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Attorney Advertising In The Wake Of Florida Bar v. Went For It, Inc.: A Groundbreaking Maintenance Of The Status Quo

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I. Introduction

Rosalie Osias is an attorney from Great Neck, New York who specializes in the mortgage banking field. In an effort to tap into the male-dominated industry, she produced a series of advertisements which showed her in revealing clothing and flirtatious poses.[1] One advertisement showed Ms. Osias lying prone across her desk with her heels in the air, with a question: "Does this law firm have a reputation?" The answer: "You bet it does!!!"[2]

The advertisements were successful. Before the advertisements were run, Ms. Osias would represent clients at about five closings per week; she now represents clients at about forty-five closings per week, and has hired three new associates to her staff due to the increased business.[3] Nassau County Bar officials derided the advertisements as "a disgrace that degrades the [legal] profession," and considered whether to commence grievance proceedings against her.[4] The bar association abandoned the idea.[5]

The issue of attorney advertising has been subject to intense debate throughout the legal community and beyond, and has

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* This Comment was submitted for membership in November 1995, and was selected for publication in September 1996. A great deal of the author's analysis rests upon a survey he conducted in September and October 1995. While the results may change if the survey were conducted today, the author's analysis remains timely and original. —*Ed.*

1. Daniel Wise, *Woman Lawyer's Suggestive Ads Stir Ire of Nassau County Bar*, N.Y. LAW J., Oct. 23, 1995, at 1.

2. *Id.* at 4.

3. *Id.*

4. *Id.*

5. Evelyn Nieves, *Using a Feminine Edge to Open a Man's World*, N.Y. TIMES, Nov. 28, 1995, at B6.

sparked vocal disagreement about its propriety. Indeed, America's foremost jurists disagree about the topic,[6] and strong opinions about attorney advertising are held by both powerful Congressional leaders[7] and ordinary citizens.[8] The integral question surrounding the issue is this: if the public, and much of the legal profession, finds certain advertising by attorneys distasteful and even offensive, why not stop the advertisements? The immediate answer is that the First and Fourteenth Amendments to the United States Constitution[9] protect the rights of attorneys and others to engage in "commercial speech."

An attorney's right to engage in commercial speech was tested recently by the United States Supreme Court in *Florida Bar v. Went For It, Inc.*.[10] In that case, the Court, in a hotly contested 5-4 decision, upheld a Florida rule that prohibited attorneys from sending targeted direct mail solicitation related to causes of action for personal injury or wrongful death to accident victims or their

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6. Supreme Court Justice Anthony M. Kennedy stated that attorney "communications may be vital to the recipients' right to petition the courts for redress of grievances." Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2383 (1995) (Kennedy, J., dissenting).

Conversely, the late Chief Justice Warren E. Burger derided some attorneys who advertise as "hucksters" and "shysters," and offered a simple "standard" for attorney advertising: "Never, never, never engage the services of a lawyer who finds it necessary to advertise in order to get clients." Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949 (1995).

7. One columnist reported some remarks by Speaker of the House Newt Gingrich in the wake of the verdict in O.J. Simpson's criminal trial:

> 'We must question the whole role of lawyers in society,' he said, and suggested a ban on lawyer advertising. When it was pointed out that that violated free market principles, not to mention the First Amendment, Gingrich stuttered and flubbed for about two seconds and then argued, basically, that he didn't have to be consistent. He was talking so fast there wasn't time to remind him that Johnnie Cochran doesn't advertise.

Rob Morse, *The Ceremony of Innocence*, SAN FRAN. EXAMINER, Oct. 12, 1995, at A24.

8. A citizen in Florida, who received a letter from an attorney offering his services, wrote: "I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind." Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2378 (1995).

9. The First Amendment reads: "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. . ." U.S. CONST. amend I.

The Fourteenth Amendment provides that "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." U.S. CONST. amend XIV, § 1.

10. 115 S. Ct. 2371 (1995).

families within thirty days of an accident or disaster.[11] The Court's decision, which upheld a restriction on an attorney's right to engage in non-misleading, truthful advertising, represented a dramatic departure from a long line of cases upholding and strengthening an attorney's right to engage in commercial speech.

The purpose of this Comment is to determine the extent to which the Court's decision in *Went For It* will serve to prompt future regulations on attorney advertising.[12] Part II describes the development and expansion of commercial speech rights for attorneys. Part III discusses the factual background and Supreme Court opinion in *Went For It.*

Part IV discusses attorney advertising in the wake of *Went For It* and illustrates the dual quality of the decision. Part IV(A) describes an informal survey of fifty-three state bar associations conducted by the Author in an effort to determine the states' reaction to *Went For It.* Part IV(B) argues that *Went For It* is a truly remarkable and groundbreaking decision, and points to the Court's apparent shift in course and to the reaction of several states and courts.

Finally, Part IV(C) argues that despite the remarkable nature of the *Went For It* decision, its impact should be the maintenance of the status quo—that the decision will *not* serve to invite future regulation of attorney advertising. Towards that end, this part will argue that *stare decisis*, the importance of empirical data, and the reaction of the majority of the states to *Went For It* demonstrates that *Went For It* should not be seen as permission for states to hastily regulate lawyer advertising.

II. Background: The Development Of Commercial Speech Rights For Attorneys

A. Breaking New Ground: Virginia State Board

Before scrutinizing the *Florida Bar v. Went For It, Inc.* decision and its impact on the future of attorney advertising, it is important first to trace the development of the body of First Amendment law that guarantees an attorney the right to commercial speech. This body of law spans almost twenty years.

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11. *Id.* at 2375.

12. This Comment does not purport to discuss specific areas of attorney advertising or to advocate a position on its desirability or professionalism.

The United States Supreme Court first recognized First Amendment protection of commercial speech in the seminal case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[13] In that case, the plaintiffs attacked on both First and Fourteenth Amendment grounds a Virginia statute forbidding the advertisement of prescription drug prices.[14] The plaintiffs were prescription drug consumers who claimed that they would benefit from freely allowed advertising.[15]

The Court, in a 6-3 opinion by Justice Blackmun,[16] held that the advertising was protected as "commercial speech" by the First Amendment,[17] and asserted that "speech does not lose its First Amendment protection because money is spent to project it . . . even though it is carried in a form that is 'sold' for profit."[18] The Court also noted that society may have an important interest in the "free flow of commercial information."[19]

The Court then went on to discuss the State's interest in promulgating the advertising ban. Justice Blackmun conceded that the state may have an interest in "maintaining a high degree of professionalism on the part of licensed pharmacists."[20] The Court, however, argued that the ban on advertising did not affect the desired result; rather, the close regulation of the profession in general ensured standards of professionalism.[21] The Court rejected Virginia's "highly paternalistic approach," stating that if

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13. 425 U.S. 748 (1976).

14. *Id.* at 750.

15. *Id.* at 753.

16. Justice Rehnquist was the lone dissenter. Chief Justice Burger and Justice Stewart each filed a concurring opinion. *Id.* at 748.

17. *Id.* at 762. 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,' . . . that it lacks all protection. Our answer is that it is not." *Id.*

18. *Virginia State Bd.*, 425 U.S. at 761.

19. *Id.* at 764. In a passage relevant to the continuing debate over advertising by attorneys, Justice Blackmun noted that:

> [a]dvertising, *however tasteless and excessive it sometimes may seem*, is nonetheless dissemination of information as to who is producing and selling what product, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. *To this end, the free flow of commercial information is indispensable.*

Id. at 765 (emphasis added).

20. *Id.* at 765.

21. *Id.* at 768-69.

people are well informed they will make competent decisions regarding their own self interests.[22]

In fashioning a middle-tier standard of review, the Court stated that commercial speech may be subject to regulation by the state.[23] The Court wrote that reasonable restrictions on the time, place and manner of advertisements were within the state's authority, but regulations must be "justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."[24] Finally, the majority noted that states are free to prohibit false and misleading advertisements, as well as those which promote illegal activities.[25] In dissent, Justice Rehnquist argued that commercial speech, unlike political or ideological speech, is not the type of speech that the framers of the First Amendment intended to protect, and expressed his disappointment in the elevation of commercial speech to a protected level.[26]

B. Commercial Speech Rights Pass to Attorneys: Bates

A year after *Virginia State Board*, the Supreme Court extended First Amendment commercial speech protection to attorneys in *Bates v. State Bar of Arizona*.[27] In *Bates*, two attorneys who opened a general practice clinic primarily for the benefit of low-income clients placed newspaper advertisements indicating the clinic's fee for certain standard legal procedures.[28] A complaint was filed by the State Bar of Arizona, charging the attorneys with violations of disciplinary rules prohibiting advertising by attor-

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22. *Id.* at 770.
23. *Virginia State Bd.*, 425 U.S. at 770.
24. *Id.*
25. *Id.*
26. *Id.* at 789-90. Justice Rehnquist argued that

> [t]he Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decision-making in a democracy." . . . I had understood this view relative to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.

Id. at 787.
27. 433 U.S. 350 (1977).
28. *Id.* at 354.

neys.[29] The Court invalidated the rule as a violation of an attorney's First Amendment commercial speech rights.[30]

The State of Arizona's primary interest in enacting an advertising ban was advertising's alleged adverse affect on professionalism. The State argued that advertising would cause commercialization, thereby "undermin[ing] the attorney's sense of dignity and self worth."[31] The Court disagreed, finding no causal link between advertising and the decline of professionalism.[32] The Court also disputed Arizona's argument that advertising will diminish the legal profession's reputation in the community.[33]

The Court then disagreed with Arizona's argument that advertising by attorneys was inherently misleading,[34] noting that the argument "assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information."[35] The Court also rejected Arizona's argument that lawyer advertising would encourage more lawsuits and impair the administration of justice, noting that advertising may actually be beneficial to the administration of justice.[36]

The state's fourth argument in support of its regulation was that advertising by attorneys would have unfortunate economic consequences because the overhead costs of the legal profession would be increased, and that such increased costs would be borne

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29. *Id.* at 355.

30. *Id.* at 379.

31. *Id.*

32. *Bates*, 433 U.S. at 368.

33. *Id.* at 370. Indeed, the Court instead pointed to one of the putative benefits of attorney advertising, stating that the public may hold attorneys in disregard because they *do not* advertise, "while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients." *Id.* Along the same lines, the Court indulged in a brief history of the legal profession and stated that "a ban on advertising originated as a rule of etiquette and not as a rule of ethics." *Id.* at 371. Then the Court stated that "habit and tradition are not in themselves an adequate answer to a constitutional challenge." *Id.*

34. *Id.* at 372. Arizona argued that advertisements were inherently misleading because (1) legal services are necessarily individualized; thus would-be clients cannot make informed comparisons between their situations and those depicted in advertisements; (2) the would-be client might not know in advance just what services he or she may need; and (3) advertisements will emphasize irrelevant factors and ignore the lawyer's skill. *Id.*

35. *Id.* at 375.

36. *Id.* at 375-76. The Court argued that while lawyer advertising may add to the number of cases filed, "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.*

by the clients of those who advertise.[37] In addition, the state argued that such increased costs would serve to prevent young attorneys from entering the market, thereby reinforcing the market share of the established bar.[38]

The Court rejected both of these arguments, noting that competition in the marketplace may serve to lower the cost of legal services.[39] Furthermore, the Court found that in the absence of advertising, attorneys must rely solely on their presence in the community to generate clients—a position which inevitably favors and sustains the position of the established bar.[40] The Court further rejected the state's argument that advertising would diminish the quality of legal services, declaring that "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising."[41]

Arizona finally argued that if advertisements were allowed, the state would have considerable trouble protecting against abuses. Arizona argued that "[b]ecause the public lacks sophistication in legal matters, it may be particularly susceptible to misleading or deceptive advertising by lawyers."[42] The Court rejected this argument as well, asserting that the high standards of the legal profession will serve to "weed out" those attorneys who "abuse their trust."[43]

Notwithstanding its ruling, the Court pointed to the state's right to place "reasonable restrictions on the time, place, and manner of advertising,"[44] and reiterated that "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint."[45]

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37. *Bates*, 433 U.S. at 377.

38. *Id.*

39. *Id.*

40. *Id.* at 378.

41. *Id.* The Arizona Bar was concerned that advertising would cause lawyers to advertise a "package" of legal services at a set price, thereby overlooking the individual needs of individual clients. *Id.*

42. *Bates*, 433 U.S. at 379.

43. *Id.* Justice Blackmun noted:

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. . . . For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.

Id.

44. *Id.* at 383.

45. *Id. See Virginia State Bd.*, 425 U.S. at 771-72.

Furthermore, the Court hinted that states may require certain safeguards to protect consumers, namely the use of a disclaimer or some other form of supplementation.[46] Finally, the Court stressed the role of the organized bar "in assuring that advertising by attorneys flows both freely and cleanly."[47]

Chief Justice Burger delivered a forceful dissent in which he argued that the changes in the practice of law spurred by the Court's holding "will be injurious to those whom the ban on legal advertising was designed to protect—the members of the general public in need of legal services."[48] He also criticized the Court's imposition of new regulatory burdens on state bar organizations.[49] Finally, the Chief Justice conceded the need for public access to information regarding lawyers, their services, and their fees, but expressed his apprehension at allowing lawyers to advertise.[50]

Justice Rehnquist also dissented. He opined that the First Amendment was not written to protect commercial speech at all, let alone advertisements by attorneys.[51] He stated that once the Court started down a "slippery slope" in *Virginia State Board*, "the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated."[52]

C. *The Expansion of Commercial Speech Rights of Attorneys*

The eighteen years following the Court's decision in *Bates* have seen a steady expansion in attorneys' rights to advertise in a truthful and nonmisleading way. In *In re Primus*,[53] the Court

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46. *Bates*, 443 U.S. at 384.

47. *Id.*

48. *Id.* at 386 (Burger, C.J., dissenting).

49. *Id.*

50. *Id.* at 388. He wrote, "[t]he public needs protection from the unscrupulous or the incompetent practitioner anxious to prey on the uninformed," and recommended that the organized bar "experiment with and perfect programs which would announce to the public" information regarding legal services and fees. *Id.*

51. *Bates*, 443 U.S. at 404. Justice Rehnquist wrote:

> [T]he First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, *is demeaned by invocation to protect advertisements of goods and services*. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort or expression that the Amendment was adopted to protect.

Id. (Rehnquist, J., dissenting) (emphasis added).

52. *Id.* at 405.

53. 436 U.S. 412 (1978).

applied a political speech analysis to hold that solicitation letters sent by an attorney for the American Civil Liberties Union were protected by the First Amendment.[54] The attorney sent letters to prospective clients regarding the forced sterilization of women in conjunction with the Aiken County, South Carolina administration of the federal Medicaid program.[55] The Court noted that the State may have an interest in protecting consumers from overreaching by attorneys, but rejected the application of prophylactic rules to cure such ills.[56]

First Amendment protection was expanded in *In re R.M.J.*.[57] There, the Court held that an attorney who announced the opening of his office by mailing announcement cards and placing advertisements in the newspaper and yellow pages was protected by the First Amendment.[58] The attorney included information which was not explicitly approved by the bar's rules; specifically, he described his work as "personal injury" and "real estate" instead of "tort" or "property," and included no disclaimer regarding certification of expertise.[59] Finally, the attorney stated, in capital letters, that he was "[a]dmitted to practice before THE UNITED STATES SUPREME COURT."[60] The unanimous Court held that the advertisements were not misleading and that the State had failed to prove a substantial state interest in proscribing his conduct.[61]

The Supreme Court, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[62] extended First Amendment protection to an attorney's use of accurate illustrations[63], and held that Ohio's ban on self-recommendation and the acceptance of business generated by unsolicited legal advice violated the plaintiff's commercial speech rights.[64] Attorney

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54. *Id.* at 421.

55. *Id.* at 415.

56. *Id.* at 432. Justice Rehnquist dissented, arguing that the state's prohibition on lawyer contact with prospective clients was "entirely reasonable." *Id.* at 445 (Rehnquist, J., dissenting).

57. 455 U.S. 191 (1982).

58. *Id.* at 207.

59. *Id.* at 196-97.

60. *Id.* at 197.

61. *Id.* at 205. The Court did say, however, that the lawyer's use of large capital letters to indicate his admission to the bar of the United States Supreme Court was "at least bad taste," but found nothing in the record to show that it was misleading. *Id.*

62. 471 U.S. 626 (1985).

63. *Id.* at 647.

64. *Id.* at 639-41.

Zauderer had placed advertisements in thirty-six Ohio newspapers soliciting business from women who suffered from injuries resulting from their use of the Dalkon Shield intrauterine device.[65] The advertisement contained an accurate drawing of the device with the words "DID YOU USE THIS IUD?".[66]

The Court held, however, that Ohio did not violate Zauderer's commercial speech rights by requiring him to mention potential plaintiff liability for court costs and expenses if he chose to mention contingent fees.[67] The Court distinguished the disclosure requirement from a prophylactic requirement by noting that the rule was an attempt to get the attorney to convey more information than he or she normally would.[68] Additionally, the Court found that the inclusion of such information was necessary to avoid misleading consumers.[69]

First Amendment protection was expanded further in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*,[70] the Court extended commercial speech protection to an attorney who indicated on his letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy (NBTA).[71] The Court concluded, contrary to the assertion of the bar, that the use of the NBTA notation was not inherently misleading, because the distinction between "licensed" and "certified" is "an obvious one."[72] The Court also dismissed the bar's argument that the notation was at least *potentially* misleading, asserting that it was no more misleading than the "[a]dmitted to Practice Before THE

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65. *Id.* at 630.

66. *Id.*

67. *Zauderer*, 471 U.S. at 652.

68. *Id.* at 650.

69. *Id.* at 652-53. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, dissented in part with regard to the Court's holding that attorneys may obtain clients through unsolicited legal advice. *Id.* at 673. She argued that such a practice is prone to undue influence and overreaching:

> Merchants in this country commonly offer free samples of their wares. Customers who are pleased by the sample are likely to return to purchase more. This effective marketing technique may be of little concern when applied to many products, but it is troubling when the product being dispensed is professional advice.

Id. at 673-74 (O'Connor, J., dissenting).

70. 496 U.S. 91 (1990).

71. *Id.* at 93.

72. *Id.* at 102-03. The court rejected "the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television." *Id.* at 105.

UNITED STATES SUPREME COURT" at issue in *In re R.M.J.*[73]

On a related matter, in *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*,[74] the Court held that an attorney who was a Certified Public Accountant (CPA) and Certified Financial Planner (CFP) was protected by the commercial speech doctrine when she used the CPA and CFP designations on her law office letterhead.[75] The Court noted that both designations were entirely accurate and not misleading.[76]

Finally, the Supreme Court held only once in the line of cases preceding *Went For It* that the government's wholesale regulation of attorney advertising passed First Amendment muster. In *Ohralik v. Ohio State Bar Association*,[77] the Court, via Justice Powell, held that a state may prohibit direct, in-person solicitation of clients by lawyers for pecuniary gain.[78]

The Court found that in-person solicitation was not entitled to the same protection as other forms of advertisement because it does not merely provide the recipient with information that he or she may simply ignore. Rather, in-person solicitation is likely to pressure the recipient because it often "demands an immediate response, without providing an opportunity for comparison or reflection."[79] The Court found that the state's interest in consumer protection was strong[80] and that rules proscribing such conduct were necessary to "prevent[] harm before it occurs."[81]

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73. *Id.* at 106-07. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented. She argued that the NBTA notation was inherently misleading because it would lead readers to assume that Peel was better qualified to litigate than attorneys without NBTA certification, and that such superiority was somehow licensed by the State. *Id.* at 121-23 (O'Connor, J., dissenting).

74. 114 S. Ct. 2084 (1994).

75. *Id.* at 2089-90. The Court's opinion was unanimous with respect to the CPA designation. Justice O'Connor, joined by Chief Justice Rehnquist, dissented in part with respect to the CFP designation. *Id.* at 2032 (O'Connor, J., dissenting in part).

76. *Id.* at 2089-91.

77. 436 U.S. 447 (1978).

78. *Id.* at 449.

79. *Id.* at 457. The Court noted that in-person solicitation offers a "one-sided" presentation and encourages "speedy and perhaps uninformed decisionmaking." *Id.*

80. *Id.* at 460.

81. *Id.* at 464. The Court also lamented some of the unsavory effects of in-person solicitation: (1) recipients of the solicitation may become distressed by the obtrusiveness of the attorney or the invasion of their privacy; and (2) unlike printed advertisements, in-person solicitation is not "visible or otherwise open to public scrutiny," thus potential abuses by attorneys may go unnoticed by bar officials. *Id.* at 465-66.

Ever since *Virginia State Board* and *Bates*, the Court has gradually expanded the scope of First Amendment protection for lawyers who wish to advertise. This protection extends to direct mail advertising, as illustrated by the following section.

D. Shapero and Direct Mail Advertising

Faced with facts similar to those in *Went For It*, the Court in *Shapero v. Kentucky Bar Association*[82] extended First Amendment protection to targeted direct mail solicitation that was neither false nor misleading.[83] The Court, speaking through Justice Brennan, held that because Attorney Shapero's letter was neither deceptive nor false, his sending of targeted letters must be constitutionally protected, as a similar newspaper advertisement would have been under *Zauderer*.[84] The Court found that the Kentucky Supreme Court disapproved of the letter because it was targeted. To this the Court retorted that "the First Amendment does not permit a ban on certain speech merely because it is more efficient."[85] The Court also rejected Kentucky's contention that targeted solicitation would subject the reader to undue influence from a trained advocate aware of the reader's situation.[86] It stated that the effect on the reader is the same whether in letter form or newspaper form.[87]

Furthermore, the Court rejected the State's assertion that a targeted letter somehow rises to the intrusiveness of the in-person solicitation repudiated in *Ohralik*.[88] The Court distinguished targeted letters, and print advertisements generally, from in-person solicitation by noting that unlike a personal contact situation, the recipient of a letter can "effectively avoid bombardment of [his] sensibilities by simply averting [his] eyes."[89] Likewise, the Court

82. 486 U.S. 466 (1988).

83. *Id.* at 471. Kentucky had instituted a complete ban on direct mail advertising. *Id.* at 468.

84. *Id.* at 473. The Court found that its cases had "never distinguished among various modes of written advertising to the general public." *Id.*

85. *Id.* at 473.

86. *Id.* at 474.

87. *Shapero*, 486 U.S. at 474.

88. *Id.* at 475.

89. *Id.* (citing *Ohralik*, 436 U.S. at 465). This is the same argument proffered by the Court in *Zauderer*. *See Zauderer*, 471 U.S. at 642.

asserted that a targeted letter invades the reader's privacy no more than a letter mailed to the general public.[90]

The Court conceded that letters which are *personalized*, rather than *targeted*, may increase the risks of deception. However, simply because a form of advertisement may be abused does not justify a prophylactic rule banning it.[91] The Court related that the state may regulate such abuses, and in fact may prevent them by requiring attorneys to seek prior approval of a potential advertisement by State bar officials.[92] While acceding to the notion that such a scheme may create more work for state bar officials, the Court opined that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators" the burden of policing advertisements prevent misleading letters from reaching would-be clients.[93]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented. Justice O'Connor criticized targeted letters as inherently intrusive and misleading.[94] She then reviewed the Court's initial decision in *Bates*, and asserted that *Bates* was inconsistent with the test laid down in *Central Hudson*.[95] Furthermore, her application of the *Central Hudson* test yielded a much different result—that in fact Kentucky had a substantial interest in "preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards."[96]

In sum, Justice O'Connor's view was that the *Bates* experiment had failed and that the issue of attorney advertising should be left to the respective states.[97] In so doing, she challenged the efficacy of lawyer advertising in the first place and asserted that lawyer

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90. *Shapero*, 486 U.S. at 476.

91. *Id.* (citing *In re R.M.J.*, 455 U.S. at 203).

92. *Id.*

93. *Id.* at 478.

94. *Id.* at 481-82. Justice O'Connor argued that targeted letters are misleading because they (1) impose legal services on someone who has not sought them; (2) indicate that the lawyer is familiar with the recipient's particular situation; and (3) are likely to contain advice that, unlike general advertisements, is more geared to the lawyer's financial interests than the client's legal needs. *Id.* (O'Connor, J., dissenting).

95. *Shapero*, 486 U.S. at 485-86. *See infra* notes 99-109 and accompanying text.

96. *Shapero*, 486 U.S. at 486.

97. *Id.* at 487.

advertising is inconsistent with the ethical interests and goals of the legal profession.[98]

E. The Central Hudson Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[99] the Court developed a four-part, middle-tier scrutiny test for application in future commercial speech cases. The litigation arose from the Public Service Commission's banning New York electric utilities from using advertising that encourages the use of electricity.[100] The Supreme Court, per Justice Powell, held that the ban was unconstitutional.[101]

The Court held that for regulation of non-misleading advertising to withstand constitutional attack, the state must prove both a "substantial interest" and that the regulation is "designed carefully to achieve the state's goal."[102] From this, the Court devised a four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[103]

Applying this test, the Court found that the First Amendment did in fact apply and that the state's proffered interest was substantial.[104] The Court also found a "direct link" between New

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98. *Id.* at 488-90. In Justice O'Connor's opinion,

> fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession . . . this 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.

Id. at 491.

99. 447 U.S. 557 (1980).

100. *Id.* at 558. The Commission determined that the use of promotional advertising was "contrary to the national policy of conserving energy," yet admitted that the ban on advertising "is not a perfect vehicle for conserving energy." *Id.* at 559.

101. *Id.* at 561.

102. *Id.* at 563.

103. *Id.* at 566.

104. *Central Hudson*, 447 U.S. at 568.

York's interest and the ban on advertising.[105] The Court, however, found that the fourth prong of the test was not met. The Court held that "[i]n the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising."[106]

Justice Rehnquist was the lone dissenter.[107] He assailed the Court's test and argued that it elevates the protection of commercial speech too high—"to a level that is virtually indistinguishable from that of noncommercial speech."[108] Justice Rehnquist, who had dissented in every prior case that held regulations unconstitutional, referred to his dissent in *Virginia State Board.* He said, "I remain of the view that the Court unlocked a Pandora's Box when it 'elevated' commercial speech to the level of traditional political speech by according it First Amendment protection."[109]

F. Summary

The eighteen years following the Supreme Court's decision in *Bates* have seen a gradual and consistent expansion of First Amendment commercial speech rights for attorneys. On June 21, 1995, the Court handed down its decision in *Went For It*, holding for the first time that the state may restrict truthful, nondeceptive advertising. The following part describes the Court's opinion, and subsequent sections will discuss its impact on the future regulation of attorney advertising.

III. *Florida Bar v. Went For It, Inc.*

A. Background and Lower Court Rulings

Attorney G. Stewart McHenry brought suit in federal court on behalf of himself and Went For It, Inc., a lawyer referral service he owned, challenging the constitutionality of Florida Rules 4-7.4 and 4-7.8.[110] Rule 4-7.4 prohibited direct mail advertisements by attorneys regarding personal injury or wrongful death legal services within thirty days of the accident or disaster which created the need

105. *Id.* at 569.
106. *Id.* at 571.
107. Justices Brennan, Blackmun and Stevens concurred in the judgment. *Id.*
108. *Id.* at 591 (Rehnquist, J., dissenting).
109. *Central Hudson*, 477 U.S. at 598.
110. McHenry v. Florida Bar, 808 F. Supp. 1543, 1544-45 (M.D. Fla. 1992).

for legal services.[111] Rule 4-7.8 applied the same rule to attorney referral services.[112] During the course of the litigation, McHenry was disbarred; the entire case, however, did not become moot because Rule 4-7.8 still prevented Went For It, Inc. from sending targeted letters.[113]

Both parties moved for summary judgment, and the Magistrate Judge recommended an order in favor of the bar.[114] The district court, however, disagreed and found that the thirty-day ban violated the First, Fifth, and Fourteenth Amendments to the United States Constitution.[115]

The Florida Bar justified its rule by claiming that a potential for abuse was inherent in direct solicitation of would-be clients by lawyers, especially since the recipient of the letter is often in a sensitive situation.[116] Thus the possibility of undue influence, overreaching and intimidation was present. A thirty-day moratorium would serve to reduce such possibilities, and was justified since other means of advertising remained available to the attorney.[117] The district court noted that the arguments proffered by the Florida Bar were the same as those posited by the Kentucky Bar and rejected by the Supreme Court in *Shapero*.[118]

The district court rejected the bar's assertion that sending a letter was a direct interpersonal encounter, noting that "a letter, unlike a 'badgering advocate,' can be avoided merely by placing it in a drawer to be considered later, ignored or discarded."[119] In addition, the court found that the bar's concerns over a lawyer's deliberate overreaching were nullified by disciplinary rules already in place.[120] Thus, the state's proffered interests did not justify the prophylactic rule.

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111. *Id.* at 1544.

112. *Id.*

113. *Id.* at 1545. Hence the use of "Went For It, Inc." in the caption to the Supreme Court's decision. McHenry was disbarred for engaging in sexual misconduct in the presence of clients. Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992).

114. *McHenry*, 808 F. Supp. at 1544-45.

115. *Id.* at 1548.

116. *Id.* at 1545-46.

117. *Id.*

118. *Id.* at 1546.

119. *McHenry*, 808 F. Supp. at 1546 (citing *Shapero* 486 U.S. at 476-77).

120. *Id.* The rule mentioned by the court states that a lawyer shall not send a written advertisement to someone if "[t]he 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." *Id.* (citing Rule 4-7.4(b)(1)(f)).

The court then rejected the bar's claim that the thirty-day moratorium was a reasonable restriction on time, place or manner.[121] The bar analogized its rule to restrictions on political or ideological speech upheld by the Supreme Court.[122] The court rejected these analogies because in those situations the recipient of the speech could not avoid the speech merely by "averting [his or her] eyes."[123] Furthermore, the court noted that, under existing Florida rules, direct mail advertisements must be clearly marked in red with the word "advertisement" on the envelope—thus the recipient could discard it without even opening it.[124]

More significantly, the court rejected the rule as a valid time, place, or manner restriction because the rule was not content-neutral.[125] The rule covered only personal injury and wrongful death actions; indeed, the court noted that family members in a wrongful death situation could be contacted within the thirty-day period by probate attorneys.[126] Because the court found the restriction to be content-based, it did not consider the alternative means of communication available to the lawyer.[127]

Finally, the district court concluded by hinting that it thought the proffered advertisements served some useful purpose. It stated that "[t]he challenged rules substantially impair and impede the availability of truthful and relevant information which can make a positive contribution to consumers in need of such legal services."[128] It held, as a matter of law, that the rules were repugnant to the Constitution; entitling Went For It, Inc. to summary judgment.[129]

The Court of Appeals for the Eleventh Circuit affirmed.[130] It agreed with the district court's holding that the bar failed to

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121. *Id.* at 1547.

122. *Id.* Specifically, the bar referred to three cases: Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (prohibiting the posting of election signs on public property); Kovacs v. Cooper, 336 U.S. 77 (1949) (prohibiting the use of sound trucks emitting loud noises); and Frisby v. Schultz, 487 U.S. 474 (1988) (prohibiting anti-abortion picketing outside private home). *McHenry*, 808 F. Supp. at 1547.

123. *McHenry*, 808 F. Supp. at 1547 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 (1978)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *McHenry*, 808 F. Supp. at 1548.

129. *Id.*

130. McHenry v. Florida Bar, 21 F.3d 1038, 1039 (11th Cir. 1994).

show substantial state interest or that the rule met that proffered interest.[131] In addition, the court also found that the rule was an invalid time, place or manner restriction because it was not content-neutral.[132]

The court concluded by sympathizing with the bar and expressing its disapproval of the type of advertising at issue. The court, however, felt compelled by precedent to affirm the ruling of the district court.[133] The Florida Bar appealed to the United States Supreme Court, which granted certiorari.[134]

B. The Supreme Court's Opinion

In a hotly contested 5-4 decision, the Supreme Court reversed the Eleventh Circuit, holding that Florida's use of the thirty-day moratorium did not violate the First Amendment commercial speech doctrine.[135] Justice O'Connor, writing for the majority,[136] analyzed the rule within the framework set forth in *Central Hudson*.[137]

Considering the Florida Bar's proffered interest in protecting the privacy and tranquility of the recipient of direct mail solicitation, and its appurtenant interest in preserving the reputation of the legal profession, the majority held that "[w]e have little trouble crediting the Bar's interest as substantial."[138] The Court found the rule to be an effort to protect the waning reputation of the legal profession in Florida "by preventing them from engaging in conduct that, the Bar maintains, 'is universally regarded as deplorable and beneath common decency.'"[139]

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131. *Id.* at 1043-44.

132. *Id.* at 1044-45.

133. *Id.* The court wrote:

> We are forced to recognize that there are members of our profession who would mail solicitation letters to persons in grief, and we find The Florida Bar's attempt to regulate such intrusions entirely understandable. Although the Bar may not formally restrict such behavior, an attorney's conscience, self-respect, and respect for the profession should dictate self-restraint in this area. To preserve the law as a learned profession demands as much.

Id.

134. 115 S. Ct. 42 (1994).

135. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2374 (1995).

136. Justice O'Connor was joined by Chief Justice Rehnquist, and Justices Scalia, Thomas, and Breyer. *Id.*

137. *Id.* at 2376.

138. *Id.*

139. *Id.*

With respect to *Central Hudson*'s requirement that the regulation serve the government's interest in a "direct and material way," the Court explained that the government's burden "is not satisfied by mere speculation and conjecture; rather, a governmental body . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them."[140] Towards this end, the Court found that the bar satisfied its burden with its two-year study.[141]

The Court observed that the anecdotal and statistical data from the study showed that the Florida public saw direct mail solicitation within the proscribed period as invasive of its privacy and a poor reflection on the legal profession.[142] Citing the record, the Court noted that fifty-four percent of those surveyed indicated that the disputed communications were violations of privacy.[143] Additionally, forty-five percent said that the solicitation's purpose was to capitalize on the gullible or sensitive.[144] The Court then related a series of anecdotal reactions to the solicitations as evidence of public disapproval.[145] Based on the evidence proffered by the bar, which was uncontradicted by Went For It, Inc., the Court held that the bar had met its burden of proving that its interest was advanced by the regulation.[146]

The Court distinguished the Florida rule from the situation in *Shapero*. Justice O'Connor noted that *Shapero*'s treatment of the privacy issue was casual—the Kentucky Bar asserted that its state interest was in preventing attorney overreaching; whereas Florida's interest was specifically found in the protection of the recipient's privacy.[147] Furthermore, the direct mail ban of *Shapero* was a broad ban on all direct mail, "whatever the time frame and whoever the recipient," whereas Florida's moratorium was for a limited duration and for the protection of a limited number of

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140. *Went For It*, 115 S. Ct. at 2377 (citing Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1588 (1995)).

141. *Id.* at 2377.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Went For It*, 115 S. Ct. at 2377-78. *See supra* note 8.

146. *Went For It*, 115 S. Ct. at 2378. In so holding, Justice O'Connor responded to Justice Kennedy's criticism of the accuracy of the Bar's study by noting that empirical evidence need not be perfect to meet the Constitution's requirements. *Id.*

147. *Id.*

potential recipients.[148] Finally, in *Shapero* the Kentucky Bar offered no empirical data to prove its interest and the relation of the regulation to that interest.[149]

The Court argued that the harm that the regulation seeks to eliminate "cannot be eliminated by a brief journey to the trash can."[150] Rather, the thirty-day ban's purpose was to prevent "the outrage and irritation with the state-licenses legal profession" that is inherent in the receipt of a solicitation letter within such a short time of an accident or disaster.[151]

The Court then found that the requirement of *Central Hudson* that regulations be no more extensive than necessary was satisfied. The Court noted that the Constitution requires a "'fit' between the legislature's ends and the means chosen to accomplish those ends," and that the "fit" contemplated need not be a perfect fit to pass constitutional muster.[152] The Court found the rule to be acceptable even though it applied to advertisements sent to those afflicted with minor injuries who were not in a sensitized emotional state.[153] The Court also asserted that, given the obvious harm caused by the mailing of such letters, it saw no less-burdensome alternative.[154] The Court also noted that during the thirty-day period, lawyers may avail themselves of a myriad of other advertising means.[155] Finally, the Court stated that, contrary to the views of Justice Kennedy, the record indicated that individuals would have "little difficulty finding lawyers when they need one."[156]

Justice Kennedy, joined by Justices Stevens, Souter, and Ginsburg, offered a strident dissent.[157] In asserting that the recipients of direct mail solicitations occasionally may benefit from such communications, Justice Kennedy stated that "[t]he Court today undercuts this [commercial speech] guarantee in an important

148. *Id.*
149. *Id.*
150. *Id.* at 2379.
151. *Went For It*, 115 S. Ct. at 2379.
152. *Id.* at 2380. The Court noted that its characterization of the fit not needing to be perfect did not constitute "the less rigorous obstacles of rational basis review." *Id.*
153. *Id.* In fact, the Court noted that a rule with an exception for those with minor injuries would be difficult to construct. *Id.* at 2380.
154. *Id.* at 2380.
155. *Id.* at 2380-81.
156. *Went For It*, 115 S. Ct. at 2381.
157. *Id.* at 2381.

class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance."[158] He stated that vital speech and legal interests were at stake in the thirty-day period covered by the bar's ban, because during this period accident victims may be contacted by defense attorneys or insurance personnel offering settlement.[159] Thus, he argued it would be oversimplification to assume that direct mail solicitation is commercial speech and nothing more.[160]

Justice Kennedy argued that Florida's purported state interests in privacy and the legal profession failed to satisfy the requirements of *Central Hudson*.[161] He accused the majority of ignoring the Court's holding in *Shapero*, which explicitly dealt with privacy concerns and direct mail solicitation; there the Court determined that direct mail solicitation does not produce the same privacy intrusions as in-person solicitation.[162] Additionally, *Shapero* held that the Court's inquiry should not be into the state of mind of the recipient, but rather "whether the mode of communication poses a serious danger."[163]

Next, the dissent rejected the majority's notion that a different form of privacy concern was present here than in *Shapero*. Justice Kennedy pointed to the Court's reliance on the sensitive state of many recipients as justification for the privacy interest.[164] He repudiated this argument, noting that "we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener."[165] Furthermore, he added that recipients of targeted direct mail are not a captive audience; thus "[a]ll the recipient of objectionable mailings need do is to take 'the short, though regular, journey from mail box to trash can.'"[166]

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158. *Id.* at 2381 (Kennedy, J., dissenting).
159. *Id.* at 2382.
160. *Id.*
161. *Went For It*, 115 S. Ct. at 2382.
162. *Id.*
163. *Id.* (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 474 (1988)).
164. *Id.* at 2282-83.
165. *Id.* at 2383. Justice Kennedy quoted from the Court's opinion in *Zauderer*:

> [T]he mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar find beneath their dignity.

Id. (citing Zauderer v. Office of Disciplinaray Counsel of the Supreme Court of Ohio, 471 U.S. 626, 648 (1985)).
166. *Went For It*, 115 S. Ct. at 2383.

Turning to *Central Hudson*'s next requirement, Justice Kennedy argued that even if the Florida Bar could show a substantial state interest in privacy and the reputation of the profession, the regulation fails because it does not advance that interest "in a direct and material way."[167] He attacked the bar's study as flawed because the record of it before the Court "include[d] no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results."[168] Finally, Justice Kennedy contended that the Florida Bar's real concern was the reputation of the legal profession and not the plight of accident victims.[169]

Next, Justice Kennedy argued that the regulation fails the final prong of the *Central Hudson* test because it is more restrictive than necessary and not a "reasonable fit."[170] Justice Kennedy contended that the rule deals with all victims of all injuries regardless of their severity and assumes that no prospective clients desire contact from an attorney.[171] He also asserted that where a situation involves serious injury or death, it may be more imperative that prompt legal representation be employed.[172]

Justice Kennedy's final arguments regarding the reasonableness of the ban centered around what he viewed as "commonsense consideration[s]."[173] He noted that the purported problem surrounding direct mail solicitation was "self policing: [p]otential clients will not hire lawyers who offend them."[174] Additionally, victims who are seriously injured and are "too ill-informed to know that time is of the essence" may mistakenly enter into settlement agreements before the thirty day period has expired.[175]

Justice Kennedy concluded by lamenting the Court's retreat from a long line of precedent in an effort to spare the legal

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167. *Id.* at 2383-84.

168. *Id.* at 2384.

169. *Id.* He wrote: "Indeed, when asked at oral argument what a 'typical injured plaintiff get[s] in the mail,' the Bar's lawyer replied: 'That's not in the record . . . and I don't know the answer to that question.' " *Id.*

170. *Id.* He argued that the rule "creates a flat ban that prohibits far more speech than necessary to serve the purported state interest." *Id.*

171. *Went For It*, 115 S. Ct. at 2384-85.

172. *Id.* at 2385.

173. *Id.*

174. *Id.*

175. *Id.*

profession of a bad reputation.[176] He observed that if indeed the legal profession suffers from a bad reputation, that reputation can be remedied only by improving the substance of legal practice.[177] Finally, Justice Kennedy accused the Court of complicity in the face of censorship.[178]

IV. The Dual Nature Of *Went For It* And Its Impact On Attorney Advertising

A. The Survey

Because the *Went For It* decision is of recent vintage, it is hardly surprising that there is a dearth of reported case law that interprets its holding in the lawyer advertising context. In an effort to determine whether *Went For It* would lead to more state regulation of attorney advertising, the Author informally surveyed fifty-three bar associations on October 22, 1995[179] for their reactions and future plans. Thirty-five jurisdictions responded, yielding a return rate of approximately sixty-six percent.[180]

The survey asked several broad questions: (1) whether the jurisdiction had a rule similar to Florida Rule 4-7.4 on its books; (2) whether, in light of *Went For It*, a similar rule will be proposed and/or adopted; (3) whether, in light of *Went For It*, further regulation of attorney advertising will be proposed and/or adopted; (4) whether a recent study concerning public attitudes towards

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176. *Went For It*, 115 S. Ct. at 2386.

177. *Id.*

178. *Id.* Justice Kennedy wrote:

> The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence.

Id.

179. All fifty states plus the District of Columbia, Puerto Rico and the United States Virgin Islands received the survey via facsimile.

Citations to the survey will be in the form of "Survey (state name(s))." See *infra* Appendix A.

180. The Author is grateful to the bar associations of the following jurisdictions for their generous participation in the survey: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia.

All responses remain on file with the *Dickinson Law Review*.

attorney advertising had been conducted; and (5) whether a similar study was planned in the near future. Generally speaking, of the thirty-five jurisdictions which responded, sixteen—approximately forty-six percent—indicated that future regulation was a possibility, and nineteen—approximately fifty-four percent—indicated that the status quo would prevail.[181]

B. Why Went For It Is Groundbreaking

There are several factors that illustrate the truly remarkable nature of the *Went For It* decision. First and foremost, the Court's decision itself represents a dramatic change. *Went For It* was the first case since *Virginia State Board*, save *Ohralik*,[182] to hold that a given regulation did not violate the First Amendment.[183] Additionally, Chief Justice Rehnquist and Justice O'Connor, persistent dissenters in the long line of cases prior to *Went For It*, now constitute a majority, albeit a slim one. Their series of dissents show their discomfort with First Amendment protection for attorney advertising.[184]

A second factor showing the remarkable nature of the *Went For It* decision is the reaction of the legal community and several

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181. Survey (all respondents).

182. *See supra* notes 77-81 and accompanying text.

183. *Went For It* is also significant because it was factually very similar to *Shapero*, yet the Court reached an opposite conclusion without overruling *Shapero*. *See supra* notes 82-98 and accompanying text.

Additionally, Justice O'Connor's arguments in dissent in *Shapero* concerning the effect of direct mail advertising on professional standards, *Shapero*, 486 U.S. at 490 (O'Connor, J., dissenting), carried the day in *Went For It* when the Court found that the Florida Bar had a substantial state interest in preserving the reputation of the legal profession. *Went For It*, 115 S. Ct. at 2376.

184. Chief Justice Rehnquist dissented in *Virginia State Bd.*, *see supra* note 26; *Bates*, *see supra* notes 51-52; *In re Primus*, *see supra* note 56; and Central *Hudson*, *see supra* notes 107-09.

Justice O'Connor wrote dissents in *Zauderer*, *see supra* note 69; *Peel*, *see supra* note 73; and *Shapero*, *see supra* notes 94-98. Indeed, Justice O'Connor's belief that *Bates* was wrongly decided and that attorney advertising is undesirable is evident in her dissent in a recent case involving the in-person solicitation of clients by Certified Public Accountants. She wrote:

> I continue to believe that this Court took a wrong turn with Bates v. State Bar of Arizona . . . and that it compounded this error by finding *increasingly unprofessional forms of attorney advertising to be protected speech* . . . . In my view, the States have the broader authority to *prohibit* commercial speech that, albeit not directly harmful to the listener, *is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large.*

Edenfield v. Fane, 507 U.S. 761, 778 (1993) (O'Connor, J., dissenting) (emphasis added).

states to the decision. Opponents of the Florida Bar's regulation decried the Court's decision as a "victory for the insurance industry" and "judge-made PR."[185] Still others commented that "states have been waiting for this decision to come down" and that the decision could pave the way for future regulation.[186]

The reaction of State bar associations is further indication of the significance of *Went For It.* Of the thirty-five jurisdictions which responded to the Author's survey, sixteen indicated that further regulations of attorney advertising may be pursued in light of *Went For It.*[187] Nine states indicated that they would pursue rules similar to the Florida rule,[188] while five others responded that the possibility of proposing such a rule is currently under consideration.[189]

The survey also revealed that eight states are considering additional action beyond the waiting period rule in light of *Went For It.*[190] California, Florida, Indiana, Louisiana, Oklahoma, South Carolina and Texas responded that the possibility of further regulation is under consideration, but no specific proposals have been formulated.[191] The State Bar of New Jersey reported that

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185. Larry Smith, *Supreme Court Flexes Censor's Muscle*, OF COUNSEL, July 3, 1995, at 2-3. Additionally, Mr. Smith castigated Justice O'Connor's reference to the "outrage and irritation" that recipients of direct mail feel by retorting that "[l]awyers, apparently, don't have as much right to be outrageous and irritating in this democracy as, say, Nazi thugs." *Id.* at 2.

Beverly Pohl, an attorney who represented Went For It, Inc., stated that "[t]his is the first time that the Court has decided a First Amendment question on the basis of public opinion." Richard C. Reuben, *Florida Bar's Ad Restriction Constitutional*, A.B.A. J., Aug. 1995, at 20.

186. Reuben, *supra* note 185, at 20. Barry Richard, counsel for the Florida Bar, noted that *Went For It* "makes clear that the authority of states to regulate in this area is not limited to deceptive or misleading advertisements." *Id.*

187. Survey (Alabama, California, Colorado, Florida, Hawaii, Idaho, Indiana, Louisiana, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas).

188. Survey (Alabama, Hawaii, Idaho, Louisiana, New Hampshire, New Jersey, Oklahoma, Pennsylvania, and Tennessee).

189. Survey (California, Colorado, Indiana, North Carolina, and South Carolina).

190. Survey (California, Florida, Indiana, Louisiana, New Jersey, Oklahoma, South Carolina, and Texas).

191. Survey (California, Florida, Indiana, Louisiana, Oklahoma, South Carolina, and Texas).

Comments by State Bar of Texas President David J. Beck are noteworthy. In a column he wrote: "[T]he State Bar has the green light to aggressively police barratry and unauthorized solicitation through overly intrusive direct mail—and as a profession we must do so." David J. Beck, *Let's Clean Up Our Profession*, TEX. BAR J., Oct. 1995, at 890.

it signed an agreement with the American Red Cross—the first such agreement in the nation—whereby both organizations would join in providing information to victims of disasters, "including cautions about avoiding unwanted solicitations from *anyone* [not just attorneys] who might take advantage of their distress for their own pecuniary advantage."[192] This agreement grew out of the public's reaction to solicitations by attorneys of victims of the recent pipeline explosion in Edison, New Jersey.[193]

Thus, the survey results demonstrate that states are considering further restrictions on attorney advertising in light of the Court's decision in *Went For It.* In this respect the *Went For It* decision represents a remarkable change in the Supreme Court's First Amendment jurisprudence, for the Court, at least at first glance, has finally given its stamp of approval to the regulation of lawyer advertising, something that states have sought ever since *Virginia State Board* and *Bates.*

The remarkable nature of the *Went For It* decision is further evidenced by its treatment in various courts since its issue. The Fifth Circuit held that Texas' equivalent to the Florida rule,[194] in light of *Went For It,* was constitutional. In *Moore v. Morales,*[195] the court of appeals held that as applied to attorneys, "*Florida Bar* controls."[196]

The *Moore* court found a substantial state interest in the privacy of accident victims and their families, and found that the statute substantially affected this interest.[197] The court also noted that the state met its burden of proof with evidence "of the great number of complaints associated with direct mail solicitation in

192. Survey (New Jersey).

193. *Id.*

194. Texas' version of the Florida Bar rule is statutory. The Texas Penal Code declares a person is guilty of barratry if the person (1) is an attorney, chiropractor, physician, surgeon, or private investigator licensed in Texas, and (2) if written communication concerning an action for personal injury or wrongful death is sent within thirty days of the accident or disaster. TEX. PENAL CODE ANN. § 38.12 (West 1995). The statute further instructs that violation of the rule is a felony of the second degree if the perpetrator had previously been convicted of the same offense. *Id.*

For a discussion of similar rules in Nevada and New Mexico, *see infra* notes 238-47 and accompanying text.

195. 63 F.3d 358 (5th Cir. 1995).

196. *Id.* at 361. During the course of the *Went For It* litigation, the District Court for the Southern District of Texas found the statute to be unconstitutional. Moore v. Morales, 843 F. Supp 1124, 1134 (S.D. Tex. 1994).

197. *Moore,* 63 F.3d at 362.

general," and testimony of expert witnesses on behalf of the state that indicated the solicitations at issue were "detrimental to an accident victim and his or her family."[198] The court made this finding despite the absence of even a perfunctory "study" similar to that conducted by Florida. Thus, *Moore* may indicate a move towards a greater acceptance of regulation of lawyer advertising.

A third and final factor illustrating the remarkable nature of *Went For It* is the Court's interest in cases of this sort. One commentator characterized the Court as having an "insatiable appetite" for attorney advertising cases.[199] To that extent, *Went For It* should not be viewed as the last of a long line of cases, but rather a harbinger of future litigation. Indeed, some commentators are predicting that the Court will hear a case currently making its way through the Florida federal court system.[200] In *Jacobs v. The Florida Bar*,[201] the plaintiffs are challenging rules which prohibit advertisements with testimonials, dramatizations, or illustrations.[202] Additionally, the plaintiffs are challenging a rule that affects radio and television advertisements by mandating the use of only one voice, allowing only background instrumental music, and prohibits the use of a voice of anyone other than a full-time employee of the firm whose services are being advertised.[203] The

198. *Id.* The court did not, however, mention any formal study conducted by the State Bar of Texas. Instead, the court argued that *Went For It* "does not require an overwhelming record in support of the 30-day ban." *Id.*

In related matters, the District Court for the Eastern District of Texas recently upheld the majority of Texas' new advertising rules. In Texans Against Censorship, Inc. v. State Bar of Texas, 888 F. Supp. 1328 (E.D. Tex. 1995), the court upheld twelve rules aimed at preventing misleading advertising. *Id.* at 1350-66.

The court, however, invalidated three rules: (1) a rule requiring the advertisement to indicate the firm's principal office and prohibiting the mention of a branch office if that office is not staffed at least three days per week; (2) a rule prohibiting the use of a statement that the advertisement had received prior approval from the Bar; and (3) a rule prohibiting the sending of written solicitations by registered mail. *Id.* The court's decision is on appeal to the Fifth Circuit Court of Appeals. Letter from David J. Beck, President, State Bar of Texas, to Thomas J. Moore, the *Dickinson Law Review* (Nov. 2, 1995) (on file with the *Dickinson Law Review*).

The Supreme Court of Florida, on July 20, 1995, adopted Rule 4-7.4(b)(2(C), which prohibits the sending of written solicitations via "registered mail or other forms of restricted delivery." *See* Florida Bar Re Amendments to Rules Regulating the Florida Bar, 658 So. 2d 930, 943 (1995).

199. Smith, *supra* note 185, at 2.

200. *Id.*

201. 50 F.3d 901 (11th Cir. 1995).

202. *Id.* at 902.

203. *Id.*

Eleventh Circuit reversed and remanded the district court's granting of summary judgment for the Bar, holding that the Bar has the burden of proving its interest and justifying its restriction on commercial speech.[204]

The preceding factors demonstrate that the Court's decision in *Went For It* was truly notable and represents a shift in First Amendment jurisprudence. But the dual nature of *Went For It* is evident when one considers its practical implications. Simply put, despite its groundbreaking nature, the reaction of states in favor of future restrictions, and the validation of the thirty-day rule in Texas, *Went For It* is best characterized as maintaining a tentative status quo.

C. *Went For It Should Not Alter the Status Quo*

Despite the fact that *Went For It* may be viewed as an invitation to do so, state bar associations should not hastily "jump on the bandwagon" and enact further regulations of lawyer advertising. Several factors support the conclusion that whatever "floodgates" have been opened by *Went For It* should be closed.

1. Stare decisis.—The *Went For It* decision did not create a new rule of law for commercial speech and attorney advertising cases. The Court made its ruling specifically within the confines of *Central Hudson*.[205] It did so despite Justice O'Connor's history of dissent in such cases[206] and Chief Justice Rehnquist's disapproval of the *Central Hudson* test.[207] Furthermore, in *Went For It* the Court declined to revisit its holding in *Bates*[208]—which granted attorneys commercial speech rights in the first place—something the Florida Bar expressly asked it to do.[209] This refusal again is telling given Justice O'Connor's dissent in *Shapero* that the rule of *Bates* should be reviewed.[210]

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204. *Id.* at 906. To date, no decisions have been reported after remand to the District Court for the Northern District of Florida.

205. *Went For It*, 115 S. Ct. at 2376. See *supra* notes 99-109 and accompanying text for a discussion of *Central Hudson*.

206. *See supra* note 184 and accompanying text.

207. *See supra* notes 107-09 and accompanying text.

208. *See supra* notes 27-52 and accompanying text.

209. *See, e.g.*, Petitioner's Brief on the Merits at *15, Florida Bar v. McHenry, No. 94-226, 1994 WL 614916 (U.S. Nov. 4, 1994).

210. *See supra* notes 94-98 and accompanying text.

The Court's rigid application of the *Central Hudson* test and its refusal to reconsider its holding in *Bates*, despite the majority's discomfort with both cases and their progeny, are testament to the fact that *Went For It* is to be viewed strictly within the confines of *Central Hudson*. That being said, *Central Hudson* imposes strict limitations upon a state's ability to restrict attorney advertising.

2. Empirical data: Proving the state's case.—Although *Went For It* upheld a rather narrow rule, states should not assume that a similar rule, or any other rule for that matter, automatically passes constitutional muster when applied to them. In order to withstand scrutiny under *Central Hudson*, the state must *prove* its interest and the means chosen to advance that interest.

The Court in *Went For It* found that the Florida Bar established its substantial interest, and showed that its rule advanced that interest, by the findings of its two-year study.[211] The Court noted that a state's burden "is not satisfied by mere speculation or 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.*"[212]

Thus, a state bar's opinion that certain forms of advertising are distasteful and reflect poorly on the profession, or indeed the fact that some members of the public find them distasteful, should not by itself be viewed as justification for restricting an attorney's First Amendment right to advertise. That is not to say that the state's data or proof must be perfect; the Court in *Went For It* acknowledged that it need not.[213] But states should not simply rely on Florida's study as proof of its interest.[214] Stated another way, behavior that may invade the privacy of Floridians may not necessarily invade the privacy of Iowans or Alaskans. Simply because Floridians may have adequate access to attorneys, the same

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211. *Went For It*, 115 S. Ct. at 2377.

212. *Id.*, (citing Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1995) (emphasis added)).

213. *Id.* at 2377.

214. The Court in *Went For It*, however, did note that it had in the past allowed "reference to studies and anecdotes pertaining to different locales altogether." *Went For It*, 115 S. Ct. at 2377 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-1 (1986)). But "reference" and "reliance" are distinct notions. Regulators should be more circumspect than to see the above statement as license to rely solely on Florida's efforts.

may not be true in Vermont or North Dakota.[215] With this in mind, the Fifth Circuit wrongly decided *Moore* when it upheld Texas' rule in the absence of any original data to support the state's contention that the *Central Hudson* test was met.

The Virginia, Arkansas, and New York State Bar Associations all share this view. The Virginia Bar not only revisited one of its prior advisory rulings in light of *Went For It*, but acknowledged that *Went For It* "reinforced the requirements under *Central Hudson* that any regulation of truthful advertising must be *shown* to advance a significant governmental interest."[216] The Arkansas Bar Association reported that it had a thirty-day rule petitioned for consideration before the state supreme court, and after *Went For It* was delivered, it withdrew its petition because it had neither conducted a study nor otherwise produced evidence to justify the rule.[217]

Likewise, the New York State Bar Association's Special Committee on Lawyer Advertising and Referral Services specifically declined to propose a waiting period rule because "there is no guaranty that New York, *without a study similar to Florida's two year study*, could similarly demonstrate the interest and the nexus between the regulation and the interest."[218] Furthermore, the Committee's report also stated:

> It is also questionable whether any other state, in enacting a like regulation, could rely upon the Florida Bar's study to support the finding of a substantial government interest. While the decision does contain references to reliance upon a study from a different locale, there was considerable discussion of the breadth of the study conducted by the Florida Bar, which was largely anecdotal. While there is nothing in particular that linked the findings to any specific customs within Florida, the

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215. H. Ritchey Hollenbaugh, chair of the American Bar Association's Commission on Legal Advertising, stated this proposition. In warning that *Went For It* should not be read to hold that a thirty-day rule is acceptable everywhere, he stated that states "will need to provide evidence of some sort that direct-mail solicitation causes some harm in their state, which is a state-by-state test." Richard C. Reuben, *Florida Bar's Ad Restriction Constitutional*, A.B.A. J., Aug. 1995, at 20.

216. Letter from James M. McCauley, Ethics Counsel, Virginia State Bar, to Thomas J. Moore, the *Dickinson Law Review* (Oct. 27, 1995) (on file with the *Dickinson Law Review*) (emphasis added).

217. Survey (Arkansas).

218. SPECIAL COMMITTEE ON LAWYER ADVERTISING AND REFERRAL SERVICES, NEW YORK STATE BAR ASS'N, *Attorney Advertising Committee Report*, Sept. 1995, at 41 (emphasis added) [NYSBA REPORT].

> reliance upon anecdotal information would be troublesome for any other state to rely upon the Florida study.[219]

A state considering further regulation may use the results of the Florida study to bolster its showing of a state interest. It should not, however, rely solely on Florida's results to show its interest. It must produce its own evidence.

Of the sixteen states that responded to the Author's survey indicating that they plan to enact further restrictions on attorney advertising, six indicated that they had not, nor were they sure that they would, conduct a comprehensive study of the public's attitudes concerning advertising.[220] Six states responded that they had not conducted a comprehensive study, but expected to do so in the near future.[221] Finally, four states responded that they had conducted studies and either have obtained or are awaiting the results.[222]

The standards set forth in *Central Hudson* and *Went For It* impose heavy burdens on a state wishing to restrict attorney advertising. Thus, states should proceed with deliberate caution before regulating advertising. In this sense, then, *Went For It* cannot be seen as inviting further regulation.

3. Developments in the states.—Developments in various states, and their reaction to *Went For It*, evince a climate of maintaining the status quo with respect to attorney advertising, despite state efforts to impose more regulation. The United States District Court for the Southern District of Mississippi recently held that six new advertising rules violated an attorney's right to commercial speech.[223] The Court noted that the plaintiffs

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219. *Id.* at App. A, 2.

220. Survey (Alabama, California, Idaho, Louisiana, Pennsylvania and Texas).

221. Survey (Colorado, Hawaii, Indiana, New Hampshire, North Carolina, and Tennessee).

222. Survey (Florida, New Jersey, Oklahoma, and South Carolina).

223. Schwartz v. Welch, 890 F. Supp. 565, 576 (S.D. Miss. 1995).

The plaintiffs challenged rules which: (1) required the use of a disclaimer on all advertisements; (2) required that an advertisement suggested an area of specialty it be accompanied by a related disclaimer; (3) required disclosure of the advertising lawyer's principal location of practice; (4) required disclosure that in contingency fee situations the client may be responsible for expenses; (5) prohibited the statement that all attorneys in a given firm were "juris doctors" without stating that the J.D. is not a medical degree and that virtually all American lawyers are J.D.s; and (6) requiring disclosures such as "actor portrayal" if the voice in the advertisement is not that of one affiliated with the advertiser. *Id.* at 568.

mounted "as-applied" challenge[224] and declared the rules unconstitutional because the Bar did not meet its burden of proof.[225]

Likewise, the Oregon Court of Appeals recently invalidated a statute which prohibited access to police records of automobile accidents—otherwise public information—by individuals who intended to use the information for commercial purposes by contacting the persons involved.[226] The plaintiffs were lawyers who sought the information to aid in soliciting legal business.[227] The court found that the restriction was content-based, and therefore an unconstitutional time, place, or manner restriction because it applied only to those who sought the information for their own commercial use.[228] Similarly, the District Court for the Northern District of Georgia recently applied the *Central Hudson* test to invalidate an analogous rule, permanently enjoining its enforcement.[229]

The premise that the status quo should prevail is borne out by the results of the Author's informal survey. Of the thirty-five jurisdictions that responded to the Author's survey, nineteen responded that, in the wake of *Went For It*, they had no plans to pursue either rules similar to Florida's thirty day rule or other restrictions on attorney advertising.[230] Michigan indicated that it was "studying" whether to pursue any rule changes.[231] Washington responded that it had declined to propose a waiting period rule in 1993 and was unsure whether it would propose that rule or others again.[232] Additionally, Oregon responded that a

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224. The court found that the plaintiffs mounted an "as-applied" challenge because, but for the prohibitions, they would advertise in the manner proscribed by the rules. *Id.* at 570. Alternatively, a "facial challenge" is one in which a plaintiff has not violated the rule, nor are there any circumstances which may test the rule. *Id.*

The distinction is important because a plaintiff mounting a facial challenge bears the burden of proving that the rule is unconstitutional on its face. *Id.* at 570, n.11. Conversely, in an as-applied challenge, "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Id.* (citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71, n.20 (1983)).

225. *Id.* at 576.

226. Zackheim v. Forbes, 895 P.2d 793 (Or. Ct. App. 1995).

227. *Id.* at 794-95.

228. *Id.* at 795-97.

229. Speer v. Miller, 864 F. Supp. 1294 (N.D. Ga. 1994).

230. Survey (Alaska, Arizona, Arkansas, Kansas, Maryland, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oregon, Puerto Rico, Rhode Island, Utah, Vermont, Virginia, Washington, and West Virginia). *See also* NYSBA REPORT.

231. Survey (Michigan).

232. Survey (Washington).

temporal ban had been proposed and defeated in the past, and that there was no attempt to impose a waiting period when the state's disciplinary rules were amended in 1993.[233]

The response of the majority of the states to the Author's survey that they would not, in light of *Went For It*, further pursue regulation is testimony to the notion that *Went For It* is a very narrow holding and not likely to spur widespread regulation.[234] In addition, the responses of those who indicated plans to enact regulations in light of *Went For It* is telling. Of those sixteen respondents, fourteen indicated that they may pursue waiting period rules,[235] while only eight indicated present or potential plans for additional restrictions.[236] This disparity suggests that, to the extent that *Went For It* leads to more regulation at all, such regulation should be narrowly crafted—limited in large part to the type upheld in *Went For It*. In this context, *Went For It* can hardly be construed as inviting scores of further regulations.

4. Construing rules in light of Went For It.—Nevada Supreme Court Rule of Professional Conduct 197(4) states that

> [w]ritten communication directed to a specific prospective client who may need legal services due to a particular transaction or occurrence is prohibited in Nevada within 45 days of the transaction or occurrence giving rise to the communication.[237]

The rule is noteworthy because it makes no reference to personal injury or wrongful death cases. Thus it would appear that the rule applies to all attorneys in all situations.[238]

Given the *Went For It* majority's argument that Florida's thirty-day ban was of only a limited duration, coupled with its observation that during this period the attorney may take advantage of alternative means of advertising,[239] Nevada's rule should withstand scrutiny under *Went For It*. This is especially likely since the rule appears to apply to *all* lawyers, not simply tort lawyers,

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233. Survey (Oregon).

234. The Virginia, Arkansas, and New York Bar Associations all indicated that they would not pursue further regulation in light of *Went For It*. For a discussion of their responses, see *supra* notes 217-20 and accompanying text.

235. *See supra* notes 188-89 and accompanying text.

236. *See supra* note 190 and accompanying text.

237. NEV. RULES OF PROFESSIONAL CONDUCT Rule 197(4) (Michie, 1995).

238. To date, no decision has been reported which rules on the constitutionality of the rule or defines its parameters.

239. *Went For It*, 115 S. Ct. at 2380-81.

thus eliminating any argument that the rule is content-based.[240] The assertion of the constitutionality of Nevada's rule under *Central Hudson* and *Went For It*, of course, presupposes that the Nevada Bar could effectively demonstrate a substantial state interest and that the rule is narrowly tailored to serve that interest.

New Mexico's version of the Florida rule is unique. Rule 16-701(C)(4) simply imposes a complete ban on direct mail solicitation if it "concerns an action for personal injury or wrongful death."[241] The comment by the New Mexico Trial Lawyers Association states that such solicitation "impedes, rather than encourages, the informed selection of attorneys."[242]

The NMTLA Comment further posits that the rule is not in conflict with *Shapero*, because it does not apply to all attorneys; only personal injury and wrongful death cases "where legitimate government interests are at stake."[243] The NMTLA Comment finally argues that the rules serves the substantial state interest of the "protection of the public to select their attorneys free of duress," and that the rule is specifically tailored to meet that interest because a complete ban is the only reasonable method of achieving the state's interest.[244]

If challenged, this rule should be deemed unconstitutional. It is a complete ban on only personal injury and wrongful death lawyers. Thus, while distinguishable from *Shapero*, it is in conflict with *Went For It*, which (1) specifically noted the lack of "less burdensome alternatives" to Florida's "short temporal ban of only thirty days," and (2) hinted that the Florida rule might have been unconstitutional "if the Bar's rule were not limited to a brief period."[245] Here, personal injury lawyers may never solicit clients by letter. Thus, the rule is also content-based, and therefore is an unreasonable time, place or manner restriction.[246] To date, no

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240. *See, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (restrictions on time, place and manner are acceptable "provided that they are justified without reference to the content of the regulated speech.").

241. N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-701(C)(4) (Michie, 1995 Supp.).

242. *Id.* Cmt.

243. *Id.*

244. *Id.*

245. *Went For It*, 115 S. Ct. at 2380.

246. *See, e.g.*, *Virginia State Bd.*, 425 U.S. at 771 (restrictions on time, place and manner are acceptable "provided that they are justified without reference to the content of the regulated speech.").

case has been reported that rules on the constitutionality of this rule.

5. Summary.—While the *Went For It* result is at first blush a groundbreaking decision, as a practical matter it does not alter the status quo concerning regulation of attorney advertising. If anything, it increases the regulator's burden because in *Went For It* Florida's interest and means were substantiated by empirical data. Thus, in order to implement future regulations, states must have tangible evidence that there is a substantial state interest and narrowly tailored means.

In addition, the Supreme Court's adherence to precedent and its refusal to revisit *Bates* demonstrate that its holding is narrow indeed. Likewise, the reaction of the states to *Went For It* illustrates that, at most, some states may attempt to implement a waiting period similar to Florida's, but the majority of states do not see *Went For It* as an invitation to implement further regulation.

V. Conclusion

The Supreme Court's decision in *Florida Bar v. Went For It, Inc.* was groundbreaking because it was the first in a long line of cases since *Bates* in which the Court upheld a restriction on truthful, non-misleading advertising by attorneys. The decision is also significant because it has led several states to consider enacting further regulations on advertising.

Despite these novel effects, however, *Went For It* should not be read as an invitation to states to hastily regulate forms of advertising it finds distasteful or beneath the dignity of the legal profession. For regulation to pass constitutional muster, it must meet the stringent requirements of *Central Hudson*, which have been strengthened by the *Went For It* majority's reliance empirical data.

States seeking to regulate attorney advertising should read *Went For It* as evincing the Supreme Court's willingness to uphold regulations of commercial speech, but only if the state can prove a substantial interest and narrowly tailored means with solid evidence. An alternative reading invites not only litigation but the risk of having the regulation deemed unconstitutional. Thus, states should proceed with deliberate caution and careful study.

Went For It has certainly clouded the parameters of what constitutes acceptable regulation of attorney advertising. Just

where those parameters are currently located and where they may wind up is open to debate. It is a certainty, however, that the organized bar's efforts to rein in what it considers distasteful and unprofessional advertising will result in further litigation before the Supreme Court. Only then will we know for sure the greater impact of *Went For It.* And until then, *Went For It* will serve to maintain the status quo.

Thomas Jon Moore

Appendix A
QUESTIONAIRE

1. Does your jurisdiction currently have a rule prohibiting direct mail solicitation by attorneys within a specified time after an accident or some other event?

   Yes _____ No _____

   If no, has/will your jurisdiction take action to implement such a rule?

2. In light of *Florida Bar v. Went For It*, has your jurisdiction implemented (or do you *expect* your jurisdiction to implement) further regulations concerning attorney advertising?

   Yes _____ No _____

   If yes, please briefly describe those regulations

3. Has your jurisdiction recently conducted any studies concerning the public's attitudes towards attorney advertising?

   Yes _____ No _____

   If yes, please briefly describe the results of any studies

   If no, do you expect to conduct a survey sometime in the near future?

   Yes _____ No _____

Thank you for your participation in this survey!