CONSTITUTIONAL LAW—FIRST AMENDMENT—BAR ASSOCIATION RULE PROHIBITING LAWYERS FROM SENDING TARGETED MAIL SOLICITATIONS TO PERSONAL INJURY OR WRONGFUL DEATH VICTIMS OR THEIR FAMILIES WITHIN THIRTY DAYS OF AN ACCIDENT WITHSTANDS FIRST AMENDMENT SCRUTINY FOR COMMERCIAL SPEECH—*Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371 (1995).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] Prior to 1964, however, purely commercial speech[2] did not receive protection under the First Amendment.[3] In a series of Supreme Court

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1 U.S. CONST. amend. I. The First Amendment is applicable to the states under the due process clause of the Fourteenth Amendment. *See* Schneider v. State, 308 U.S. 147, 160 (1939) (holding that the First Amendment is applicable to the states through the Fourteenth Amendment).

Commentators have espoused three different views on what speech this language actually protects. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 786-87 (2d ed. 1988). The most restrictive view, held by Alexander Meiklejohn, states that only "public" speech warrants protection by the Constitution. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26-28 (1960). Public speech, in Meiklejohn's view, consists of speech linked to public issues or to self-government and would not include such things as commercial speech. *Id.*; *see* TRIBE, *supra*, at 786-87 (discussing Meiklejohn's approach).

A more moderate view, espoused by Thomas Emerson, condenses speech into four different functions. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963). According to Emerson, speech is: (1) a way to guarantee self-fulfillment to individual members of society; (2) a method to develop knowledge and ascertain truth; (3) a means of equipping individuals with a method of influencing decision-making; and (4) a formula for balancing change and stability in society. *Id.* According to some, it is unclear whether commercial speech would receive protection under Emerson's view. *See* GERARD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1109 n.3 (10th ed. 1980).

The most liberal of views was championed by Oliver Wendell Holmes in a dissent to Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). TRIBE, *supra*, at 786. In Justice Holmes's view, the appropriate way to regulate speech is to permit it to regulate itself in the "marketplace of ideas." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). Holmes, who believed that all speech was important, clearly would have given protection to commercial speech. *Id.*; *see* TRIBE, *supra*, at 785-86 (discussing further Justice Holmes's "marketplace of ideas" theory).

2 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980). The Supreme Court defined commercial speech as "expression related solely to the economic interest of the speaker and its audience." *Id.*; *but see id.* at 580 (Stevens, J., concurring) (discussing how the Court's definition of commercial speech is overly broad). Commercial speech is also defined as speech that advertises products or services for a business purpose. BLACK'S LAW DICTIONARY 271 (6th ed. 1990).

3 Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). In *Valentine*, the Court addressed the constitutionality of a section of the New York City Sanitary Code. *Id.* at 53. Chrestensen, the owner of an old Navy submarine open to the public for a fee, arrived in New York to showcase his museum but was refused wharfage by the City. *Id.* 52-53. Chrestensen attempted to solicit business by distributing a handbill with an advertisement for his museum printed on one side and a message of protest against

decisions beginning in 1964,[4] the Court began to change this absolute rule and has since held that just because an advertiser seeks to make money does not justify stripping that speech of First Amendment protection.[5]

This new relaxed rule on commercial speech, however, did not include attorney advertising and solicitation.[6] Attorney advertising had been prohibited since 1908 when the American Bar Association (ABA) adopted the Canons of Professional Ethics.[7] All states, in some form or another, adopted rules that applied the ABA's prohibition to their local bars.[8] As a result of these prohibitions, many states' codes of legal ethics banned mass media advertising by attorneys.[9]

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the city printed on the other. *Id.* at 53. The Code forbade distribution in the streets of commercial advertisements but did allow handbills to be distributed if they were devoted solely to public information or a protest. *Id.* The police restrained Chrestensen from distributing his handbill and subsequently filed suit "to enjoin the petitioner from interfering with the distribution." *Id.* at 53-54. The Supreme Court, in reversing the decision of the Second Circuit, held for the petitioner, saying that "purely commercial advertising" was not protected under the First Amendment. *Id.* at 54-55. The Court's holding was based on the conclusion that the respondent had included the message of protest with the intent and purpose of eluding the city's ordinance. *Id.* at 55.

[4] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (holding that an advertiser's purely commercial interest in a commercial advertisement does not disqualify him from protection under the First Amendment); Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (holding that speech is not deprived of First Amendment protection simply because it appears in the style of a paid commercial advertisement); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that statements otherwise protected by the First Amendment do not relinquish protection when published as a paid advertisement).

[5] *See* TRIBE, *supra* note 1, § 12-15, at 891.

[6] *Virginia State Bd. of Pharmacy*, 425 U.S. at 773 n.25. For a full discussion of this case *see infra* notes 46-51 and accompanying text; *see* BLACK'S LAW DICTIONARY 54, 1392 (6th ed. 1990) (distinguishing that the terms "advertising" and "solicitation" have two separate and distinct meanings). To "advertise" means to announce, to notify, or to publish. *Id.* at 54. To "solicit" means to appeal for something, to plead for, or to try to obtain. *Id.* at 1392.

[7] ABA CANONS No. 27 (1908). The prohibition stated that solicitation of business through advertisement, personal communication, or interviews that was not the result of personal relations was unprofessional. *Id.*

The Canons of Professional Ethics was the first statutory prohibition on advertising by attorneys, but some state case law prior to 1908 also seemed to prohibit it. *See* People *ex rel.* Maupin v. MacCabe, 32 P. 280, 280 (Colo. 1893) (commenting that professional ethics forbade a lawyer from advertising his abilities and competence in the manner a storeowner advertises his products).

[8] Thomas E. Skowronski, Comment, *Of Shibboleths, Sense and Changing Tradition—Lawyer Advertising*, 61 MARQ. L. REV. 644, 645 n.5 (1978). The ABA's Model Code of Professional Responsibility, first prepared in 1969, was the successor to the Canons of Professional Ethics. *Id.* at 648 n.32.

[9] *In re* R.M.J., 455 U.S. 191, 193 (1982); *see infra* notes 81-94 and accompanying

This prohibition on attorney advertising had been violated and challenged in the courts,[10] but the challenges were unsuccessful until recent years.[11] State courts had agreed with the ABA's rationalization for completely banning attorney advertising and solicitation.[12] Soon after the Supreme Court extended First Amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[13] however, it extended the commercial speech doctrine to cover advertising by attorneys.[14]

Recently, the Supreme Court once again took up the issue of attorney advertising and solicitation in *Florida Bar v. Went for It, Inc.*[15] There, the Court held that a thirty-day ban on targeted direct-mail solicitation of personal injury or wrongful death clients withstood First Amendment scrutiny for commercial speech.[16] According to the *Went For It* Court, the Bar Association's interest in protecting the citizens of Florida from invasive behavior by attorneys and preventing the loss of confidence in the profession were substantial enough to pass the constitutional test.[17]

In 1987, the Florida Bar commissioned a study of lawyer advertising and solicitation in Florida, which included such things as public hearings, review of public commentary, and the conducting of surveys.[18] At the conclusion of the study, the Florida Bar found that an overwhelming majority of Floridians had negative opinions

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text; *see* Lori B. Andrews, *The Selling of a President*, 10 STUDENT LAW. March 1982, at 12, 14 (explaining that most states follow the ABA's Model Code of Professional Responsibility).

10 *See, e.g., In re* Anonymous, 32 A.D.2d 37, 39, 299 N.Y.S.2d 240, 243 (1969) (discussing the defense that a sign in a window that listed practice areas did not comprise advertising).

11 Bates v. State Bar of Arizona, 433 U.S. 350, 383-84 (1977) (holding that attorney advertising is commercial speech and subject to some level of First Amendment protection). *See infra* notes 52-57 and accompanying text.

12 *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978). The *Ohralik* Court, however, acknowledged the differences between advertising and solicitation. *Id.* at 457-58. First, advertising does not require the listener to make immediate decisions, whereas solicitation encourages the listener to make a quick response, possibly before having time to reflect. *Id.* at 457. Second, advertisements can be subjected to supervision, whereas solicitation provides no opportunity for intervention. *Id. See infra* notes 58-68 and accompanying text for further discussion of *Ohralik*.

13 425 U.S. 728, 773 (1976). For a further discussion of *Virginia Pharmacy*, *see infra* notes 46-51 and accompanying text.

14 *Bates*, 433 U.S. at 383. For further discussion of *Bates*, see *infra* notes 52-57 and accompanying text.

15 115 S. Ct. 2371, 2374 (1995).

16 *Id.* at 2381.

17 *Id.*

18 *Id.* at 2374.

of attorney advertising.[19] Moreover, more than half of the people surveyed stated that contacting people concerning accidents or disasters was an invasion of privacy.[20]

In late 1990, the Florida Bar submitted to the Florida Supreme Court a proposal for changes to the rules regulating advertising among attorneys.[21] The Florida Supreme Court, with only a few modifications, adopted the Bar's proposed amendments.[22] The two rules at issue in this case[23] create a thirty-day period after an accident during which attorneys may not directly solicit business from accident victims or their families.[24]

In March 1992, G. Stewart McHenry filed an action seeking declaratory and injunctive relief on behalf of himself and his wholly-owned attorney referral service, Went For It, Inc., in the United States District Court for the Middle District of Florida, challenging Florida Bar Rules of Professional Conduct 4.7-4(b)(1) and 4.7-8 as violative of the United States Constitution's First and Fourteenth Amendments.[25] McHenry claimed that he regularly sent targeted solicitations to victims of accidents and disasters, or their survivors, within thirty days of the injury and wanted to continue this process in the future.[26] Went For It, Inc. represented that it

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

20 *Id.*

21 *Id.* at 2374.

22 *Id.* For the full text of the Florida Supreme Court's opinion regarding the proposed changes to the advertising rules, see The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar - Advertising Issues, 571 So. 2d 451, 451-75 (Fla. 1990).

23 The Florida Rules of Professional Conduct provide:

> A lawyer shall not send, or knowingly permit to be sent, on behalf of himself, his firm, his partner, an associate, or any other lawyer affiliated with him or his firm, a written communication to a prospective client for the purpose of obtaining professional employment if: (a) [t]he written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication . . . .

FLORIDA RULES OF PROFESSIONAL CONDUCT R. 4-7.4(b)(1) (1991).

The rules also state:

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

Id., R. 4-7.8(a).

24 *Went For It*, 115 S. Ct. at 2374.

25 *Id.*

26 *Id.* G. Stewart McHenry was disbarred on October 24, 1992, for reasons irrele-

wanted to communicate with accident victims or their survivors within thirty days of the injury and to direct prospective clients to participating Florida attorneys.[27]

Both parties filed motions for summary judgment with a magistrate judge in the Middle District of Florida.[28] The magistrate judge concluded that the Florida Bar had significant governmental interests in protecting the privacy of accident victims and their families and ensuring that these people are not victimized by undue influence.[29] Accordingly, the magistrate judge recommended that the Florida Bar's motion for summary judgment be granted because the rules did not violate the Constitution.[30] The district court, however, rejected the recommendation of the magistrate judge and, relying on *Bates v. State Bar of Arizona*,[31] granted summary judgment in favor of the plaintiffs.[32]

The Florida Bar appealed the district court's ruling to the United States Court of Appeals for the Eleventh Circuit.[33] The Eleventh Circuit, in affirming the district court's decision, ruled

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vant to these actions. *Id.* McHenry, who had previously been publicly reprimanded twice, was disbarred for engaging in sexual improprieties in the presence of clients. Florida Bar v. McHenry, 605 So. 2d 459, 461 (Fla. 1992). As a result, another Florida attorney, John T. Blakely, was substituted in this action for McHenry. *Went For It*, 115 S. Ct. at 2374.

27 *Id.* An attorney referral service, such as used in this case, is defined by the Florida Bar Rules of Professional Conduct as:

> any person, group of persons, association, organization, or entity that receives a fee or charge for referring or causing the direct or indirect referral of a potential client to a lawyer drawn from a specific group or panel of lawyers; or (2) any group or pooled advertising program operated by any person, group of persons, association, organization, or entity wherein the legal services advertisements utilize a common telephone number and potential clients are then referred only to lawyers or law firms participating in the group or pooled advertising program . . . .

FLORIDA BAR RULES OF PROFESSIONAL CONDUCT Rule 4-7.8(b) (1991). A pro bono referral program is not considered an attorney referral service under this rule. *Id.*

28 *Went For It*, 115 S. Ct. at 2374. Summary judgment for either party in a lawsuit, pursuant to FED. R. CIV. P. 56(c), shall be granted if:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56(c).

29 *Went For It*, 115 S. Ct. at 2374.

30 *Id.*

31 433 U.S. 350 (1977). *See infra* notes 52-57 and accompanying text.

32 McHenry v. Florida Bar, 808 F. Supp. 1543, 1548 (M.D. Fla. 1992).

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

that the state interests advanced by the Florida Bar were not substantial enough to justify the ban[34] and that the rules were not valid time, place, and manner restrictions on speech because they were not content-neutral.[35]

The United States Supreme Court granted certiorari[36] to determine whether the Florida Bar rules concerning advertising are violative of the United States Constitution's First and Fourteenth Amendments.[37] The Court acknowledged that attorney advertising is considered commercial speech and is therefore to be accorded some degree of protection under the First Amendment.[38] The Court, however, then articulated that such protection is not absolute and that attorney advertising is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."[39] The Court held that the Bar had substantial interests in protecting the privacy of injured citizens and in preventing the erosion of trust in the legal profession and, therefore, upheld the Florida Bar rules that imposed a thirty-day restriction on targeted direct-mail solicitation of accident victims and their families.[40]

First Amendment freedom of speech has long been identified as one of the preeminent rights of democratic theory.[41] Justice Cardozo once characterized free speech as "the indispensable condition of, nearly every other form of freedom."[42] Commercial

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34 *Id.* at 1042. In order for a restriction on speech to be valid, the state must set forth a substantial interest in suppressing that speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that a valid time, place, or manner restriction on speech must be "narrowly tailored to serve a significant governmental interest").

35 *McHenry*, 21 F.3d at 1045. For a further discussion on time, place, or manner restrictions on speech, see Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that in order for a time, place, or manner restriction to be valid, the regulation must be content-neutral, "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information").

36 Florida Bar v. Went For It, Inc., 115 S. Ct. 42, 42 (1994).

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

38 *Id.* at 2375. *See infra* notes 130-32 and accompanying text.

39 *Id.* (quoting Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 477 (1989)).

40 *Id.* at 2381. For further discussion of the test used by the Court in this case, see *infra* notes 133-36 and accompanying text.

41 Dunagin v. City of Oxford, 489 F. Supp. 763, 769 (N.D. Miss. 1980). For a more in-depth analysis of the free speech clause of the First Amendment, see TRIBE, *supra* note 1, at 785. *See also* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 107 (1982) (discussing the various contending interpretations of the Free Speech Clause of the First Amendment).

42 Palko v. Connecticut, 302 U.S. 319, 327 (1937).

speech, however, has not always been thought of so highly.[43] In *Valentine v. Chrestensen*,[44] the Supreme Court espoused its "commercial speech" doctrine, stating that "purely commercial advertising" was not entitled to any First Amendment protection and could therefore be subject to regulation by the government.[45]

Over thirty years later, the Supreme Court changed its view on purely commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[46] In this case, a consumer group challenged, on First Amendment grounds, a Virginia statute that prohibited pharmacists from advertising prescription drug prices.[47] The State of Virginia defended the statute on the grounds that because its purpose was to maintain professional standards, it was a permissible regulation on commercial speech.[48] The Court disagreed with the state and held for the consumer group.[49] Justice Blackmun, writing for the Court, stated that although the speech involved was purely commercial, the consumers had a protected interest in the free flow of accurate information pertaining to lawful activity.[50] The Court, however, limited this new protection to

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[43] *See* Breard v. Alexandria, 341 U.S. 622, 644-45 (1951) (upholding a conviction for the violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that the Constitution imposes no restraint on regulating purely commercial speech).

[44] 316 U.S. 52 (1942). *See supra* note 3.

[45] *Valentine*, 316 U.S. at 54. The Court stated that the streets are the proper forum for communicating information and opinions and that the states may not unduly burden or proscribe speech in these public places. *Id.* The Court also stated, however, that it was clear that the Constitution imposed no such hindrance on governments when the issue was purely commercial advertising. *Id.*

[46] 425 U.S. 748 (1976).

[47] *Id.* at 749-50. The Virginia statute at issue in this case provided:

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

VA. CODE ANN. § 54-524.35 (Michie 1974) (quoted in *Virginia State Bd. of Pharmacy*, 425 U.S. at 750 n.2).

[48] JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 932 (2d ed. 1983).

[49] *Virginia State Bd. of Pharmacy*, 425 U.S. at 773.

[50] *Id.* at 764. *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301, 306-07 (1965) (holding that the First Amendment protects a citizen's right to receive political publications sent from abroad).

advertising by pharmacists because of a fear that advertising by other professionals, like physicians and lawyers, who only offer services rather than tangible products, would lead to a greater "possibility for confusion and deception."[51]

The Court, however, modified its *Virginia State Board of Pharmacy* decision that attorney advertising could be suppressed a year later in *Bates v. State Bar of Arizona*.[52] *Bates* involved two attorneys who advertised in a newspaper, in contravention of Arizona Bar Association disciplinary rules, that they were "offering legal services at a very reasonable fee."[53] The advertisement also listed a schedule of fees for the services listed in the advertisement.[54] The State Bar of Arizona advanced numerous justifications in favor of its prohibition against attorney advertising, including that such advertising was inherently misleading.[55] The Supreme Court, however, rejected the Bar's proffered interests and held that a state cannot ban truthful advertisements pertaining to the terms and availability of ordinary legal services.[56]

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51 *Virginia State Bd. of Pharmacy*, 425 U.S. at 773 n.25. *See also* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 91-98 (1977) (holding that the First Amendment does not permit a government to prohibit the posting of "For Sale" signs even though the town did so to curb what is known as "White Flight"); Carey v. Population Services Int'l, 431 U.S. 678, 700 (1977)(holding that the First Amendment protects the advertisement or display of contraceptives).

52 433 U.S. 350 (1977).

53 *Id.* at 354-55. The Arizona Bar Association disciplinary rule prohibiting advertising by lawyers stated:

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

17A ARIZ. REV. STAT. 26 (Supp. 1976).

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

55 *Id.* at 372.

56 *Id.* at 382-83. The Court was quick to state that its ruling was limited and that it only approved advertising of fees charged for ordinary legal assistance, allowing states the freedom to govern other facets of attorney advertising. *Id.* at 383-84. The Court acknowledged that areas of advertisement such as representations of superiority of services, in-person solicitation, and false, deceptive, or misleading advertisements could demand some sort of restriction. *Id.* Additionally, the Court reiterated that, as with other types of speech, it would allow reasonable time, place, and manner restrictions on advertising speech. *Id.* at 384.

Following *Bates*, 45 states along with the District of Columbia revised their respective attorney disciplinary codes to allow for advertising. Roger P. Brosnahan & Lori B. Andrews, *Regulations of Lawyer Advertising: In the Public Interest?*, 46 BROOK. L. REV. 423, 426 & n.19 (1980). Many of the modifications, however, contained uncompromising provisions that allowed only those characteristics of legal advertising approved by the Court in *Bates*. *Id.* at 426-27.

The Court, in its holding in *Bates*, emphasized that there were still important questions unanswered in the attorney advertising field including the boundaries between deceptive and nondeceptive advertising.[57] The Supreme Court discussed part of this issue, that of in-person solicitation, in *Ohralik v. Ohio State Bar Association*.[58] *Ohralik* involved an attorney who solicited business from two accident victims while they were hospitalized.[59] Both of the women from whom the appellant had solicited business agreed to his representation but they later dismissed him and filed grievances with the local bar association.[60] A disciplinary board of the state's bar association charged the appellant with violating the Ohio rule forbidding in-person solicitation.[61] The Supreme Court of Ohio, in adopting the disciplinary board's findings, increased the sanction from a public reprimand to indefinite suspension.[62]

The United States Supreme Court noted that its decision in *Bates* did not automatically control the current case.[63] Unlike an advertisement to the public, which only furnishes information and leaves the recipient unconstrained to decide whether or not to act upon it, in-person solicitation may employ pressure and frequently insists on a prompt response without supplying an occasion for comparison or consideration.[64] After discussing the merits of the bar association's stated interest in forbidding in-person solicitation—protecting citizens from the intrusiveness of persuasive attorneys—the Court held that the Ohio rules did not violate the

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

58 436 U.S. 447, 449 (1978).

59 *Id.* at 449-53.

60 *Id.* at 452.

61 *Id.* at 452-53. The Ohio Code of Professional Responsibility is based on the same numbered rules of the American Bar Association's Model Code of Professional Responsibility. *Id.* at 453 n.9. The first rule that Ohralik violated provides that: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1970).

The second rule that Ohralik violated provides in relevant part:

> A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: (1) [a] lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Id., DR 2-104(A).

62 *Ohralik*, 436 U.S. at 453-54. The disciplinary board found that the two women were casual acquaintances of Ohralik and that he had initiated the contact with them. *Id.* at 453 n.10.

63 *Id.* at 454.

64 *Id.* at 457.

Constitution and could be applied to the appellant.[65]

The Court opined that because it is the state's responsibility to preserve the professional ethics of attorneys, particularly because attorneys are crucial to the execution of justice, the bar association's interest in deterring the type of conduct exhibited by Ohralik is particularly strong.[66] The Court concluded that the class of solicitation involved in *Ohralik* was not entitled to the same protection under the Constitution as the speech in *Bates*.[67] The Court closed by articulating that a state may categorically ban in-person solicitation by attorneys for pecuniary gain.[68]

In 1980, the Supreme Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, laid down an explicit four-part test to ascertain whether a given restriction on commercial speech violates the First Amendment.[69] In this case, the New York State Public Service Commission proscribed all promotional advertising by electric companies.[70] The Commission stated that the purpose of the ban was to conserve energy.[71] Central Hudson Gas & Electric Corporation challenged the policy statement in a

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65 *Id.* at 467-68.

66 *Id.* at 460.

67 *Id.* at 457-58. *But see* Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993) (holding that a state cannot ban direct, in-person uninvited solicitation of business people by certified public accountants).

68 *Ohralik*, 436 U.S. at 468. But see *In re* Primus, 436 U.S. 412, 438-39 (1978), a case decided the same day as *Ohralik*, where the Court distinguished the lawyer solicitation issue from that in *Ohralik*. *In re Primus* involved an attorney affiliated with a branch of the American Civil Liberties Union (ACLU), who attempted to solicit plaintiffs, on behalf of the ACLU, who allegedly had been illegally sterilized as a condition to receiving Medicaid benefits. *Id.* at 414-16. A complaint was filed against Primus with the disciplinary committee of the Supreme Court of South Carolina alleging that Primus engaged in "'solicitation in violation of the Canons of Ethics.'" *Id.* at 417. The United States Supreme Court, in holding for Primus and distinguishing the case from *Ohralik*, stated that solicitation of possible litigants by nonprofit groups that engage in litigation as a type of political expression comprises expressive conduct entitled to full First Amendment protection. *Id.* at 422-26 (citing NAACP v. Button, 371 U.S. 415, 428-33 (1963)).

But see Martin v. City of Struthers, 319 U.S. 141, 142, 149 (1943) (holding that a municipal ordinance forbidding the door-to-door distribution of handbills violates the First Amendment Freedom of Speech).

69 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564, 566 (1980).

70 *Id.* at 558. The Commission's policy statement containing the prohibition, which was issued on February 25, 1977, defined promotional advertising as "advertising intended to stimulate the purchase of utility services." *Id.* at 559. The policy statement only banned promotional advertising, so an electric company could still issue informational and institutional advertisements. *Id.* at 560.

71 *Id.* at 559-60. In the policy statement, the Commission pronounced that all promotional advertising was antithetical to the national policy of preserving energy resources. *Id.* at 559.

New York state court, contending that the Commission had restricted commercial speech in breach of the First and Fourteenth Amendments.[72] The trial court and the appellate division upheld the Commission's order, and the New York State Court of Appeals affirmed.[73]

In reversing the decision by the New York Court of Appeals, the United States Supreme Court derived a four-part test for ascertaining whether certain restrictions curtail First Amendment freedoms.[74] First, the Court found that it must be determined whether the commercial speech is protected by the First Amendment at all.[75] Second, the Supreme Court noted that a court must ask whether the governmental interest espoused by the state, or its actor, is substantial.[76] Third, the Court stated that it must be determined whether the regulation directly promotes the governmental interest professed in the second part of the test.[77] Finally, the Supreme Court explained that a court must determine whether or not the restriction is more extensive than is essential to serve the asserted governmental interest.[78] Applying this four-part test to the

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[72] *Id.* at 560. Central Hudson also asserted that the Commission's order extends beyond the agency's powers granted by the legislature. *Id.* at 560 n.3. The New York Court of Appeals rejected this argument and it was not brought up in the appeal before the United States Supreme Court. *Id.*; *see* Consolidated Edison Co. v. Public Service Comm'n, 390 N.E.2d 749, 754 (1979) (holding that the Public Service Commission possesses sufficient statutory power to restrict promotional advertising of electricity).

[73] *Central Hudson*, 447 U.S. at 560-61. The Court of Appeals concluded that the interests of the government in prohibiting the advertising outweighed the limited constitutional worth of the commercial speech at hand. *Id.* at 561 (citing Consolidated Edison Co. v. Public Service Comm'n, 390 N.E.2d 749, 757-58 (1979)). The United States Supreme Court noted probable jurisdiction and granted certiorari. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 444 U.S. 962, 962 (1979).

[74] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).

[75] *Id.* The Court indicated that all commercial speech receives at least partial protection unless it is misleading or if it concerns unlawful activity. *Id.* If the speech is considered either misleading or it concerns illegal activities, the Court held, no First Amendment issue is raised and the speech may be proscribed or otherwise regulated by the government. *Id.* at 566-68.

[76] *Id.* at 566. The Court emphasized that if the interest is not substantial, the regulation on the speech will be struck down. *Id.* at 568-69.

[77] *Id.* at 566.

[78] *Id.* The Court stated that if the restriction is more extensive than necessary, it will be struck down. *Id.* at 569-71. *But see* Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993) (holding that restrictions on commercial speech need only be reasonably tailored to serve the asserted governmental interest).

Justice O'Connor referred to the scrutiny given to restrictions on commercial speech as "intermediate." Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2375 (1995). The lowest level of scrutiny used, referred to as the rational basis test, pro-

facts of the case, the Supreme Court reversed the decision of the New York Court of Appeals and held that the regulation was more extensive than necessary to serve the substantial interests set forth by the government.[79]

In response to *Bates*, and the test set forth in *Central Hudson*, many states adopted rules that attempted to control advertising by attorneys through a "laundry list" approach.[80] The Supreme Court seized the occasion to survey this "laundry list" approach in 1982 in *In re R.M.J.*[81] In this case, a lawyer advertised the creation of his practice in newspapers and phone books as well as mailing announcements to a preselected index of addresses.[82] Missouri permitted lawyers to publish advertisements of up to ten categories of information in newspapers, magazines, and the telephone book.[83] Missouri also allowed attorneys to send announcement cards regarding their practice to other lawyers, their clients, former clients, friends, and relatives.[84] The State, however, used a long and spe-

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claims that a court "will not second-guess the legislature as to the wisdom or rationality of a particular statute if there is a rational basis for its enactment, and if the challenged law bears a reasonable relationship to the attainment of some legitimate governmental objective." BLACK'S LAW DICTIONARY 1262 (6th ed. 1990). *See* Heller v. Doe, 113 S. Ct. 2637, 2642 (1993) (holding that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity").

If a regulation is found to affect unfavorably a fundamental right, strict scrutiny is applied and the government must establish that it has a compelling interest that justifies the law and that any distinctions created by the law are needed to further that compelling interest. BLACK'S LAW DICTIONARY 1422 (6th ed. 1990). *See* Miller v. Johnson, 115 S. Ct. 2475, 2490 (1995) (holding that to satisfy strict scrutiny, the government must prove that its legislation is narrowly tailored to achieve a compelling interest).

79 *Central Hudson*, 447 U.S. at 572. The Court observed that the speech was of the sort protected by the First Amendment, that the interests asserted by the state were substantial, and that there was a direct link between the proscription and at least one of the stated interests. *Id.* at 566-71. The Court held, however, that the restrictions were more extensive than were necessary and, therefore, reversed the lower court's judgment. *Id.* at 572.

80 Shawn B. Meador, Comment, *In Re* R.M.J.: *The Scope of Lawyer Advertising Expands*, 1983 UTAH L. REV. 99, 108-10 (1983). The Missouri Rules of Court allowed attorney advertising to contain the name, address, telephone number, date of birth, schools attended, office hours, languages spoken, areas of practice, fee for initial consultation, availability of a schedule of fees, credit arrangements, and the fixed fee for specific routine services enunciated in the Addendum to the rules. *In re R.M.J.*, 455 U.S. at 194 (citing MO. REV. STAT. SUP. CT., R. 4, DR 2-101(B) (Vernon 1978)).

81 455 U.S. 191, 193 (1982).

82 *Id.* at 196-98.

83 *Id.* at 194 n.3 (citing MO. REV. STAT. SUP. CT., R. 4, DR 2-101(B) (Vernon 1978)).

84 *Id.* at 196 (citing MO. REV. STAT. SUP. CT., R. 4, DR 2-102(A)(2) (Vernon 1981)). These announcements could contain such things as new or changed associ-

cific "laundry list" rule that enumerated the only information that an attorney could impart through an advertisement.[85]

The attorney in *In re R.M.J.* was accused of violating the Missouri Rules of Court by publishing advertisements that contained areas of practice not approved for listing, not publishing the required disclaimer of expertise, and sending announcement cards to people other than clients, former clients, friends, relatives, and other attorneys.[86] In proceedings before the Missouri Supreme

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ates, new or changed addresses, change of firm name, or any other similar information. *Id.*

85 *Id.* at 195 n.6. The addendum to the rule, which contained the list of specific information, provided in relevant part, as follows:

> [T]he following areas or fields of law may be advertised by use of the specific language hereinafter set out:
>
> 1. General Civil Practice
> 2. General Criminal Practice
> 3. General Civil and Criminal Practice
>
> If a lawyer or law firm uses one of the above, no other area can be used .... If one of the above is *not* used, then a lawyer or law firm can use one or more of the following:
>
> 1. Administrative Law
> 2. Anti-trust Law
> 3. Appellate Practice
> 4. Bankruptcy
> 5. Commercial Law
> 6. Corporation Law and Business Organizations
> 7. Criminal Law
> 8. Eminent Domain Law
> 9. Environmental Law
> 10. Family Law
> 11. Financial Institution Law
> 12. Insurance Law
> 13. International Law
> 14. Labor Law
> 15. Local Government Law
> 16. Military Law
> 17. Probate and Trust Law
> 18. Property Law
> 19. Public Utility Law
> 20. Taxation Law
> 21. Tort Law
> 22. Trial Practice
> 23. Workers Compensation Law
>
> No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.
>
> If one or more of these specific areas of practice are used in any advertisement, the following statement must be included. . . : 'Listing of the above areas of practice does not indicate any certification of expertise therein.'

Id. at 195-96 (citing MO. REV. STAT. SUP. CT., R. 4, Addendum III (Adv. Comm. Nov. 13, 1977)) (emphasis in original).

86 *In re R.M.J.*, 455 U.S. at 197-98.

Court, the accused attorney argued that the court should follow the rule set forth in *Central Hudson* regarding commercial speech.[87] A divided court disagreed and the attorney was reprimanded.[88]

The Supreme Court granted certiorari[89] to decide whether certain facets of the ethical rules of the Missouri Bar regulating attorney advertising harmonize with the requirements set forth in *Bates*.[90] Justice Powell, writing for a unanimous Court, stated that a state could manage commercial speech where its objective is to control deceptive or false advertising and that *Bates*'s narrow ruling held only that attorneys can advertise prices for routine services as long as such advertisements are not misleading.[91] Justice Powell noted, however, that even where a message is not misleading, the government maintains some power to regulate it, as long as it professes a substantial interest and the hindrance to speech is in correlation to the interest served.[92]

The Court, in reversing the decision of the Missouri Supreme Court, held that three restrictions in the rule that applied to R.M.J. could not be sustained when compared to the attorney's First Amendment rights.[93] The Court concluded that the attorney's information was neither misleading nor inherently misleading and that if a state is going to regulate commercial speech, it must do so in a way that is no more extensive than rationally necessary to further the state's substantial interest.[94]

The Supreme Court enunciated its views on attorney advertis-

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87 *In re* R.M.J., 609 S.W.2d 411, 412 (Mo. 1981).

88 *In re R.M.J.*, 455 U.S. at 198.

89 *In re* R.M.J., 452 U.S. 904 (1981).

90 *In re R.M.J.*, 455 U.S. at 193. For a discussion on the Supreme Court's ruling in *Bates*, see *supra* notes 52-57 and accompanying text.

91 *Id.* at 199-202.

92 *Id.* at 203 (citing Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 564 (1980)).

93 *Id.* at 206.

94 *Id.* at 206-07. The Court continued by emphasizing that

> [s]tates retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. . . . But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on [the] appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.

Id. at 207. For a detailed analysis of *In re R.M.J.*, see generally Note, *Attorney's Expanding Right to Advertise Under the First Amendment*, 26 How. L.J. 281 (1983) (discussing the evolution of commercial speech under the First Amendment and state regulation of attorney advertising until *In re R.M.J.*).

ing again in 1985 in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[95] The lawyer in *Zauderer* ran two newspaper advertisements promoting his services in various areas of the law.[96] The first advertisement informed readers that the attorney would represent defendants in drunk driving cases on a contingent fee basis.[97] The second advertisement, appearing several months later, expressed the attorney's interest in representing women who suffered injuries from use of the Dalkon Shield Intrauterine Device.[98] The advertisement was very successful, netting the attorney 106 clients on behalf of whom he instituted lawsuits.[99]

The Office of Disciplinary Counsel decided to file a complaint against the attorney for violating several state bar disciplinary rules.[100] First, the complaint alleged that the drunk driving advertisement violated Ohio Disciplinary Rule 2-101(A) in that it was "'false, fraudulent, misleading, and deceptive to the public' because it offered representation on a contingent-fee basis in a crimi-

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95 471 U.S. 626 (1985).

96 *Id.* at 629-30.

97 *Id.* This advertisement appeared in the *Columbus Citizen Journal* in the fall of 1981 and promised that if the defendant were convicted of drunk driving, his legal fees would be refunded. *Id.* at 629. An attorney employed by the Office of Disciplinary Counsel of the Supreme Court of Ohio telephoned the attorney and informed him that his advertisement seemed to be offering to criminal defendants representation on a contingent fee basis. *Id.* at 630. This practice is prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility. *Id.* The attorney immediately withdrew his advertisement and sent a letter of apology to the Office of Disciplinary Counsel. *Id.*

98 *Id.* at 630. This advertisement appeared in 36 different newspapers and was accompanied by a drawing of the device. *Id.* An intrauterine device (IUD) is "'a plastic or metal coil, spiral, or other shape, about 25mm long, that is inserted into the cavity of the womb to prevent conception. Its exact mode of action is unknown but it is thought to interfere with implantation of the embryo.'" *Id.* at 630 n.2. The Dalkon Shield is a type of IUD that was marketed beginning in early 1970 and only lasting until 1974. *Id.* At the time it was taken off the market, the Dalkon Shield was connected to multiple health problems among its users. *Id.* In 1980, the manufacturer of the Dalkon Shield, A.H. Robins, recommended that doctors remove the device from any patient still using it. *Id.* The Food and Drug Administration issued a similar statement in 1983. *Id.* In 1984, the manufacturer inaugurated a mass-media campaign advising users to seek the removal of the device. *Id.* Originally, about 330,000 claims were filed against A.H. Robins by women alleging injuries caused by the device. Paul Marcotte, *$2.48 Billion Trust Fund: A.H. Robins Faces Claimants, Bankruptcy, Takeover Agreement*, A.B.A. J., March 1, 1988, at 24. Due to duplication and claimants not wishing to proceed, the number of claims dropped to about 200,000. *Id.* In 1985, A.H. Robins filed for Chapter 11 Bankruptcy, at which time they had already paid over $500 million in damages to IUD users. *Id.* The federal judge hearing the bankruptcy case ordered A.H. Robins to create a $2.48 billion trust fund to pay the remaining plaintiffs. *Id.*

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

100 *Id.* The complaint was filed against the attorney on July 29, 1982. *Id.*

nal case[,] an offer that could not be carried out under Disciplinary Rule 2-106(C)."[101] Second, the complaint alleged that in running the Dalkon Shield advertisement, and accepting employment by women responding to it, the appellant violated Disciplinary Rules 2-101(B),[102] 2-103(A),[103] 2-104(A),[104] and 2-101(B)(15).[105]

The Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court heard the charges against the attorney and, dismissing the attorney's argument that the regulations on attorney advertisements were unconstitutional as applied to him, found that the attorney had in fact violated the specified disciplinary rules set forth in the complaint.[106] The Board of Commissioners recommended that the attorney be publicly reprimanded for his violations and the Ohio Supreme Court adopted their findings and recommendations.[107]

The attorney, contending that the Ohio Bar's disciplinary rules violated the First Amendment, filed an appeal with the United States Supreme Court.[108] The Supreme Court affirmed the

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101 *Id.* Disciplinary Rule 2-101(A) states that a lawyer "shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self laudatory or unfair statement or claim." *Id.* at 631 n.3.

102 *Id.* at 632. This rule prohibits attorneys from using illustrations in their advertisements, requires dignity, and limits the material that the advertisements may include to a list of 20 items. *Id.*

103 *Id.* at 633. This rule prohibits a lawyer from recommending himself to a nonlawyer who has not sought his advice regarding employment as an attorney. *Id.*

104 *Id.* This rule states that an attorney who has given unsolicited guidance to a layman that he or she should obtain legal counsel or take legal action cannot accept employment resulting from such advice. *Id.*

105 *Id.* This rule states that an advertisement mentioning contingent-fee rates, as the Dalkon Shield advertisement did in this case, must disclose how fees will be computed (whether before or after expenses are subtracted) and that if the plaintiff's claim is unsuccessful, the plaintiff will be liable for court costs. *Id.* Because the advertisement in this case did not contain this information, the Office of Disciplinary Counsel alleged that it constituted a violation of Disciplinary Rule 2-101(A). *Id.* For the text of Rule 2-101(A), see *supra* note 101.

106 *Zauderer*, 471 U.S. 634-35. The panel's reasoning for holding the attorney liable under the drunk driving advertisement differed from that set forth in the complaint. *Id.* at 634. The panel decided

> that because the advertisement failed to mention the common practice of plea bargaining in drunken driving cases, it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) *and* be liable for attorney's fees (because they had not been convicted of drunken driving).

Id.

107 *Id.* at 635.

108 *Id.* at 636. The United States Supreme Court noted probable jurisdiction and

judgment as it related to the drunk driving advertisement and the omission of information regarding the plaintiff's liability for costs in the IUD advertisements.[109] The Court did, however, reverse the portion of the judgment that related to the IUD illustration and legal advice stating that such rules, as applied to the petitioner, were violative of his First Amendment rights.[110] The Court again emphasized that advertising by attorneys is accorded constitutional protection and that commercial speech that is not erroneous or deceptive and does not involve illegal activities may be limited only if there is a substantial governmental interest present, and only through methods that directly promote that interest.[111] The Court noted that the government's interest in circumventing the danger that the populace might be misled, manipulated, or confused were inadequate to justify the complete ban on the use of illustrations in advertisements.[112]

The Supreme Court continued its discussion of attorney advertising in a 1987 case, *Shapero v. Kentucky Bar Association.*[113] The petitioner in *Shapero,* a member of the Kentucky Bar Association, petitioned the Kentucky Attorneys Advertising Commission for permission to mail a letter to possible clients facing foreclosure suits.[114] The Commission found the letter to be neither false nor

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granted certiorari. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 469 U.S. 813 (1984).

109 *Zauderer,* 471 U.S. at 655.

110 *Id.* at 655-56.

111 *Id.* at 638.

112 *Id.* at 649. The Court held that restrictions on the use of illustrations in advertising must survive the scrutiny set forth in the *Central Hudson* test. *Id.* at 647. For an in-depth analysis of the commercial speech test set forth by the Supreme Court in *Central Hudson,* see *supra* notes 69-79 and accompanying text.

113 486 U.S. 466 (1988).

114 *Id.* at 469. The Attorneys Advertising Commission governs attorney advertising as dictated by the Rules of the Kentucky Supreme Court. *Id.* at 469 n.1 (citing KY. SUP. CT. R. 3.135(3) (1988)). The Commission's findings are appealable to the Board of Governors of the Kentucky Bar Association and can be ultimately reviewed by the Kentucky Supreme Court. *Id.* (citing KY. SUP. CT. R. 3.135(8)(a); KY. SUP. CT. R. 3.135(8)(b) (1988)).

The proposed letter submitted to the Commission read as follows:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor [*sic*] to *STOP* and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for *FREE* information on how you can keep your home.
>
> Call *NOW,* don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember, it is *FREE,* there is *NO* charge for calling.

Shapero, 486 U.S. at 469.

misleading, but rejected Shapero's petition because soliciting legal business by targeted direct mail conflicted with a Kentucky Supreme Court rule.[115] The Commission did, however, enter its opinion that this specific rule banning targeted direct-mail advertising violated the First Amendment and advocated that the Kentucky Supreme Court amend that specific rule.[116]

As a result, the petitioner appealed to the Committee on Legal Ethics of the Kentucky Bar Association for a consulting opinion on the rule's validity.[117] The Committee on Legal Ethics, paralleling the opinion of the Advertising Commission, held that although the letter was neither false nor misleading, it violated established rules of the Kentucky Supreme Court.[118]

Reviewing the advisory opinion of the Committee on Legal Ethics, the Supreme Court of Kentucky felt that due to the decision in *Zauderer*, Rule 3.135(5)(b)(i) should be deleted and the ABA's Rule 7.3 should be placed in its stead.[119] The court did not, however, explicitly state in its opinion the infirmity in Rule 3.135(5)(b)(i) or how Model Rule 7.3 cured it.[120] Rule 7.3 banned

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115 *Id.* at 469-70. KY. SUP. CT. R. 3.135(5)(b)(i) provides that:

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

Id. at 470 n.2.

116 *Id.* at 470. The Commission's opinion was based on the standards articulated in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985). *Shapero*, 486 U.S. at 470. For a further discussion on these standards, *see supra* notes 95-112 and accompanying text.

117 *Shapero*, 486 U.S. at 470.

118 *Id.* The Committee on Legal Ethics held that the rule was valid on the basis that it was comparable to Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (1984). *Id.*

119 *Shapero*, 486 U.S. at 470 (citing Shapero v. Kentucky Bar Ass'n, 726 S.W.2d 299, 300 (Ky. 1987)).

The ABA's Rule 7.3 provides in relevant part that:

> (a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if: (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress or harassment.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984).

120 *Shapero*, 486 U.S. at 471.

targeted direct-mail solicitation of business by attorneys for pecuniary gain without an exclusive conclusion that the solicitation is either false or misleading.[121] The Supreme Court of the United States granted certiorari to determine whether such a blanket ban is compatible with the First Amendment.[122]

The Supreme Court, determining that a state may not unconditionally ban attorneys from soliciting employment by sending accurate and nondeceptive letters to possible clients known to face specific legal problems, reversed the decision of the Supreme Court of Kentucky.[123] In so doing, the Court emphasized that in measuring the possibility for overreaching and undue influence, the method of communication is determinative.[124] The Court stated that in-person solicitation of business, which under *Ohralik* can be categorically banned by the government, is distinguishable from targeted direct-mail solicitation because there is less risk that the mailed solicitation will overreach or impose undue influence on the recipient.[125] According to the Court, written communication does not involve "'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.'"[126]

With this extensive background of case law, the United States Supreme Court in *Florida Bar v. Went For It, Inc.* once again confronted the issue of whether a state can restrict advertising and solicitation by attorneys.[127] The *Went For It* Court addressed the specific issue of whether a state, pursuant to the First Amendment, can institute a thirty-day waiting period before an attorney or an attorney referral service can contact an accident victim through targeted direct-mail solicitations.[128] The Court held that the Florida Bar's thirty-day restriction withstood constitutional scrutiny

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121 *Id.* at 471.

122 Shapero v. Kentucky Bar Ass'n, 484 U.S. 814 (1987); *Shapero*, 486 U.S. at 468.

123 *Shapero*, 486 U.S. at 479-80.

124 *Id.* at 475.

125 *Id.*

126 *Id.* (quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 642 (1985)). *See supra* notes 95-112 and accompanying text.

See also Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 99-100 (1990) (plurality) (holding that a lawyer has the constitutional right, governed by the applicable commercial speech standards, to advertise, on professional letterhead, his or her certification as a specialist by the National Board of Trial Advocacy).

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

128 *Id.*

under the *Central Hudson* test for commercial speech.[129]

Justice O'Connor, writing for the majority, began by stating that it is now well established that advertising by attorneys is considered commercial speech and, thus, is given protection under the First Amendment.[130] The Justice quickly characterized this statement by noting that the protection afforded to commercial speech is not absolute.[131] Justice O'Connor then remarked that commercial speech, which possesses a narrow measure of protection commensurate with its secondary status as protectable speech, is subject to types of restrictions that may be impermissible in the area of noncommercial speech.[132]

Having made this precursory statement about the level of First Amendment protection given to commercial speech, the Court began its analysis of whether the Florida Bar Association's rule violated the freedom of speech.[133] The Court noted that the validity of restrictions on commercial speech is governed by the test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.*[134] Under the *Central Hudson* test, the Justice noted, a government may freely restrict or proscribe commercial speech that concerns either illegal activities or is misleading.[135] Justice O'Connor then stated, however, that commercial speech that neither misleads nor concerns illegal activities may be regulated only if there is a substantial state interest at stake, if the regulation directly advances that interest, and if the regulation is narrowly drawn.[136]

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129 *Id.* at 2381. For an in-depth discussion on the *Central Hudson* test for commercial speech, see *supra* notes 69-79 and accompanying text.

130 *Id.* at 2375 (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 637 (1985) (stating that "[t]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment" and that the legal advertising at issue fell well within the bounds of commercial speech); *In re* R.M.J., 455 U.S. 191, 199 (1982) (stating that attorney advertising is a type of commercial speech protected under the First Amendment)).

131 *Went For It*, 115 S. Ct. at 2375.

132 *Id.* (quoting Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 477 (1989)). The Justice observed that "'[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.'" *Id.*

133 *Id.* at 2375-76.

134 *Id.* at 2376 (citing Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 564 (1980)). For a more in-depth discussion of *Central Hudson*, *see supra* notes 69-79 and accompanying text.

135 *Id.* (citing *Central Hudson*, 447 U.S. at 563-64).

136 *Id.* (citing *Central Hudson*, 447 U.S. at 564-65).

Continuing, the Court applied the facts of the case at bar to the test enunciated in *Central Hudson*.[137] Because the Court already determined that the commercial speech in this case was neither misleading nor concerned unlawful activity, and therefore deserved some level of First Amendment protection, Justice O'Connor began the Court's analysis by determining whether or not the interests set forth by the Florida Bar were substantial.[138] The Court stated that the Bar's interests in regulating targeted direct-mail solicitations, which include protecting the privacy and tranquility of personal injury victims and maintaining a good reputation for the legal profession, are substantial and thus survive scrutiny under the applicable prong of the *Central Hudson* test.[139]

Next, the Court discussed whether the regulation at issue advances the Florida Bar's substantial interest "in a direct and material way."[140] Justice O'Connor noted that in order to show that the regulation is valid, the Florida Bar must illustrate that the harms it enumerates are in fact real and that the regulation will materially alleviate them.[141] The majority concluded that the Florida Bar had

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137 *Id.* at 2376.

138 *Went For It*, 115 S. Ct. at 2376. The Court noted that "'[u]nlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions.'" *Id.* (quoting Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993)).

The Court noted that, according to the Bar, the proffered regulation "is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, 'is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.'" *Id.* (quoting *In re* Anis, 126 N.J. 448, 458, 599 A.2d 1265, 1270 (1992)).

139 *Id.* Justice O'Connor noted that the Court has, on several occasions, "accepted the proposition that 'States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'" *Id.* (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978) (commenting that a state may categorically ban in-person solicitation of clients by attorneys).

Furthermore, the Court noted, the protection of potential clients' privacy, along with protecting a citizen's well-being and tranquility, are considered to be substantial state interests. *Went For It*, 115 S. Ct. at 2376. *See also* Edenfield v. Fane, 113 S. Ct. at 1799 (holding that a state's interest in "ensuring the accuracy of commercial information in the market place" and protecting the potential clients' privacy are substantial); Carey v. Brown, 447 U.S. 455, 471 (1980) (holding that a "[s]tate's interest in protecting the well-being, tranquility, and privacy of the home is . . . of the highest order in a . . . society").

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

141 *Id.* (quoting *Rubin*, 115 S. Ct. at 1592).

satisfied this part of the test through the submission of a summary of a two-year-long study on attorney advertising and solicitation in Florida.[142] The Court noted that the summary contained statistical and anecdotal data supporting the Bar's contentions that the public viewed direct-mail solicitations immediately after an accident as an invasion of victims' privacy and that it reflected poorly upon the profession as a whole.[143] Justice O'Connor stated that this summary of statistical and empirical data adduced by the Bar was sufficient enough to satisfy the requirements to this prong of the *Central Hudson* test.[144]

In so concluding, however, the Court distinguished the case at bar from two of its earlier decisions.[145] First, the Court discussed the differences between the present case and *Shapero v. Kentucky Bar Association*, upon which the Court of Appeals relied.[146] First, the Court opined that *Shapero*'s approach to privacy was casual and that the Kentucky Bar Association focused on the dangers of overreaching that are inherent in targeted solicitations instead of, as in the present case, trying to prevent invasions of privacy by attorneys.[147] Second, the Court noted that, unlike the present case, *Sha-*

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142 *Id.* at 2377-78. *See supra* notes 18-20 and accompanying text.

143 *Id.* at 2377. The Court stated that a survey by the Bar showed that adult Floridians have negative opinions about lawyers who advertise by direct mailings. *Id.* Furthermore, the majority noted, over half of those surveyed felt that it is an invasion of privacy to contact people concerning accidents or disasters. *Id.* Justice O'Connor also noted that, in the anecdotal section of the summary, there were numerous newspaper articles and editorials discussing and criticizing the use of direct-mail solicitations by Florida attorneys. *Id.* Finally, the Justice noted, the summary contained many pages of excerpts from complaints of recipients of direct-mail solicitations. *Id.*

144 *Id.* at 2378. The Court, in concluding that the regulation passed this prong of the test, relied on its decision in Edenfield v. Fane, 113 S. Ct. 1792 (1993). *Went For It*, 115 S. Ct. at 2378. In *Edenfield*, the Court struck down a Florida ban on in-person solicitation of clients by certified public accountants (CPAs). *Edenfield*, 113 S. Ct. at 1796. The Court noted in *Edenfield* that the State Board of Accountancy presented no empirical or anecdotal evidence "'that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear.'" *Id.* at 1800. According to the Court, speech restrictions can be justified by alluding to studies and anecdotes. *Went For It*, 115 S. Ct. at 2378.

145 *Went For It*, 115 S. Ct. at 2378-79.

146 *Id.* at 2378. For a more in-depth discussion on the holding in *Shapero*, see *supra* notes 113-26 and accompanying text.

The Court chose this case to distinguish because it was the precedent that the Court of Appeals relied upon in striking down the Florida Bar's regulation. *Id.*

147 *Went For It*, 115 S. Ct. at 2378. The Court recognized that the encroachment targeted by the Bar's restriction did not stem from the reality that an attorney has discovered an accident or disaster, but from the attorney's encounter with victims in order to solicit business from them. *Id.* at 2379. In this respect, the Court stated that an untargeted mailed solicitation differed from a targeted one because the un-

pero dealt with a complete prohibition on targeted direct-mail solicitations, regardless of the recipient and the time frame.[148] Finally, the majority stated that the Kentucky Bar Association in *Shapero*, unlike the Florida Bar in the present case, compiled no evidence to demonstrate that the solicitations caused any direct harm.[149] Due to these three differences, the Court found it easy to distinguish *Shapero* from the case at bar.[150]

The second case that the Court distinguished from the present one was *Bolger v. Youngs Drug Products Corp.*,[151] which involved a federal ban on "'offensive' and 'intrusive' direct-mail advertisements for contraceptives."[152] Justice O'Connor noted that the Court in *Bolger* struck down the regulation because "'[r]ecipients of objectionable mailings . . . may effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"[153] The majority noted that the Court in *Bolger*, in holding that the restriction was unnecessary and unduly restrictive, thought that a trip from the mailbox to the garbage can was an acceptable burden to place on the recipient.[154]

In the present case, the Court contrasted, the abuse targeted by the Florida Bar could not be exterminated by the short journey to a garbage can.[155] The Court opined that the receipt of these solicitations within days of an accident is as much a part of the harm posited by the Florida Bar as the actual contents of the letter.[156] The Court concluded that throwing the solicitation away may minimize the latter encroachment, but did little or nothing to combat the former one.[157]

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targeted letter involves no willful invasion of the privacy and tranquility of an accident victim. *Id.*

148 *Id.* at 2378.

149 *Id.* Justice O'Connor expounded that the Court in *Shapero* rejected the Bar's effort to rationalize a prophylactic ban on the evidence of blanket and untested declarations of undue influence and overreaching. *Id.* at 2378-79.

150 *Id.*

151 463 U.S. 60 (1983).

152 *Went For It*, 115 S. Ct. at 2379.

153 *Id.* (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983)).

154 *Id.* Justice O'Connor noted that the *Bolger* Court felt that recipients of objectionable mailings had ample means of deflecting any material injury. *Id.*

155 *Id.* The Court again stated that "[t]he purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered." *Id.*

156 *Id.*

157 *Id.* The Court stated that they saw no basis in *Bolger* for discharging the Bar's pronouncements of harm due to the unopposed empirical and anecdotal basis for the Florida Bar's deductions. *Id.*

After finding that the Bar's restriction passed the first three parts of the *Central Hudson* test, the Court continued its analysis and applied the final prong to the case.[158] Under this prong, the Court examined whether the means that the Florida Bar selected to serve its interests was narrowly tailored.[159] Justice O'Connor stated that what is required under this prong is a fit between the state's ends and the method chosen by it to accomplish those ends.[160] The majority noted that the means employed by the Bar need not be the least restrictive available, but need only be narrowly tailored to reach the desired interests.[161]

In upholding the Bar's regulation against the final prong of the *Central Hudson* test, the Court dismissed two separate arguments put forth by the respondents.[162] First, the Court noted that the respondents contended that the regulation is unconstitutionally overinclusive because it does not differentiate between victims in terms of the seriousness of their injuries.[163] In rejecting this argument, Justice O'Connor highlighted the fact that the Court did not see "'numerous and obvious less-burdensome alternatives' to Florida's short temporal ban."[164] The Court stated that because the regulation was reasonably tailored to serve the Bar's stated objectives, the rule was not unconstitutionally overinclusive.[165]

Second, the Court refuted the respondent's argument that the regulation may preclude people from learning about their legal alternatives.[166] In discrediting this argument, the Court stated that because the Florida Bar's regulation was limited in its time period and there were countless other ways for injured citizens to discover the availability of legal representation during the thirty-day ban,

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

159 *Id.* *See* Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989) (discussing that the "least restrictive means" analysis has no position in the commercial speech context).

160 *Went For It*, 115 S. Ct. at 2380. According to the Court, the fit does not need to be perfect, only reasonable; it need not represent the best disposition, but only one whose extent is in balance with the interests served. *Id.*

161 *Id.* The Court quickly noted, however, that this test is not equal to that used in rational basis review. *Id.* The Court stated that the reality of less burdensome options to the regulation is a relevant point in determining whether the fit between the ends and the means is sound. *Id.* *See* Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510 n.13 (1993) (discussing that numerous and obvious less-burdensome options to regulations on commercial speech is relevant in determining whether there is a reasonable fit between the ends and the means).

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

163 *Id.* at 2380.

164 *Id.* (quoting *Cincinnati*, 113 S. Ct. at 1510).

165 *Id.*

166 *Id.*

the regulation passed muster under the *Central Hudson* test.[167] The presence of these alternative channels for receiving information regarding the availability of legal representation during the thirty-day time period following accidents, the Court noted, probably explained why there is no case in which immediate solicitation avoided, or failure to solicit during the thirty day period brought about, the harms of which the respondent complains.[168]

In concluding its opinion, the Court stated that there are several circumstances in which speech by attorneys will be afforded the strongest protection under the Constitution.[169] Justice O'Connor noted, however, that the speech in this case concerns only commercial advertising, which receives a lesser degree of First Amendment protection.[170] Consequently, the Court upheld as constitutional the Florida Bar's thirty-day ban on soliciting accident victims, or their families, through targeted direct-mail advertisements under the test set forth in *Central Hudson*.[171] The Court held that the Bar had a substantial interest in protecting the privacy of the accident victims and in protecting the reputation of the legal profession, that the tendered study proved that the regulation advanced the Bar's interests in a direct and material way, and that the regulation devised by the Bar was narrow both in scope and duration.[172] Accordingly, the Supreme Court reversed the judgment of the Eleventh Circuit.[173]

Dissenting, Justice Kennedy, joined by Justices Stevens, Souter, and Ginsburg, voiced concern that the rule announced in the present case undercuts the guarantee of First Amendment protection for attorneys who, by conveying their willingness to aid potential

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167 *Went For It*, 115 S. Ct. at 2380-81. The Court noted that Florida permits attorneys to advertise on television, radio, in newspapers, and through other news media. *Id.* at 2380. The majority also stated that lawyers may advertise on billboards, they may send untargeted letters to a mass group of people, and they may advertise in the telephone directories. *Id.*

168 *Id.* at 2381. The majority noted that the record contained significant amounts of survey information showing that Floridians have no difficulty finding legal help when they need it. *Id.*

169 *Id.* Justice O'Connor stated that these circumstances usually involve speech on public issues and matters of legal representation. *Id. See, e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030, 1065 (1991) (holding that a state may prevent a lawyer from making any statement that would have a substantial likelihood of materially prejudicing an adjudicative hearing); *In re* Primus, 436 U.S. 412, 423 (1978) (holding that an attorney may solicit pro bono business on behalf of nonprofit political group).

170 *Went For It*, 115 S. Ct. at 2381.

171 *Id.*

172 *Id.*

173 *Id.*

clients, engage in protected speech.[174] Justice Kennedy stated that vital interests in free speech are at stake when a regulation forbids an attorney from directing a letter to an accident victim that simply explains the victim's rights and offers legal representation.[175]

Although conceding that the correct test to be used in this case is that from *Central Hudson*, Justice Kennedy argued that none of the three final prongs of the test were satisfied by the Florida Bar in this case.[176] First, the dissent argued that neither of the state interests proffered by the Bar, that of protecting the privacy and tranquility of the victims and in protecting the dignity of the legal profession, were significant enough to warrant the Bar's regulation.[177] Justice Kennedy insisted that, in regard to the first proposed interest, the rules set forth in *Shapero* were dispositive.[178] In *Shapero*, Justice Kennedy noted, the Court held that whether or not there exists any likely clients whose circumstances make them vulnerable to undue influence is not the appropriate query; rather, the proper question is whether the method of communication poses a significant danger that attorneys will manipulate any vulnerability.[179]

Justice Kennedy opined that in order to avoid the controlling effect of *Shapero*, the Court attempted to declare that a different privacy interest was implicated in this case.[180] The dissent rejected the majority's argument that the ban was valid because it prevented the listener from being offended due to several precedents of the Court stating that restrictions on speech cannot be justified on these grounds.[181] The Justice noted that it is only in cases where

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174 *Went For It*, 115 S. Ct. at 2381 (Kennedy, J., dissenting).

175 *Id.* Justice Kennedy noted the danger in forbidding plaintiff attorneys from contacting victims within a 30-day period from the accident, where investigators and attorneys for a potential defendant can contact the victim to gather evidence and enter into settlement negotiations. *Id.* at 2382 (Kennedy, J., dissenting).

176 *Id.* Justice Kennedy stated that "[i]t would oversimplify to say that what [the Court] consider[ed] here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipient's right to petition the courts for redress of grievances." *Id.* The Justice noted that the complicated nature of expression is a reason why even commercial speech has become a vital part of the public dialogue protected by the First Amendment. *Id.*

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

178 *Id.* at 2382 (Kennedy, J., dissenting).

179 *Id.* Here, Justice Kennedy stated that "the mode of communication makes all the difference." *Id.*

180 *Id.* Justice Kennedy noted that the Court sees the matter as whether the victim or his family will take offense to receiving a solicitation during a period of grief and trauma. *Id.*

181 *Id.* at 2383 (Kennedy, J., dissenting). *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) (holding that protected speech may not be suppressed just be-

there is a captive audience that the Court will allow regulations to provide protection from offensive speech.[182] Justice Kennedy stated that because the audience in the present case was not captive, and outside this context the Court has never allowed the state to forbid mailing materials that may offend a recipient, the Bar's asserted interest in protecting the privacy of accident victims is not substantial.[183]

Furthermore, the dissent insisted that the proffered interest of protecting the dignity of the legal profession was also not significant enough to pass muster under the *Central Hudson* test.[184] Justice Kennedy quickly dismissed this interest as being censorship and, therefore, antithetical to the principles of free speech, because the Bar is doing nothing more than trying to manipulate the public's opinion by subduing speech that informs people of how the legal system operates.[185]

Even if the interests professed by the Bar were substantial, the dissenting opinion argued, the regulation would fail under the third prong of the *Central Hudson* test.[186] Justice Kennedy commented that what the Florida Bar submitted as proof of the harms it was trying to redress—the summary of the study commissioned by the Bar—fell short of proving that the regulation advanced the state's interests in a direct and material way.[187] The Justice argued that the material was useless because, for the most part, it was con-

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cause it may be offensive to some recipients). *See also* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 648 (1985) (opining that "the mere possibility that some member of the population might find advertising . . . offensive cannot justify suppressing it").

182 *Went For It*, 115 S. Ct. at 2383 (Kennedy, J., dissenting). *See Carey v. Population Servs.*, 431 U.S. at 701 (plurality) (holding that offensiveness to the listener is not a valid justification for banning said speech).

183 *Went For It*, 115 S. Ct. at 2383 (Kennedy, J., dissenting). The Justice noted that occupants of a household who receive mail are not considered a captive audience and that the professed interest in averting offensiveness should not be controlling in such a case. *Id.* The dissent reiterated the Court's prior position that "[a]ll the recipient of objectionable mailings need to do is to take 'the short, though regular, journey from mail box to trash can.'" *Id.* The Justice observed, as the Court has previously, that this is a constitutionally permissible burden. *Id.*

184 *Id.*

185 *Id.*

186 *Id.* The dissent stated that the third prong of the *Central Hudson* test requires that the dangers that the Bar is trying to eliminate must be real and that the regulation must advance the interests of the Bar both directly and materially. *Id.* at 2383-84 (Kennedy, J., dissenting).

187 *Id.* at 2384 (Kennedy, J., dissenting). Justice Kennedy rejected the use of this summary because it contained no actual surveys, no explanation of methodology, very few manifestations of sample size or selection policies, and no discussion of excluded results. *Id.*

cerned with phone book listings and television advertisements rather than direct mail solicitations.[188] The dissent contended that the Court's precedents require more than a few pages of unsupported statements to illustrate that a restriction directly and materially promotes real harm when the state seeks to quell truthful and nondeceptive speech.[189]

The dissent continued by stressing that if it were necessary to reach the final part of the *Central Hudson* test, it would be clear that the relation between the state's interests and the means chosen by them is not a rational fit.[190] First, the dissent noted, the regulation applies to all accident victims no matter what the gravity of the injury.[191] The dissent argued that it is "no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner."[192]

Furthermore, the dissent noted, the Bar's regulation denies accident victims the information that may be critical to their right to file a claim for their injuries.[193] Justice Kennedy explained that although yellow page and other general advertisements may serve this objective in part, the ban on direct solicitations will hurt those who most need legal representation.[194] The dissent posited that the use of modern methods of communication in a timely way is vital if a potential client is to be familiar with his or her options and

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188 *Id.* Justice Kennedy stated that "[t]he most generous reading of this document permits identification of 34 pages on which direct mail solicitation is arguably discussed." *Id.* The dissent noted that of these 34 pages, only two have a discussion of a study of the public's attitude towards such solicitations and the remaining pages include comments by attorneys about direct mail, excerpts from complaints filed by citizens, and excerpts from newspaper articles and editorials on the subject. *Id.*

189 *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting).

190 *Id.*

191 *Id.* The Court justified this excess of regulation because of an alleged difficulty of drawing lines between minor injuries and those that are much more serious. *Id.* Justice Kennedy noted that such distinctions were unnecessary, but that even if they were, the Court's argument would be unsound because in the criminal context, states often draw lines between degrees of crime. *Id.* at 2384-85 (Kennedy, J., dissenting).

192 *Id.* at 2385 (Kennedy, J., dissenting). The Justice noted that, in the less dire cases, victims may think that no attorney is willing to help them if they are not contacted after the accident has occurred. *Id.* In the context of more serious cases, the Justice stated, the harm of the regulation may be greater because prompt legal representation is crucial where serious injury or death resulted from an accident. *Id.*

193 *Id.*

194 *Id.* The Justice noted that, at least in the context of a serious injury or death, a victim not contacted by an attorney immediately may not be aware that timing is crucial if the lawyer is to assemble evidence and warn them not to begin settlement negotiations. *Id.*

rights in selecting an attorney.[195]

Went For It presented the United States Supreme Court with the opportunity to once again deregulate attorney advertising and solicitation, a position it has taken several times over the past twenty years.[196] Stepping away from the Supreme Court's prior jurisprudence, the majority grasped this opportunity to tighten the reins on advertising and solicitation by attorneys.[197] The majority upheld the thirty-day moratorium on targeted direct-mail solicitations by accepting the Florida Bar's contention that the regulation was protecting injured Floridians.[198] While the majority of the Court was willing to accept this argument as valid, it is unclear whether the Court's decision will end up hurting injured Floridians instead of helping them.

Although the Court's conclusion will allow state bars and attorney regulatory organizations to impose regulations on direct-mail solicitations, and possibly eliminate the suggested invasions of privacy, the dissent recognized the more probable result of the majority's decision: that victims may end up waiving their legal rights or releasing a potential defendant from liability.[199] The Florida rule

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195 *Id.* Justice Kennedy noted that "[n]othing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel . . . can be deliberate and informed." *Id.*

196 *Went For It*, 115 S. Ct. at 2374-75.

197 *See id.* at 2381 (Kennedy, J., dissenting) (discussing that the majority undercuts leading First Amendment precedent in coming to its conclusion).

198 *See id.* (holding that the state has substantial interests in protecting injured citizens from invasive conduct by attorneys "and in preventing the erosion of confidence in the profession that such repeated invasions have engendered").

199 *See id.* at 2385 (Kennedy, J., dissenting) (professing that insurance adjustors and defense attorneys may contact victims within the 30-day time period to gather evidence and enter into settlement negotiations).

New Jersey, prompted by the 1994 Texas Eastern gas explosion in Edison, New Jersey, is currently considering adopting a 31-day ban on solicitation of accident or disaster victims unless the victim makes the initial contact. Dana Coleman, *NJSBA Supports 31-Day Ban on Solicitation, if. . .*, N.J. LAW., Oct. 2, 1995, at 1, 14. The New Jersey Bar Association is willing to support the legislative action if, among other things, the bill is amended to allow victims and their families the opportunity to back out of insurance company releases. *Id.* at 14.

The New Jersey Legislature accepted the Bar Association's proposed amendments and has released from committee the new version of the bill. Dana Coleman, *Runners, Insurance Agents Covered by Solicitation Law*, N.J. LAW., Nov. 27, 1995, at 3. The newly released version bans attorneys, medical professionals, and "runners" from directly soliciting victims of accidents or disasters within 31 days. *Id.* Additionally, the bill allows any victim who signed an insurance release form within that 31-day period to later nullify the agreement. *Id.* Under the proposed legislation, "ambulance chasing" becomes a crime in the fourth degree and is punishable by an 18-month prison sentence and a $7500 fine. *Id.* Furthermore, after the decision in *Went For It*, the New

does not prohibit the other party's lawyers or insurance company from contacting the victim within days after the accident to offer terms for a settlement.[200] This loophole leaves open the chance for injured citizens to be coerced into signing agreements by pushy insurance adjustors or defense attorneys and ending up with a settlement worth only a fraction of the cost of their injuries. The majority's decision may allow for these injured citizens to be free from possible offensive mailings, but it may also cost these same citizens their rights under the legal system to petition the court for redress of their grievances.[201]

The fact that the Court's holding may actually cause a greater harm than it is intended to prevent is not the only flaw in the *Went For It* case. Additionally, it is troublesome to embrace the proposition that the dissemination of truthful and nondeceptive information can be restricted for the simple reason that some may find it offensive.[202] It is long-standing precedent that restrictions on speech cannot be justified on the ground that it may offend the listener, unless the listener is a captive audience.[203] The majority

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Jersey Supreme Court has decided to consider a similar waiting period for attorneys. *Id.*

The reason that both the Legislature and the Supreme Court are seeking to do basically the same thing is that under the New Jersey Constitution, "[t]he Supreme Court [has] jurisdiction over the admission to the practice of law and the discipline of persons admitted." N.J. CONST. art. VI, § 2, ¶ 3. New Jersey courts have held that the Supreme Court has exclusive jurisdiction over the practice of law and any rules that affect that practice. *State v. Bander*, 106 N.J. Super. 196, 200, 254 A.2d 552, 554 (Monmouth County Ct. 1969), *rev'd on other grounds*, 56 N.J. 196, 265 A.2d 671 (1970). Would the statute, if passed by the Legislature and signed by the Governor, be an unconstitutional infringement on the powers expressly granted to the judiciary? It is possible that the proposed law would be unconstitutional. *See Winberry v. Salisbury*, 5 N.J. 240, 255, 74 A.2d 406, 414, *cert. denied*, 340 U.S. 877 (1950) (concluding "that the rule-making power of the [New Jersey] Supreme Court is not subject to overriding legislation"). It is also possible that the proposed statute would not be invalidated because the New Jersey Supreme Court has previously held that penal statutes are to be considered an aid to the judiciary instead of a limitation upon its authority to govern the practice of law. *In re* Baker, 8 N.J. 321, 336, 85 A.2d 505, 512 (1951). This is obviously an issue the Court must decide if and when the proposed legislation becomes law.

200 *See supra* notes 23-24 and accompanying text for a discussion of the Florida Rules of Professional Conduct at issue in this case.

201 *See Went For It*, 115 S. Ct. at 2384-86 (Kennedy, J., dissenting). One may ask the question: Is it possible that a specified moratorium may render a disservice in instances where a victim would be better served by early communication of legal services by an attorney?

202 *See id.* at 2382-83 (Kennedy, J., dissenting).

203 *Id.* at 2383 (Kennedy, J., dissenting). *See also* Carey v. Population Services, Inc., 431 U.S. 678, 701 (1977) (holding that protected speech may not be suppressed just because it may be offensive to some recipients).

in *Went For It* ignored this long-standing precedent without specifically overruling it, and accepted this as a valid reason for the proffered restriction.[204]

Although "ambulance chasing" and lawyer advertising, specifically that aimed at accident victims, is considered to be offensive by much of the populace, it is just as offensive that a state can regulate the flow of this accurate and nondeceptive information. With the Court's decision in this case, we are sure to see a proliferation of thirty-day bans similar to Florida's.[205] The decision may also prompt bar associations to regulate advertisement in other areas to see whether the Court is willing to back away from the present legal view of attorney advertising. Will a bar association once again be able to ban yellow page advertisements and regulate the use of emotional advertising? The Court will most likely not return to such pre-*Bates* rules, but now that it has been held that a thirty-day ban is reasonable, some bar associations are sure to attempt to find out how much more is "reasonable."[206]

In recent years, the United States Supreme Court, through several key cases, has built upon the supposition that attorneys may sell their services in much the same manner as other professionals.[207] With *Went For It*, however, the Court has retreated in their prior views and now attempts to "protect" victims of accidents and disasters from solicitations in order to avoid invasions of privacy and to protect the dignity of the legal profession.[208] Only time will tell if the Court's decision will actually protect or harm accident

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204 *See Went For It*, 115 S. Ct. at 2383 (Kennedy, J., dissenting) (contending that the possibility that some people may find advertising offensive does not warrant its suppression).

205 *See Moore v. Morales*, 63 F.3d 358, 360 (5th Cir. 1995) (holding that a Texas statute that bans lawyers' direct mail solicitation of accident victims within 30 days of an accident is valid under the rule set forth in Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995)).

Besides Florida and Texas, Arkansas and Nevada have similar rules requiring attorneys to wait a certain time period before sending direct mail solicitations to accident victims. *Lawyer Advertising: Solicitation Waiting Period Upheld*, A.B.A. J., Jan. 1996, at 48. New Mexico's current rule, which bans all such direct mail advertising and solicitation by attorneys, is currently being challenged in the lower federal courts. *Id.*

206 *See supra* notes 52-57 for a discussion on the rule laid down in *Bates*.

207 *But see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978) (holding that a state can categorically ban in-person solicitation by attorneys). For a discussion of *Ohralik*, see *supra* notes 58-68 and accompanying text.

208 *See Went For It*, 115 S. Ct. at 2381 (emphasizing that the Bar's interest in protecting Floridians injured in accidents or disasters from invasive conduct by attorneys and in protecting the dignity of the legal profession are substantial).

victims and whether commercial speech by attorneys will continue to erode.

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