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Constitutional Law - First Amendment - Freedom of Speech

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CONSTITUTIONAL LAW—FIRST AMENDMENT—FREEDOM OF SPEECH—The United States Supreme Court held that Florida Bar rules prohibiting attorneys from using direct mail to solicit personal injury or wrongful death clients within thirty days of an accident are constitutional and do not violate an attorney's First Amendment rights.

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

From 1987 to 1989, the Florida Bar conducted a study of lawyer advertising¹ and solicitation² within the State of

1. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2374 (1995). Rule 7.2 of the ABA Model Rules of Professional Conduct outlined advertising as follows:

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.
- (b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
- (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay the reasonable costs of advertisements or communications permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or legal service organization.
- (d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1989) (amended 1994).

2. *Went For It*, 115 S. Ct. at 2374. Rule 7.3 of the ABA Model Rules of Professional Conduct outlines solicitation as follows:

- (a) A lawyer shall not by in-person or live telephone contact solicit professional employment 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 solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

Florida.³ The study found that Florida adults felt that lawyer advertising encouraged frivolous lawsuits and belittled the legal profession.⁴ As a result of the study, the Florida Bar petitioned the Florida Supreme Court to amend the Rules Regulating the Florida Bar, Chapter 4 of the Rules of Professional Conduct, with respect to lawyer advertising and solicitation.⁵ The proposed amendments were adopted with some modifications⁶ and became effective April 1, 1991.⁷

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1989).

3. *Went For It*, 115 S. Ct. at 2374. Included in the study were: 1) results of statewide hearings; 2) the results of a public opinion survey; and 3) a compilation of public commentary on attorney advertising. Petitioner's Brief on the Merits at 3, *Went For It* (No. 94-226). The public polling organization was also retained to compile statistics regarding the public's perception and attitudes toward solicitation and advertising by attorneys. *Id.*

4. Petitioner's Brief on the Merits at 3-4, *Went For It* (No. 94-226). The study also found that much of the Florida news media condemned lawyer advertising in general, and particularly the solicitation of recent accident victims and their families. *Id.* at 4.

5. *Id.* at 3 (citing *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d 451 (Fla. 1990) (approving the modifications to the rules petitioned by the Florida Bar)). The Florida Supreme Court received a complete version of the study with the petition to amend. *Id.*

6. *Went For It*, 115 S. Ct. at 2374 (citing *The Florida Bar*, 571 So. 2d at 451). Two of the amendments were at issue in *Went For It*. *Id.* Rule 4-7.4(b)(1)(A) provides that:

A lawyer shall not send, or knowingly permit to be sent, on behalf of himself, his firm, his partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, 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.

The Florida Bar, 571 So. 2d at 466. Rule 4-7.8(a) provides that:

[A] lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

Went For It, 115 S. Ct. at 2374. In combination, these rules prohibit lawyers from directly or indirectly contacting accident victims or their families by direct mail within 30 days after an accident. *Id.*

7. See *McHenry v. Florida Bar*, 808 F. Supp. 1543, 1544 (M.D. Fla. 1992) (holding that the Florida Bar rule which prohibited personal injury and wrongful death-targeted direct mail lawyer advertising and lawyer referral for thirty days following an accident was unconstitutional), *aff'd*, 21 F.3d 1038 (11th Cir. 1994), *rev'd sub nom.* *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

In March of 1992, G. Stewart McHenry ("McHenry") and his wholly owned lawyer referral corporation, Went For It, Inc. ("WFI"), filed suit against the Florida Bar (the "Bar") and Assistant Staff Counsel for the Florida Bar, Susan V. Bloemendaal ("Bloemendaal"), in the United States District Court for the Middle District of Florida.⁸ The district court referred the parties' competing summary judgment⁹ motions to a magistrate judge who,¹⁰ in turn, recommended that McHenry's motion for summary judgment be denied and that the Bar's motion for summary judgment be granted.¹¹ The United States District Court for the Middle District of Florida rejected the report and recommendation of the magistrate judge, granted McHenry's motion for summary judgment and denied the Bar's motion for summary judgment.¹² The Bar appealed

8. *McHenry*, 808 F. Supp. at 1543. McHenry, as a member of the Florida Bar, had a history of sending direct mail advertisements to personal injury victims to solicit legal clients. *Id.* at 1545 n.1. In conflict with the disputed rules, McHenry wanted to continue direct mail solicitation to personal injury victims. *Id.* On October 24, 1992, the Florida Supreme Court disbarred McHenry, rendering moot the action as to McHenry. *Id.* at 1545. However, a case and controversy remained between Went For It, Inc. ("WFI") and the Florida Bar. *Id.*

9. Summary judgment is defined as a "[p]rocedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved." BLACK'S LAW DICTIONARY 1435 (6th ed. 1990).

10. *Went For It*, 115 S. Ct. at 2374. Upon McHenry's motion for summary judgment and the Bar's cross-motion for summary judgment, this case was referred to, and heard by, the Honorable Charles R. Wilson, a United States Magistrate Judge. *McHenry*, 808 F. Supp. at 1544. Judge Wilson was authorized to hear the motion pursuant to 28 U.S.C. § 636(b)(1) (1988) (providing authority for a federal judge to designate a magistrate judge to hear and determine any pretrial matter) and Rule 72 of the Federal Rules of Civil Procedure (requiring a magistrate judge to promptly conduct nondispositive pretrial proceedings when referred). *Id.* See 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72.

11. *McHenry*, 808 F. Supp. at 1544. Judge Wilson found that, as a matter of law, Florida Bar Rule 4-7.4(b)(1)(A) and Florida Bar Rule 4-7.8 do not violate the First or Fourteenth Amendments to the United States Constitution. *Id.* The First Amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Fourteenth Amendment to the Constitution provides in part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. amend. XIV, § 1.

12. *McHenry*, 808 F. Supp. at 1548. The district court concluded that the challenged rules substantially impair the availability of truthful and relevant information, which could make a positive contribution to consumers in need of legal servic-

the district court's decision to the United States Court of Appeals for the Eleventh Circuit.¹³ On May 10, 1994, the court of appeals affirmed the district court's grant of summary judgment in favor of WFI.¹⁴ On September 26, 1994, the United States Supreme Court granted certiorari¹⁵ to address the issue of whether Rules 4-7.4(b)(1) and 4-7.8(a) of the Rules Regulating the Florida Bar¹⁶ violate the First and Fourteenth Amendments to the United States Constitution.

The Supreme Court, in an opinion delivered by Justice O'Connor, began by noting that it is now established law in the United States that attorney advertising qualifies as "commercial speech" for the purposes of the First Amendment and, as such, should be accorded a measure of First Amendment protection.¹⁷

es. *Id.* The district court held that, as a matter of law, the Florida Bar's thirty-day ban on targeted direct mail lawyer advertising violates the First, Fifth, and Fourteenth Amendments to the United States Constitution. *Id.* Following the declaratory judgment of the district court, the Bar agreed that it would not enforce the thirty-day rule during the pendency of appellate proceedings. Brief for Respondents at 3 n.6, *Went For It* (No. 94-226).

13. *McHenry v. Florida Bar*, 21 F.3d 1038 (11th Cir. 1994), *rev'd sub nom. Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995). WFI moved to add John T. Blakely as a plaintiff, as his allegations were identical to *McHenry's*. Petitioner's Brief on the Merits at 6, *Went For It* (No. 94-226). The case was remanded to the district court for consideration of the motion; the motion was granted and Blakely was added as a plaintiff. *Id.*

14. *McHenry*, 21 F.3d at 1045. The Eleventh Circuit concluded that, because the rules in question only prohibit solicitation for wrongful death or personal injury clients, the rules are not content-neutral; accordingly, they are not a reasonable time, place, and manner restriction on speech. *Id.* Justice Black, the author of the opinion, expressed his disfavor with the conclusion the court reached in this case. *Id.*

15. *Florida Bar v. McHenry*, 115 S. Ct. 42 (1994) (granting certiorari).

16. Rule 4-7.4(b)(1) provides:

A lawyer shall not send, or knowingly permit to be sent, on behalf of himself, his firm, his partner, an associate, or any other lawyer affiliated with him or his firm, a written communication to a prospective client for the purpose of obtaining professional employment if: (a) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication; (b) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; (c) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer; (d) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence; (e) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under rule 4-7.1; or (f) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

The Florida Bar, 571 So. 2d at 466-67. Rule 4-7.8(a) outlines identical prohibitions for lawyer referral services. *Id.*

17. *Went For It*, 115 S. Ct. at 2375. Joining Justice O'Connor in the majority

However, the Court further stated that such First Amendment protection is not absolute, and commercial speech may be subject to regulations which otherwise would be impermissible with noncommercial speech.¹⁸ Finally, the Court indicated that it would examine the instant case under the framework of *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁹

The Court outlined the *Central Hudson* test—commercial speech can be regulated if the government demonstrates that: 1) it has a substantial interest in regulating the commercial speech; 2) its substantial interest is “directly and materially” advanced by the restriction; and 3) the regulation was “narrowly drawn.”²⁰ The *Central Hudson* test required the Court to use “intermediate” scrutiny in analyzing the Florida Bar rules.²¹ Under *Central Hudson*, if commercial speech concerns unlawful activity or the speech is misleading, it may be regulated.²²

Under the first prong, the Court found that the state had a substantial interest in regulating the practice of professions.²³

were Chief Justice Rehnquist and Justices Scalia, Thomas and Breyer. *Id.* at 2373. Justice Kennedy filed a dissenting opinion in which Justices Stevens, Souter and Ginsburg joined. *Id.* at 2381. The Court relied on and cited the following: *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988) (holding that a state may prohibit solicitation through the medium of direct mail to potential clients known to face a particular legal problem), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (holding that an attorney may not be prohibited by a state from engaging in printed advertising for the purpose of soliciting clients when the advertising contains truthful and nondeceptive information and is directed at specific legal rights of potential clients) and *In re R.M.J.*, 455 U.S. 191, 199 (1982) (holding that a state advertising rule prohibiting lawyers from deviating from precise listing requirements, listing jurisdictions licensed to practice in, and mailing announcement cards to the public violates the First Amendment when there is no showing of misleading advertising or that mailings would be sufficiently difficult to supervise). *Id.* at 2375.

18. *Id.* at 2375. The Court cited *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (holding that state regulation of commercial speech is not required to be the least restrictive means to achieve the desired end) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (holding that a state may prohibit direct, person-to-person solicitation by attorneys)). *Id.*

19. 447 U.S. 557, 561, 571-72 (1980) (holding that the promotional advertising of an electric utility is protected commercial speech, that the state failed to show an adequate interest to restrict such speech, and that the state's suppression of the speech was overextensive and violated the First and Fourteenth Amendments).

20. *Went For It*, 115 S. Ct. at 2376 (citing *Central Hudson*, 447 U.S. at 564-65).

21. *Id.* at 2375.

22. *Id.* at 2376.

23. *Id.* The Court based its finding on the general acceptance of the compelling interest of a state in the professions within its boundaries and in protecting public health, safety, and professional standards. *Id.* (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (holding that a state may prohibit direct, person-to-person solicitation by attorneys), *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (holding that a minimum fee schedule for title examinations published by a county bar constitutes price fixing and violates the Sherman Act, 15 U.S.C. §§ 1-7

The Court concluded that the Bar satisfied the second prong based on the results of the 1987-1989 study conducted by the Bar.²⁴ The Court determined that the Bar had made a significant showing for advancing its interests.²⁵ Finally, the Court examined the relationship between the state's interests and the regulations and determined that Florida's regulations satisfied the third prong.²⁶

(1994) and *Cohen v. Hurley*, 366 U.S. 117, 124 (1961) (holding that the Fourteenth Amendment does not forbid a state from making an attorney's refusal to answer a bar inquiry's questions regarding professional conduct a per se ground for disbarment)). The Court also stressed that the protection of potential clients' privacies is a substantial state interest. *Id.* at 2376-77 (citing *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (holding that a state cannot ban in-person solicitation by Certified Public Accountants ("CPA's") when a CPA-proposed communication to potential clients is truthful, nondeceptive information proposing a lawful commercial transaction), *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (holding that a municipal ordinance prohibiting picketing before or about a residence or dwelling of an individual served a significant governmental interest in protecting residential privacy, was narrowly tailored and did not violate the First Amendment) and *Carey v. Brown*, 447 U.S. 455, 471 (1980) (holding that a statute prohibiting picketing of residences or dwellings, but exempting peaceful picketing of a place of employment during a labor dispute, denies equal protection)).

24. *Id.* at 2378. The Bar submitted a 106 page summary of the study to the district court. *Id.* at 2377. The summary contained data supporting the Bar's position that the general public of the State of Florida believed that direct mail solicitations after an accident were an invasion of privacy and detrimental to the perception of the profession. *Id.* The summary provided: As of June 1989, attorneys mailed 700,000 direct solicitations annually in Florida, 40% of which were directly aimed at accident victims or their survivors. *Id.* Fifty-four percent surveyed believed that soliciting persons involved in accidents was a violation of privacy. *Id.* A random sampling of those who were solicited by direct mail advertising from lawyers in 1987 showed that 45% thought that such practice was "designed to take advantage of gullible or unstable people." *Id.* Thirty-four percent thought such practices were "annoying or irritating." *Id.* Twenty-six percent found the practice "an invasion of your privacy." *Id.* Twenty-four percent said that it made them angry. *Id.* Finally, 27% of those contacted by direct mail reported that their regard for attorneys and the entire judicial process was lower due to receiving the mail. *Id.* The summary also included anecdotal evidence, newspaper clippings and pages of excerpts of complaints from people who had been solicited by direct mail by lawyers. *Id.* WFI failed to refute any of the aforementioned. *Id.* at 2378.

25. *Went For It*, 115 S. Ct. at 2377. The Court found that the ban on targeted mailing was sufficient to pass the second prong because it did not prohibit lawyers from advertising generally in newspapers, but rather sought to specifically protect the privacy of those individuals whose "wounds are still open." *Id.* at 2379. This was contrary to the approach taken by the court of appeals, which held that a targeted letter does not invade an individual's privacy any more than an at-large letter would. *Id.* at 2378 (citing *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988)). The Court found that the concern of the Bar was the effect the mailing had on the profession. *Id.* at 2379. It was not enough, according to the Court, to simply not read the letter. *Id.*

26. *Id.* at 2380-81. The Court was unpersuaded by WFI's argument that the rules are unconstitutionally overinclusive. *Id.* The Court did not find it necessary that the ban distinguished among potential clients based on the severity of the injury or grief. *Id.* at 2380. The Court stated that the Bar's rules are well-tailored to

The Court concluded that the rules in question, restricting Florida lawyers from using targeted direct-mail solicitation of accident victims and their families within thirty days of an accident, satisfied the *Central Hudson* test.²⁷ In so concluding, the Court reversed the judgment of the court of appeals.²⁸

In a dissenting opinion, Justice Kennedy asserted that attorney advertising is speech protected by the First and Fourteenth Amendments.²⁹ Justice Kennedy argued that it is necessary, in the aftermath of an accident, to investigate quickly.³⁰ Justice Kennedy further noted that a failure to do so or to find legal representation could actually harm the individuals whom the rules in question were designed to protect.³¹ However, Justice Kennedy agreed with the majority that the three-pronged *Central Hudson* test was applicable to the instant case.³²

The dissent concluded that the State of Florida had failed to demonstrate a substantial interest in banning targeted direct-mail lawyer advertising.³³ The dissent also noted that the

the objective of eliminating the type of targeted mailings which were hurting the legal profession. *Id.* The Court also discussed, at length, other types of options available to attorneys to communicate their services to the general public and concluded that the ban did not disrupt any of these other types of available communication. *Id.* at 2380-81.

27. *Id.* at 2381.

28. *Id.*

29. *Id.* (Kennedy, J., dissenting). Justice Kennedy was joined in his dissent by Justices Stevens, Souter, and Ginsburg. *Id.* The dissenting opinion was based on the constitutional protection of free speech outlined by the Court in *Bates v. State Bar*, 433 U.S. 350 (1977) (holding that a state may not establish a blanket ban on attorney advertising for routine legal services). *Id.*

30. *Went For It*, 115 S. Ct. at 2382.

31. *Id.*

32. *Id.* Justice Kennedy's dissent asserted that the majority had oversimplified that the advertising in question was simply commercial speech. *Id.* In addition, Justice Kennedy asserted the dissent's belief that many banned communications could be vital to those solicited in establishing their rights. *Id.* at 2381. Finally, Justice Kennedy also stressed the importance in applying McHenry's commercial speech with care and fidelity to the existing precedents. *Id.* at 2382.

33. *Id.* at 2382-83. The dissent relied on the Court's ruling in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), which distinguished between direct in-person solicitations and direct-mail solicitations. *Id.* at 2382. See *Shapero*, 486 U.S. at 475-76. The Court in *Shapero* found no dangers present in direct mail advertising, and held that the "relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.* at 474. The dissent believed this case was no different, and stated that restrictions on speech could not be justified because a listener might be offended. *Went For It*, 115 S. Ct. at 2382-83. Likewise, the dissent rejected the majority's opinion that the state had an interest in protecting the reputation of the profession, stating that any restriction on these grounds is pure censorship. *Id.* at 2383.

regulation failed the second prong of the test because the state had failed to effectively demonstrate the existence of real danger.³⁴ The dissent also concluded that, although it would have been inappropriate to examine the third part of the *Central Hudson* test in this case because of the failure to meet the other prongs' requirements, the relationship between the Bar's interests and the solution chosen would not have provided a reasonable approach to a viable solution.³⁵ In concluding, the dissent criticized the majority's opinion for retreating from the constitutional guarantees afforded commercial speech in order to protect the legal profession.³⁶

The concept of constitutional protection for attorney advertising, or for any type of commercial speech, is a recent legal development.³⁷ The Supreme Court first examined the constitutional implications of regulating commercial speech in 1942 in *Valentine v. Chrestensen*.³⁸ In *Valentine*, the Court examined the constitutionality of a New York Sanitary Code provision³⁹ which forbade distribution of commercial and business advertising material in the streets.⁴⁰ The Court

34. *Went For It*, 115 S. Ct. at 2383-84. The dissent concluded that the "Summary of Record" (the summary of the 2-year study conducted by the Florida Bar and submitted to the district court) relied on by the majority was flawed, that it was filled with invalidated studies, that it did not effectively question the problem with regard to direct-mail solicitations, and that nothing in the summary indicated that the reputation of the legal profession would be aided by the rules in question. *Id.* at 2384.

35. *Id.* at 2384. The dissent concluded that there was no basis for assuming that an attorney's advice would be unwelcome by a majority of people when it was necessary to begin the assessment of legal rights in a rational manner. *Id.* at 2385. The dissent concluded that the time immediately following an injury is the most important time for a person injured to know that legal advice is available, and that those who most need legal advice may fail to obtain it. *Id.*

36. *Id.* at 2386. The dissent declared that the Constitution does not allow the suppression of information regarding the legal profession in order to advance a state's interest in promoting lawyers' public image. *Id.* The dissent also declared that the majority opinion validated the Bar's censorship. *Id.*

37. *Id.* at 2375.

38. 316 U.S. 52, 54 (1942).

39. *Valentine*, 316 U.S. at 53. New York Sanitary Code § 318 provided:
Handbills, cards and circulars.—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letter-box therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

Id. at 53 n.1.

40. *Id.* at 53. Chrestensen attempted to distribute double-sided handbills which

reasoned that states and municipalities may impose some regulation on the privilege of free speech in the name of public interest, but any such regulation may not unduly burden or proscribe an organization's employment in the streets.⁴¹ However, the Court held that there is no constitutional protection which restrains state governments from regulating speech which is "purely commercial advertising," and that any determination of whether an individual may promote or pursue an occupation in the streets, and to what extent, is a matter for state legislatures.⁴²

The broad rule established by the Court in *Valentine* remained the law until the Court shifted direction in 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁴³ In *Virginia State Board*, the Court examined the constitutionality of a portion of the Virginia Code,⁴⁴ which prohibited a Virginia licensed pharmacist from publishing or advertising, in any manner, any fee, price, discount, rebate or credit on any prescription drug.⁴⁵ The question before the Court

contained, on one side, commercial advertising for an exhibit of a United States Navy submarine moored in the East River of New York City; the other side contained a protest against the City Dock Department for not allowing Chrestensen to use city wharfage facilities for the submarine. *Id.* Upon attempting to distribute the handbills, *Valentine*, the Police Commissioner, restrained Chrestensen. *Id.* Chrestensen then filed suit to enjoin *Valentine* from interfering with the distribution of the handbills. *Id.* at 54.

41. *Id.* at 54.

42. *Id.*

43. 425 U.S. 748 (1976).

44. *Virginia State Bd.*, 425 U.S. at 752. The Virginia Code provided in pertinent part:

Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

VA. CODE ANN. § 54-524.35 (Michie 1974) (repealed 1988).

45. *Virginia State Bd.*, 425 U.S. at 749-50. The claim was brought by a Virginia resident, the Virginia Citizens Consumer Council, Inc. (the "VCCC") and the Virginia State AFL-CIO. *Id.* at 753-54 n.10. The VCCC's claim was that VCCC members had a First Amendment right, as users of prescription drugs, to receive information from pharmacists concerning their drug prices. *Id.* at 753-54. This case represented the second constitutional challenge to this section of the Virginia Code. *Id.* at 753. In *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969), the court held that a state could ban prescription drug advertising by pharmacists of prices and terms of sale, but could not employ the ban to fix prescription drug prices and upheld a prohibition on drug price advertising. *Patterson Drug Co.*, 305 F. Supp. at

was whether a pharmacist's communication regarding a particular drug's price to a customer falls outside the protection of the First Amendment.⁴⁶ The Court held that commercial speech of this kind is indeed protected under the First Amendment and in so holding, the Court invalidated the Virginia statute.⁴⁷ However, in holding that commercial speech enjoys protection under the First Amendment, the Court clarified that its holding does not prohibit all regulation of commercial speech in all circumstances.⁴⁸ In so clarifying, the Court stated that it is constitutionally acceptable to regulate commercial speech if it is done as a mere restriction on time, place and manner.⁴⁹ The Court concluded by limiting the application of its holding to advertising by pharmacists.⁵⁰

823. The challenge in *Patterson Drug Co.* was primarily based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment and not the First Amendment. *Id.* The challenge under the Fourteenth Amendment, coupled with the interests of a pharmacist and a drug retailing company, was enough for the three-judge district court panel to uphold the prohibition. *Id.* at 827.

46. *Virginia State Bd.*, 425 U.S. at 761. Specifically, the Court stated: "Our question is whether speech which does 'no more than propose a commercial transaction,' is so removed from any 'exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.* at 762 (citing *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 385 (1973) (holding that municipal human relations ordinances which prohibit newspapers from carrying gender designated advertising columns for nonexempt job opportunities does not violate the newspaper publishers' First Amendment rights), *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that a federal obscenity statute punishing the mailing of material that is obscene, lewd, lascivious, or filthy, or other publications of an indecent character, and a California obscenity statute making punishable, inter alia, the keeping for sale or advertising of material that is obscene or indecent, does not offend constitutional safeguards against convictions based on protected material; nor do these statutes violate constitutional requirements of due process by failing to give adequate notice of what is prohibited) and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that a New Hampshire statute prohibiting the addressing of any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, or calling said person by any offensive or derisive name is not unconstitutional)).

47. *Id.* at 762. The Court found that the justifications given by the Virginia State Board for the restrictions failed to outweigh the public's First Amendment rights to the information in question. *Id.* at 770. The Court stated: "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative." *Id.* at 773.

48. *Id.* at 770.

49. *Id.* at 771. The Court further stated that it had previously approved restrictions of the aforementioned type if: 1) there was sufficient justification for the restriction without reference to the content of the regulated speech; 2) the government could show the restriction advanced a significant governmental interest; and 3) the restriction allowed the dissemination of the information through "ample alternative channels." *Id.*

50. *Id.* at 773 n.25. The Court stated:

In the year following the *Virginia State Board* decision, the Court applied the principles it had outlined with respect to pharmacists to invalidate an Arizona Bar rule prohibiting attorneys from advertising in newspapers and other forms of media.⁵¹ In *Bates v. State Bar*,⁵² the Court addressed the issue of whether a state may constitutionally prohibit an attorney from publishing truthful advertising relating to the availability and costs of routine legal services in a newspaper.⁵³ In *Bates*, attorneys Bates and O'Steen placed an advertisement in a daily newspaper offering "legal services at very reasonable fees."⁵⁴ The advertisement violated the rules prohibiting advertising by attorneys established by the Arizona Bar.⁵⁵ The Court held that attorney advertising may not be subjected to a blanket suppression of the kind attempted by the Arizona Bar, and stated that attorney advertising cannot be restrained from the flow of information.⁵⁶ However, the Court once again limited its holding and indicated that its decision could not be used to invalidate all forms of attorney advertising regulations.⁵⁷

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

Id.

51. *Went For It*, 115 S. Ct. at 2375 (citing *Bates v. State Bar*, 433 U.S. 350 (1977)).

52. 433 U.S. 350 (1977).

53. *Bates*, 433 U.S. at 384.

54. *Id.* at 354. Bates and O'Steen placed the advertisement in the Arizona Republic, a daily newspaper generally circulated in the Phoenix metropolitan area. *Id.* The advertisement stated that Bates and O'Steen were offering "legal services at very reasonable fees" and listed various services, including uncontested divorces, adoptions, bankruptcy proceedings and name changes. *Id.* at 385.

55. See Disciplinary Rule 2-101(B), incorporated in Rule 29(a) of the Supreme Court of Arizona, 17A ARIZ. REV. STAT. at 26 (Supp. 1976) (repealed and replaced by Rule 42 of the Supreme Court of Arizona, 17A ARIZ. REV. STAT. at ER 7.2 (1995)). The rule provided:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id.

56. *Bates*, 433 U.S. at 384-85.

57. *Id.* at 383. The Court allowed regulation of certain advertising. *Id.* A state can still regulate any advertising by attorneys that is "false, deceptive, or misleading." *Id.* A state can still require warnings or disclaimers to accompany attorney advertisements. *Id.* at 384. A state may also restrict, within reason, the "time,

The Court's reservation on the question of the permissible scope of regulating attorney advertising allowed the Court to change course in *Ohralik v. Ohio State Bar Ass'n.*⁵⁸ The Court considered, in *Ohralik*, whether the constitutional protections established in *Bates* apply to the solicitation of clients by an attorney through direct, in-person contact.⁵⁹ In *Ohralik*, an attorney, upon learning of an automobile accident, contacted the accident victim's parents to solicit their daughter as a client and later proceeded to the hospital to contact the victim to secure her case.⁶⁰ *Ohralik* also sought out a second victim, utilized a concealed tape recorder, and told her that the first victim's insurance policy contained provisions which could provide her recovery of her damages.⁶¹ The Court held that the type of face-to-face confrontation engaged in by *Ohralik* may be prohibited without constitutional conflict because it demonstrates the potential for problems with attorney solicitation and because the state had shown a substantial interest in protecting the rights of the public.⁶²

place and manner of advertising." *Id.* Any advertising with regard to illegal transactions may be prohibited. *Id.* Finally, any "special problems" encountered in television advertising can justify special restrictions. *Id.*

58. 436 U.S. 447 (1978).

59. *Ohralik*, 436 U.S. at 449.

60. *Id.* at 449-50. *Ohralik* was a lawyer and a member of the Ohio Bar. *Id.* at 449. *Ohralik* became aware of an automobile accident which had occurred 11 days prior involving a young woman with whom *Ohralik* was casually acquainted, Carol McClintock ("McClintock"). *Id.* McClintock had been injured in the accident. *Id.* *Ohralik* proceeded to telephone the woman's parents and they agreed to visit with him as a prerequisite to his visiting McClintock. *Id.* After a short visit with the parents, *Ohralik* was informed that the decision on whether or not to hire him as McClintock's attorney was her choice. *Id.* *Ohralik* proceeded to the hospital where he met with McClintock, and she informed him that she would not enter into any agreement with him for his services without first discussing the matter with her parents. *Id.* *Ohralik* returned to the parents' home where he was informed that McClintock had assented to his representation. *Id.* Meanwhile, *Ohralik* visited the home of Wanda Lou Holbert ("Holbert"), another person in the car with McClintock at the time of the accident, without an invitation. *Id.* at 451. *Ohralik* concealed a tape recorder under his coat and informed Holbert that McClintock's insurance policy contained a provision against uninsured motorists which might provide Holbert with damages. *Id.* *Ohralik* offered to represent Holbert for a contingent fee of one-third of any recovery, and Holbert agreed, but stated that she was confused by what was happening. *Id.* Holbert attempted to sever the relationship with *Ohralik* the next day and McClintock eventually discharged *Ohralik*. *Id.* at 452. Holbert eventually paid *Ohralik* one-third of her recovery in settlement after he filed a breach of contract suit against her. *Id.* McClintock and Holbert filed complaints against *Ohralik* with the Geauga County Bar Association's Grievance Committee. *Id.* *Ohralik* was indefinitely suspended by the Supreme Court of Ohio, which found that his conduct was not protected under the First and Fourteenth Amendments. *Id.* at 453-54.

61. *Id.* at 450-51.

62. *Id.* at 468. The Court stated: "The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person so-

The Court's decision in *Ohralik* became clearly defined by a case decided the same day. In *In re Primus*,⁶³ the Court considered whether a state may prohibit an attorney from advising a lay person of the person's legal rights and disclosing in a subsequent letter that free legal assistance is available from a nonprofit organization with which the attorney is associated.⁶⁴ The Court considered the relevance of soliciting clients, not for pecuniary self-interest, but to advance political and ideological goals.⁶⁵ In *Primus*, an attorney associated with the American Civil Liberties Union (the "ACLU") spoke to a group of women, advising them of their legal rights.⁶⁶ *Primus* later sent a letter to one of the women advising her that the ACLU would provide free legal assistance in the event that she chose to file suit.⁶⁷ The Court distinguished *Primus* from

licitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public." *Id.* The Court stated that an individual targeted by a lawyer is more easily influenced and overly vulnerable. *Id.* at 465. Under these circumstances, the lawyer's invasion of the individual's privacy may cause distress. *Id.* Thus, the Court stated, under these circumstances, the lawyer may upset the individual simply by solicitation. *Id.* This, the Court noted, allows the presumption that such conduct by lawyers will cause injury to the solicited individual. *Id.* at 466.

63. 436 U.S. 412 (1978).

64. *Primus*, 436 U.S. at 414.

65. *Id.*

66. *Id.* at 415-16. *Primus* was a lawyer associated with the American Civil Liberties Union (the "ACLU") in Columbia, South Carolina. *Id.* at 414. During the Summer of 1973, there were local and national newspaper reports that in Aiken, South Carolina, pregnant mothers on public assistance were being sterilized or threatened with sterilization in order for them to receive medical care under the Medicaid program. *Id.* at 415. Concerned by this, local businessman Gary Allen ("Allen") arranged for *Primus* to meet with some of the women who had been sterilized to address any concerns they might have had about their legal rights. *Id.* Mary Etta Williams attended the meeting at Allen's bequest because she had been sterilized by Dr. Clovis H. Pierce after the birth of her third child. *Id.* At the meeting, *Primus* advised the women, including Williams, of their rights and raised the possibility of a lawsuit. *Id.* at 416.

67. *Id.* at 416-17. The ACLU informed *Primus* early in August of 1973 of its willingness to represent Aiken mothers who had been sterilized. *Id.* at 416. *Primus* was notified by Allen that Williams wanted to file suit. *Id.* As such, *Primus* sent a letter dated August 30, 1973 to Williams, notifying her of the ACLU's offer of free legal assistance. *Id.* at 416-17. After receiving *Primus*' letter, Williams visited Dr. Pierce, and at his lawyer's request, signed a letter releasing the doctor of any liability. *Id.* at 417. Williams then showed the doctor's lawyer *Primus*' letter, and they retained a copy. *Id.* Williams called *Primus* to tell her that she no longer wished to sue. *Id.* As a result of the letter, the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (the "Board") filed a formal complaint against *Primus*, alleging that *Primus* had solicited in violation of the Canons of Ethics. *Id.* On March 20, 1975, the complaint was heard by a panel of the Board. *Id.* The panel recommended that *Primus* be found guilty of soliciting Williams and that a private reprimand be issued. *Id.* at 418-19. A decision by the full Board followed the findings of the panel. *Id.* at 421. The Supreme Court of

Ohralik and held that the letter was protected by the First Amendment and that when political expression or association is at issue, a greater precision of regulation is required than when the conduct is purely commercial.⁶⁸ The Court limited the opinion to the associational freedoms characteristic of nonprofit organizations.⁶⁹

In 1980, the Court devised a three-pronged test for commercial speech under the First and Fourteenth Amendments. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁷⁰ the Court examined whether a Public Service Commission of New York regulation, which completely banned an electric utility from engaging in any advertising designed to promote the use of electricity, violated the First and Fourteenth Amendments.⁷¹ The Court initially determined that commercial speech must not be misleading or relate to unlawful activity in order to fall under the limited protection of the Constitution.⁷² Once the Court determined that the commercial speech at issue was protected, it applied the following three-pronged test: 1) the government must establish a substantial interest in support of the regulation; 2) the government must establish that the regulation on commercial speech materially and directly advances the interest asserted; and 3) the government must establish that the regulation is only as extensive as is necessary to serve its interest, or is "narrowly

South Carolina adopted the findings and increased the sanction to a public reprimand on March 17, 1977. *Id.*

68. *Id.* at 423. The Court held that the communication in *Primus* was not in-person solicitation for pecuniary gain as in *Ohralik*. *Id.* The Court further held that *Primus*' communication was the product of expressing personal political beliefs and to advance the goals of the ACLU, but not to secure a financial gain as in *Ohralik*. *Id.* The Court stated that *Primus*' letter "thus comes within the generous zone of First Amendment protection reserved for associational freedoms." *Id.* at 431. The Court stated: "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advis[ing] another that his legal rights have been infringed and refer[ing] him to a particular attorney or group of attorneys . . . for assistance." *Id.* at 432 (quoting *NAACP v. Button*, 371 U.S. 415, 434, 437 (1963) (holding that activities of the NAACP are modes of expression and association protected by the First and Fourteenth Amendments and members cannot be prohibited from advising people of their legal rights)). Additionally, the Court stated: "[B]road prophylactic rules in the area of free expression are suspect, and that [p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* (quoting *Button*, 371 U.S. at 438).

69. *Primus*, 436 U.S. at 439. The Court emphasized that its opinion did not prohibit regulations that do not infringe on the freedom of association of nonprofit organizations like the NAACP or the ACLU. *Id.*

70. 447 U.S. 557 (1980).

71. *Central Hudson*, 447 U.S. at 558.

72. *Id.* at 566.

drawn.⁷³

In 1973, the Public Service Commission of New York (the "Commission") banned all advertising by New York electric utilities which promoted the use of electricity to effectively manage fuel shortages.⁷⁴ In 1977, the Commission extended its ban and declared that all promotional advertising is contrary to the national policy of conserving energy.⁷⁵ The Central Hudson Gas & Electric Corporation challenged the ban under the First and Fourteenth Amendments.⁷⁶ The Court determined that the ban failed the third prong of the test and that a complete suppression of advertising privileges is too extensive and is unnecessary to accomplish the government's goals.⁷⁷

In 1981, the Court examined the bounds of ethical rules in *In re R.M.J.*⁷⁸ The Court considered whether certain restrictions imposed by the Supreme Court of Missouri relating to ethical rules regulating legal advertising violated the First and Fourteenth Amendments.⁷⁹ R.M.J., an attorney, mailed announcement cards to a selected list of addresses and placed advertisements in the yellow pages of the local phone directory and in local newspapers.⁸⁰ The Court summarized its

73. *Id.* at 566-70.

74. *Id.* at 558-59.

75. *Id.* at 559. The ban was extended in a policy statement issued by the Commission on February 25, 1977. *Id.* The statement placed advertising into one of two categories: 1) promotional—advertising with the purpose to increase the purchase of utility services, and 2) institutional and informational—advertising not intended to promote the purchase of utility services. *Id.* The statement banned promotional advertising and allowed institutional and informational advertising. *Id.* at 559-60.

76. *Central Hudson*, 447 U.S. at 560.

77. *Id.* at 570-71. The Commission argued that energy conservation is needed and that advertising would aggravate inequities in utilities' rates and would raise consumer rates. *Id.* at 568-69.

78. 455 U.S. 191 (1982).

79. *R.M.J.*, 455 U.S. at 193-94. The rules stated that a lawyer "may 'publish . . . in newspapers, periodicals and the yellow pages of telephone directories' 10 categories of information: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified 'routine' legal services." *Id.* at 194 (citing MO. REV. STAT., Sup. Ct. Rule 4, DR2-101(B) (1978) (Index Vol.)). The rules also allowed a lawyer to mail a "brief professional announcement card stating new or changed associates or addresses, change of firm name, or similar matters," but only to "lawyers, clients, former clients, personal friends, and relatives." *Id.* at 196 (citing MO. REV. STAT., Sup. Ct. Rule 4, DR2-102(A)(2) (1978) (Index Vol.)).

80. *Id.* at 196. R.M.J. was a member of both the Missouri and Illinois Bars and began practice as a sole practitioner in April of 1977. *Id.* The advertisements placed in the phone directory and newspapers contained information that R.M.J. was licensed in both Missouri and Illinois, that he was admitted to practice before the United States Supreme Court, and contained a list of practice areas using different language than that prescribed by the rules; all of which was in violation of the

commercial speech doctrine⁸¹ and held that: 1) the advertisement listed by the attorney was not misleading; 2) the state failed to identify a substantial interest in prohibiting an attorney from identifying in the advertisement the jurisdictions where the attorney is licensed to practice; and 3) an absolute prohibition on announcement cards to the general public is too restrictive.⁸² Once again, however, the Court reserved to the states the authority to regulate misleading advertising.⁸³

The next consideration in this area was presented to the Court in *Zauderer v. Office of Disciplinary Counsel*.⁸⁴ The main issue before the Court was whether a state may prohibit an advertisement by an attorney directed at individuals with a specific legal problem.⁸⁵ Zauderer, an attorney, placed an advertisement in a newspaper offering to represent individuals against charges of drunk driving and promised a full refund of legal fees if the individual was convicted of drunk driving charges.⁸⁶ Zauderer placed a second advertisement, containing an illustration, in thirty-six Ohio newspapers, in which he offered to represent women who had suffered injuries as a result of using the Dalkon Shield Intrauterine Device.⁸⁷ The Court

rules. *Id.* at 196-97.

81. *Id.* at 203. The Court summarized its commercial speech doctrine, in the context of professional service advertising, as such:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

Id.

82. *Id.* at 205-06

83. *Id.* at 207.

84. 471 U.S. 626 (1985).

85. *Zauderer*, 471 U.S. at 638. The Court also considered whether an attorney could be restricted in the use of illustrations within an advertisement and whether a state could require certain disclosures within the ads relating to the terms of the fees to be involved. *Id.* The Court held that an attorney may not be prohibited from using an illustration which is accurate and nondeceptive in the advertisements. *Id.* at 649. The Court also held that a state could require that an attorney disclose information relating to a client's costs and liability within an advertisement. *Id.* at 653.

86. *Id.* at 629-30.

87. *Id.* at 630-31. The advertisement contained an illustration of the device and the following information:

The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and

determined that a state may not prohibit an attorney from engaging in printed advertising for the purpose of soliciting clients when the advertising contains truthful and nondeceptive information, and when the advertising is directed at specific legal rights of potential clients.⁸⁸

In *Shapero v. Kentucky Bar Ass'n*,⁸⁹ the Supreme Court examined whether a state may prohibit an attorney from using direct mail to solicit potential clients known to have a specific legal problem.⁹⁰ Shapero, a member of the Kentucky Bar, sought approval to send a letter to potential clients who he knew had foreclosure suits filed against them.⁹¹ The Court held that

full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer.

Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

Id. at 631. Subsequent to the publishing of these ads, the Office of Disciplinary Counsel of the Supreme Court of Ohio filed a complaint against Zauderer charging him with various disciplinary violations. *Id.* The Supreme Court of Ohio concluded that Zauderer's actions warranted a public reprimand under Ohio's Disciplinary Rules. *Id.* at 636. Zauderer contended that the rules violated the First Amendment and his due process rights. *Id.* The United States Supreme Court granted certiorari to address the issue of whether a state may prohibit an advertisement by an attorney directed at individuals with a specific legal problem. *Id.* at 638.

88. *Id.* at 647. The Court reasoned that, although the Dalkon Shield advertisement by Zauderer may have been interpreted by some as being in poor taste, no privacy rights were invaded by anyone who may have read the ads. *Id.* at 642. This rationale provided the basis for the Court to distinguish this case from *Ohralik*. *Id.* at 641.

89. 486 U.S. 466 (1988).

90. *Shapero*, 486 U.S. at 468.

91. *Id.* at 469. Shapero applied to the Attorneys' Advertising Commission, which was responsible for the regulation of attorney advertising according to the Rules of the Kentucky Supreme Court, for approval of the issuance of the letter. *Id.* at 469 n.1. The letter was neither false nor misleading, but was not approved by the Commission based on the then existent Kentucky Supreme Court Rule 3.135(5)(b)(i). *Id.* Rule 3.135(5)(b)(i) provided:

A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Id. at 470 n.2. The Commission, however, voiced its opinion that the rule violated the First Amendment, and based upon this suggestion, Shapero petitioned the Committee on Legal Ethics of the Kentucky Bar Association to determine the validity of the rule. *Id.* After an advisory opinion by the Committee, the Kentucky Supreme Court invalidated the rule and replaced it with Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (1984). *Id.* Rule 7.3 provides:

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 communica-

it is unconstitutional for a state to impose a blanket ban on all direct mail solicitations to potential clients with specific known legal needs.⁹² It was the holding in *Shapero* which provided a captive legal audience for the Court's reversal in *Went For It*.

Before the Court was prepared to conclude as it did in *Went For It*, it considered *Board of Trustees v. Fox*.⁹³ The Court considered whether state regulations on commercial speech are required to reflect the least restrictive means to achieve a desired end.⁹⁴ A commercial representative of a housewares company gave a demonstration of the company's products to a group of students on campus in a university dormitory.⁹⁵ As a result of the demonstration, and the representative's subsequent refusal to cease the demonstration, the representative was arrested by campus police.⁹⁶ The Court concluded that

tion 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.

92. *Id.* at 479-80. The Court refused to accept the state's position that there is greater harm when a letter is targeted at specific potential clients with specific legal problems and stated: "[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." *Id.* at 473-74. The Court concluded that the mode of attorney communication is significant, and distinguished this case from *Ohralik* by reasoning that a letter, unlike a lawyer, may be discarded. *Id.* at 475-76.

93. 492 U.S. 469 (1989).

94. *Board of Trustees*, 492 U.S. at 471. The State University of New York ("SUNY") had regulations regarding the use of school property, including dormitories. *Id.* The regulation in question, Resolution 66-156 (1979), provided: "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events." *Id.* at 471-72.

95. *Id.* at 472. In October of 1982, an American Future Systems, Inc. ("AFS") representative gave a demonstration of the company's products in a dormitory for students at SUNY's Cortland campus. *Id.* AFS sold housewares (china, silverware, etc.) to college students through "Tupperware parties" hosted by a prospective buyer receiving some compensation; the products were demonstrated and then offered for sale to small groups of usually 10 or more people. *Id.* At the October 1982 "Tupperware party," campus police attempted to stop the "party" as a violation of Resolution 66-156. *Id.*

96. *Id.* As a result of the arrest of the representative, several students at SUNY/Cortland, including Fox, filed suit requesting a declaratory judgment that the prohibition of students' ability to attend or host an AFS "Tupperware party" violated the First Amendment. *Id.* The district court granted a preliminary injunction, but later found for SUNY because it held that the dormitory did not constitute a public forum for commercial activity purposes. *Id.* The court of appeals reversed and remanded, concluding that the state's interests were not clear, and even if these interests were clear, the restriction might not have been the least restrictive means to

something short of a least-restrictive-means standard is applicable in determining the constitutionality of state regulation of commercial speech.⁹⁷ Thus, the framework was complete for *Went For It*.

The five-to-four decision in *Went For It* appears to represent a shift in the Court toward a more politically conservative position. Within the cases discussed, there was clearly a difference of opinion on the part of Chief Justice Rehnquist with the rationale and conclusions of a Court more politically liberal. Until recently, Chief Justice Rehnquist had been unable to muster a majority for his opinions on "commercial speech," but has been strongly supported by Justice O'Connor since her appointment to the Court. In *Went For It*, however, it appears that the Chief Justice created a majority which might possibly have turned the Court back toward extending less First Amendment protection to "commercial speech" and allowing states greater latitude in regulating professions.

The Court's use of the *Central Hudson* test was ironic and yet masterful as the previous dissenter, Chief Justice Rehnquist, joined a majority⁹⁸ whose decision was based on the test.⁹⁹ Justice O'Connor used the *Central Hudson* test and distinguished *Went For It* from *Shapero*.¹⁰⁰ However, upon review, the decision seems more appropriately to represent a shifting of the majority toward the views of Chief Justice Rehnquist and Justice O'Connor.

In *Virginia State Board*, Chief Justice Rehnquist accurately predicted that the rule adopted by the Court would not remain limited to pharmacists, but rather would later be extended to doctors, lawyers, and other professionals.¹⁰¹ Furthermore, Chief Justice Rehnquist initially criticized the Court for failing to leave such regulation to state legislatures.¹⁰²

the end. *Id.* at 473.

97. *Id.* at 477. The Court stated that to impose a least-restrictive-means standard creates a heavy burden on states which makes illusory the Court's extension of a limited measure of protection for commercial speech. *Id.* The Court clarified that the requirement for a narrow restriction in advancement of a substantial state interest does not mandate one possible solution, but only that the regulation not place a greater burden than necessary to achieve the state's goal. *Id.* at 478 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1981)). Finally, the Court stated that it has never intended that states be required to impose a restriction which is absolutely the least severe that would achieve a desired end. *Id.* at 480. That, the Court stated, is left to state decisionmakers. *Id.*

98. *Went For It*, 115 S. Ct. at 2373.

99. *Id.* at 2375-76.

100. *Id.* at 2378-79.

101. *Virginia State Bd.*, 425 U.S. at 783 (Rehnquist, J., dissenting).

102. *Id.* Chief Justice Rehnquist, who was an Associate Justice on the Court at

Chief Justice Rehnquist continued to adamantly disagree with the holdings of the Court in the area of "commercial speech" with his dissent in *Bates*.¹⁰³ As for the Court's first consideration of attorney commercial speech, Chief Justice Rehnquist professed his belief that the First Amendment is reserved for the protection of speech expressing intellectual interest and items of public welfare, and that the First Amendment is demeaned by invoking it to protect advertisements for goods and services.¹⁰⁴ Chief Justice Rehnquist finally replied to the Court's ruling by stating that the *Virginia State Board* decision was the impetus for the Court to establish a workable and understandable approach to differentiating between protected and unprotected speech in the field of advertising.¹⁰⁵

Predictably, Chief Justice Rehnquist concurred in *Ohralik*,

the time of the *Virginia State Bd.* decision, criticized the Court for ignoring the concerns of the Virginia legislature in passing such restrictions on pharmacists. *Id.* at 784-85. The Chief Justice provided two examples to rebut the Court's reasoning. *Id.* at 784. Chief Justice Rehnquist quoted Justice Black in *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (holding that a state statute making it unlawful to engage in the business of debt adjustment except as incident to a practice of law does not violate the Fourteenth Amendment), when he stated:

The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws.

Ferguson, 372 U.S. at 730. Chief Justice Rehnquist also quoted from *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (holding that a statute dealing with regulation of visual care did not violate the Fourteenth Amendment), a case which dealt with a prohibition on advertising for eyeglass frames when he stated: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." *Williamson*, 348 U.S. at 490.

103. *Bates*, 433 U.S. at 404-05 (Rehnquist, J., dissenting). Chief Justice Rehnquist again expressed his view of the First Amendment, commenting on the demeaning effect of this case. *Id.* at 404. The Chief Justice declared that regardless of the truthfulness or reasonableness of the advertisement, it still fell outside of the protection accorded by the majority in *Bates*. *Id.* Chief Justice Rehnquist advocated returning to the endorsement of the rationale in *Valentine*. *Id.* at 405.

104. See *supra* notes 52-57 for a discussion of *Bates*. *Bates* was the first decision in which the Court considered the application of the First Amendment to advertising by an attorney. *Bates*, 433 U.S. at 353. Chief Justice Rehnquist further stated that regardless of the quality, reasonableness or truthfulness of an advertisement, it was not what the Framers of the First Amendment had in mind for its protection. *Id.* at 404-05.

105. *Bates*, 433 U.S. at 405. Chief Justice Rehnquist further declared that once the Court deviated from the established rule in *Valentine*, the shift to a case-by-case assessment of First Amendment claims was inevitable. *Id.* Finally, Chief Justice Rehnquist simply refused to endorse the opinion that any forms of legal advertising have constitutional protection. *Id.*

which held that there can be no constitutional protection for a lawyer who solicits legal clients for pecuniary gain in a direct person-to-person manner.¹⁰⁶ Likewise, Chief Justice Rehnquist dissented in *Primus*, which held that a lawyer may contact a potential client in a person-to-person manner if the lawyer's incentive is not a pure pecuniary interest, but rather the advancement of a political agenda.¹⁰⁷

Chief Justice Rehnquist's dissent in *Central Hudson* clearly directed attention to the misapplication of the First Amendment by the Court.¹⁰⁸ The Chief Justice discussed the illogical conclusion of the Court that the speech of a state-created monopoly, itself the subject of a comprehensive state scheme of regulation, may be protected by the First Amendment.¹⁰⁹ Finally, Chief Justice Rehnquist criticized the Court again for its failure to properly place this speech in the subordinate position of commercial speech with very limited First Amendment protection.¹¹⁰

Zauderer provided the first opportunity for Chief Justice Rehnquist and Justice O'Connor to express similar views in dissent to the Court's application of precedent.¹¹¹ Justice O'Connor, joined by Chief Justice Rehnquist, wrote that the use of "unsolicited legal advice to entice clients" provided "enough of a risk of overreaching and undue influence" to allow Ohio's ban on such activity.¹¹² Finally, Chief Justice Rehnquist and Justice O'Connor applied a strong state interest rationale. Justice O'Connor stated that states may determine in a reasonable manner that unsolicited legal advice poses a sufficient threat to the substantial state interests to the extent that a blanket prohibition is not unwarranted.¹¹³ Additionally, the Chief Justice and Justice O'Connor found a substantial state

106. *Ohralik*, 436 U.S. at 477 (Rehnquist, C.J., concurring).

107. *Primus*, 436 U.S. at 440 (Rehnquist, C.J., dissenting).

108. *Central Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting).

109. *Id.*

110. *Id.* at 589. Chief Justice Rehnquist stated: "I thought by now it had become well established that a State has broad discretion in imposing economic regulations." *Id.* (citing *Nebbia v. New York*, 291 U.S. 502 (1934) (holding that a state may fix the selling price of milk)).

111. *Zauderer*, 471 U.S. at 673 (Burger, C.J., Rehnquist and O'Connor, J.J., dissenting).

112. *Id.* Justice O'Connor applied a comparison between the speech in controversy and merchants commonly offering free samples of their products to entice business. *Id.* Justice O'Connor was troubled when the product being peddled as samples is professional advice. *Id.* at 673-74. Justice O'Connor stated: "The States understandably require more of attorneys than of others engaged in commerce." *Id.* at 676.

113. *Id.* at 678.

interest in the requirement that licensed lawyers exercise independent professional judgment on a consistent basis in order to best serve their clients.¹¹⁴

In 1988, Chief Justice Rehnquist and Justices O'Connor and Scalia dissented in *Shapero*.¹¹⁵ It was this dissent which provided the culmination of Chief Justice Rehnquist's criticism of the Court's handling of this line of cases, and also provided the basis for the majority opinion in *Went For It*. The dissent addressed all of the prior criticisms, including the rights of the states to regulate professions,¹¹⁶ the substantial interests states have in maintaining high professional standards¹¹⁷ and the inappropriate extension of the First Amendment to "commercial speech" which dilutes the power of the First Amendment's protection.¹¹⁸ Additionally, it was in this dissent that Justice O'Connor advocated the use of the *Central Hudson*

114. *Id.* The dissenters feared that the allowance of advice in advertisements would lead attorneys to advertise advice which would be most likely to bring in clients, rather than advertise advice which the client may need to know. *Id.*

115. *Shapero*, 486 U.S. at 480 (Rehnquist, C.J., O'Connor and Scalia, J.J., dissenting).

116. *Id.* at 481. The dissent declared that *Bates* was nothing but an early experiment, and one which should be reexamined because it has proved to be problematic in determining the constitutional parameters of commercial speech. *Id.* at 487. Likewise, the dissent declared:

[W]e should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in the light of that doctrine.

Id.

117. *Id.* at 481. The dissent declared: "The advice contained in unsolicited 'free samples' is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining." *Id.* In demonstrating what the dissent believed to be a substantial state interest under what has been determined by it to be an unworkable standard, the dissent stated: "The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations." *Id.* at 487. The dissent believed that regulation of lawyers and special ethical standards are understood, and properly so, to be appropriate in restraining lawyers in the exercise of their unique power granted by the political system in which our law operates. *Id.* at 489. Finally, the dissent declared:

[T]his Court's recent decisions reflect a myopic belief that "consumers," and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. In one way or another, time will uncover the folly of this approach. I can only hope the Court will recognize the danger before it is too late to effect a worthwhile cure.

Id. at 491.

118. *Id.* at 483.

three-pronged test to determine the outcome of commercial speech cases.¹¹⁹ The reasoning in the dissent provided a reasonable and well-examined majority opinion in *Went For It*.

The *Went For It* opinion is an opinion which leaves no bases uncovered. The Court clearly established the relationship between lawyer advertising, commercial speech and the First Amendment protections thus afforded it.¹²⁰ The Court outlined the *Central Hudson* test, and then applied it carefully and meticulously to the facts of the case, including distinguishing the case from others which may have led to confusion or further debate.¹²¹ The Court used prior case law and constitutional parameters and weaved them into a common sense approach to regulating attorney speech which neither closes the avenues to which an attorney could procure business, nor denies states the ability to establish professional standards to insure the positive practice and perception of its professionals. The *Bates* line of cases and its rationale have regressed to the reasoning of *Valentine*. Commercial speech regulation has been returned to the state legislatures and the strictest constitutional protections have been reserved for speech which truly exists to encourage debate and disseminate information and opinion in the area of public interest.

The fallout from *Went For It* could be substantial. The decision opens the door for states to regulate lawyers and other service-oriented professions, such as physicians, in areas of advertising and client contact. The acceptance by the Court of the Florida survey purporting to prove the substantial state interest alleged by the Florida Bar signals a greater acceptance

119. *Id.* at 485. The dissent reasoned that an application of the *Central Hudson* test to attorney direct-mail solicitation demonstrates that states have a substantial interest in preventing what could easily be misleading effects of the targeted direct mail. *Id.* at 486. The dissent reasoned that such direct-mail solicitation might also have a corrosive effect on professional standards. *Id.*

120. *Went For It*, 115 S. Ct. at 2374. The Court declared: "[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.* at 2375 (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989)).

121. *Id.* at 2376. The Court went to great lengths to establish the "substantial interest" of the State of Florida, by lending great weight to the un rebutted findings of the two year study on the effects of lawyer advertising. *Id.* at 2377-78. The Court also took a special look at *Shapero*, and declared that the Court in *Shapero* took a very casual approach to the interest of protecting the privacy of individuals who were the targets of direct-mail solicitation. *Id.* at 2378. In *Went For It*, the Court reasoned, the Florida Bar had made the proper argument concerning the interest in protecting the privacy rights of individuals and the Court refused to take a casual approach to what it considered to be a substantial state interest. *Id.* at 2379.

by the Court of states' desires to protect their citizens, in conjunction with their professionals, from the degradation of such professions, based on the public's perception. Undoubtedly, state courts nationwide will be faced with proposals from State Bar Associations or other professional regulating organizations which attempt to regulate stricter guidelines over the practices of their professionals in the area of advertising and public perception.

Clearly, the Florida survey provided a disturbing realization for members of the legal profession. Contrary to the aspirations of the profession, lawyers are not generally perceived to be the protectors of rights or the upholders of justice. Rather, the general public exhibits an attitude of great disfavor toward the legal profession. Of course, it is beyond consideration that the First Amendment could be precluded by the public's perception of what is right and wrong. To do so would be to thwart the spirit of the First Amendment. Likewise, to apply the First Amendment to every form of speech would also thwart that spirit. It is for this reason that the Court was correct in denying the full protection of the First Amendment to the speech in *Went For It*.

The Court refused to extend the full protection of the First Amendment to direct-mail solicitation of legal clients within thirty days of an accident. The Court correctly weighed the interests of states in protecting those individuals who are the victims of great tragedies from the direct realization that their pain involves a monetary figure. It would be improper, even inhuman, to find it overburdensome to restrict any profession for thirty days in order to protect the privacy of an individual when it is needed most, especially when what is restricted is a business solicitation. Although the implications of this decision will not be determined for some time, the legal profession can only benefit from such regulations, which may finally sway public opinion toward attorneys.

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