on Legal Ethics for an opinion on the validity of the rule itself. The Committee, in an opinion that was formally adopted by the Bar Association's Board of Governors, did not find Shapero's proposed letter to be false or misleading, but it upheld the Kentucky rule that prohibited such solicitations on the ground that the rule was consistent with the American Bar Association's model rule on solicitation.²⁹ On review, the Kentucky Supreme Court deleted the existing Kentucky rule on solicitation,³⁰ but

26. *Id.* at 468, 98 S. Ct. at 1925. *Cf.* *In re Primus*, 436 U.S. 412, 98 S. Ct. 1893 (1978) (ACLU attorney engaged in solicitation of a prospective client, not for pecuniary reasons, but to identify a plaintiff who could challenge a practice of sterilizing pregnant mothers who were receiving public assistance. The Supreme Court indicated that this type of solicitation came within the right to engage in political expression and political association, and that a prophylactic rule was therefore unconstitutional. The attorney could not be disciplined, said the Court, "unless her activity in fact involved the type of misconduct (eg. fraud or duress) at which [the State's] broad prohibition is said to be directed.")

27. 486 U.S. 466, 108 S. Ct. 1916 (1988).

28. *See* 486 U.S. at 469-70, 108 S. Ct. at 1919-20. However, the Commission also noted its view that the Kentucky rule violated the First Amendment, and it recommended that the Kentucky Supreme Court amend its rules. *Id.* at 470, 108 S. Ct. at 1920.

29. *Id.* at 470, 108 S. Ct. at 1920.

30. The Kentucky court did not identify the "precise infirmity" in the existing Rule, but it said that it felt "compelled by the decision in *Zauderer*" to order that the old rule be deleted. *See id.* In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S. Ct. 2265 (1985), the United States Supreme Court ruled that First Amendment protections applied to "targeted" newspaper advertisements. The advertisement in that case invited Dalkon shield claimants to contact the attorney about potential personal injury claims.

it adopted ABA Model Rule 7.3, which prohibited targeted, direct-mail solicitation by lawyers for pecuniary gain.³¹

The United States Supreme Court granted certiorari to consider whether a blanket prohibition against targeted mailings was consistent with the provisions of the First Amendment. The Court ruled that it was not. The Court thought that Shapero's letter was more akin to advertising, which was entitled to substantial First Amendment protection, than to in-person solicitation, which was not:

Like print advertising, petitioner's letter—and targeted, direct mail solicitation generally—“poses much less risk of over-reaching or undue influence” than does in-person solicitation. . . . Neither mode of written communication involves “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.” . . . A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded.³²

The Court acknowledged that targeted direct-mail solicitation presented “lawyers with opportunities for isolated abuses or mistakes,” but that was not enough to “justify a total ban on that mode of protected speech.”³³ Instead, the State could “regulate such abuses and minimize mistakes through far less restrictive and more precise means.”³⁴

C. *Went For It and a Thirty-Day Waiting Period*

Targeted solicitation issues came before the Court again in the 1995 case of *Florida Bar v. Went For It, Inc.*³⁵ This time, the issue was the constitutionality of a Florida rule that prohibited attorneys from making direct mail solicitations to victims of accidents, or relatives of those victims, within thirty days of the occurrence of an accident or disaster. The Court upheld the constitutionality of

31. 486 U.S. at 470, 108 S. Ct. at 1920. ABA Model Rule 7.3 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. The term “solicit” includes 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. at 470-71, 108 S. Ct. at 1920.

32. *Id.* at 475-76, 108 S. Ct. at 1923 (citation omitted).

33. *Id.* at 476, 108 S. Ct. at 1923.

34. *Id.*

35. 115 S. Ct. 2371 (1995).

the rule. Because the *Went For It* decision dealt with a solicitation rule that is very similar to the new Louisiana rule, the case merits some discussion here.

1. *The Florida Rule and the Background of the Litigation*

In 1989, the Florida Bar completed a two-year study on the effects of lawyer advertising on public opinion. Based on the study, the bar concluded that some changes in the rules for lawyer advertising should be made. The Florida Supreme Court agreed and it adopted some amendments in late 1990. One of the amendments imposed a thirty-day waiting period:

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.³⁶

Florida lawyers were also prohibited from accepting client referrals from a lawyer referral service that engages in 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."³⁷

An individual, McHenry, and his wholly-owned lawyer referral service, *Went For It, Inc.*, filed an action challenging the Florida rules as violative of the First and Fourteenth Amendments to the Constitution. McHenry routinely sent targeted solicitations to accident victims or their survivors within thirty days of the accidents, and he wanted to continue this practice in the future. The Federal District Court granted summary judgment for the plaintiffs,³⁸ and the Eleventh Circuit affirmed.³⁹

2. *The Majority Opinion*

Writing for the majority, Justice O'Connor noted that the case involved commercial speech, and that the Court would consider restrictions on such speech using an "intermediate" level of scrutiny:

Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protec-

36. Fla. Stat. Ann. Bar Rule 4-7.4(b)(1) (Supp. 1996).

37. Fla. Stat. Ann. Bar Rule 4-7.8(a) (West 1994).

38. McHenry was disbarred for reasons unrelated to the litigation. Blakely, another Florida lawyer, was substituted as a plaintiff. *Went For It*, 115 S. Ct. at 2371.

39. 21 F.3d 1038 (11th Cir. 1994).

tion Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.* . . . Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "'narrowly drawn.'"⁴⁰

The Court then went on to apply the *Central Hudson* test. With respect to the first prong of the test, that there be a "substantial interest in support of the regulation," the Florida Bar had referred to the privacy of personal injury victims and to the reputation of the legal profession. The Court noted:

The Florida Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affect the administration of justice." . . . Because direct mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately The regulation, then is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, "is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families."⁴¹

The Court had "little trouble" concluding that this interest was substantial.⁴²

The second prong of the *Central Hudson* test requires the state to demonstrate that the regulation advances the state's interest "in a direct and material way."⁴³ This burden, said the Court "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech

40. 115 S. Ct. at 2375-76.

41. *Id.* at 2376.

42. *Id.*

43. *Id.* at 2377.

must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."⁴⁴ In this case, the Court concluded that the State had met its burden on the strength of its two-year study. A 106 page summary of the study that had been presented to the District Court contained "data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession."⁴⁵

In discussing the second prong of the *Central Hudson* test, the Supreme Court also distinguished its earlier decision in the *Shapero* case. In the first place, it said that the State, in *Shapero*, "did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations."⁴⁶ A second distinction was that *Shapero* "dealt with a broad ban on all direct-mail solicitations"⁴⁷ not a thirty-day waiting period on mailed solicitations to accident victims. Finally, the Court noted that the State in *Shapero* had "assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail."⁴⁸ In contrast, the State in *Went For It* had submitted the results of a two-year study.

The third prong of the *Central Hudson* test requires the State's restriction to be narrowly drawn. This is not, said the Court, a requirement that the State use the "least restrictive means" available, nor is it equivalent to a "rational basis" test.⁴⁹ Instead, it is a requirement that the fit be "reasonable"—that it represent a disposition whose scope is "in proportion to the interest served."⁵⁰ The Court was not convinced by arguments that the Florida rule was unconstitutionally overinclu-

44. *Id.* (quoting *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1588 (1995), and *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 1798 (1993)).

45. 115 S. Ct. at 2377. The summary reported that, as of June 1989, Florida lawyers were mailing 700,000 direct solicitations annually. It recited survey results showing that Floridians have "negative feelings" about attorneys who engage in direct mail advertising. And it included an "anecdotal record . . . noteworthy for its breadth and detail" showing public dissatisfaction with lawyers who send targeted direct mail solicitations to accident victims. *Id.*

The dissenting Justices were not as impressed with the study, pointing out, for example, that the Court had few indications of the sample size or selection procedures used in the public opinion surveys, and that the Court had not been provided with actual copies of the surveys.

The majority repeated that the Bar's evidence was sufficient, and then went on to say:

In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Id. at 2378.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 2380.

50. *Id.* (quoting from *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

sive because it "bans targeted mailings even to citizens whose injuries or grief are relatively minor,"⁵¹ and that it prevents citizens from learning about their legal options at a time when other actors, such as claims adjustors, may be "clamoring for victims' attentions."⁵² In light of the relatively brief period of the ban, and the difficulty of distinguishing "among injured Floridians by the severity of their pain or the intensity of their grief,"⁵³ the Court concluded that the "Bar's rule is reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession."⁵⁴ Because the Florida statute satisfied all three prongs of the *Central Hudson* test, the Court concluded that it was constitutional.⁵⁵

3. *The Dissent*

Justice Kennedy wrote the dissenting opinion and was joined by three other justices.⁵⁶ He agreed that the *Central Hudson* test was controlling, but concluded that the Florida rule did not satisfy its elements.

As an initial matter, Justice Kennedy did not believe that the interests that had been advanced in support of the rule⁵⁷ were substantial enough to sustain the restriction on speech. With respect to the claimed interest in preserving the privacy of accident victims, he said that the "problem the Court confronts, and cannot overcome"⁵⁸ is its own decision in *Shapero*. In that case, the Court had recognized a distinction between direct in-person solicitation and direct mail solicitation and had concluded that "the mode of communication makes all the difference."⁵⁹ Justice Kennedy said that the danger perceived by the *Shapero* Court was not "whether there exist potential clients whose 'condition' makes them susceptible to

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* The Court also observed that the 30-day rule did not prevent citizens from learning about their legal options, because there were "many other ways for injured Floridians to learn about the availability of legal representation during that time." *Id.*

55. In so concluding, the Court stated:

The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

Id. at 2381.

56. The other dissenters were Justices Stevens, Souter and Ginsburg.

57. Those interests were: (1) preserving the tranquility of accident victims and their families, and (2) protecting the reputation and dignity of the legal profession. *Id.* at 2382-83.

58. *Id.* at 2382.

59. *Id.* (quoting *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475, 108 S. Ct. 1916, 1922 (1988)).

undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."⁶⁰ In contrast, the *Went For It* majority was concerned "that victims or their families will be offended by receiving a solicitation during their grief and trauma."⁶¹ Justice Kennedy disagreed with this focus of concern, stating that, "we do not allow restrictions on speech to be justified on the ground the expression might offend the listener."⁶²

Nor was Justice Kennedy persuaded that the rule could be justified by the proffered interest in preserving the reputation and dignity of the legal profession. While he acknowledged that "disrespect will arise from an unethical and improper practice,"⁶³ he said that "the majority begs a most critical question by assuming that direct mail solicitations constitute such a practice."⁶⁴ On the contrary, he said that direct solicitation "may serve vital purposes and promote the administration of justice The disrespect argument . . . proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose."⁶⁵

Justice Kennedy also concluded that the Florida rule flunked the second prong of the *Central Hudson* test. "[W]hat the State has offered," he said, "falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests."⁶⁶ The State did submit a "Summary of Record" in support of its position. However, the dissent noted:

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 the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," . . . but when examined, it is noteworthy for its incompetence. . . . Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech.⁶⁷

60. *Id.* (quoting *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 474, 108 S. Ct. 1916, 1922 (1988)).

61. *Id.* at 2382-83.

62. *Id.* at 2383. In support of this contention, Justice Kennedy cited *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648, 105 S. Ct. 2265, 2280 (1985), where the Court had struck down a ban on attorney advertising and had said that "the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it."

63. *Id.* at 2383.

64. *Id.*

65. *Id.*

66. *Id.* at 2384.

67. *Id.* More specifically, Justice Kennedy said:

Finally, as to the third prong of the test, Justice Kennedy concluded that "the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit."⁶⁸ He thought that the Florida rule created a "flat ban that prohibits far more speech than necessary to serve the purported state interest."⁶⁹ The ban applied to "all accidental injuries, whatever their gravity."⁷⁰ "With regard to lesser injuries," he said, "there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney."⁷¹ And "as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents."⁷² The effect of the rule, thought Justice Kennedy, would

fall on those who most need legal representation: for those with minor injuries, the victims too ill-informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill-informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties.⁷³

4. Responses to the Decision

Went For It was a five-to-four decision in which, for the first time since *Bates*, the United States Supreme Court had upheld a state restriction on lawyer "advertising." The case has generated a considerable volume of commentary,

The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians toward such solicitations. . . .

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. . . . Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

Id.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 2285.

72. *Id.*

73. *Id.*

much of it unfavorable.⁷⁴ Critics have frequently echoed the views of Justice Kennedy about the Court's cutting back on First Amendment protections.⁷⁵ Bar associations and state supreme courts have tended to have another reaction. After the case came down, several states, Louisiana included, adopted Florida-like waiting period rules.⁷⁶

Although the majority opinion in *Went For It* may certainly be subject to reasonable criticism, this article is more concerned with the application of the *Went For It* decision than it is with deficiencies, or perceived deficiencies, in the opinion itself. The next section of this article considers the constitutionality of the Louisiana waiting period rule, in light of the *Went For It* decision and other relevant authorities.

IV. THE CONSTITUTIONALITY OF THE LOUISIANA RULE

A. The Federal Constitution

1. Is There a Potential Problem?

Louisiana's thirty day waiting period rule is very similar to the one approved by the Supreme Court in *Went For It*. At first glance, the constitutionality of the Louisiana rule might appear to be a given, but there is at least one issue that

74. See, e.g., Robert Battey, *Loosening the Glue: Lawyer Advertising, Solicitation and Commercialism*, 9 Geo. J. Legal Ethics 287, 302-06 (1995); Israel Dahan, *Attorney Direct-Mail Solicitation Revisited in Florida Bar v. Went For It, Inc.: A Step Too Far*, 4 J.L. & Pol'y 611, 647 (1996); Tara L. Lattomus, *Offensiveness, The New Standard For First Amendment Legal Advertising Cases: Florida Bar v. Went For It, Inc.*, 40 Vill. L. Rev. 1209, 1251-55 (1995); Marc David Lawlor, *Ivory Tower Paternalism and Lawyer Advertising: The Case of Florida Bar v. Went For It, Inc.*, 40 St. Louis U. L.J. 895, 921 (1996); Todd Mitchell, *Privacy and Popularity: The Supreme Court Attempts to Polish the Public Image of the Legal Profession in Florida Bar v. Went For It, Inc.*, 74 N.C. L. Rev. 1681, 1715 (1996); Kim Y. Oldham, "Let Me Represent You!" *Florida Bar v. Went For It, Inc.: Supreme Court Succumbs to State Regulation of Lawyer Advertising*, 4 Comm. L. Conspectus 83, 91 (1996); Daniel L. Zelenko, *Do You Need A Lawyer? You May Have to Wait 30 Days: The Supreme Court Went Too Far in Florida Bar v. Went For It, Inc.*, 45 Am. U.L. Rev. 1215, 1237 (1996); *Commercial Speech—Attorney Advertising*, 109 Harv. L. Rev. 190, 198-99 (1995).

75. See, e.g., *supra* note 74.

76. See Ala. Code, Rules of Alabama Supreme Court, A.R.P.C. Rule 7.3(h)(1)(i) (1996); Tenn. Code Ann., Court Rules, Rules of the Supreme Court, Rule 8, DR-2-104(c) (1996). In January, 1996, the President of the Rhode Island Bar stated that "many states are now actively considering such a rule following the *Went For It, Inc.* decision." R. Kelly Sheridan, *President's Message*, 44 R.I. B.J. 3, 4 (1996).

Since 1992, Texas has had a penal statute that prohibits direct mail solicitation within 30 days of an accident. The statute is not limited to attorneys. It also covers solicitation letters by chiropractors, physicians, surgeons, private investigators, and licensed health care providers. See Tex. Penal Code Ann. § 38.12(b)(1) (West 1992). In 1995, the United States Fifth Circuit Court of Appeals rejected a claim by attorneys that the statute's 30-day waiting period for lawyer solicitation letters violated the federal Constitution. See *Moore v. Morales*, 63 F.3d 358 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 917 (1996).

merits discussion. The second prong of the *Central Hudson* test—the one requiring the state to show that its restriction directly and materially advances a substantial interest—was satisfied in *Went For It* because Florida had done a two-year study that generated empirical and anecdotal information supportive of the rule. Although Louisiana could presumably rely on the same “substantial” interests that were articulated by the Florida Bar in *Went For It*, it does not seem that Louisiana undertook a study equivalent to the one that supported the Florida rule.

The Advertising Committee of the Louisiana Bar Association apparently gave some consideration to a waiting period rule on targeted solicitation prior to the issuance of the *Went For It* decision.⁷⁷ During the 1991-1993 period, the Committee undertook a rather extensive review of lawyer advertising and solicitation rules.⁷⁸ The review included study of regulatory efforts in other states, consideration of complaints that had been filed with the bar about lawyer advertising, reviewing decisions of the United States Supreme Court, holding public hearings, and receiving written comments from lawyers and members of the public.⁷⁹ Some of the information gathered by the Committee apparently included complaints about solicitation letters to accident victims.⁸⁰ The

77. Telephone interview with E. Phelps Gay (Sept. 24, 1996). Mr. Gay was a member of the Advertising Committee prior to the issuance of the *Went For It* decision. He was the chairman of the committee when *Went For It* was handed down. See also Milford Fryer, *New Restriction On Lawyers Was Needed Step*, Baton Rouge Sunday Advocate, March 10, 1996, at 7B.

78. The Lawyer Advertising Committee of the Louisiana Bar Association was established in the summer of 1991, with the charge to review the then-existing rules and to determine whether any action should be taken with respect to them. In 1992, it proposed a working draft of proposed revisions, and established October 30, 1992 as deadline for submitting comments. See *Lawyer Advertising Rules, Proposed Revisions for Consideration*, 40 La. B.J. 46 (1992). In June, 1993, the Committee made its final proposals to the Louisiana State Bar House of Delegates. The House of Delegates and the Board of Governors approved the rule changes and submitted them to the Louisiana Supreme Court for approval. The Supreme Court approved the changes on October 1, 1993. See *Lawyer Advertising Rules Changes Approved*, 41 La. B.J. 345 (1993).

79. See *Lawyer Advertising Rules, Proposed Revisions for Consideration*, 40 La. B.J. 46-47 (1992).

80. In a report dated May 3, 1993, the Advertising Committee referred to the public hearings it had conducted and to the comments it had received, and it stated: “There were also a number of complaints made by individuals who had been the subject of targeted solicitation practices by lawyers in Louisiana.” Report of the Lawyer Advertising Committee of the Louisiana State Bar Association, May 3, 1993, at 9 (on file with *Louisiana Law Review*).

When the Advertising Committee later proposed a 30-day waiting period rule for targeted solicitation of accident victims, it mentioned, in a comment to the proposed rule, that it had received “numerous complaints” about solicitation letters during its 1991-1993 “deliberations”:

During its deliberations the Committee heard numerous complaints regarding mail solicitation of accident victims shortly after the occurrence of an accident. This practice is considered by many to be offensive and intrusive from the standpoint of the solicited person and to reflect negatively upon the legal profession. Complaints relating to written solicitation of accident victims have been received by the Office of Disciplinary Counsel.

Comment Re Proposed Amendment to Rule 7.2(b)(iii) of the Rules of Professional Conduct. The comment also referred to targeted mailings that had been generated in connection with the October

Advertising Committee was aware, during this period of review, that Florida had adopted a waiting period rule, and the Committee actually gave some initial thought to the development of a similar rule for Louisiana.⁸¹ But the Committee was also aware that the Florida rule had been challenged on constitutional grounds, and it decided to await judicial developments with respect to that rule.⁸² Nonetheless, as a result of its review process, the Committee recommended substantial changes to the rules on advertising and solicitation, and on October 1, 1993, the Louisiana Supreme Court ordered a number of changes to be made.⁸³

After the *Went For It* decision came down, the President of the State Bar asked the Advertising Committee to make a recommendation on a waiting period rule.⁸⁴ With the *Went For It* decision before it, the Advertising Committee proposed a new waiting period rule that was very close to the Florida rule approved by the Supreme Court.⁸⁵ In January, 1996, the proposed rule was unanimously approved by the House of Delegates and the Board of Governors

1995 Bogalusa gas leak: "[I]t is a matter of record that numerous solicitation letters were circulated to Bogalusa residents after the gas leak at the Gaylord Chemical plant this past October. Expressions of outrage from the public and many in the legal profession were widely reported." *Id.*

81. Telephone interview with E. Phelps Gay (September 24, 1996). See also Milford Fryer, *New Restriction on Lawyers was Needed Step*, *Baton Rouge Sunday Advocate*, March 10, 1996, at 7B; Barbara Schlichtman, *New Ethics Rule Aimed at Overly Eager Attorneys*, *Baton Rouge Advocate*, March 6, 1996, at 1B.

82. Telephone interview with Jay C. Zainey (Sept. 23, 1996). Mr. Zainey was the President of the Louisiana Bar Association at the time the *Went for It* decision was handed down. See also Milford Fryer, *New Restriction on Lawyers Was Needed Step*, *Baton Rouge Sunday Advocate*, March 10, 1996, at 7B; Barbara Schlichtman, *New Ethics Rule Aimed At Overly Eager Attorneys*, *Baton Rouge Advocate*, March 6, 1996, at 1B (reports that the bar association had been considering a waiting period rule prior to the October 1995 Bogalusa gas leak, but had questioned the constitutionality of such a rule. The gas leak occurred between the time of the *Went For It* decision and the promulgation of the new rule); Comment Re Proposed Amendment to Rule 7.2(b)(iii) of the Rules of Professional Conduct (States that the Advertising Committee was aware of the Florida rule, however, "[i]n view of existing jurisprudence, particularly *Shapero v. Kentucky Bar Assn . . .*, the Committee questioned whether the Florida rule would pass constitutional muster").

83. See *Lawyer Advertising Rules Changes Approved*, 41 La. B.J. 345 (1993).

84. Telephone interview with Jay C. Zainey (Sept. 23, 1996).

85. The initial paragraph of the resolution submitted by the Advertising Committee stated:
WHEREAS, on June 21, 1995 the U.S. Supreme Court in *Florida Bar v. Went For It, Inc.*, ___ U.S. ___, 115 S. Ct. 2371 (1995) upheld the constitutionality of the Florida law banning targeted mail solicitation of accident victims within thirty days of the accident or disaster. . . .

Resolution to Amend Rules of Professional Conduct 7.2(b)(iii). A comment to the proposed rule said:

At its meeting on December 14, 1995 the Lawyer Advertising Committee decided to recommend for consideration by the House of Delegates an amendment to current Rule 7.2(b). The proposed rule is essentially identical to the Florida thirty-day ban upheld by the U.S. Supreme Court.

Comment Re Proposed Amendment to Rule 7.2(b)(iii) of the Rules of Professional Conduct.

of the State Bar.⁸⁶ The Supreme Court adopted the rule on February 19, 1996.⁸⁷

It seems that the Louisiana State Bar did not "commission surveys" similar to the surveys that the Florida Bar utilized to support its waiting period rule before the United States Supreme Court.⁸⁸ The Florida Surveys appear to have been a source of "statistical" information that was presented to the Court.⁸⁹ If Louisiana did not undertake corresponding surveys, the Louisiana State Bar

86. See Jay C. Zainey, *President's Message*, 43 La. B.J. 541 (1996). Mr. Zainey indicated in his message that the amendment was undertaken to improve the image of the profession, particularly in the aftermath of "outrageous conduct" by client-seeking lawyers following a poisonous gas leak in Bogalusa, Louisiana:

There is an old saying that goes: There is always good that comes out of bad. We saw the worst of our profession following the poisonous gas leak in Bogalusa. Although this outrageous conduct took place in a small town in southeast Louisiana, the effects were felt by lawyers statewide.

The Louisiana State Bar Association stepped in and did something about it. In their first meeting since the Bogalusa incident, and the first meeting since the constitutional issue was decided by the United States Supreme Court, your representatives on the House of Delegates . . . UNANIMOUSLY voted to, in effect, prohibit lawyers from sending mail solicitation letters to accident victims for a period of 30 days from the date of the accident.

...

. . . I feel we have taken a giant leap forward in restoring dignity to our profession . . .

Id. The Bogalusa gas leak in October of 1995 "sent more than 4000 residents to emergency rooms and displaced thousands from their homes for three days." Barbara Schlichtman, *New Ethics Rule Aimed At Overly Eager Attorneys*, Baton Rouge Advocate, March 6, 1996, at 1B.

87. Rule 7.2.

88. Telephone interview with E. Phelps Gay (Sept. 24, 1996). The majority opinion in *Went For It* stated: "After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order." *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2374 (1995). The summary of the Florida study that was presented to the Supreme Court contained "data—statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Id.* at 2377.

89. According to the majority opinion in *Went for It*:

As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 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." . . . Significantly, 27% of direct-mail recipients reported 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. at 2377. It is not clear whether this is all of the statistical information that was contained in the 106 page summary submitted by the Florida Bar. Whether or not there was other such data, the data that is referenced above provides some indication of the extent to which targeted mailings was a problem in Florida.

would probably be unable to generate corresponding statistical data. To what extent is this a problem?

2. *Help From Dicta?*

Dicta in *Went For It* suggests that Louisiana's lack of statistical data may not be much of a problem. The majority opinion stated:

[W]e believe the evidence adduced by the Bar is sufficient to meet the standard elaborated in *Edenfield, supra*. In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."⁹⁰

This language suggests the possibility that Louisiana might be able to use the Florida summary as a basis for its changes to Rule 7.2. The summary contains "studies and anecdotes" from a different "locale." And the *Went For It* decision pronounced the Florida evidence sufficient to justify a thirty-day waiting period rule. If people in Florida believe that targeted mailings within thirty days of an accident are "intrusive," and if they think less well of lawyers because of such solicitations, it is likely that people in Louisiana would believe and think similarly. In any event, it could be contended that "simple common sense" indicates that seriously injured individuals, or their survivors, are likely to take offense, and are likely to think poorly of lawyers, if they are inundated with solicitation letters at a time of post-accident grief.

The problem, of course, with all of this is that the language quoted above is simply dicta; the Court in *Went For It* based its decision on the second prong of the *Central Hudson* test on the existence of a Florida study that produced both statistical and anecdotal information in support of the rule. A subordinate problem is with the language of the dicta itself. The majority opinion cites several cases to support the statements in the dicta, but, at least in some respects, the language of the dicta seems broader than is warranted by the cited cases.

The *Went For It* majority cites *Renton v. Playtime Theatres, Inc.*⁹¹ and Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*⁹² to support the idea that "studies and anecdotes pertaining to different locales" may be used

90. *Id.* at 2378 (italics added) (referring to *Edenfield v. Fane*, 507 U.S. 751, 770-71, 113 S. Ct. 1792, 1800 (1993)).

91. 475 U.S. 41, 106 S. Ct. 925, *reh'g denied*, 475 U.S. 1132, 106 S. Ct. 1663 (1986).

92. 501 U.S. 560, 111 S. Ct. 2456 (1991).

to justify restrictions on free speech.⁹³ The *Renton* opinion provides good support for the idea of relying on the "experience of" and "studies produced by"⁹⁴ other locales. However, neither *Renton*, nor the concurring opinion in *Barnes*, provide clear support for the idea of relying on mere "anecdotes" to support free speech restrictions, unless one takes the view, not altogether unreasonable, that experiences, studies, and perhaps even some court decisions,⁹⁵ are compilations of anecdotes.

The *Went For It* opinion also referred to *Burson v. Freeman*⁹⁶ for the proposition that "history, consensus and 'simple common sense'" may be enough to justify free speech restrictions.⁹⁷ This case featured a rare conflict between the right of free speech and the right to vote. The dispute was over a Tennessee statute that prohibited solicitation of votes within 100 feet of the entrance to a polling place. Justice Blackmun, who wrote the plurality opinion stated:

Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.⁹⁸

Earlier, Justice Blackmun wrote: "[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question."⁹⁹ He indicated that a lesser burden of proof was appropriate in a case where "the First Amendment right threatens to interfere with the act of voting itself."¹⁰⁰ Given the rather unusual conflict between rights involved in the *Burson* case, the fact that the language quoted by Justice O'Connor comes from a plurality opinion, and the reasoning of the opinion itself, it is not clear

93. *Went For It*, 115 S. Ct. at 2378.

94. *Renton*, 475 U.S. at 50, 106 S. Ct. at 930.

95. The Court in *Renton* said that the Renton City Council was entitled to rely on detailed findings summarized in a reported decision of the Washington Supreme Court. *Id.* at 51, 106 S. Ct. at 931.

96. 504 U.S. 191, 112 S. Ct. 1846 (1992).

97. *Went For It*, 115 S. Ct. at 2378.

98. 504 U.S. at 211, 112 S. Ct. at 1857-58.

99. *Id.* at 208, 112 S. Ct. at 1856 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195, 107 S. Ct. 533, 537 (1986)).

100. 504 U.S. at 209 n.11, 112 S. Ct. at 1856 n.11.

that "history, consensus, and simple common sense" (much less common sense alone) would be enough to justify free speech restrictions in other situations.¹⁰¹

3. *Help From Renton?*

As suggested above, the *Renton* case is potentially relevant to the current inquiry. The city of Renton had enacted an ordinance that prohibited adult movie theaters from operating in certain areas of the city. The city relied on "the experience of, and studies produced by, the city of Seattle," to support its contention that the ordinance was "aimed" not at the content of speech as such, but at preventing certain "secondary effects," such as urban blight, "caused by the presence of even one such theater in a given neighborhood."¹⁰² It is not entirely clear whether the Renton city council had actual Seattle-area studies before it at the time it enacted the ordinance.¹⁰³ But the council apparently did have before it the opinion of the Washington Supreme Court in *Northend Cinema, Inc. v. Seattle*,¹⁰⁴ which described Seattle's experience relating to adult movie theaters and which included trial court testimony on the negative effects adult movie theaters on nearby neighborhoods. The Supreme Court said:

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 enacting its adult theater zoning ordinance. 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.¹⁰⁵

101. Which may not be a good thing. Common sense does not always seem to receive the credit it deserves, and may have once enjoyed. We have become a rather empirical people. If a restriction on expression were to actually enjoy the support of common sense, it would be rather wasteful of resources to also require that the restriction be supported by empirical evidence.

102. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S. Ct. 925, 930, *reh'g denied*, 475 U.S. 1132, 106 S. Ct. 1663 (1986).

103. Justice Brennan, who dissented in the *Renton* case, said that the city council had "never actually reviewed any of the studies" that had been conducted by Seattle and Detroit. *Id.* at 61, 106 S. Ct. at 936.

After the litigation had commenced, the city council amended the Renton ordinance, and added a statement of reasons for its enactment. *Id.* at 45, 106 S. Ct. at 927. The city council added that it had intended to rely on the opinion of the Washington Supreme Court in *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153 (Wash. 1978), *cert. denied*, 441 U.S. 946, 99 S. Ct. 2166 (1979), a case that had upheld Seattle's zoning regulations against constitutional attack. *See Renton*, 475 U.S. at 50-51, 51 n.5, 106 S. Ct. at 930, 936 n.5. Justice Brennan complained that "despite the suspicious coincidental timing of the amendment, the Court holds that 'Renton was entitled to rely . . . on the "detailed findings" summarized in the . . . *Northend Cinema* opinion.'" *See Renton*, 475 U.S. at 61 n.5, 106 S. Ct. at 936 n.5.

104. 585 P.2d 1153 (Wash. 1978), *cert. denied*, 441 U.S. 946, 99 S. Ct. 2166 (1979).

105. *Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931.

This case supports not only the propriety of relying on a study from another locale, but also the propriety of relying on court opinions that contain "findings" relevant to the subject matter of the study. Therefore, *Renton* is potentially relevant with respect to the constitutionality of the Louisiana waiting period rule, because the *Went For It* decision, with its references to the Florida study, was before the Advertising Committee of the State Bar when it proposed the amendment to Rule 7.2.

4. *Edenfield and the Second Prong*

On the other hand, at least one pre-*Went For It* decision suggests that the state's showing on the second prong of the *Central Hudson* test should incorporate a fair degree of rigor. In *Edenfield v. Fane*,¹⁰⁶ the Supreme Court stated that the state's burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."¹⁰⁷ Read literally, this seems to be a fairly difficult burden to meet, particularly the demonstration of prospective success that seems to be required.

Edenfield itself involved a ban on in-person solicitation by Florida certified public accountants.¹⁰⁸ Although the Supreme Court thought that the State had articulated significant interests in support of the ban,¹⁰⁹ it concluded that the State Board of Accountancy had not met its burden on the second prong of the *Central Hudson* test. The Court stated that the Board "presents no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the board claims to fear."¹¹⁰ Moreover "[t]he record does not disclose any anecdotal evidence, either from Florida or another State, that validates the Board's suppositions."¹¹¹ The Board had actually offered an affidavit and a report on CPA solicitation prepared by the American Institute of Certified Public Accountants. The Court, however, found these offerings to be deficient: the report, which had been prepared in 1981, was found to contradict the Board's

106. 507 U.S. 761, 113 S. Ct. 1792 (1993).

107. *Id.* at 770-71, 113 S. Ct. at 1800.

108. The Florida rule provided that a CPA "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication." See 507 U.S. at 764, 113 S. Ct. at 1796 (quoting Fla. Admin. Code Ann. r. 21A-24.002(2)(c) (1992)).

109. The Board satisfied the first prong of the analysis by arguing that the state had substantial interests in protecting consumers from fraud and overreaching and in maintaining the fact and the appearance of CPA independence in auditing businesses and in attesting to financial statements. *Id.* at 768, 113 S. Ct. at 1798.

110. *Id.* at 771, 113 S. Ct. at 1800.

111. *Id.*

assertions, and the affidavit was regarded as "nothing more than a series of conclusory statements."¹¹² The Court held that "as applied to CPA solicitation in the business context," the Florida rule violated the First and Fourteenth Amendments.¹¹³

Edenfield was, from one perspective, a harder case than *Went For It* for the state to win. The restriction in *Went For It* was limited to a thirty-day period; the restriction in *Edenfield* was unlimited in time. In addition, the report that the Accountancy Board offered in *Edenfield* was weaker than the study that the Florida Bar offered in *Went For It*. On the other hand, *Edenfield* involved a prohibition against direct in-person solicitation, the very type of ban that had been upheld by the Supreme Court in *Ohralik*. If it is appropriate to ban direct, in-person solicitation of clients by attorneys, then it might be thought appropriate to ban such solicitation by accountants. Still, the ban was rejected in *Edenfield*. This result may be partially attributed to the Court's focus on "business" solicitation by accountants in *Edenfield*, which has less risk of overreaching, and is less likely to cause distress, than in-person solicitation of seriously-injured accident victims by attorneys.¹¹⁴ But the result may also reflect a bit of rigor in the *Edenfield* Court's requirements with respect to supporting studies for the second prong of the *Central Hudson* test.

5. Louisiana's Rule

Assuming that the information recited earlier about the Louisiana "study" is accurate,¹¹⁵ it seems reasonable to conclude that Louisiana's study is not as strong as the study that supported the Florida rule in *Went For It*. On the other hand, Louisiana would be able to make a stronger showing than the State did in *Edenfield*, where the only study that was presented apparently contradicted the State's position. Louisiana would also enjoy one advantage that Florida did not have in *Went For It*: a previous opinion by the United States Supreme Court upholding a thirty-day waiting period rule and containing "statistical and anecdotal" information from a study supporting such a rule. The majority opinion in *Went for It* indicated, in dicta, that the State might be able to justify

112. *Id.*

113. In dissent, Justice O'Connor said that by attempting to limit its holding to the rule's application in the business context, the Court had implied that the rule itself satisfied the *Central Hudson* test. Her view was that the rule did satisfy the *Central Hudson* test, and that the Court's opinion was inconsistent with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912 (1978), a case in which the Supreme Court had upheld a ban against in-person solicitation by attorneys. 507 U.S. at 779, 113 S. Ct. at 1809.

114. Of course, this line of thought would also support First Amendment protection for attorneys who are engaged in in-person solicitation of "business" clients. Cf. Justice Marshall's discussion of "benign" solicitation in his concurring opinion in the *Ohralik* case. 436 U.S. at 472 & n.3, 98 S. Ct. at 1927 & n.3.

115. That is, that the 1991-1993 review by the Advertising Committee generated at least "anecdotal data" supportive of a 30-day waiting period.

speech restrictions "by reference to studies and anecdotes pertaining to different locales altogether." The *Renton* case shows an instance of reliance on a court opinion that contained findings based on a study in another locale. The *Went For It* decision itself sets forth a considerable amount of statistical and anecdotal information supportive of the Florida rule. It seems that the Supreme Court majority has invited reliance on that information.

If Louisiana were to lose a constitutional contest over the second prong of the *Central Hudson* test, it would probably be because Louisiana did not undertake formal surveys from which statistical information could be generated. It might be contended that the absence of such statistical data makes it impossible to determine the extent to which targeted mailing to accident victims really was a problem in Louisiana prior to the amendment to Rule 7.2. But if this were to be determinative of the constitutional issue, it would mean, as a practical matter, that no state could impose a thirty-day waiting period without doing predicate survey work. Presumably, the results of the survey would then have to show that there was an appreciable level of targeted mailing activity by lawyers and that a statistically significant number of recipients of targeted mailings found the mailings to be "intrusive."

Given the importance of free speech, even commercial speech, some might argue that survey information of this sort would be an appropriate thing to require. But a universal requirement of this nature should not be imposed simply to make it more expensive for a state to adopt a thirty-day waiting period. Once at least one state has gathered sufficient survey data to support a ban, a requirement that another state also conduct surveys should be based on doubts about whether the results of the existing surveys carry over to the new state that is considering a ban. It is perhaps theoretically possible that accident victims in a new state would be generally pleased to receive solicitation letters that would generally offend residents of another state where survey data had been gathered. This does not seem very likely, however, if the new state has collected "anecdotal" information showing that its residents regard such solicitations as "intrusive."

Translated into the context of the *Renton* case, the argument might have been that a local study should be required of the effects of adult movie theaters on neighborhoods in the City of Renton, because an adult movie theater that would cause blight in residential neighborhoods of Seattle, or some other city, might not do so (or might even improve conditions) in comparable residential neighborhoods of Renton. Of course, the Supreme Court required no such local study in the *Renton* case. It was enough that the "evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."¹¹⁶ That evidence consisted, in large part, of findings related to a Seattle-area study that were contained in a court decision.

116. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 931 (1986).

Although the question is not free from doubt, it appears that the new Louisiana rule may have sufficient support to survive the second prong of the *Central Hudson* test. The Louisiana State Bar Advertising Committee had the *Went For It* decision before it when it proposed thirty-day waiting period rule, and it took that opinion into account. That opinion, in turn, referenced Florida survey information on the negative effects of solicitation letters to accident victims. Finally, the Advertising Committee had apparently already gathered anecdotal information on the negative effects of solicitation letters to accident victims. This may be enough.¹¹⁷

B. The Louisiana Constitution

1. Free Speech: More or Less Protected in Louisiana?

A restriction on speech might pass muster under the federal Constitution and still run afoul of state constitutional requirements¹¹⁸ because the language, or

117. Even if it were not enough, there might be another way to support the new rule. The state's burden, under the second prong of the *Central Hudson* test, is not to show what the state's motive was at the time it adopted the restriction on speech. Instead, the burden is to "demonstrate that the restriction on commercial speech directly and materially advances" a substantial interest. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2376. As a practical matter, the time when that burden must be met is the time when the rule is challenged in court.

A recent Fifth Circuit Court of Appeals decision indicates one way in which that burden might be satisfied. In *Moore v. Morales*, 63 F.3d 358 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 917 (1996), a post-*Went For It* decision, the Fifth Circuit upheld a Texas penal statute that imposed a 30-day waiting period on lawyer solicitation letters. There is no indication, in the reported opinion, that "studies" were conducted before the adoption of the waiting period. The evidence that the court considered in support of the limitation appears to have consisted mostly of testimony offered by witnesses at a bench trial in federal district court:

Before us is extensive evidence of the great number of complaints associated with direct mail solicitation in general. As to such solicitation within 30-days of an accident, experts for the State testified that it can be detrimental to an accident victim and his or her family. They testified further that the 30-day ban would provide reasonable protection from many of these detrimental effects.

There is also testimony from individuals that their receipt of direct mail solicitation immediately following an accident outraged them, invaded their privacy, and contributed to their emotional distress. Those same individuals testified that they would have been better able to cope with the intrusiveness of the solicitation letters had they not received them until at least one month after the accident. The State's evidence was further supported by the co-chairman of the Houston Trial Lawyers' Association and the author of the 1993 provisions; both testified to numerous complaints of outrage and invasion of privacy regarding direct mail solicitation.

Based on Florida Bar, we find this evidence sufficient to satisfy the first two *Central Hudson* prongs. . . .

63 F.3d at 362-63. Presumably, it would be possible to offer similar trial testimony if there were a constitutional challenge to the Louisiana waiting-period rule.

118. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S. Ct. 2035, 2041 (1980).

the construction given to the language, of a state constitution might be more protective of speech than corresponding provisions of the First Amendment. It is important, therefore, to consider whether commercial speech (particularly lawyer advertising) might enjoy greater protection under the free speech guaranty of the Louisiana Constitution than under the free speech guaranty of the First Amendment.

Article I, Section 7 of the Louisiana Constitution states: "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom."¹¹⁹ This language seems to be at least as broad in its protection of speech as the language in the federal Constitution. The Louisiana Supreme Court has indicated that "our state constitution's guarantee of these liberties was designed to serve the same purpose and provides at least coextensive protection."¹²⁰

A recent decision of the Fourth Circuit Court of Appeal,¹²¹ however, may be read to suggest that the Louisiana free speech protections may be even broader than those under the federal Constitution. In *State v. Moses*,¹²² a case involving restrictions on the distribution of anonymous¹²³ political campaign literature, the appellate court stated:

In view of our own jurisprudence and state constitution, the state interest required to justify even a limited prohibition on election-related anonymous literature in Louisiana should be much more compelling than that which theoretically the U.S. Supreme Court might have found sufficient in Ohio or elsewhere.¹²⁴

However, this conclusion appears to have been based, not only on Article 1, section 7, dealing with freedom of expression, but also on Article 1, section 5, dealing with the right to privacy. In a later portion of its opinion, the court said the Louisiana Constitution "contains even stronger language" than the First Amendment "bearing on freedom of expression and the right to remain

119. La. Const. art. 1, § 7 (1974).

120. See *State v. Franzone*, 384 So. 2d 409, 411 (La. 1980) (criminal statutes made it illegal for property owners to knowingly use or lease their premises "for the practice of obscenity"; Louisiana Supreme Court declared them unconstitutional, as invalid prior restraints on expression).

The Louisiana Supreme Court has frequently cited federal authorities when deciding free expression cases. See, e.g., *Gregory v. Louisiana Board of Chiropractic Examiners*, 608 So. 2d 987 (La. 1992); *Louisiana State Bar Ass'n v. St. Romain*, 560 So. 2d 820 (La. 1990).

121. *State v. Moses*, 655 So. 2d 779 (La. App. 4th Cir. 1995).

122. *Id.*

123. Campaign literature that does not contain the name and address of the person responsible for its contents. *Id.* at 781.

124. *Id.* at 782. The Ohio reference relates to *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), a United States Supreme Court case that considered the constitutionality of a Ohio statute prohibiting distribution of anonymous campaign literature.

anonymous in doing so."¹²⁵ In particular, the court said: "We find that article 1, Section 7, Freedom of Expression, of the Louisiana Constitution when combined with article 1, Section 5, Right to Privacy, affords stronger protection for anonymity in Louisiana than can be found in the U.S. Constitution."¹²⁶

Of course, even if the Louisiana Constitution is more protective of free speech in some contexts than the First Amendment, this does not mean that commercial speech, and, in particular, lawyer speech, is entitled to broader protection in Louisiana.

2. *Gregory v. Louisiana Board of Chiropractic Examiners—A Recent Commercial Speech Case*

There is a fairly recent commercial speech decision by the Louisiana Supreme Court that sheds some light on the extent to which commercial speech is entitled to protection under the provisions of the Louisiana Constitution.¹²⁷ In *Gregory v. Louisiana Board of Chiropractic Examiners*,¹²⁸ the Louisiana Supreme Court considered the constitutionality of a statute that prohibited "health care providers" from engaging in direct telephone or mail solicitation of potential patients that were known to have been involved in a recent accident or injury.¹²⁹ Five chiropractors and a chiropractic clinic challenged the statute as an infringement on free speech. Prior to the enactment of the statute, the plaintiffs would purchase accident reports from the police and would send direct mail solicitations to people who were reported to have been injured. Wanting to continue this practice, the plaintiffs brought their claims before the Louisiana Supreme Court.

125. *Moses*, 655 So. 2d at 784.

126. *Id.* at 784. The court quoted other authorities for the proposition that the Louisiana right to privacy gives a "higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution." *Id.* at 785 (quoting *State v. Daniels*, 631 So. 2d 1281, 1283 (La. App. 4th Cir. 1984) and *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982)).

127. See *Gregory v. Louisiana Board of Chiropractic Examiners*, 608 So. 2d 987 (La. 1992).

128. *Id.*

129. The statute provided, in pertinent part:

A. A health care provider or person designated, contracted, or paid by the health care provider, shall not directly solicit by phone or mail, patients or potential patients who, because of their particular circumstances, are vulnerable to undue influence. Circumstances in which patients or potential patients may be considered to be vulnerable to undue influence include but are not limited to:

- (1) When a person is known to the health care provider to have recently been involved in a motor vehicle accident.
- (2) When a person is known to the health care provider to have recently been involved in a work-related accident.
- (3) When a person is known to the health care provider to have recently been injured by another person or as a result of another person's actions.

La. R.S. 37:1743 (Supp. 1996).

The court began its opinion by identifying the dispute as one involving commercial speech.¹³⁰ In the course of its opinion, the court referred to the free speech provisions of both the Louisiana Constitution and the United States Constitution.¹³¹ However, with one exception,¹³² every case the court cited was one that had been decided by the United States Supreme Court. Included were all of the principal cases to date on lawyer advertising and solicitation.¹³³ The court indicated that the controlling test was the one set forth in *Central Hudson*.¹³⁴

Applying the *Central Hudson* test, the court concluded that the State had advanced two substantial interests in support of its ban on solicitation: (1) "reducing unnecessary medical treatment and in reducing insurance costs";¹³⁵ and (2) "protecting its citizens from possible overreaching" by health care providers.¹³⁶ However, citing *Shapero*, the court said that "targeted mail solicitations could generally be regulated by the state through less restrictive and more precise means than a total ban, such as by requiring submission of letters of solicitation to a state agency for approval and restricting or penalizing only those letters which were abusive."¹³⁷ In the end, the court decided that the "interference with commercial speech in the statute at issue is broader than is necessary to prevent the evil feared by the Board. Although telephone solicitation is in-person solicitation and a total ban on such solicitation may be permissible, such an extensive restriction on targeted direct mail solicitation is not."¹³⁸ Accordingly, the court declared the statutory prohibition against targeted mailings to be unconstitutional.¹³⁹

There is no indication in the opinion that commercial speech is entitled to more protection under the Louisiana Constitution than it is under the First Amendment. To the contrary, the opinion contains a hint of dissatisfaction over the extent to which the United States Supreme Court has given constitutional protection to

130. 608 So. 2d at 987.

131. *Id.* at 989.

132. *National Funeral Services v. Rockefeller*, 870 F. 2d 136 (4th Cir. 1989), *cert. denied*, 493 U.S. 966 (1989) (This case upheld some West Virginia statutes that prohibited "in-person and telephone solicitations of preneed funeral contracts.").

133. The Court discussed, in chronological order, the following cases: *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977), *reh'g denied*, 434 U.S. 881, 98 S. Ct. 242 (1977); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912 (1978); *In re Primus*, 436 U.S. 412, 98 S. Ct. 1893 (1978); *In re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S. Ct. 2265 (1985); and *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S. Ct. 1916 (1988).

134. 608 So. 2d at 989 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980)).

135. 608 So. 2d at 992.

136. *Id.*

137. *Id.* at 992-93.

138. *Id.*

139. The plaintiffs had not sought a declaration of unconstitutionality with respect to the restriction on telephone solicitations. *Id.*

lawyer advertising. Discussing the *Bates* case, the Court emphasized the *dissent* of Justice Powell:

In dissent Justice Powell argued that advertising of undefined "routine legal services" is vastly different from price advertising of a standardized product such as the prepackaged prescription drugs in the Virginia Pharmacy Board case. The advertising of professional services also implicates the vastly increased potential for deception and the enhanced difficulty of effective regulation in the public interest. The dissenter concluded that the great risk of public deception was not justified by the marginal First Amendment interests involved.¹⁴⁰

Earlier in its opinion, the court said that "potential for misleading and deception is particularly significant in advertising for professional services."¹⁴¹ Underscoring this point, Justice Lemmon wrote a concurring opinion in which he indicated that his views on professional advertising were closer to those of the dissenting justices in recent Supreme Court cases on lawyer advertising.¹⁴²

The *Gregory* opinion may also contain another hint about the Louisiana Supreme Court's views on commercial speech restrictions, one that is pertinent to the issues involved in the recent amendment to Rule 7.2. Near the end of its opinion, the Court listed some examples of restrictions on solicitation letters that the State Board of Chiropractic Examiners could permissibly impose:

For example, the Board may consider requiring that all letters be prominently identified as an ADVERTISEMENT; that all letters be submitted to the Board for approval before mailing; that copies of all letters be retained by the sender for a reasonable period; and that the letter

140. *Id.* at 990.

141. *Id.*

142. He stated:

I believe, along with the dissenters in those cases [Zauderer and Shapers], that greater deference should be accorded to the state's legitimate effort to regulate advertising for professional services because of the vastly greater difficulty for a lay person to evaluate the quality of professional services than the quality of standardized consumer products, and because the consequences of a mistaken evaluation of a "free sample" of professional services may be much more serious.

....

The medical profession, like the legal profession, is founded on a service orientation rather than a commercial orientation. The sad commentary on lawyer advertising is that the accompanying dramatic increase in emphasis on commercialism in the practice of law has led to a corresponding decline in professionalism. The fact that many professionally oriented lawyers have been forced into advertising in order to meet the competition only compounds the general problem that advertising for professional services frequently tends to mislead more than to inform. This is an area where an absolute bar on personal contact for solicitation of employment may be required by the substantial governmental interest involved.

Id. at 993-94.

advise the recipient of the importance of employing a health care provider and suggest inquiry into the provider's qualifications and experience.¹⁴³

Immediately after these suggestions, in the same paragraph, the Court added: "Moreover, the question whether the Board may impose a ban on written solicitations to an accident victim for a specified reasonable period immediately following the accident is not presented in this case."¹⁴⁴ In context with the preceding "suggestions," and in light of the reference to a "reasonable period" for the ban, this sentence seems to signal an absence of hostility to a waiting period rule for targeted mail solicitations by chiropractors.

This "signal" (if that is what it is) in the *Gregory* opinion was given in a case involving chiropractors, but most of the cases that the Louisiana Supreme Court relied on were United States Supreme Court cases dealing with lawyer advertising and solicitation. Presumably, if the Court were willing to consider a waiting period rule for chiropractor solicitation letters, it would be willing to consider one for solicitation letters written by lawyers. Of course, in 1996, the court adopted an amendment to Rule 7.2 that included such a ban. There is little reason to think that the Court would find that ban more vulnerable to an attack under the free speech provisions of the Louisiana Constitution than under the provisions of the First Amendment.

V. THE WAITING PERIOD AND ATTORNEY BEHAVIOR

How will the new rule affect the behavior of Louisiana lawyers? It seems reasonably certain that some Louisiana lawyers have, in the past, mailed targeted solicitation letters to accident or disaster victims, or their surviving relatives, within thirty days of the accident or the disaster.¹⁴⁵ Lawyers who used to do this, who are familiar with the new rule, and who wish to comply with it (or sufficiently fear the consequences of not complying with it), can be expected to avoid mailing targeted solicitation letters to accident or disaster victims, or their relatives, within the thirty-day period. These lawyers may not send solicitation letters at all, or if they do, they may send them after the end of the period.

Some lawyers may continue to mail targeted solicitation letters contrary to the provisions of the new rule. These lawyers would fall into one of two categories. First, there could be some lawyers who do not know about the new rule and, out of ignorance, mail targeted solicitation letters within the thirty-day period.¹⁴⁶ It

143. *Id.* at 993 n.8.

144. *Id.*

145. A New Orleans-based newspaper reported: "The practice is pervasive, as any victim of a well-publicized accident can attest. Before the bandages are off, letters of solicitation appear in the mailbox." *Braking Ambulance Chasers*, *New Orleans Times Picayune*, Jan. 24, 1996, at B6.

146. A lawyer who does not know of the existence of the rule might be expected to articulate his or her ignorance as a mitigating factor in discipline. There is some authority for the proposition that misconduct arising from "negligence or oversight is . . . less egregious than that deriving from

would be surprising, however, if there were many lawyers who do personal injury work who have not heard about the rule.

A second category of non-complying lawyers could be described as "marginally-ethical." These would be lawyers who know about the rule, and who choose to violate it because they care more about obtaining clients than about complying with the rule, and because they believe that they will obtain clients by violating the rule that they would not otherwise obtain. There will probably not be many lawyers in this category either, for at least two reasons.¹⁴⁷ First, even if there are a fair number of lawyers who would subordinate rule compliance to client-getting, they would probably realize that, by mailing a targeted solicitation letter, they would create a paper trail of non-compliance with an ethics rule. The post-mark alone would evidence the non-compliance. Unless they believe that the disciplinary authorities would not enforce the rule, or would not enforce it seriously, such lawyers would probably hesitate to create the negative evidence that would arise from non-compliance.

Second, there are other ways to approach the potential clients. One way to approach accident victims is to engage in direct solicitation, either by live telephone contact, or by in-person visit. Both types of solicitation are clearly unethical, regardless of when they occur.¹⁴⁸ However, anecdotal reports, and even some newspaper accounts, indicate that such solicitation efforts do occur.¹⁴⁹ A potential downside to the new rule is that it might incline marginally-ethical lawyers to give up targeted mailings and shift to these more obnoxious forms of obtaining new clients. Marginally-ethical lawyers, who desire to contact accident victims but who are anxious to avoid a negative paper trail, might choose to engage in these forms of solicitation within the thirty-day period.¹⁵⁰

But there are other, more appropriate, options available as well. Attorneys who used to send immediate targeted mailings to accident victims and who desire to attract accident victims as clients could always turn to conventional advertising. The rules permit various forms of advertising,¹⁵¹ and it is clear that at least some

an intent to engage in prohibited conduct." See *In re Anonymous*, 637 N.E.2d 131, 132 (Ind. 1994).

147. One hopes that there are not very many "marginally-ethical" lawyers to begin with.

148. See La. R.S. 37, Ch. 4 App., Art. 16, Rule 7.2(a) (Supp. 1996). At least they are unethical when the persons being solicited have no prior professional or family relationship with the lawyer and where a significant motive for the solicitation is the lawyer's pecuniary gain. *Id.*

149. See, e.g., Susan Finch, *Mother Helps Legal Sting*, *New Orleans Times Picayune*, July 12, 1996, at A1; *Braking Ambulance Chasers*, *New Orleans Times Picayune*, Jan. 24, 1996, at B6; Edward Pratt, *Lawyers Try To Improve Image*, *Saturday State Times*, March 9, 1996, at 7B; Milford Fryer, *New Restriction On Lawyers Was Needed Step*, *Baton Rouge Sunday Advocate*, March 10, 1996, at 7B.

150. Of course, even telephone solicitation and in-person solicitation may create evidentiary trails, such as business cards or recorded telephone discussions. See, e.g., *In re D'Amico*, 668 So. 2d 730 (La. 1996) (per curiam) (attorney subject to disciplinary hearing based on conversation recorded by a telephone answering machine). Even if there were no paper trail, a disgruntled prospective client could provide testimony about the solicitation in a disciplinary hearing.

151. See Rules 7.2 & 7.3.

forms of advertising help attract new clients.¹⁵² Lawyer television advertisements are commonplace. "Untargeted" mass mailings, which constitute a form of permissible advertising, would not be subject to the thirty-day waiting period.

It appears that there are even some forms of "targeted" solicitation of accident victims that would not be covered by the thirty-day rule. Rule 7.2(b) permits attorneys to use written or recorded messages to solicit business from "persons known to need legal services of a particular kind," so long as certain requirements are met. For example, a recorded solicitation may be used, if a copy is retained by the lawyer, if it identifies a lawyer responsible for its content, if it is identified as an "advertisement," and if it meets certain other requirements set forth in Rules 7.1 and 7.2. But the new thirty-day rule expressly applies only to "written" communications. As a result, it seems that a lawyer would not violate the new rule if he or she walked up to the door of an accident victim, hung a recorded solicitation message on the doorknob, and left without encountering anyone.¹⁵³ Similarly, to the extent current technology permits, it would seem permissible for a lawyer to engage the services of a computer to make a telephone call to an accident victim, and deliver a recorded solicitation message over the telephone. It appears that a lawyer could even mail a recorded solicitation message to an accident victim within the thirty-day period, so long as no "written communication" were included.

The language of the rule might even permit a type of written solicitation within the thirty-day period. Although 7.2(b)(3) imposes a thirty-day waiting period on written communications, the pertinent portion of the rule references *mailing*. It

152. Some Alabama lawyers were disciplined because their advertising brought in more business than they could competently handle. See *Davis v. Alabama State Bar*, 676 So. 2d 306 (Ala. 1996).

153. At least that would seem to be the result unless the language of Rule 7.2(a) could be somehow be said to cover this as an "in person" solicitation. The rule should not be read that way.

The first portion of Louisiana Rule 7.2 states: "A lawyer shall not solicit professional employment in person, by person to person verbal telephone contact or through others acting at his request. . . ." This is slightly different from the corresponding language in ABA Model Rule 7.3: "A lawyer shall not by in-person or live telephone contact solicit professional employment. . . ." The "in-person . . . contact" language from the Model Rule seems to describe a "person-to-person" solicitation scenario—one in which the attorney solicits business from a person who is in his presence, or who is within earshot. The "in-person" language from the Louisiana version is somewhat less clear in this respect.

Does the difference in the language matter? It would, if the "in person" reference in the Louisiana rule were thought to cover more than the standard "person to person" solicitation situation described in the foregoing paragraph. Thus, it might be argued that the "in person" reference should be read to prohibit that "person" (the attorney) from being involved in the delivery of any communication that solicits clients. But that would be a rather strange result. In the first place, such a reading would also be broad enough to cover "person to person verbal telephone contact," rendering that portion of the Rule unnecessary. Second, such a broad reading would prohibit activities that are expressly permitted under part (b) of the Rule. That is because an attorney who engages in the activities permitted under part (b) of Rule 7.2 would certainly be involved, to some extent, in delivering a message of solicitation. At the very least, the attorney would complete a written communication, and would initiate the delivery process by taking it to a secretary for mailing, or by taking it directly to a mail slot or a post office. Obviously, the language of part (a) of the rule should not be read to prohibit the activities that are expressly permitted in part (b).

states that "such communication shall not be initiated by the lawyer unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." It might be argued that the language of the rule applies only to written solicitations that are mailed. If that is so, then the rule would not prohibit a lawyer from hanging a written solicitation letter on the accident victim's doorknob within the thirty-day period. Whether or not this is a reasonable reading of the Rule,¹⁵⁴ it would, of course, be impermissible for the lawyer to engage in "in person" solicitation if someone came to the door before the lawyer departed.

Would lawyers actually use some of these other, apparently permissible, means to solicit business from "targeted" accident or disaster victims within the thirty-day period? The guess here is that some lawyers will try to do so. But there are some practical problems that may discourage their use. Even if it were permissible for a lawyer to engage in targeted solicitation within the thirty-day period, by, for example, placing a recorded message on the doorknob of an accident victim, the lawyer would find that this is more labor-intensive than sending a targeted solicitation letter by mail. The lawyer may also fear, with good reason, that an accident victim, or surviving relative, would be less pleased to find a lawyer communication hanging on his or her front door than to find it in the mailbox. A hostile recipient would probably not want to be a client. There would also be the risk that a lawyer (or an agent of the lawyer) who goes to the front door would actually encounter someone there. It would be odd and uncomfortable for the lawyer to say nothing in that circumstance. On the other hand, if the lawyer says anything meaningful about why he or she has come to the front door, or even if the lawyer simply hands over the recording, the lawyer might then be guilty of prohibited in-person solicitation. The latter risk could be avoided if the lawyer were able to have a targeted solicitation message transmitted over the telephone by some sort of machine. But a machine solicitation might be relatively difficult to arrange, would almost certainly be fairly unimpressive to the hearer, and might, in any event, be received by someone other than the intended "target."

VI. CONCLUSION

The recent amendment to Louisiana's Rule 7.2 makes it unethical for Louisiana lawyers to engage in a previously permissible form of targeted solicitation of clients. As of March 1, 1996, they may no longer mail solicitation letters to accident or disaster victims, or their relatives, within thirty days of the accident or disaster. Within the thirty-day period, lawyers are still free to engage in conventional advertising. They may also engage in forms of targeted solicitation that are not covered by the thirty-day restriction, provided, of course, that they comply with the other rules relevant to advertising and solicitation.

154. Another, less persuasive, reading of the rule is that it *requires* all "written communications" to accident victims or their relatives to be *mailed*, but then it prohibits the communications from being mailed during the waiting period.

There is an issue about the constitutionality of the new rule. The United States Supreme Court approved a similar restriction on Florida lawyers, in part because a two-year study by the Florida State Bar established, to the satisfaction of the Court, that the restriction directly and materially advanced a substantial interest. From 1991-1993, Louisiana undertook its own review of lawyer advertising and solicitation rules. However, unlike Florida, Louisiana did not undertake formal surveys relative to the solicitation letter issue, and, as a result, it does not seem that Louisiana would be able to make a statistical showing in support of its rule comparable to the one that Florida generated in the *Went For It* case. But the Louisiana study apparently did gather negative anecdotal information on targeted solicitation letters. And the Louisiana authorities had the *Went For It* decision, with its detailed references to the Florida study, before them at the time they acted. The United States Supreme Court has indicated that restrictions on speech may be supported by reliance on studies from other locations. Such reliance here could well enable Louisiana's new rule to pass constitutional muster.

Louisiana's thirty-day rule should have a definite effect on lawyer behavior: lawyers who comply with the rule will no longer mail targeted solicitation letters to accident victims within the thirty-day period. On the negative side, it is possible that the new rule could incline marginally-ethical lawyers to engage in prohibited in-person solicitation or person-to-person telephonic solicitation. But it is more likely that lawyers who desire to represent accident or disaster victims will turn to permissible ways to reach them, such as conventional advertising, or perhaps in some cases, forms of targeted solicitation that are not expressly prohibited by the rules.