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## Attorney Direct-Mail Solicitation Revisited in *Florida Bar v. Went For It, Inc.*: A Step Too Far

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**ATTORNEY DIRECT-MAIL  
SOLICITATION REVISITED IN  
FLORIDA BAR v. WENT FOR IT, INC.:<sup>\*</sup>  
A STEP TOO FAR**

*Israel Dahan*<sup>\*\*</sup>

*Dear "Anonymous":*

*It has come to our attention that you were recently injured in an automobile accident. Under the law, you have the right to fair compensation for all accident and injury related costs. If you do not have a lawyer to help you at this time of need, please feel free to give us a call.<sup>1</sup>*

INTRODUCTION

The vast majority of low- and moderate-income families in America avoid consulting an attorney even when they perceive a need to do so.<sup>2</sup> Numerous studies suggest that this behavior derives

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<sup>\*</sup> 115 S. Ct. 2371 (1995).

<sup>\*\*</sup> Brooklyn Law School class of 1997. The author wishes to thank Brooklyn Law School Associate Dean Joel M. Gora for his guidance and invaluable assistance in the preparation of this Comment. A special note of thanks to my wife Melanie, for her love and continual support.

<sup>1</sup> This is a fictitious letter created by the author based on text from numerous solicitation letter excerpts sent to Florida citizens and cited in Howard Pankratz, *Lawyers' Letter Angers Floridians Thirty Day Waiting Period Upheld by High Court*, DENVER POST, Aug. 11, 1995, at A12.

<sup>2</sup> See Mark Hansen, *A Shunned Justice System: Most Families Don't Turn to Lawyers or Judges to Solve Legal Problems, Survey Says*, 80 A.B.A. J. 18 (1994) (citing a 1992 survey conducted for the American Bar Association's Consortium on Legal Services and the Public which found that "while about half of all low and moderate income families in America have a legal need at any given time, most of them never turn to the justice system for help"); see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 370 (1977) (citing various surveys and studies suggesting that members of American society are generally unaware of

largely from their inability to locate a competent attorney to handle their legal problem<sup>3</sup> and their belief that they will be unable to afford the attorney's services.<sup>4</sup> Direct-mail advertising,<sup>5</sup> such as the sample letter provided above, helps remedy this problem by informing the general public about their legal rights and claims and by increasing their access to legal services.<sup>6</sup>

Nearly two decades ago, the Supreme Court lifted the ban on attorney advertising in *Bates v. State Bar of Arizona*.<sup>7</sup> The Court

where and how to obtain competent legal services and often fear the services will not be affordable).

<sup>3</sup> *Bates*, 433 U.S. at 370; see also FEDERAL TRADE COMMISSION, STAFF REP. ON IMPROVING CONSUMER ACCESS TO LEGAL SERVICES 1 (1984) [hereinafter F.T.C. REP.]; Lori B. Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808 (1982) (citing national survey conducted by Barbara A. Curran finding 83% of those polled believe that people avoid contacting attorneys because "they have no way of knowing which lawyers are competent to handle their particular problems"); Thomas Sawaya, *Willy Loman Joins the Bar*, 76 A.B.A. J. 88 (1990) (citing findings of Curran survey).

<sup>4</sup> *Bates*, 433 U.S. at 370; F.T.C. REP., *supra* note 3, at 1.

<sup>5</sup> "Direct-mail advertising" is defined as "advertising sent unsolicited through the post to prospective customers." NEW SHORTER OXFORD ENGLISH DICTIONARY 679 (4th ed. 1993).

<sup>6</sup> See FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 28 (1994) [hereinafter COMPREHENSIVE NEEDS STUDY] (finding that 31% of low-income households found an attorney through an advertisement or referral service); LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING & SOLICITATION 85 (1980). Andrews argues that relaxing the rules on attorney advertising and solicitation "helps the average citizen gain access to legal services," and reduces the costs of attorney services by creating competition among lawyers. *Id.*; BARBARA A. CURRAN, ABA CONSORTIUM ON LEGAL SERVICES FOR THE PUBLIC: TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENT OF THE POOR & PUBLIC GENERALLY 61 (1989) (reporting that relaxing the rules on attorney advertising is one reason for the dramatic increase in the public's use of legal services); ABA CONSORTIUM ON LEGAL SERVICES: LAWYER ADVERTISING AT THE CROSSROADS 136 (1995) [hereinafter LAWYER ADVERTISING AT THE CROSSROADS] (commenting on how legal services "should be promulgated and implemented for the purpose of serving the public's interest"). For a discussion of the effect of targeted, direct-mail solicitation, see generally Nomi N. Zomick, *Attorney Solicitation of Clients: Proposed Solutions*, 7 HOFSTRA L. REV. 755 (1979).

<sup>7</sup> 433 U.S. 350, 384 (1977) (finding an Arizona disciplinary rule prohibiting attorney advertising violative of the First Amendment right to free speech).

declared that legal advertising was a form of commercial speech protected by the First Amendment,<sup>8</sup> and as such, "may not be subjected to blanket suppression."<sup>9</sup> Since *Bates*, the Supreme Court has continued to expand the rights of attorney advertising and has found that the benefits to both the bar and the public outweigh the possibility of deception.<sup>10</sup>

In 1988, the Court went one step further and finally clarified the law regarding targeted, direct-mail solicitation by attorneys in *Shapero v. Kentucky Bar Association*.<sup>11</sup> In *Shapero*, the Court held that a state may not categorically prohibit targeted, direct-mail solicitation by lawyers.<sup>12</sup> In determining the propriety of a particular direct-mail solicitation, the pertinent question "is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of

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<sup>8</sup> The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 811 (1975) (stating that the Fourteenth Amendment makes the First Amendment binding on the states). "Commercial speech" has been defined as an "expression related solely to the economic interest of the speaker" and also as "speech proposing a commercial transaction." *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980).

<sup>9</sup> *Bates*, 433 U.S. at 383.

<sup>10</sup> *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646-47 (1985) (holding that courts cannot ban printed advertisements aimed at a specific audience if they are not false or misleading); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (holding that states cannot prohibit a lawyer from advertising fields of practice if not false or misleading). *But see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (holding that states may, consistent with the First Amendment, impose a blanket prohibition against in-person solicitation).

<sup>11</sup> 486 U.S. 466 (1988). Prior to 1988, the Court did not address the issue of whether the First Amendment protects direct-mail solicitation of clients known to have a particular legal problem. *See infra* page 624-25.

<sup>12</sup> *Shapero*, 486 U.S. at 473.

communication poses a serious danger that lawyers will exploit any such susceptibility.”<sup>13</sup> Most courts and commentators have interpreted *Shapero* as holding that the First Amendment protects all forms of written communication if it is neither false nor misleading.<sup>14</sup>

On June 21, 1995, despite nearly two decades of decisions expanding the rights of attorneys who wish to advertise, the Supreme Court changed direction and limited the rights of attorney advertising in *Florida Bar v. Went For It, Inc.*<sup>15</sup> In a five-to-four decision, in an opinion authored by Justice Sandra Day O'Connor,<sup>16</sup> the Court upheld a Florida Bar rule<sup>17</sup> which

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<sup>13</sup> *Id.* at 474.

<sup>14</sup> See, e.g., *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 106 (1990) (finding letterhead that made a bona fide claim of certification by the National Board of Trial Advocacy was not misleading); *Unnamed Attorney v. Attorney Grievance Comm'n*, 545 A.2d 685, 691 (Md. 1988) (holding that solicitation letters sent by attorney to recently injured persons, some as soon as the day after the injury, are protected by the First Amendment). For a chronological history on commercial speech regulation, see generally Karl A. Boedecker et al., *The Evolution of First Amendment Protection for Commercial Speech*, 59 J. MKTG. 38 (1995); see also Robert D. Peltz, *Legal Advertising—Opening Pandora's Box?*, 19 STETSON L. REV. 43, 44-45 (1989) (tracing judicial development of attorneys different advertising methods).

<sup>15</sup> 115 S. Ct. 2371 (1995).

<sup>16</sup> Chief Justice William H. Rehnquist and Justices Antonin Scalia, Clarence Thomas and Stephen Breyer joined Justice Sandra Day O'Connor's majority opinion. Justices John Paul Stevens, David H. Souter and Ruth Bader Ginsberg joined Justice Anthony Kennedy's dissenting opinion.

<sup>17</sup> In late 1990, the Florida Supreme Court approved a number of amendments to its rules regulating attorney advertising. See *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So.2d 451, 452 (Fla. 1990). Two of these amendments, Rule 4-7.4(b)(1) and Rule 4-7.8(a), were at issue in *Went For It*. See *infra* note 83 and accompanying text (providing Rule 4-7.4(b)(1) and Rule 4-7.8(a)).

Plaintiffs Stewart McHenry and a referral service, *Went For It, Inc.*, filed an action challenging Rules 4-7.4(b)(1) and 4-7.8(a) as a violation of their First Amendment right to free speech. See *McHenry v. Florida Bar*, 808 F. Supp. 1543 (M.D. Fla. 1992). Both the district court and the Eleventh Circuit Court of Appeals found for the plaintiffs and ruled that the thirty-day prohibition of targeted, direct-mail solicitation violated the plaintiffs' First Amendment right of free speech. *Id.* at 1544; *McHenry v. Florida Bar*, 21 F.3d 1038, 1042 (11th

prohibited lawyers from sending targeted direct-mail solicitation to accident victims and their loved ones within thirty days of the accident.<sup>18</sup> In reviewing the Florida law, the Court used the intermediate scrutiny standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>19</sup> which requires regulation of commercial speech to be narrowly tailored and to directly advance a substantial government interest.<sup>20</sup> Relying heavily on the Florida Bar's two-year study on the effects of lawyer advertising,<sup>21</sup> the Court found the thirty-day ban to be reasonably well-tailored to its stated objective to protect the privacy of personal injury victims against intrusive, unsolicited contact by lawyers.<sup>22</sup>

Not only does the Court's ruling in *Went For It* depart from previous rulings,<sup>23</sup> it tends to favor lawyers in large firms and

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Cir. 1994).

<sup>18</sup> *Went For It*, 115 S. Ct. at 2381.

<sup>19</sup> 447 U.S. 557 (1980). In *Central Hudson*, a utility company challenged an order of the New York Public Service Commission that banned any promotional advertising that might tend to stimulate the use of electricity. *Id.* at 558-60. In evaluating the Commission's order, the Court held that a regulation on commercial speech that does not concern unlawful activity and is not misleading is permissible if the government "assert[s] a substantial interest" in support of its regulation; establishes that the restriction directly and materially advances that interest; and demonstrates that the regulation is "narrowly drawn." *Id.* at 564-65. See *infra* note 46 (discussing the application of this test in *Central Hudson*).

<sup>20</sup> *Went For It*, 115 S. Ct. at 2376.

<sup>21</sup> *Id.* at 2377. Justice O'Connor states that the Florida Bar's study, noteworthy for its breadth and detail, "contains data—both statistical and anecdotal supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on their privacy that reflects poorly upon the profession." *Id.*

<sup>22</sup> *Id.* at 2381.

<sup>23</sup> See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 473-74 (1988) (holding that commercial speech cannot be restricted merely because the government feels some may find the speech offensive); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648 (1985) (holding that because some may find speech offensive, its suppression is not justified); *Bolger v. Young Drug Prod. Corp.*, 463 U.S. 60, 71 (1983) (holding suppression of speech is not justified merely because some may find it offensive); *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 573-75 (1980) (Blackmun, J., concurring) (arguing that absent coercion,

lawyers who can afford to spend money on other forms of expensive advertising.<sup>24</sup> Small firms and solo practitioners who rely on direct-mail solicitation as a means of procuring clients, will no doubt be most harmed by rules regulating targeted, direct-mail solicitation.<sup>25</sup> These lawyers lack the reputation, connection, or funds that allow more established firms and lawyers to attract clients without direct-mail advertising.<sup>26</sup>

Furthermore, placing regulations on lawyer advertising, such as a thirty-day ban, will have a negative impact on the general public.<sup>27</sup> Recent studies indicate that legal advertising aids the

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deception, or misinformation, a state should not be able to prohibit speech simply because of the persuasive effect the message may have on the public). *But see* Edenfeld v. Fane, 507 U.S. 761, 768 (1993) (holding that a person's privacy "is a substantial state interest" for purpose of the *Central Hudson* test); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460-62 (1978) (concluding that the bar's interest in protecting the lay public from in-person attorney solicitation justified regulation).

<sup>24</sup> See Louise L. Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 GEO. J. LEGAL ETHICS 393, 418-19 (1991) (noting that regulations on direct-mail solicitation mostly impacts lawyers in small law firms and solo practitioners who rely heavily on direct-mail solicitation as opposed to television and newspaper advertisements, as a source of attracting clients); Katherine A. Laroe, *Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct-Mail Solicitation*, 25 ST. MARY'S L.J. 1513, 1544 (1994) (reporting that regulating targeted, direct solicitation mostly affects lawyers in "small firms, young firms and solo practitioners," for they cannot afford other sources of advertising, such as television and newspaper advertisements).

<sup>25</sup> Al H. Ringleb et al., *Lawyer Direct-Mail Advertisements: Regulating Environment, Economics and Consumer Perceptions*, 17 PAC. L.J. 1199, 1235 n.238 (1986) (citing a 1980 study which indicates that most lawyers who rely on direct-mail solicitation as a means of procuring clients are younger and in small firms or solo practitioners).

<sup>26</sup> See Laroe, *supra* note 24, at 1544.

<sup>27</sup> See COMPREHENSIVE NEEDS STUDY, *supra* note 6, at 28 (reporting that over 25% of low-income households rely on advertisements or referral services to find an attorney); see also ANDREWS, *supra* note 6, at 79-80 (stating that advertising helps the public gain access to legal services and reduces cost of legal services); LAWYER ADVERTISING AT THE CROSSROADS, *supra* note 6, at 129-30, 136-38 (discussing how legal advertising benefits the public by helping the average citizen gain access to legal services).

general public by making it more aware of legal issues and the availability of legal services.<sup>28</sup> When done tastefully and professionally, legal advertising provides a practical service to people in search of an attorney.

Part I of this Comment will explore the impact that the First Amendment has had on the history of attorney advertising and solicitation, with particular emphasis on its impact on direct-mail solicitation. Part II will review the factual background and the majority and dissenting opinions in *Florida Bar v. Went For It, Inc.* Lastly, part III of this Comment will analyze the legal and socio-economic impact of this decision on attorneys who wish to advertise and on the general public's access to legal services.

## I. EVOLUTION OF ATTORNEY ADVERTISING AND SOLICITATION

In 1977, the United States Supreme Court for the first time extended First Amendment commercial speech protection to attorney advertising in *Bates v. State Bar of Arizona*.<sup>29</sup> In *Bates*,

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<sup>28</sup> For commentary on how legal advertising benefits the community, see ANDREWS, *supra* note 6, at 85; COMPREHENSIVE NEEDS STUDY, *supra* note 6, at 28; CURRAN, *supra* note 6 at 61; Sawaya, *supra* note 3, at 88 (reporting on how legal advertising benefits the public).

<sup>29</sup> 433 U.S. 350, 383 (1977) (holding that lawyer advertising is a form of commercial speech that "may not be subject to blanket suppression").

First Amendment protection for commercial speech in general has only recently been recognized by the courts. Prior to 1976, the courts followed the rule established in *Valentine v. Chrestensen*, that, although the First Amendment prevents government restriction of speech in most cases, the Constitution mandates no such governmental protection to commercial advertising. 316 U.S. 52, 54 (1942). *Valentine* involved the distribution of handbills which advertised tours on a retired United States Navy submarine. *Id.* at 53. The distribution of the handbills violated section 318 of the New York City's Sanitation Code, "which forbids distribution in the street of commercial and business advertising matter." *Id.* at 53. To circumvent the code, the distributor printed public interest information on the back of the handbills. *Id.* The Court held that the commercial message printed on one side of the handbills could not acquire constitutional protection by virtue of the public information printed on the other side. *Id.* at 54-55; see also *Breard v. Alexandria*, 341 U.S. 622 (1951) (reaffirming *Valentine's* restrictive view towards the First Amendment protection of commercial speech).



two lawyers advertised their services and fees in a daily newspaper in violation of an Arizona disciplinary rule which prohibited attorney advertising.<sup>30</sup> Following a complaint and a hearing before the Special Administrative Committee of the Arizona State Bar Association, the Board of Governors suspended each lawyer from the practice of law for one week.<sup>31</sup>

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In 1976, the Supreme Court extended First Amendment protection to commercial advertising. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court struck down a Virginia statute which banned pharmacists from advertising prescription drug prices. *Id.* at 776 (1976). Finding that pharmacists have a constitutional right to advertise "I will sell you the X prescription drug at the Y price," the Court rejected the state's argument that such speech "is so removed from 'any exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.* at 762. Chief Justice Warren Berger cautioned, however, that the majority's holding applied only to restrictions on the professional advertisement of consumer goods, a type of commercial speech that was distinguished from the advertising of professional services. *Id.* at 774 (Burger, C.J., concurring). The majority recognized that advertising by professionals, including physicians and lawyers, may pose different constitutional questions, and therefore reserved judgment on the regulation of these professions. *Id.* at 773 n.25.

<sup>30</sup> *Bates*, 433 U.S. at 354-55. The Arizona rule governing attorney advertising provides, in pertinent part:

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

*Id.* at 355 (quoting ARIZONA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976)). The advertisement stated that the Legal Clinic of Bates & O'Steen were "offering 'legal services at very reasonable fees,' and listed their fees for certain services." *Id.* at 354. For an actual picture of the advertisement at issue in *Bates*, see ANDREWS *supra* note 6, at 89.

<sup>31</sup> *Bates*, 433 U.S. at 356. At the hearing before the Special Local Administrative Committee, the three member committee recommended the suspension of each lawyer for a minimum of six months. *Id.* Upon further review, the Board of Governors suggested that each lawyer be suspended for one week. *Id.* Prior to the imposition of the sanction and pursuant to Arizona Supreme Court Rule 37, the matter was transferred to the Supreme Court of Arizona, which reduced the penalty to a "censure." *Id.* at 358. The Court

Before the U.S. Supreme Court, the lawyers argued that their advertisements were protected commercial speech and that Arizona's disciplinary rule prohibiting attorney advertising violated their First Amendment right to free speech.<sup>32</sup> The State Bar of Arizona, on the other hand, advanced a number of justifications for its prohibition, each of them rejected by the Supreme Court.<sup>33</sup> The State Bar claimed, for example, that price advertising would have an "adverse effect on professionalism,"<sup>34</sup> in part by commercializing the practice of law and thereby undermining the notability and value of the legal profession.<sup>35</sup> In dismissing this argument, the Court found that the "postulated connection between advertising and the erosion of true professionalism to be severely strained."<sup>36</sup> The Court noted that clients expect attorneys to charge for their services and that price information might encourage some potential clients to seek legal advice.<sup>37</sup>

The Arizona Bar also argued that the alternatives to a total ban on attorney advertising caused problems of enforcement.<sup>38</sup> Due to the number of lawyers, the public's lack of education with regard

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reasoned that although the attorneys deliberately violated the Arizona disciplinary rules, they did so "in good faith to test the constitutionality of DR 2-101(B)." *Id.*; see *supra* note 30 (providing Rule DR 2-101(B)).

"Censure" is defined as "the formal resolution of a legislative, administrative, or other body reprimanding a person, normally one of its own members, for specified conduct." BLACK'S LAW DICTIONARY 224 (6th ed. 1990).

<sup>32</sup> *Bates*, 433 U.S. at 363.

<sup>33</sup> *Id.* at 368-79. In justifying the ban, the state bar argued that attorney advertising: (1) adversely affects professionalism; (2) is inherently misleading in nature; (3) would tend to stir up litigation; (4) would ultimately lead to an increase in attorneys' fees; (5) adversely affects the quality of legal services; and (6) is too difficult to regulate with anything other than a complete ban. *Id.*

<sup>34</sup> *Id.* at 368-72.

<sup>35</sup> *Id.* at 368. The Court summarized the bar's argument: "The key to professionalism, it is argued, is the sense of pride that involvement in the discipline demonstrates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth." *Id.*

<sup>36</sup> *Id.* at 368.

<sup>37</sup> *Id.* at 370.

<sup>38</sup> *Id.*

to legal matters and the potential for overreaching,<sup>39</sup> overseeing attorney advertising would be too burdensome.<sup>40</sup> The Court rejected this argument as well, noting that:

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system.<sup>41</sup>

The Court, therefore, held that because attorney advertising is a form of protected commercial speech, a state may not place a blanket suppression on attorney advertising which is neither false nor deceptive.<sup>42</sup>

Nearly two decades of cases have built upon the foundation laid out in *Bates*, and it is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection.<sup>43</sup> First Amendment protection of

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<sup>39</sup> "Overreaching," "in connection with commercial and consumer transactions," is defined as "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." BLACK'S LAW DICTIONARY 1104 (6th ed. 1990). In addition, overreaching has been described as "one party, by artifice or by cunning, or significant disparity to understand the nature of the transaction, to outwit or cheat the other." *Gross v. Gross*, 464 N.E.2d 500, 506 (Ohio 1984). It has also been described as "tricking, outwitting, or cheating a person into doing an act which he would not otherwise have done." *B.A.L. v. Edna Gladney Home*, 677 S.W.2d 826, 831 (Tex. Ct. App. 1984). Overreaching "is in a general way synonymous with fraud," but "its connotation is perhaps even broader." *Browning v. Nesting*, 219 S.W.2d 712, 718 (Tex. Civ. App. 1949).

<sup>40</sup> *Bates*, 433 U.S. at 379.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 383.

<sup>43</sup> See, e.g., *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 (1990); *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466, 480 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646-47 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982). But see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978). For an overview of how various states revised their rules after the *Bates* decision, see Roger P.

commercial speech, however, is limited. “[c]ommercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.”<sup>44</sup>

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>45</sup> the Supreme Court formulated the following four-part test for determining the constitutionality of a restriction on commercial speech:

- (1) The speech must not be misleading and it must concern lawful activity;
- (2) the asserted state interest promoted by the restriction must be substantial;
- (3) the restriction must directly advance the asserted state interest; and
- (4) the restriction must not be more extensive than necessary to serve the asserted state interest.<sup>46</sup>

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Brosnahan & Lori B. Andrews, *Regulations of Lawyer Advertising: In the Public Interest?*, 46 BROOK. L. REV. 423, 426-34 (1980).

<sup>44</sup> Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 456 (1978)). In *Fox*, the Court observed that “[t]o require a parity of constitutional protection for commercial and non-commercial 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.* at 481 (quoting *Ohralik*, 436 U.S. at 456).

<sup>45</sup> 447 U.S. 557 (1980). In *Central Hudson*, a utility company challenged an order of the New York Public Service Commission that banned any promotional advertising that might tend to stimulate the use of electricity. *Id.* at 558-60.

<sup>46</sup> *Id.* at 566. Regarding the first prong of the four-part test, the Court in *Central Hudson* stated that while the government may totally suppress misleading or deceptive advertising and commercial speech related to illegal activity, all commercial speech that is not misleading, deceptive or related to unlawful activity is constitutionally protected and therefore subject to a more circumscribed governmental power. *Id.* at 563-64. The Court noted that the Commission had not alleged that the advertising was misleading or that it involved unlawful activity. *Id.* at 566. In applying the second part of the test, the Court found that the Commission’s asserted interest in promoting energy conservation and ensuring fair and efficient utility rates was substantial to justify the restriction on advertising. *Id.* at 568-69. In addressing the third part of the test, the Court found that although the argument concerning the effect of advertising on utility rates

The Court later modified the fourth part of the test to require only a "reasonable fit" between the asserted state interest and the restriction on commercial speech.<sup>47</sup>

The Court applied the *Central Hudson* test for the first time in the context of attorney advertising in the case of *In re R.M.J.*<sup>48</sup> In

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was "at most, tenuous" and "highly speculative," the ban on the advertisements did directly advance the Commission's interest of energy conservation. *Id.* at 569. However, the Court found that the Commission's prohibition violated the First Amendment because it failed to show that a more limited speech regulation would not protect the state's interest. *Id.* at 570. The rule, therefore, failed under the fourth prong, the "least restrictive means" test, because all advertising was restricted without any showing that a more limited restriction would not adequately further the state's interest in energy conservation. *Id.* at 569-71.

In *Central Hudson*, Justice Harry Blackmun denounced the four-part test implemented by the majority as inconsistent with prior cases and as lacking adequate First Amendment protection for truthful, nondeceptive commercial speech. *Id.* at 573 (Blackmun, J., concurring). Justice Blackmun contended that absent coercion, deception, or misinformation, a state should not be able to prohibit speech simply because of the persuasive effect the message may have on the public. *Id.* at 573-75 (Blackmun, J., concurring). Thus, Justice Blackmun argued, that even given the importance of energy conservation, suppression of speech was an impermissible way to achieve such a goal. *Id.* at 574 (Blackmun, J., concurring).

For further discussion on *Central Hudson* and its application, see Joanne G. Caldwell, *Recent Development: Legal Ethics—Lawyer Advertising—Advertising That Is Not Misleading May Not Be Proscribed*, 50 TENN. L. REV. 175, 188 (1982); Evan R. Levy, *Edenfeld v. Fane: In-Person Solicitation By Professionals Revisited—What Makes Lawyers Different*, 58 ALB. L. REV. 261, 262 (1994).

<sup>47</sup> *Fox*, 492 U.S. at 480. The Court held that "not more extensive than necessary," simply requires "a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable." *Id.*; see *infra* note 115 (discussing *Fox*). For an in-depth analysis of *Fox*, see Todd J. Lochner, Comment, *Board of Trustees of the State University of New York v. Fox: Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335 (1990).

<sup>48</sup> *In re R.M.J.*, 455 U.S. 191 (1982). At issue in *R.M.J.* was the Missouri Supreme Court Rule 4 which allowed attorneys to place printed advertisements in "newspapers, periodicals and the yellow pages of telephone directories." *Id.* at 194. Ten categories of information could be included: "name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours fee for initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for

*R.M.J.*, the Court struck down a Missouri rule that prohibited attorneys from mailing professional announcement cards to anyone “other than lawyers, clients, former clients, personal friends and relatives.”<sup>49</sup> The lawyer in *R.M.J.* had mailed cards that announced the opening of his new office to people who were not within the rule’s permissible group of recipients.<sup>50</sup> The Supreme Court concluded that because there existed less restrictive means of regulating general mailings by attorneys, such as requiring the filing “of a copy of all general mailings” with the state bar, the rule violated the First Amendment.<sup>51</sup>

Four years later in *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*,<sup>52</sup> the Supreme Court held that a

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certain specified ‘routine’ legal services.” *Id.* Rule 4, DR 2-102(A)(2) also stated that announcement cards could only be sent to “‘lawyers, clients, former clients, personal friends and relatives.’” *Id.* at 196 (quoting Mo. Rev. Stat., Sup. Ct. R. 4, DR 2-102(A)(2) (1978)).

<sup>49</sup> *R.M.J.*, 455 U.S. at 206-07. The lawyer also challenged the constitutionality of the other provisions of the Missouri Rule 4, such as the one restricting lawyer advertising to certain categories of information and, in some instances, to certain specified language. *Id.* at 194-95. The Supreme Court also found these rules to be an unconstitutional restriction on free speech. *Id.* at 205-06.

<sup>50</sup> *Id.* at 198. The permissible group of recipients are only “lawyers, clients, former clients, personal friends and relatives.” *Id.* at 206-07. The advertisement was displayed in the January, February and August 1978 yellow pages. *Id.* at 196-97. The advertisement indicated that the lawyer “was licensed in Missouri and Illinois” and that he was “Admitted to Practice Before THE UNITED STATES SUPREME COURT.” *Id.* at 197. Additionally, he listed practice areas not addressed in the rule, such as “contract,” “aviation,” “securities-bonds,” “pension and profit sharing plans,” “zoning and land use,” “entertainment/sports,” “food, drug and cosmetics” and “communication.” *Id.* at 197 n.8.

<sup>51</sup> *Id.* at 206. For a more detailed analysis of *In re R.M.J.* and its possible implications, see Audrey Shields, *Attorney’s Expanding Right to Advertise Under the First Amendment: In Re R.M.J.*, 26 How. L.J. 281, 295-303 (1983).

<sup>52</sup> 471 U.S. 626 (1985). In *Zauderer*, the appellant, an Ohio attorney, placed an advertisement in the local newspaper which contained a drawing of a contraceptive device referred to as the Dalkon Shield Intrauterine Device (“IUD”). *Id.* at 630. The advertisement described alleged problems caused by the IUD and offered legal advice to the reader. *Id.* at 631. The advertisement also advised the reader that the firm was currently representing women in suits concerning “the IUD” on a contingent-fee basis. *Id.* Subsequently, the Office of Disciplinary Counsel “filed a complaint against the [attorney] charging him with a number of

state's disciplinary rule which prohibited the use of illustrations in attorney advertising unconstitutionally restricted attorneys' free speech right.<sup>53</sup> The Court reasoned that a state may restrict commercial speech only in the wake of a governmental interest and by means that advance that interest.<sup>54</sup> The Court found the state's interests in preserving the dignity of the legal profession and in avoiding the risk that the public might be misled or manipulated insufficient to justify the total ban on the use of illustrations in advertisements, and deemed the rule unconstitutional.<sup>55</sup>

The Court's decisions in *Bates*, *R.M.J.* and *Zauderer* collectively establish that states cannot place blanket prohibitions on the following types of advertising by attorneys: advertising the cost of legal services in the print media;<sup>56</sup> advertising an accurate listing of the attorney's areas of practice, either through general mailings, announcements to specific targeted groups, newspaper ads, or telephone listings;<sup>57</sup> and advising target portions of the public of their rights to pursue particular types of cases.<sup>58</sup> These decisions,

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disciplinary violations arising out of [the advertisement]." *Id.*

The complaint also alleged that the IUD advertisement violated DR 2-101(B) which prohibited the use of illustrations in advertisements. *Id.* at 632 n.4. After a hearing before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, the Board concluded that the advertisements violated the rules and recommended disciplinary action. *Id.* at 634-36. On review, the Ohio Supreme Court affirmed the Board's findings and issued a public reprimand. *Id.* at 636.

A "public reprimand" is defined as "a public or formal censure or severe reproof, administered to a person in fault by his superior officer or by a body or organization to which he belongs." BLACK'S LAW DICTIONARY 1302 (6th ed. 1990).

<sup>53</sup> *Zauderer*, 471 U.S. at 639-49.

<sup>54</sup> *Id.* at 638. The Court held that the reprimand related to the attorney's use of an illustration in his advertisement, violated the First Amendment. *Id.* at 647-49. The Court reasoned that, "commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Id.* at 638

<sup>55</sup> *Id.* at 647-48.

<sup>56</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

<sup>57</sup> *In re R.M.J.*, 455 U.S. 191, 204-07 (1982).

<sup>58</sup> *Zauderer*, 471 U.S. 626, 639-48 (1985). *But see* *Ohralik v. Ohio State Bar*

however left unresolved a significant issue in the area of attorney direct-mail solicitation: whether the First Amendment protects direct-mail solicitation of clients known to have a particular legal problem. The Supreme Court answered this important question in *Shapero v. Kentucky Bar Association*.<sup>59</sup>

In *Shapero*, the Court held that a Kentucky Supreme Court Rule<sup>60</sup> which prohibited targeted, direct-mail solicitation by attorneys for monetary gain violated the First Amendment.<sup>61</sup> Richard Shapero applied to the Kentucky Attorneys Advertising Commission<sup>62</sup> and the Kentucky State Bar Association's Committee on Legal Ethics for approval of a correspondence he wished to send to recent victims of foreclosure.<sup>63</sup> Although neither

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Ass'n, 436 U.S. 447, 449 (1978) (holding that states may place regulations on in-person solicitation).

<sup>59</sup> 486 U.S. 466 (1988).

<sup>60</sup> The Kentucky State Supreme Court Rule 3.135(5)(b)(i) provided 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.

*Shapero*, 486 U.S. at 470 n.2 (quoting Ky. Sup. Ct. R. 3.135(5)(b)(i) (1988)).

<sup>61</sup> *Id.* at 468, 480.

<sup>62</sup> The responsibilities of Kentucky's Advertising Commission are as follows:

The Attorneys Advertising Commission is charged with the responsibility of "regulating attorney advertising as prescribed" in the Rules of the Kentucky Supreme Court. . . . The Commission's decisions are applicable to the Board of Governors of the Supreme Court. . . . "Any attorney who is in doubt as to the propriety of any professional act contemplated by him" also has the option of seeking an advisory opinion from a committee of the Kentucky Bar Association, which, if formally adopted by the Board of Governors, is reviewable by the Kentucky Supreme Court.

*Id.* at 469 n.1. (citing Ky. Sup. Ct. R. 3.135(3) and R. 3.135(8), respectively).

<sup>63</sup> *Id.* at 469. In *Shapero*, the proposed letter 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 creditors to STOP and give you more time to pay them. You may call my office anytime



the Advertising Commission nor the Ethics Committee found Shapero's proposed letter false or misleading, they both objected to the letter.<sup>64</sup> On review, the Kentucky Supreme Court affirmed the

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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.

*Id.*; see Marcia Coyle, *Will Another Lawyer Ad Taboo Fall? High Court to Consider Mail Ban*, NAT'L L.J., Feb. 29, 1988, at 3 (previewing the *Shapero* case and quoting Richard Shapero, the lawyer who wanted to send the targeted solicitation); see also Marcia Coyle, *Was Direct-Mail the Last Taboo? Revisions Necessary On Ad Bans*, NAT'L L.J., June 27, 1988, at 3 [hereinafter *The Last Taboo*]. In addition to summarizing the Court's decision in *Shapero*, this article reports the reaction of various attorneys and Ethics Committees to the decision. For example, the article cites Peter Moshes, an attorney and Ethics Committee Chairman who predicts the Court's decision will promote increased litigation in states trying to form regulations or restrictions on attorney advertising in accordance with *Shapero*. *Id.* On the other hand, the article also cites Mr. Johnson of the American Bar Association who predicts that *Shapero* will not have a significant impact on the states nor the public. *Id.* Mr. Johnson reasons that most states that have already permitted targeted, direct-mail solicitation have experienced very few ethical complaints regarding the solicitation. *Id.*

<sup>64</sup> *Shapero*, 486 U.S. at 469-70. The Advertising Commission based its decision upon Rule 3.135(5)(b)(i) which prohibited the dissemination of "written advertisements 'precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.'" *Id.* (quoting Ky. Sup. Ct. R. 3.135(5)(b)(i) (1988)). Despite its decision, the Advertising Commission expressed the opinion that the Kentucky rule conflicted with the First Amendment and was unconstitutional based on the U.S. Supreme Court's holding in *Zauderer*. *Id.* at 470; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646-47 (1985). As a result, the Kentucky Supreme Court replaced Rule 3.135(5)(b)(i) with Rule 7.3 of the Model Rules of Professional Conduct. *Shapero*, 486 U.S. at 470. Model Rule 7.3 provides:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in-person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal

Advertising Commission's rejection of the proposed letter,<sup>65</sup> and Shapero appealed to the United States Supreme Court.<sup>66</sup>

Before the Supreme Court, the Kentucky Bar Association argued that the Court should follow the state supreme court's ruling which upheld the ban against targeted, direct-mail solicitation because the *Shapero* case was nothing more than "*Ohralik* in writing."<sup>67</sup> Rejecting this argument, the Supreme Court

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services of the kind provided by the lawyer in the particular matter, but who are so situated that they might in general find such services useful.

MODEL RULES OF PROFESSIONAL CONDUCT R. 7.3 (1984) (amended 1989). Kentucky's adoption of Model Rule 7.3 did not change the status of Shapero's letter, however, because Model Rule 7.3, like Kentucky's prior rule, prohibited direct-mail solicitation. *Shapero*, 486 U.S. at 471; *see also* John T. Ballantine, Jr., Comment, *After Shapero v. Kentucky Bar Association: Much Remains Unresolved about the Allowable Limits of Restrictions on Attorney Advertising*, 61 U. COLO. L. REV. 115, 131 (1990) (analyzing *Shapero* decision and the replacement of Kentucky Rule 3.135(5)(b)(i) with Model Rule 7.3).

<sup>65</sup> *Shapero*, 486 U.S. at 471.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 475 (referring to *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)). In *Ohralik*, the Supreme Court addressed the issue of whether a state prohibition on in-person solicitation violated an attorney's First Amendment free speech right. *Ohralik*, 436 U.S. at 449. Albert Ohralik, an attorney, had solicited the business of two automobile accident victims while they were hospitalized. *Id.* at 450. Both victims initially agreed to Ohralik's representation, but eventually discharged him as their attorney and filed a complaint with the local bar grievance committee. *Id.* at 453. As a result, the Ohio State Bar filed a complaint with the Ohio Supreme Court Disciplinary Board claiming that Ohralik violated the Ohio statutory rules forbidding in-person solicitation. *Id.* at 452-53. Rule DR 2-103(A) of the Ohio Code of Professional Responsibility provides:

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 as a lawyer.

*Id.* at 453 (citing OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1970)). The Disciplinary Board found that Ohralik had violated Rule DR 2-103(a) and recommended to the Ohio Supreme Court that Ohralik be issued a public reprimand. *Id.* at 453-54. The Ohio Supreme Court adopted the Board's findings and ordered that Ohralik be suspended indefinitely. *Id.* Ohralik appealed to the United States Supreme Court, claiming that Ohio's statutory rule DR 2-103(A) violated his First Amendment right to commercial speech. *Id.* at 454.

distinguished targeted, direct-mail solicitation from the type of in-person solicitation that the Court had permitted states to ban in *Ohralik*.<sup>68</sup> First, the Court noted that in-person communication was “‘rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence and outright fraud.’”<sup>69</sup> Second, the Court reasoned that because in-person solicitation was not “open to public scrutiny,” enforcement of any regulation short of a total bar would be impossible.<sup>70</sup> As the Court did not find either of these potential problems present in targeted, direct-mail solicitation, it concluded that direct-mail solicitation “‘poses much less risk of overreaching or undue influence’ than does in-person

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Before the Supreme Court, *Ohralik* contended that in-person solicitation of clients was indistinguishable from the advertising the Court had approved in *Bates*. *Id.* at 455. *Ohralik* argued that the function of the advertising in *Bates* was similar to the function of his solicitation because he had done no more than inform potential clients of their legal rights and his availability to represent them. *Id.* The Ohio State Bar, on the other hand, contended that it had a substantial state interest in protecting consumers, regulating commercial transactions and protecting professionalism. *Id.* at 460. Furthermore, the state argued that these interests were protected by restricting in-person solicitation by attorneys. *Id.*

In agreeing with the State Bar's arguments, the Court upheld *Ohralik*'s sanction and reasoned that the in-person solicitation of clients poses a significant public harm that does not exist in other forms of public advertising. *Id.* at 464-66. The Court stated that unlike public advertisements, attorneys who solicit in-person apply pressure which “encourage[s] speedy and perhaps uninformed decision making.” *Id.* at 457. The Court also acknowledged that the state had a substantial interest in preventing “fraud, undue influence, intimidation, overreaching and other forms of ‘vexatious conduct’” that may occur when a client is personally solicited. *Id.* at 462. The Court concluded that a state statute which restricts an attorney's use of in-person solicitation as a means of procuring clients is not a violation of the attorney's constitutional right to commercial speech. *Id.* at 467.

<sup>68</sup> *Shapero*, 486 U.S. at 475; see Ballentine, *supra* note 64, at 132 (discussing the *Shapero* court's distinction between targeted direct-mail solicitation and in-person solicitation); *The Last Taboo*, *supra* note 63, at 3 (reporting the Court's rejection of the similarity of dangers involved in-person solicitation and targeted, direct-mail solicitation).

<sup>69</sup> *Shapero*, 486 U.S. at 475 (quoting *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 641 (1985)).

<sup>70</sup> *Id.*

solicitation.”<sup>71</sup> Direct-mail solicitation, in the Court’s view, did 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.’”<sup>72</sup>

The Supreme Court also dismissed the Kentucky Supreme Court’s conclusion that a ban on targeted, direct-mail solicitation was justified because an individual might become “overwhelmed” by his or her legal dilemma and will consequently be unable to exercise “good judgment.”<sup>73</sup> The Court noted:

The relevant inquiry is not whether there exists potential clients whose “condition” makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility. . . . In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference.<sup>74</sup>

Thus, the Court held that because targeted, direct-mail solicitation was not a type of communication through which lawyers could easily exploit clients that may be more susceptible to undue influence, if truthful and not misleading, it was protected by the First Amendment.<sup>75</sup> Many courts interpret *Shapero* to stand for the principle that all types of direct-mail solicitation enjoy First Amendment protection, regardless of the recipient’s condition or

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<sup>71</sup> *Id.* (quoting *Zauderer*, 471 U.S. at 642); Thomas Morgan, *Commercial Interruptions*, LEGAL TIMES, Aug. 29, 1988, at S20 (reporting the Supreme Court’s rejection of state arguments that targeted direct-mail solicitation might “unfairly overwhelm” the desires of the recipients).

<sup>72</sup> *Shapero*, 486 U.S. at 475-76. The Court observed that the nature of written communications is fundamentally different than face-to-face encounters, and commented that: “A letter, like a printed advertisement (but unlike a lawyer) can readily be put in a drawer to be considered later, ignored or discarded.” *Id.* at 475-76; *see also* Fred Strasser & Marcia Coyle, *Ad Ban*, NAT’L L.J., Mar. 14, 1988, at 5 (reporting that during oral argument *Shapero*’s attorney stated that “[i]t’s a lot easier to throw out a letter than a 250-pound lawyer in your living room”).

<sup>73</sup> *Bates*, 486 U.S. at 474.

<sup>74</sup> *Id.* at 474-75.

<sup>75</sup> *Id.* at 479.

vulnerability, as long as the mailing is not false, misleading or overreaching.<sup>76</sup>

## II. *FLORIDA BAR V. WENT FOR IT, INC.*

In *Florida Bar v. Went For It, Inc.*,<sup>77</sup> the Supreme Court limited the First Amendment protection afforded to attorneys in *Shapero*,<sup>78</sup> by upholding a Florida Bar rule which bars attorneys and attorney referral services from sending targeted, direct-mail solicitations to accident victims or their families within thirty days of the accident.<sup>79</sup> This section will review the factual background of *Went For It*, and describe in great detail both the majority and dissenting opinions given in this case.

### A. *Facts*

Based on the results of a two-year survey on the effect of lawyer advertising,<sup>80</sup> in 1989 the Florida Bar decided that its advertising rules required several changes.<sup>81</sup> The following year, the Florida Bar offered before the Florida Supreme Court a list of amendments it wished to make to its rules regulating attorney advertising.<sup>82</sup> Two of these amendments were at issue in *Went For*

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<sup>76</sup> See, e.g., *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 106 (1990) (holding that a letterhead making a bona fide claim as to the lawyer's certification was not misleading); *Unnamed Attorney v. Attorney Grievance Comm'n*, 545 A.2d 685, 691 (Md. 1988) (holding that solicitation letters sent by attorney to recently injured persons, some as soon as the day after the injury, are protected by the First Amendment). *But see Edenfeld v. Fane*, 507 U.S. 761, 768 (1993) (finding that protection of a potential client's privacy was indeed a substantial state interest for purposes of the *Central Hudson* test).

<sup>77</sup> 115 S. Ct. 2371 (1995).

<sup>78</sup> 486 U.S. 466 (1988) (holding that a state statute prohibiting targeted, direct-mail solicitation by attorneys was unconstitutional).

<sup>79</sup> *Went For It*, 115 S. Ct. at 2381. See *infra* note 83 and accompanying text (describing the Florida Bar rules at issue in *Went For It*).

<sup>80</sup> See *infra* note 103 (discussing results of the Florida study).

<sup>81</sup> See *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d 451, 452 (Fla. 1990).

<sup>82</sup> *Id.*

*It.*<sup>83</sup> Together these two amendments created a thirty-day blackout period in which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit business.

In March 1992, Stewart McHenry<sup>84</sup> and a referral service, Went For It, Inc., filed an action in the United States District Court for the Middle District of Florida challenging Rules 4-7.4(b)(1) and 4-7.8(a), as a violation of their First Amendment right to free speech.<sup>85</sup> They argued that they frequently sent direct-mail solicitations to accident victims or their loved ones within thirty days of the accidents and that they desired to continue this practice.<sup>86</sup> The district court, relying on *Bates v. State Bar of*

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<sup>83</sup> Rule 4-7.4 of the Rules Regulating the Florida Bar provides in pertinent part:

(b) Written Communication.

(1) 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 employment if:

(a) The written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.

*See* The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So.2d at 466.

Rule 4-7.8 of the Rules Regulating the Florida Bar provides in pertinent part:

(a) When Lawyers May Accept Referrals. 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.* at 471.

<sup>84</sup> In October 1992, Stewart McHenry was disbarred. John T. Blakely replaced McHenry in the suit. *McHenry v. Florida Bar*, 21 F.3d 1038, 1040 (11th Cir. 1994) (citing *Florida Bar v. McHenry*, 605 So.2d 459 (Fla. 1992)).

<sup>85</sup> *McHenry v. Florida Bar*, 808 F. Supp. 1543, 1545 (M.D. Fla. 1992).

<sup>86</sup> *Id.* at 1544 n.1; *McHenry*, 21 F.3d at 1040.

*Arizona*,<sup>87</sup> ruled that the thirty-day prohibition of targeted direct-mail solicitation violated the First Amendment and entered summary judgment for the plaintiff.<sup>88</sup> The Eleventh Circuit affirmed for similar reasons.<sup>89</sup> Troubled that *Bates* required this outcome, the U.S. Supreme Court granted writ of certiorari.<sup>90</sup>

*B. The Supreme Court Decision: Justice Sandra Day O'Connor's Majority Opinion*

The Supreme Court reversed the lower court's judgment, holding that the Florida Bar's rule prohibiting lawyers from sending direct-mail solicitation to accident victims or their loved ones within thirty days of the accident did not violate a lawyer's First Amendment right to free speech.<sup>91</sup> In reviewing the constitutionality of the thirty-day ban, the Court used the four-prong test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>92</sup> which requires regulation of commercial speech to

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<sup>87</sup> 433 U.S. 350 (1977); see *supra* notes 31-43 and accompanying text (discussing *Bates*).

<sup>88</sup> *McHenry*, 808 F. Supp. at 1548. The district court concluded that: The challenged rules substantially impair and impede the availability of truthful and relevant information which can make a positive contribution to consumers in need of legal services. This Court holds that as a matter of law, the Florida Bar's thirty-day ban on personal injury and wrongful death targeted direct mail lawyer advertising violates the First Amendment to the United States Constitution.

*Id.*

<sup>89</sup> *McHenry*, 21 F.3d at 1042. The Eleventh Circuit Court of Appeals affirmed, holding that neither of the bar's asserted state interests of protecting traumatized individuals who are unable to make an "objective evaluation of a personalized solicitation from a lawyer" nor safeguarding the personal privacy of accident victims and their loved ones justified a thirty-day ban on "constitutionally protected direct mail advertising by attorneys." *Id.* at 1042.

<sup>90</sup> *The Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995).

<sup>91</sup> *Id.* at 2381.

<sup>92</sup> *Id.* at 2375-76; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 560 (1980); see also *supra* note 46 and accompanying text (discussing *Central Hudson*).

directly advance a substantial government interest and to be narrowly tailored to serve that interest.<sup>93</sup>

Finding the first part of the test had been satisfied because neither party had alleged that the advertisement was false or misleading,<sup>94</sup> the Court proceeded to satisfy the second prong of *Central Hudson*, which requires that the state's asserted interest be substantial.<sup>95</sup> In this case, the Florida Bar asserted an interest "in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers."<sup>96</sup> That interest, Justice O'Connor held, is indeed substantial.<sup>97</sup> In many instances the Supreme Court has concluded that "[s]tates 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."<sup>98</sup> Thus, Justice O'Connor noted, the Court's precedents "leave no room for doubt that the protection of potential clients' privacy is a substantial state interest."<sup>99</sup>

Finding the Florida Bar's asserted interest to be substantial, the Court then proceeded to satisfy the third prong of *Central*

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<sup>93</sup> *Went For It*, 115 S. Ct. at 2376; *Central Hudson*, 447 U.S. at 564.

<sup>94</sup> *Went For It*, 115 S. Ct. at 2376.

<sup>95</sup> *Id.*; *Central Hudson*, 447 U.S. at 560.

<sup>96</sup> *Went For It*, 115 S. Ct. at 2376.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) which held that "[t]he interest of the states in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been 'officers of the courts'" and *Cohen v. Hurley*, 366 U.S. 117, 123-24 (1961) which held that a state's interest in disciplining lawyers is "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied").

<sup>99</sup> *Went For It*, 115 S. Ct. at 2376 (quoting *Edenfeld v. Fane* 507 U.S. 761, 768 (1993)). In *Edenfeld*, the Court held that protecting one's privacy from unsolicited intrusion was indeed substantial state interest for purpose of *Central Hudson* test. 507 U.S. at 768; see also *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 477 (1978) (concluding that the bar's interest in protecting the public justified a regulation on in-person solicitation).



*Hudson*.<sup>100</sup> Under *Central Hudson*, "the state must demonstrate that the challenged regulation advances the government's interest in a direct and material way."<sup>101</sup> In satisfying this burden, a state must not only prove that the evils it desires to prevent exist, but must also show how the proposed regulation will remove the evil "to a material degree."<sup>102</sup> In support of its view that a ban on attorney direct-mail solicitation advances a substantial governmental interest, the Florida Bar proffered the results of a two year attorney advertising and solicitation study.<sup>103</sup> The Court stated that the Florida Bar's summary, noteworthy for its breadth and detail,

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<sup>100</sup> *Went For It*, 115 S. Ct. at 2377.

<sup>101</sup> *Id.*; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

<sup>102</sup> *Went For It*, 115 S. Ct. at 2377 (quoting *Edenfeld*, 507 U.S. 761, 769).

<sup>103</sup> *Id.* at 2377. The two-year study conducted by Magid Associates revealed that "[a]s of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were [targeted at personal injury] victims or their survivors." *Id.* In addition, the survey showed that "54% of the general population surveyed said that contacting personal injury victims was a violation of privacy." *Id.* Included in the study was a random sampling of persons who received direct-mail advertising from lawyers in 1987. The survey shows that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people;" 34% found such tactics "annoying or irritating;" 26% found it "an invasion of your privacy;" and 24% reported that it "made you angry." *Id.*

The study also includes "excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was appalled and angered by the brazen attempt of a law firm to solicit him by letter shortly after he was injured and his fiance was killed in an auto accident." *Id.* at 2377-78. Another Florida citizen, whose mother received a direct mail solicitation letter just three days after his father's funeral, found the letter to be "despicable and inexcusable." *Id.* at 2378. Another person whose nephew's family received a direct-mail solicitation just one day after their son's funeral described the letter as "beyond comprehension." *Id.* Finally, the survey presented a letter written by a recipient of a direct mailing to the attorney who sent the letter. The citizen wrote, "I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste. . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind." *Id.*; see also Howard Pankratz, *Lawyers' Letters Anger Floridian Thirty Day Waiting Period Upheld by High Court*, DENV. POST, Aug. 11, 1995, at A12 (reporting numerous excerpts from complaints of direct-mail recipients).

“contains data—both statistical and anecdotal—supporting the Bar’s contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the [legal] profession.”<sup>104</sup>

Satisfying this prong of *Central Hudson*, Justice O’Connor then explained why the holding in *Shapero v. Kentucky Bar Association*,<sup>105</sup> was not binding on *Went For It*.<sup>106</sup> First, in *Shapero* the state “did not seek to justify its regulation as a measure undertaken to prevent lawyers’ invasions of privacy interests. . . . Rather, the state focused exclusively on the special dangers of overreaching inher[ent] in targeted solicitations.”<sup>107</sup> In contrast, the purpose of the Florida Bar’s ban on direct-mail solicitation is to protect against lawyers’ intrusions upon citizens’ personal grief in times of trauma.<sup>108</sup> Second, unlike the Florida Bar’s thirty-day ban, the proposed ban in *Shapero* had no “time frame.”<sup>109</sup> Finally, in contrast to *Went For It*, *Shapero* failed to proffer any real evidence which revealed a direct harm precipitated by direct-mail solicitation.<sup>110</sup> Justice O’Connor concluded that “the Court’s perfunctory treatment of privacy in *Shapero* [is] of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents.”<sup>111</sup>

The Court then proceeded to satisfy the last prong of *Central Hudson*.<sup>112</sup> Under this prong, *Central Hudson* requires that the state narrowly draw the commercial speech regulation.<sup>113</sup> In

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<sup>104</sup> *Went For It*, 115 S. Ct. at 2377.

<sup>105</sup> 486 U.S. 466 (1988) (holding that Kentucky rule prohibiting targeted, direct-mail solicitation by attorneys was unconstitutional).

<sup>106</sup> *Went For It*, 115 S. Ct. at 2378. “*Shapero* differs in several fundamental respects from the case before us, Justice O’Connor argued.” *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2376, 2378.

<sup>109</sup> *Id.* at 2378. In *Shapero*, Kentucky’s restriction on targeted, direct-mail solicitation was a complete ban on solicitation to any victims of foreclosure. *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 468 (1988).

<sup>110</sup> *Went For It*, 115 S. Ct. at 2378.

<sup>111</sup> *Id.* at 2379.

<sup>112</sup> *Id.* at 2380.

<sup>113</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 565 (1980).

*Board of Trustees of State University of New York v. Fox*,<sup>114</sup> the Supreme Court determined that there need only be a reasonable "fit between the [government's] end and the means chosen to accomplish those ends."<sup>115</sup> On this point, the respondents, John Blakely

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<sup>114</sup> 492 U.S. 469 (1989).

<sup>115</sup> *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). In *Fox*, the Supreme Court addressed the issue of whether state restrictions on commercial speech are permissible if the restrictions "go beyond the least restrictive means" needed to promote the states' interests. *Id.* at 471. Todd Fox, a student at the State University of New York at Cortland filed a lawsuit against the State University of New York, arguing that its Resolution 66-156 infringed upon his First Amendment right to free speech. *Id.* at 472-73. Fox was upset that the University applied Resolution 66-156 to prohibit a representative of American Future Systems from showing the corporation's china, crystal and silverware in the dormitory. *Id.* at 472. Resolution 66-156 stated:

No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

*Id.* at 471-72 (citing State Univ. of N.Y. Res. 66-156 (1979)).

In determining the constitutionality of Resolution 66-156, the Court applied the four-prong test established in *Central Hudson*. *Id.* at 475. The Court found that the first prong had been satisfied because the parties stipulated that the speech was not misleading. *Id.* As for the second prong, the Court found that the University indeed had a substantial interest in promoting an educational atmosphere in the dormitory. *Id.* The Court left the third prong to the district court to decide on remand. *Id.* at 476. The Court focused on the fourth prong of *Central Hudson*. *Id.*

In discussing the fourth prong, the Court considered whether the University's regulation was more extensive than necessary to serve the asserted interest in maintaining an educational atmosphere. *Id.* In deciding this question, the Court first discussed whether the word "necessary" in the *Central Hudson* test should be interpreted strictly to require an application of a least-restrictive means test or if a more flexible meaning could be applied. *Id.* at 476-77. A more flexible interpretation of *Central Hudson*, the Court held, would only require that the restrictions be narrowly tailored and no more extensive than is "reasonably necessary" to directly advance the substantial interest. *Id.* at 477. In resolving this conflict, the Court reviewed other tests applied to other speech restrictions, such as the time, place and manner restriction. *Id.* The Court explained that in time, place or manner restrictions we have held that they need not be the least restrictive alternative because of the heavy burden such a test would impose on

and Went For It, Inc., argued that the Florida Bar's thirty day regulation on targeted, direct-mail solicitation was overreaching.<sup>116</sup> By prohibiting the sending of direct-mail solicitation to all individuals involved in an accident, regardless of the accident's severity or the injured person's mindset, "the rule keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice."<sup>117</sup>

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the state; rather, the Court will uphold a time, place or manner restriction if it is narrowly tailored to serve a substantial state interest. *Id.* at 477-78. In reasoning that commercial speech warranted the same constitutional protection afforded to other speech regulated by a time, place or manner restriction, the Court concluded that it would not require the application of a least restrictive means test in commercial speech cases because of the heavy burden such a test imposes. *Id.* at 477. Rather, in satisfying the fourth prong of *Central Hudson*, the Court held it would only require a "reasonable fit" between the state's asserted interest and the restriction chosen to satisfy that interest. *Id.* at 480. Finding there to be a "reasonable fit" between the University's restriction and its substantial interest in promoting an educational atmosphere in a dormitory, the Court concluded that the Resolution 66-156 was constitutional. *Id.* For a further discussion and in-depth analysis of the decision in *Fox*, see *Lochner*, *supra* note 47, at 1335.

Time, place and manner regulation is another vast issue in First Amendment jurisprudence and therefore outside the scope of this Comment. Supreme Court decisions dealing with time, place and manner regulation include: *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). For an in-depth discussion on time, place and manner regulation and its application, see Paul G. Chevigny, *First Amendment: Begging And The First Amendment: Young v. New York City Transit Authority*, 57 BROOK. L. REV. 525 (1991); Ned Greenberg, *Mendelsohn v. Meese: A First Amendment Challenge To The Anti-Terrorism Act of 1987*, 39 AM. U. L. REV. 355 (1990); William B. Harvey, *Private Restraint Of Expressive Freedom: A Post-Pruneyard Assessment*, 69 B.U. L. REV. 929 (1989); Elena W. Slipp, *Bankruptcy: Loper v. New York City Police Department Begs The Question: Is Panhandling Protected By The First Amendment*, 60 BROOK. L. REV. 587 (1994); David A. Stoll, Comment, *Public Forum Doctrine Crashes At Kennedy Airport Injuring Nine: International Society For Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271 (1993).

<sup>116</sup> *Went For It*, 115 S. Ct. at 2380.

<sup>117</sup> *Id.*

Not persuaded by respondents' claim as to the ban's overinclusivity, the majority stated,<sup>118</sup> "We find little deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief."<sup>119</sup> The Court declared that the ban is "reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians [and is] narrow both in scope and duration."<sup>120</sup> The ban also leaves open "ample alternative channels for receipt of information about the availability of legal representation,"<sup>121</sup> including advertisements on billboards, television, radio and in the yellow pages.<sup>122</sup> The Court therefore concluded that because Florida's thirty-day ban on direct-mail solicitation of personal injury victims or their family members passes the *Central Hudson* test, the rule does not violate of the First Amendment.<sup>123</sup>

### C. Justice Anthony M. Kennedy's Dissenting Opinion

In leading the dissent, Justice Anthony M. Kennedy argued that "[a]ttorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First Amendment"<sup>124</sup> for nearly two decades under the principle established in *Bates v. State Bar of Arizona*.<sup>125</sup> Although this

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2380-81.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2380. Rule 4-7.2(a) of the Rules Regulating the Florida Bar provides:

A lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4-7.4.

*Id.* at 2380-81; The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So.2d 451, 461 (Fla. 1990).

<sup>123</sup> *Went For It*, 115 S. Ct. at 2381.

<sup>124</sup> *Id.* at 2381 (Kennedy, J., dissenting).

<sup>125</sup> 433 U.S. 350, 384 (1977) (reversing an Arizona disciplinary rule that prohibited attorney advertising). Since *Bates*, the Supreme Court has found most

protection is limited and subject to the intermediate scrutiny framework set forth in *Central Hudson*,<sup>126</sup> Justice Kennedy vigorously disagreed with the majority that the Florida Bar's ban on direct-mail solicitation satisfied the *Central Hudson* test.<sup>127</sup>

The holding in *Shapero v. Kentucky Bar Association*,<sup>128</sup> Justice Kennedy argued, prevents the Court from finding a substantial state interest in this case.<sup>129</sup> In *Shapero*, the Court found that the dangers presented by in-person solicitation, such as "overreaching and undue influence," did not exist in direct-mail solicitation.<sup>130</sup> The Court reasoned that "[a] letter . . . (unlike a lawyer), can readily be put in a drawer to be considered later,

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communications by attorneys to be neither false nor misleading and therefore protected by the First Amendment. *See, e.g.,* *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 (1990) (holding that advertising one's certification by National Board of Trial Advocacy was not actually or inherently misleading); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (holding illustrations or pictures in advertisements not inherently misleading); *In re R.M.J.*, 455 U.S. 191, 205 (1982) (listing jurisdictions in which lawyer is admitted to practice not inherently misleading).

The Court, however, has found some types of advertising by lawyers misleading. *See Zauderer*, 471 U.S. at 652-53 (holding statement that "no fee will be charged unless recovery" is misleading, unless it informs clients of liability for costs and expenses of litigation); *In re R.M.J.*, 455 U.S. at 205 (listing lawyers as members of U.S. Supreme Court Bar "in large capital letters" might be misleading to general public unfamiliar with admission requirements).

<sup>126</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

<sup>127</sup> *Went For It*, 115 S. Ct. at 2382 (Kennedy, J., dissenting).

<sup>128</sup> 486 U.S. at 475. The Court held that a state may not categorically prohibit targeted, direct-mail solicitation by lawyers. The Court emphasized that the relevant inquiry in determining the propriety of a particular direct-mail solicitation does not involve examining "whether there exist potential clients whose condition makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.* at 474. Employing this test, the Court declared that written forms of communication, such as direct-mail solicitation poses no such danger and are thus protected by the First Amendment. *Id.* at 475.

<sup>129</sup> *Went For It*, 115 S. Ct. at 2382 (Kennedy, J., dissenting).

<sup>130</sup> *Id.* (Kennedy, J., dissenting); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988).

ignored, or be discarded.”<sup>131</sup> The *Shapero* Court concluded that direct mail solicitation does not present the same justification for restriction of speech as in-person solicitation cases.<sup>132</sup>

Justice Kennedy further argued that even were the state’s asserted interests substantial, the Florida Bar’s thirty-day ban fails the third part of the *Central Hudson* test which “requires that the dangers the state seeks to eliminate be real and that the speech restriction advance the asserted state interest in a direct and material way.”<sup>133</sup> Justice Kennedy found the Florida Bar’s two-year study to be inadequate to show harm, and argued that the study “includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology and no discussion of excluded results.”<sup>134</sup> Justice Kennedy further noted that the study for the most part dealt “with television advertising and phone book listings, and not direct-mail solicitations.”<sup>135</sup>

Finally, Justice Kennedy argued that the Florida thirty-day ban fails the last part of the *Central Hudson* test, which requires that the speech restriction be “reasonably fit” to the asserted state interest.<sup>136</sup> First, the ban applies to all types of injuries, regardless of their severity.<sup>137</sup> Second, there is simply no logical reason for the Court to believe that “in all or most cases an attorney’s advice would be unwelcome or unnecessary” within thirty days of an injury.<sup>138</sup> Justice Kennedy concluded that the Court’s decision “is a serious departure, not only from [the Court’s] prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech.”<sup>139</sup>

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<sup>131</sup> *Went For It*, 115 S. Ct. at 2382 (Kennedy, J., dissenting); *Shapero*, 486 U.S. at 475.

<sup>132</sup> *Went For It*, 115 S. Ct. at 2382 (Kennedy, J., dissenting).

<sup>133</sup> *Id.* at 2383-84 (Kennedy, J., dissenting); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>134</sup> *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting).

<sup>135</sup> *Id.* (Kennedy, J., dissenting).

<sup>136</sup> *Id.* (Kennedy, J., dissenting); *Central Hudson*, 447 U.S. at 566.

<sup>137</sup> *Went For It*, 115 S. Ct. at 2384-85 (Kennedy, J., dissenting).

<sup>138</sup> *Id.* (Kennedy, J., dissenting).

<sup>139</sup> *Id.* at 2386 (Kennedy, J., dissenting). See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (reversing Arizona disciplinary rule that prohibited attorney advertising); see also *Peel v. Attorney Registration and Disciplinary Comm’n*,

## III. A STEP IN THE WRONG DIRECTION

In *Florida Bar v. Went For It, Inc.*, the Court weighed the right of Florida citizens to personal privacy in times of grief with the First Amendment right of attorneys to advertise their services and the interests of clients to receive this information. Relying on a Florida Bar two-year survey on the effects of lawyer advertising, the Court concluded that protecting the privacy of personal injury victims or their families from unsolicited contact by attorneys is a substantial state interest, and thus outweighed an attorney's First Amendment right to commercial advertising.<sup>140</sup> As a result, the Court upheld as constitutional a Florida Bar rule prohibiting personal injury lawyers or referral services "from sending targeted, direct-mail solicitations to victims or their relatives for thirty days following an accident or disaster."<sup>141</sup> The remainder of this Comment will analyze the legal impact of this decision which recognized the vulnerable-audience theory as a substantial state interest, and how the overall decision of the Court, which permitted a thirty-day ban on direct-mail solicitation, will affect attorneys and the general public in the near future.

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496 U.S. 91, 99-103 (1990) (using *Bates* analysis to determine that a state may not prohibit attorneys from advertising special certifications on letterhead if information is truthful and not deceptive); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988) (holding that Kentucky rule prohibiting targeted, direct-mail solicitation by attorneys was unconstitutional); *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 647 (1985) (holding that it is unconstitutional for a state to prohibit illustrations in newspaper advertising to intrauterine device users); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (striking down state regulation on advertisements that were not misleading). *But see* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (holding state may place regulations on in-person solicitation).

<sup>140</sup> *Went For It*, 115 S. Ct. at 2374, 2381.

<sup>141</sup> *Id.* at 2384; *see also supra* note 83 and accompanying text (describing Rule 4-7.4(b)(1) and Rule 4-7.8(a)).



A. *The Legal Impact of Florida Bar v. Went For It, Inc.*

1. *Florida Bar's Vulnerable-Audience Theory Attacks Doctrine of Stare Decisis*

Underlying the Florida Bar's thirty-day ban is the theory that the state has "a substantial interest in protecting the personal privacy and tranquility of [personal] injury victims and their loved ones against intrusive, unsolicited contact by lawyers."<sup>142</sup> However, as noted by the dissent, the Court has consistently rejected this vulnerable audience argument in the past.<sup>143</sup> In *Shapero v. Kentucky Bar Association*,<sup>144</sup> the Court held that commercial speech cannot be restricted where the government simply believes certain consumers cannot handle the message.<sup>145</sup> In *Shapero*, the Court established that in cases which assess whether attorneys' targeted direct-mail solicitations are entitled to constitutional protection, courts are not to ask whether an attorney has sent communications to individuals "whose 'condition' makes them susceptible to undue influence."<sup>146</sup> Instead, in passing judgment on whether the First Amendment protects a certain communication, courts must inquire "whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."<sup>147</sup> Employing this test, the Court in *Shapero*

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<sup>142</sup> *Went For It*, 115 S. Ct. at 2376.

<sup>143</sup> *Id.* at 2381 (Kennedy, J., dissenting); see *supra* note 23 and accompanying text (discussing cases rejecting the vulnerable audience argument). For a further discussion on *Shapero* and the rejection of the vulnerable audience argument, see generally Ballantine, *supra* note 64, at 132-35; *The Last Taboo*, *supra* note 63, at 3; Laroe, *supra* note 24, at 1530-34.

<sup>144</sup> 486 U.S. 466, 474 (1988).

<sup>145</sup> *Shapero*, 486 U.S. at 474; see also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648 (1985). In striking down the ban on attorney advertising, the Court in *Zauderer* held that "the mere possibility that some members of the population might find advertising offensive cannot justify suppressing it." *Id.*

<sup>146</sup> *Shapero*, 486 U.S. at 474.

<sup>147</sup> *Id.*

declared that written forms of communication, such as targeted direct-mail solicitation, pose no such danger and are protected by the First Amendment.<sup>148</sup> Thus, following precedence, the Court in *Went for It* should have rejected the Florida Bar's vulnerable audience argument as a substantial state interest.

Furthermore, even assuming that the Florida Bar has correctly gauged the emotional state of the recipients, the Court should have rejected the state's argument of intrusion, for the Florida rules contain a provision which effectively addresses that problem.<sup>149</sup> According to Rule 4-7.4(b)(2)(A), the envelope and each page of all lawyer solicitation letters must bear a statement in red ink advising the recipient that the letter is an advertisement.<sup>150</sup> Once forewarned, the only recipient who will be exposed to the contents of the solicitation letters are those who take the affirmative step of opening the letter and reading its contents. No one is compelled to do so, as the Court noted in *Shapero*, those who do not want to be troubled by such advertisements can readily discard them unopened.<sup>151</sup> Thus, there is no reason to require a thirty-day ban

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<sup>148</sup> *Id.* But see *The Last Taboo*, *supra* note 63, at 3 (reporting consumer complaints immediately increased after Florida allowed targeted direct-mail solicitation); Kathy Sawyer, *Lawyers Compound Disaster Grief: Complaints of Ambulance-Chasing After Dallas Jet Crash Probed*, WASH. POST, Aug. 16, 1985, at A14 (reporting that families of Delta Air Lines plane crash victims were "resentful of being solicited by lawyers").

<sup>149</sup> See *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d 451 (Fla. 1990). Rule 4-7.4(b)(2)(A) states as follows:

(2) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(A) Each page of such written communications shall be plainly marked "advertisement" in red ink, and the lower left corner of the face of the envelope containing a written communication likewise shall carry a prominent, red "advertisement" mark. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark in red shall appear on the address panel of the brochure or pamphlet . . . .

*Id.* at 467.

<sup>150</sup> *Id.*

<sup>151</sup> *Shapero*, 486 U.S. at 476.

to protect the personal privacy of victims when there are other existing regulations, such as the red ink label addressing, which accomplishes the same desired result.<sup>152</sup>

2. *Florida Bar's Vulnerable Audience Theory Poses a Danger to Commercial Speech Doctrine*

The general rule with respect to commercial speech "is that the speaker and the audience, not the government, assess the value of the information presented."<sup>153</sup> Even if a particular commercial message is offensive to some adults, that does not empower the government to deprive commercial speakers of their right to communicate with other adults through truthful, nonmisleading

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<sup>152</sup> See Andrew Blum, *Red-Letter Days*, NAT'L L.J., Aug. 21, 1989, at 6 (reporting that Arizona responded to the *Shapero* ruling which prohibited a ban on direct-mail solicitation by passing an "emergency" rule requiring "advertising material" to be written in red ink on the envelope and the first page of the letter); see also LOUISE L. HILL, *LAWYER ADVERTISING* 114-17 (1990). Hill lists various states' approaches to labeling requirements on written advertisements. For example, Arkansas requires all written communications to be marked "advertising." *Id.* at 115. Arizona requires that "written communications to persons known to need legal services must be clearly marked on envelope and first page of communication, in all capital letters, in red ink, in type size at least double the largest type size used in body of communication 'ADVERTISING MATERIAL: THIS IS A COMMERCIAL SOLICITATION.'" *Id.* Illinois requires "letters or advertising circulars and their envelopes to be plainly labeled as advertising material." *Id.* Kentucky requires "written or recorded communications to contain the words 'THIS IS AN ADVERTISEMENT,' in writing to be prominently displayed in type at least as large as the type in body of the letter and the envelope must also contain word 'ADVERTISEMENT' in print at least as large as the name of addressee." *Id.* New Jersey requires the "word 'ADVERTISEMENT' to be prominently displayed in capital letters at top of first page of text." *Id.* at 116.

<sup>153</sup> *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993). See *infra* note 172 (discussing *Edenfeld*).

speech.<sup>154</sup> This principle has been applied to attorney advertising cases<sup>155</sup> as well as to other general advertising cases.<sup>156</sup>

For example, in *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*,<sup>157</sup> an attorney advertising case, the Court struck down a state disciplinary rule that prevented attorneys from placing newspaper advertisements advising target portions of the public of their rights to pursue particular types of cases.<sup>158</sup> The Court held that "the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it."<sup>159</sup>

Furthermore, in *Bolger v. Youngs Drug Products Corp.*,<sup>160</sup> a general advertising case, the Court struck down a ban on mail advertisements for contraceptives.<sup>161</sup> The Court found that a

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<sup>154</sup> *Shapero*, 486 U.S. at 474 (1988); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648 (1985); *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 71 (1983); *Central Hudson Gas & Electric v. Public Serv. Comm'n*, 447 U.S. 557, 573-75 (1980) (Blackmun, J., concurring); see also *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that offensive speech is nonetheless protected by the First Amendment for those offended can avoid such speech by simply "averting their eyes").

<sup>155</sup> *Shapero*, 486 U.S. at 474; *Zauderer*, 471 U.S. at 648.

<sup>156</sup> *Bolger*, 463 U.S. at 71; *Central Hudson*, 447 U.S. at 573-75 (Blackmun, J., concurring).

<sup>157</sup> 471 U.S. 626 (1985).

<sup>158</sup> *Id.* at 648; see *supra* note 52 and accompanying text (discussing *Zauderer*).

<sup>159</sup> *Zauderer*, 471 U.S. at 648.

<sup>160</sup> 463 U.S. 60 (1983).

<sup>161</sup> *Id.* at 75. In *Bolger*, the Supreme Court reviewed a federal statute that "prohibit[ed] the mailing of unsolicited advertisements for contraceptives." *Id.* at 61-62. Title 39 U.S.C. § 3001(e)(2) states that "any unsolicited advertisement of matter which is designed, adapted, or intended for preventing contraception is nonmailable matter, shall not be carried or delivered by mail and shall be disposed of as the Postal Service directs. . . ." *Id.* at 61 (citing 39 U.S.C. § 3001(e)(2) (1994)). In this case, Youngs Corporation attempted to send an unsolicited mass mailing of informational pamphlets through the mail. *Id.* at 62-63. The post office discovered the plan and informed Youngs that the proposed mailing violated a federal statute. *Id.* at 63. As a result, Youngs filed for declaratory and injunctive relief claiming that the federal statute violated the First Amendment. *Id.* Finding Youngs' proposed mailing to be commercial speech, the Court decided to use the framework set forth in *Central Hudson* in determining

federal statute designed to protect people from mail that they might find offensive furthered an interest of "little weight."<sup>162</sup> The Court noted that "the fact that protected speech may be offensive to some [adults] does not justify its suppression."<sup>163</sup> Thus, just as

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the statute's constitutionality. *Id.* at 68.

The Court first analyzed whether the governmental interests were substantial. *Id.* at 70. The government claimed two interests: the statute protected the recipients from material that "they were likely to find offensive," and the statute assisted "parents' efforts to control the manner in which their children became informed about sensitive and important subjects such as birth control." *Id.* at 71. The Court rejected the first interest, stating that "offensiveness was classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment. . . . [W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Id.* (quoting *Carey v. Population Serv. Int'l*, 431 U.S. 678, 680 (1977)). The Court, however, found substantial the second interest in aiding parents' control over their children's access to information regarding birth control. *Id.* at 73. Despite this finding, the Court struck down the federal statute as unconstitutional for it failed the third and fourth prongs of the *Central Hudson* test. *Id.*; see also *supra* note 45-46 (discussing the four-prong test of *Central Hudson*).

<sup>162</sup> *Bolger*, 463 U.S. at 71.

<sup>163</sup> *Id.* (citing *Carey*, 431 U.S. at 701); see also *Central Hudson Gas & Electric v. Public Serv. Comm'n*, 447 U.S. 557, 573-75 (1980) (Blackmun, J., concurring) (arguing that absent coercion, deception, or misinformation, a state should not be able to prohibit speech simply because of the persuasive effect the message may have on the public); *Cohen v. California*, 403 U.S. 15, 18 (1971).

In *Cohen*, the Supreme Court considered whether a state statute can punish the wearer of a jacket bearing the words "Fuck the Draft." *Cohen*, 403 U.S. at 16. Defendant, Paul R. Cohen, was observed wearing such a jacket in front of the Los Angeles County Courthouse. *Id.* Cohen was arrested and convicted of violating § 415 of the California Penal Code which restricts "maliciously and willfully disturbing the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . ." *Id.* (quoting CAL. PEN. CODE § 415 (1970)). This conviction was later affirmed by the Court of Appeals. *Id.* at 17. Cohen eventually appealed his case before the U.S. Supreme Court, claiming that the California statute violated his First Amendment right to free speech. *Id.* In a classic opinion led by Justice Harlan, the Court reversed Cohen's conviction on First Amendment grounds. *Id.* In doing so, Justice Harlan rejected a number of arguments advanced by the state. *Id.* at 17-24. For example, Justice Harlan rejected the argument that the words on the jacket were obscene. *Id.* at 20. Justice Harlan argued that an expression is obscene only if it is "in some significant way erotic." *Id.* No erotic "psychic stimulation" could reasonably have been expected to result in anyone reading Cohen's jacket, Justice Harlan

the First Amendment puts faith in individual Americans to determine the value of protected speech, and not the government or legislatures,<sup>164</sup> so too must American citizens assume responsibility for accepting, rejecting or simply disregarding such speech without a government filter.<sup>165</sup>

### 3. *Florida Bar's Thirty-Day Regulation on Direct-Mail Solicitation Promotes Future Underinclusive State Regulations*

The Supreme Court has held that underinclusive regulation in the First Amendment area "may diminish the credibility of the government's rational for restricting speech in the first place."<sup>166</sup>

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concluded. *Id.* Justice Harlan also rejected the state's argument that Cohen's message had been "thrust upon unwilling or unsuspected viewers," and that a state had the power to protect such captive audience from such offensive language. *Id.* at 21. Justice Harlan reasoned that "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* Justice Harlan concluded that a person may not be punished merely because the statements uttered are profane and therefore offensive to the listeners. *Id.* For a further discussion of *Cohen*, see generally John Donovan, *Unconstitutional Motivation Analysis and the First Amendment: The Further Demise of a Wise and Ancient Doctrine*, 33 CASE W. RES. L. REV. 271 (1983); Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets The New Media*, 51 FORDHAM L. REV. 606 (1983); Dianne L. Zimmerman, *Requiem For A Heavyweight: A Farewell To Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

<sup>164</sup> *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993). The Court noted that:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

*Id.*; see *infra* note 172 (discussing *Edenfeld*).

<sup>165</sup> See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475-76 (1988).

<sup>166</sup> *City of LaDue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994) (holding that the underinclusiveness of any statute designed to restrict speech raises serious doubts whether the state is serving the interests that it claims are furthered by the

According to the Florida Bar, the mailing ban was enacted to protect the personal privacy of its citizens from "intrusive, unsolicited contact" by attorneys in times of trauma.<sup>167</sup> However, a thirty-day ban such as Florida's is underinclusive because it

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statute).

In *Gilleo*, the Supreme Court held that a city ordinance which prohibited a display of certain non-excluded residential signs violated a homeowner's right to free speech under the First Amendment. *Id.* at 2047. The City of Ladue's ordinance prohibited "homeowners from displaying any signs on their property except 'residence identification' signs, 'for sale' signs and signs warning of safety hazards." *Id.* at 2040. The respondent, Margaret P. Gilleo, placed a large sign on her yard which read "[S]ay No to the War in the Persian Gulf, Call Congress Now." *Id.* When Gilleo reported to the police that her sign was found missing on one occasion and knocked down on another, she was advised by them that the sign violated the City of Ladue's ordinance and was prohibited. *Id.* The district court found the ordinance unconstitutional and the United States Court of Appeals for the Eighth Circuit affirmed. *Id.* at 2041; *Gilleo v. City of Ladue*, 986 F.2d 1180 (8th Cir. 1993).

The United States Supreme Court affirmed the Eighth Circuit's decision and found the ordinance unconstitutional. The Court reasoned that the municipal regulations affecting speech may invite constitutional challenges either because they restrict too little speech or because they prohibit too much protected speech. *Gilleo*, 114 S. Ct. at 2043. By forbidding residents from displaying virtually every type of residential sign on their property, the city "has almost completely foreclosed a venerable means of communication that is both unique and important" and which "reflects and animates change in the life of a community. . . . Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." *Id.* at 2045. Even though the city's ordinance may be content-neutral, and even assuming that the ordinance is narrowly tailored to serve a significant governmental interest because it infringes on the residents' free speech right, the ordinance is nonetheless unconstitutional. *Id.* at 2047.

For a further discussion on *Gilleo*, see Anthony J. Durone & Melissa K. Smith, *The First Amendment & Private Property: A Sign For Free Speech*, 60 MO. L. REV. 415 (1995); Charles W. Hemingway, *A Closer Look At Waters v. Churchill & United States v. National Treasury Employees Union: Constitutional Tensions Between The Government As Employer And Citizen As Federal Employee*, 44 AM. U. L. REV. 2231 (1995); George G. Size & Glenn R. Britton, *Is There Hate Speech?: R.A.V. & Mitchell In The Context Of First Amendment Jurisprudence*, 21 OHIO N.U. L. REV. 913 (1995).

<sup>167</sup> *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

operates only to restrict those lawyers seeking to represent the accident victims or their families.<sup>168</sup> It does not forbid contact by insurance adjusters and defense lawyers who remain free to make in-person visits and telephone calls, and to send letters to recent accident victims or their families in an effort to settle the victim's claims.<sup>169</sup> The ban does little to insulate accident victims and their families from unwelcome intrusions. Instead, the ban prevents victims from receiving information regarding the obtainability of legal counsel at a time when it is most urgently needed<sup>170</sup>—when they are encircled by representatives of potential defendants urging the victims to settle or waive their claims.<sup>171</sup>

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<sup>168</sup> Robert A. Clifford, *ABA Needs More Than PR To Polish Tarnished Legal Image*, CHI. LAW., Aug. 1995, at 15 (arguing that the Florida rule is under-inclusive for it only applies to plaintiff attorneys and not to opposing insurance companies or defense counsel).

<sup>169</sup> See David G. Savage, *Supreme Court Upholds Lawyer Solicitation Curbs Law*, L.A. TIMES, June 22, 1995, at A4 (quoting criticism regarding the double standard of the Florida rule); see also Stephen Chapman, *When Public Ignorance is Good for Lawyers*, CHI. TRIB., June 25, 1995, at C3 (reporting on how "[a] lawyer who wants to sue on behalf of the victim may not contact the victim," yet a lawyer for the defendant or insurance company "is free to contact the victim").

<sup>170</sup> *McHenry v. Florida Bar*, 21 F.3d 1038, 1043 n.12 (11th Cir. 1994). The Eleventh Circuit Court of Appeals cited Justice Leander Shaw of the Florida Supreme Court who argued, in opposition to the Florida Bar's proposed thirty-day ban on targeted, direct-mail solicitation, that:

This ban will effectively deprive many accident victims of information concerning the availability of professional legal assistance precisely when they need it most—during the initial period following a serious accident when they are confronted with an unintelligible legal tangle and demands to waive or compromise their rights. It is during this time that informed decisionmaking is crucial.

*Id.* (quoting The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So.2d 451, 474 (Fla. 1990) (Shaw, C.J., concurring in part and dissenting in part)).

<sup>171</sup> For instance, immediately following the crash of a Pan Am jetliner near New Orleans, Louisiana in 1982, agents from the airline's insurance company began visiting and mailing letters to the victims' families in an effort to settle their claims. John Spelich, *Air Disasters Pit Insurers Against Lawyers*, DET. FREE PRESS, Aug. 18, 1987, at 12B. Similar measures were taken by insurance carriers after other airline disasters. Two days after "nine people died and 13 were injured in the crash of Northwest Airline Flight 2268," the United States



Indeed, the highly selective nature of the coverage of the thirty-day ban raises serious questions as to whether Florida's asserted interests are furthered by the ban on targeted direct-mailing by attorneys. It is incomprehensible that the Florida Bar Association believes that, on the one hand, the receipt of a clearly marked solicitation letter from a lawyer is a gross invasion of privacy, while, on the other hand, a barrage of visits, telephone calls and letters from potential defendants and their representatives is not an invasion of privacy. Making matters worse, the only way that an accident victim can effectively be insulated from the flood of defense entreaties is to retain an attorney. Yet the Florida rule complicates that process by severing the flow of information regarding the availability of legal counsel when the accident victim is most in need.

4. *Florida Bar's Thirty-Day Regulation on Direct-Mail Solicitation also Promotes Overinclusive State Regulation*

If a restriction on speech is overinclusive because it bans speech outside the scope of its purported purpose, then the restriction is unconstitutional.<sup>172</sup> The Florida Bar's thirty-day ban is

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Aviation Underwriters Inc. set up an office at a local airport hotel to settle insurance claims. John Saunders & Jack Kresnak, *Putting a Price Tag on Life—Insurers Talk with Crash Victims' Families*, DET. FREE PRESS, Mar. 7, 1987, at 1A.

<sup>172</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570-72 (1980); *Edenfeld v. Fane*, 507 U.S. 761, 768 (1993) (concerning restrictions on commercial speech, the Court stated that the precision of any commercial speech regulation "must be the touchstone in an area so closely touching our most precious freedoms"). In *Edenfeld*, the United States Supreme Court assessed the constitutionality of a Florida statute which restricted certified public accountants ("CPAs") from in-person solicitation of potential clients. *Id.* at 765. In 1985, Scott Fane moved from New Jersey to Florida to begin an accounting practice. *Id.* Fane planned to solicit clients by communicating in person with businesses he thought may be in need of his services. *Id.* However, the Board of Accountancy had a rule which restricted in-person solicitation by CPAs, and thus prevented Fane from carrying out his plan. *Id.* The Board's rule provided that a CPA "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of [the CPA],

overinclusive because it prohibits written communications to all types of accident or personal injury victims, regardless of their state of mind.<sup>173</sup> It keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice, and who are unlikely to be particularly upset by a lawyer's solicitation letters.<sup>174</sup> As stated by the Eleventh Circuit Court of Appeals when it determined that the Florida Bar's thirty-day ban was unconstitutional:

We note that, although all the potential clients in *Shapero* faced legal difficulties of the same magnitude (a foreclosure suit), some of the same potential clients targeted by Appellees in this case will suffer from relatively minor

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unless such person or entity has invited such a communication." *Id.* (citing FLA. ADMIN. CODE § 21A-24.002(2)(c) (1992)).

Fane initiated a lawsuit in the United States District Court for the Middle District of Florida, contending that the Florida restriction on in-person solicitation by CPAs was unconstitutional because it violated their First Amendment right to free speech. *Id.* at 766. Fane argued that the restriction neither directly advanced the asserted state's interest in policing the accounting profession nor was the statute narrowly tailored. *Id.* The Board, on the other hand, contended that the statute was constitutional because it was needed to protect the independence and objectivity of the accounting profession. *Id.* The district court rejected the Board's argument and enjoined enforcement of the Florida rule prohibiting in-person solicitation by accountants. *Id.* After the Eleventh Circuit Court of Appeals affirmed the decision, the Board appealed to the Supreme Court. *Id.*

In determining the constitutionality of the Florida rule, the Supreme Court proceeded to use the test set forth in *Central Hudson*. The Court concluded that although the Board's asserted interests in "protecting consumers from fraud or overreaching" and protecting the professionalism of accountants are substantial, the Board had failed to demonstrate how its ban on in-person solicitation advances those interests. *Id.* at 768-70. The Court reasoned that the Board presented "no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claimed to fear." *Id.* at 769. Moreover, the Court observed that the record did not disclose any anecdotal evidence either from Florida or another state that validated the Board's supposition. *Id.* Thus, the Court affirmed the prior decisions and found the Florida rule banning in-person solicitation by accountants unconstitutional. *Id.* at 773.

<sup>173</sup> Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2384 (1995).

<sup>174</sup> *Id.* at 2385.

injuries, while others no doubt will have injuries that are more severe. Nevertheless, the [Florida] Bar rule applies equally to solicitations within thirty days of a simple slip and fall or of accidents that result in severe injuries or fatalities.<sup>175</sup>

Because the Florida Bar's regulation on attorney direct-mail solicitation is overinclusive, under the test set forth in *Central Hudson*,<sup>176</sup> the rule should not be deemed constitutional.

*B. The Socio-Economic Impact of Florida Bar v. Went For It, Inc.*

*1. Nonsolicitation Rules Disproportionately Impact Small Law Firms and Solo Practitioners*

The Florida Bar's thirty-day ban on direct-mail solicitation, one of the cheapest means of attracting clients, will disproportionately impact small firms and solo practitioners relative to the more established lawyers.<sup>177</sup> In his concurring opinion in *Ohralik v. Ohio State Bar Association*,<sup>178</sup> Justice Thurgood Marshall stated:

The impact of the nonsolicitation rules, . . . is discriminatory with respect to the suppliers as well as the consumers of legal services. Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society, so the Disciplinary Rules against solicitation fall most heavily on those

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<sup>175</sup> *McHenry v. Florida Bar*, 21 F.3d 1038, 1043 n.9 (11th Cir. 1994).

<sup>176</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570-72 (1980).

<sup>177</sup> See *Laroe*, *supra* note 24, at 1544 (reporting how regulating direct-mail solicitation mostly impacts lawyers in small firms and solo practitioners); *Ringleb*, *supra* note 25, at 1235 n.238 (citing studies which show that most advertising lawyers are younger and in small law firms or are solo practitioners); Linda Greenhouse, *At the Bar*, N.Y. TIMES, June 23, 1995, at A23. Greenhouse argues that the Florida Bar's restriction will create a divide between those lawyers practicing in large firms for wealthy clients and those lawyers making a living representing ordinary people in personal injury cases. *Id.*

<sup>178</sup> 436 U.S. 447 (1978) (Marshall, J., concurring) (citations omitted).

attorneys engaged in a single-practitioner or small-partnership form of practice-attorneys who typically earn less than their fellow practitioners in larger, corporate oriented firms.<sup>179</sup>

Small firms and solo practitioners lack the reputation, connections or funds that allow more established firms and lawyers to attract business without direct-mail advertising.<sup>180</sup> The fact that such lawyers are motivated by a desire to earn a living does not reduce their entitlement to First Amendment protection. As courts continue to uphold nonsolicitation regulations, such as the Florida Bar's, it is likely that bans on targeted, direct-mailing will significantly impair small firms and solo practitioners.

2. *Nonsolicitation Rules Deprives Low-and Moderate-Income Families from Obtaining Valuable Information Regarding Legal Services*

Nearly twenty years ago, in *Bates v. State Bar of Arizona*, the Court predicted that establishing First Amendment protection for attorney advertising would "effect profound changes in the practice of law."<sup>181</sup> The Court premised its analysis not only on the general understanding that advertising is valuable because it informs the public about the obtainability and cost of legal services,<sup>182</sup> but also on the fact that the then existing methods of attracting clients failed "to reach out and serve the [entire] community."<sup>183</sup> Citing studies which revealed that many people who needed legal help were discouraged from obtaining it out of

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<sup>179</sup> *Id.* at 475 (Marshall, J., concurring).

<sup>180</sup> *See* Laroe, *supra* note 24, at 1544 (reporting that lawyers in small firms and solo practitioners are mostly affected by regulations on direct-mail solicitation "for they cannot afford other sources of advertising, such as television and newspaper advertising"); *A Protected Bar*, NAT'L L.J., July 3, 1995, at A20 (reporting that the Florida rule will create a split between large firms and small personal injury firms).

<sup>181</sup> 433 U.S. 350, 389 (Powell, J., concurring).

<sup>182</sup> *Id.* at 364; Lauren Dobrowalski, *Maintaining the Dignity of the Profession: An International Perspective on Legal Advertising and Solicitation*, 12 DICK. J. INT'L L. 367, 368 (1994).

<sup>183</sup> *Bates*, 433 U.S. at 370.

an exaggerated fear of the cost or because of inexperience locating a competent attorney,<sup>184</sup> the Court concluded that advertising "can provide some of the information that a consumer needs to make an intelligent selection."<sup>185</sup>

Analyzing the Court's prediction today, the Court was right. On balance, the protection established in *Bates* regarding attorney advertising has improved our justice system. Studies undertaken since *Bates* reveal that although the problems identified by the Court in *Bates* regarding the general public's access to legal services remain valid today,<sup>186</sup> advertising appears to have ameliorated them.<sup>187</sup> Surveys across income levels reveal a greater access to legal services today than during the *Bates* era.<sup>188</sup>

An America Bar Association ("ABA") sponsored study conducted in 1974 and 1989, illustrates that a higher percentage of adults used lawyers twelve years after *Bates* than they did three

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<sup>184</sup> *Id.* at 371 n. 22-23; see *supra* note 3 and accompanying text (discussing various studies which indicate that many people avoid contacting an attorney in time of need for they do not know how to locate a competent attorney to handle their particular legal problem).

<sup>185</sup> *Bates*, 433 U.S. at 371.

<sup>186</sup> COMPREHENSIVE NEEDS STUDY, *supra* note 6, at 25. A study conducted as recently as 1992 by the American Bar Association found that 40% of low-income families and 36% of moderate-income families took no direct action to solve their legal needs either because they were unaware of the legal problem or because they thought nothing could be done about it. COMPREHENSIVE NEEDS STUDY, *supra* note 6, at 25; see also *supra* note 2 and accompanying text (reporting other studies suggesting that the majority of the public avoid contacting an attorney in time of need).

<sup>187</sup> *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 634 (1985) (stating that witnesses testified that "they would not have learned of their legal claims had it not been for the [attorney's] advertisement"); Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 290 (1992) (citing a study conducted by three professors which reveal that one way to reach poor people is through advertising of legal services); see *supra* note 6 and accompanying text (reporting how advertising has helped the general public gain access to legal services). But see Ringleb, *supra* note 25, at 1244 (concluding that choice of attorney is relatively uninfluenced by direct-mail).

<sup>188</sup> See CURRAN, *supra* note 6, at 57.

years before the decision.<sup>189</sup> Among the reasons listed by the ABA for this dramatic increase was the relaxation by the courts on rules against advertising.<sup>190</sup> In fact, an ABA Comprehensive Needs Study conducted in 1992 found that thirty-one percent of low-income households and fifteen percent of moderate-income households who hired an attorney found the attorney either through an advertisement or an attorney referral service.<sup>191</sup> Thus, placing regulations on attorney advertising, such as the Florida Bar's thirty-day ban on direct-mail solicitation by personal injury lawyers or referral services, will effectively deprive the low- and moderate-income families from obtaining legal counsel as well as discourage such families from turning to the justice system to help solve their legal matters.

### 3. *Nonsolicitation Rules Impact on the Cost of Legal Services*

Attorney advertising not only provides information about legal services to lower income households, but it also reduces legal fees; thereby providing greater access to these households.<sup>192</sup> A 1984

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<sup>189</sup> See CURRAN, *supra* note 6, at 57.

<sup>190</sup> See ANDREWS, *supra* note 6, at 85 (reporting that relaxing the rules on advertising "helps the average citizen gain access to legal services"); CURRAN, *supra* note 6, at 61 (reporting that relaxing the rules on attorney advertising is one reason for the dramatic increase in the public's use of legal services); see also Larry Bodine, *Advertising Acumen*, NAT'L L.J., Aug. 13, 1990, at 9 (stating that "if honest and accurate lawyer advertising were allowed to flourish, and the stifling restrictions were trimmed away, the public would get a better understanding of their rights and the court system").

<sup>191</sup> COMPREHENSIVE NEEDS STUDY, *supra* note 6, at 28.

<sup>192</sup> See Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 776-78 (1988). Economic theorists Terry Calvani, James Langenfeld and Gordon Shuford explain that lifting restraints on lawyer advertising will enable new firms to compete more readily with established firms. *Id.* at 778. The increase in client volume will also enable lawyers to lower their fees. *Id.* at 776. They argue that although attorney advertising cannot replace an attorneys reputation, "advertising can provide useful information to many consumers at once, which reduces the total cost of providing legal services." *Id.*; see also ANDREWS, *supra* note 6, at 79-82 (noting that advertising encourages competition among attorneys resulting in increased quality at lower prices);

Federal Trade Commission's study found that the types of civil legal services usually needed by low-income households cost five percent to thirteen percent more in states with restrictive attorney advertising rules than in states with liberal rules.<sup>193</sup> Researchers and commentators have concluded that advertising tends to lower the cost of legal services because it facilitates comparison shopping,<sup>194</sup> increases the overall demand for legal services,<sup>195</sup> which enables practitioners to employ economies of scale; and provides attorneys with less expensive methods of attracting clients.<sup>196</sup>

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LAWYER ADVERTISING AT THE CROSSROADS, *supra* note 6, at 129 (discussing economic benefits of lawyer advertising).

<sup>193</sup> F.T.C. REP., *supra* note 3, at 79. In 1978, Dr. Steven Cox, a professor at Arizona State University, conducted a study in Phoenix, Arizona on the price difference for legal services offered by attorneys who advertise and by attorneys who did not advertise. F.T.C. REP., *supra* note 3, at 78. The study revealed that "on average, attorneys who advertised charged somewhat lower prices than those who did not." F.T.C. REP., *supra* note 3, at 78. In 1981, based on the results of Cox's 1978 study, the F.T.C. decided to conduct a follow-up study with Cox on the relationship between the state restrictions on advertising and the price of legal services. F.T.C. REP., *supra* note 3, at 78-79. The F.T.C. concluded that based on their investigation, state restrictions on attorney advertising raises the prices of legal services. According to the F.T.C. study, "attorneys in more restrictive [advertising] states" charge more "than those in less restrictive [advertising] states. The fact that more restrictions on advertising are associated with higher prices, suggests that . . . the dominant effect of advertising is to enhance price competition by lowering consumer search costs." F.T.C. REP., *supra* note 3, at 79. For various tables outlining the results of the survey, see F.T.C. REP., *supra* note 3, at 122-24; see also Calvani et al., *supra* note 192, at 783 (reporting findings of the Federal Trade Commission's study); Sawaya, *supra* note 3, at 88 (reporting on findings of the F.T.C. study).

<sup>194</sup> See Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1099 (1983). The authors of this article discuss the role of advertising in the legal service market. *Id.* They argue that there are numerous advantages to legal advertising. For example, advertising benefits the public by facilitating comparative shopping by "caus[ing] consumers to seek information about the producer's reputation and about other consumers' direct experience with him." *Id.* Furthermore, legal advertising enables the attorney to "reach and recruit a large number of consumers and thereby to increase revenue." *Id.*

<sup>195</sup> Hazard et al., *supra* note 194, at 1098.

<sup>196</sup> See ANDREWS, *supra* note 6 at 79 (relaxing the rules on legal advertising and solicitation helps reduce the cost of legal services); Calvani et al., *supra* note

Advertising, such as direct-mailing, remains a vital tool to most Americans in providing broad access to legal services at a lower cost. Advertisements that are truthful and not misleading should therefore remain free of state regulations.

## CONCLUSION

The U.S. Supreme Court, in *Florida Bar v. Went For It, Inc.*,<sup>197</sup> concluded that protecting the privacy of personal injury victims or their families from unsolicited contact by attorneys is a substantial state interest that outweighs an attorney's First Amendment right to commercial advertising, and allows a state to place a waiting period of thirty-days on direct-mail solicitation by attorneys to personal injury victims or their families. This ruling creates several problems. For one, it favors large, established firms and lawyers with money to spend on other forms of expensive advertising. Small firms and solo practitioners who rely on direct-mail solicitation as a means of attracting clients are, no doubt, disproportionately affected by regulations on targeted direct-mail solicitation. Moreover, placing regulations on lawyer advertising, such as a thirty-day ban, will have a negative impact on the general public at large. Legal advertising aids the general public by making them more aware of legal issues and the availability of legal services. These factors, and the reality that there are other less restrictive means of protecting the privacy of recent accident victims, such as requiring red ink advertising labels on all targeted, direct-mailings, requires the Court to find regulation on targeted, direct-mail solicitation unconstitutional.

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192, at 776 (commenting on the relationship between attorney advertising and legal costs).

<sup>197</sup> 115 S. Ct. 2371 (1995).



