

## NOTE

# DO YOU NEED A LAWYER? YOU MAY HAVE TO WAIT 30 DAYS: THE SUPREME COURT WENT TOO FAR IN *FLORIDA BAR* *v. WENT FOR IT, INC.*

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## INTRODUCTION

Legal advertising evokes controversy both inside and outside of the legal profession. As the legal market has become increasingly competitive, lawyers ranging from practitioners in large corporate law firms to so-called "ambulance chasers" have taken full advantage of their constitutional right to advertise.<sup>1</sup> In recent years, "ambulance chasers" have been criticized for attempting to solicit accident victims and their families in the immediate wake of a tragedy.<sup>2</sup> While lawyer advertising is protected speech under the First Amendment, many critics argue that advertising harms the reputation of the legal profession and invades the privacy of victims.<sup>3</sup> Proponents assert that direct-mail advertising is a vital source of information for victims who otherwise would not have access to the legal system.<sup>4</sup> Over the past two decades, as state and local bar associations have placed restrictions on lawyer solicitation, the Supreme Court has struggled with the balance between an attorney's First Amendment right to advertise and accident victims' right to privacy.<sup>5</sup>

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1. The term "ambulance chasing" is frequently used to describe "the practice of some personal injury lawyers [of] aggressively seek[ing] out potential clients in the wake of fires, collisions, and other disasters." L. Anita Richardson, *Stopping the Chase*, 81 A.B.A. J., Jan. 1995, at 38; see Linda Greenhouse, *At the Bar*, N.Y. TIMES, June 23, 1995, at A23 (observing that not only "ambulance chasers" advertise, but so do law firms that target potential clients through newsletters and announcements); see also David G. Savage, *Supreme Court Upholds Lawyer Solicitation Curbs*, L.A. TIMES, June 22, 1995, at A4 (maintaining that, in recent years, lawyers have become overzealous in advertising).

2. See *Scavenger Lawyers*, MIAMI HERALD, Sept. 29, 1987, at 22A (criticizing lawyers who solicit accident victims); *Solicitors Out of Bounds*, ST. PETERSBURG TIMES, Oct. 26, 1987, at 12A (asserting that Florida lawyers send targeted direct mail to victims shortly after accidents).

3. See Robert D. Peltz, *Legal Advertising—Opening Pandora's Box?*, 19 STETSON L. REV. 43, 116 (1989) (providing list of Florida editorials criticizing direct-mail solicitation of accident victims); Robert Habush, *President's Page—The Image of Trial Lawyers*, TRIAL, Dec. 1986, at 6 (observing that in 1980s, media coverage of Bhopal and widely publicized allegations of international ambulance chasing exacerbated negative image of lawyers).

4. See Jeffrey S. Kinsler, *Targeted, Direct-Mail Solicitation: Shapero v. Kentucky Bar Association Under Attack*, 25 LOY. U. CHI. L.J. 1, 7 (1993) (discussing positive effect of direct-mail solicitation, including promotion of consumer interest in "fullest possible dissemination of commercial information," and advocating protection of attorney advertising).

5. Compare *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985) (allowing use of printed advertisements to target specific legal problems) and *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (protecting truthful and non-misleading lawyer advertising) with *In re R.M.J.*, 455 U.S. 191, 207 (1982) (upholding lawyers' right to advertise certain practice areas).

In *Florida Bar v. Went For It, Inc.*,<sup>6</sup> the Supreme Court upheld a Florida Bar rule that prohibited personal injury lawyers from sending direct-mail solicitations targeted to victims and their relatives within thirty days of an accident or disaster.<sup>7</sup> G. Stewart McHenry, a Florida attorney, challenged the ban as a violation of the commercial speech protection under the First Amendment.<sup>8</sup>

The Florida Bar, acting as the state regulatory body for lawyers, adopted the restrictions in 1990 to curtail "ambulance chasing" that might "further erode the public's faith in the legal system."<sup>9</sup> The restriction was also designed to protect the "personal privacy and tranquility of accident victims and their relatives."<sup>10</sup> Moreover, the Florida Bar wanted to assure that potential clients would not be pressured by attorneys who seek to attract new clients through "undue influence or overreaching."<sup>11</sup>

The Court's decision in *Went For It* marked a dramatic change from previous decisions on legal advertising.<sup>12</sup> In a five-to-four decision, the Court rejected First Amendment protection of lawyer advertising for the first time in almost two decades.<sup>13</sup> Although the impact of *Went For It* is difficult to estimate, many observers predict that the case could open the door for greater regulation of lawyer solicitation.<sup>14</sup> Several states have already adopted regulations restricting attorney advertising, and a number of other states are considering whether to pass similar regulations.<sup>15</sup> Texas has even passed a law that makes

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and bar memberships) and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467-68 (1978) (upholding disciplinary action against lawyer soliciting prospective clients in hospital) and *In re Primus*, 436 U.S. 412, 438-39 (1978) (prohibiting disciplinary action against lawyer seeking clients for public interest class action).

6. 115 S. Ct. 2371 (1995).

7. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2381 (1995).

8. *Id.* at 2374.

9. See Lara Wozniak, *Court Upholds Rule on Lawyer Solicitations*, ST. PETERSBURG TIMES, June 22, 1995, at 1E (observing that Florida Bar originally wanted to ban all personal injury solicitation but state supreme court found total ban too extreme and suggested waiting period instead).

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

11. *Id.*

12. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988) (holding that ban on direct-mail advertising by attorneys is violation of First Amendment); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (allowing attorneys to utilize newspaper advertising for "routine legal services").

13. Richard C. Reuben, *Florida Bar's Ad Restriction Constitutional*, 80 A.B.A. J., Aug. 1995, at 20.

14. See *id.* (speculating that while most experts agree Court's ruling was narrow and perhaps limited to 30-day "cooling off" period, it may have greater impact on other restrictions); Greenhouse, *supra* note 1, at A23 (noting that *Went For It* decision will make it easier for states to implement regulations on lawyer solicitation).

15. See Greenhouse, *supra* note 1, at A23 (acknowledging that Texas, Iowa, and Mississippi have "toughened up" their rules, and Illinois, Arizona, and Georgia are considering imposing

targeted, direct-mail solicitation by attorneys a felony punishable by up to ten years in prison.<sup>16</sup>

In 1988, the Supreme Court held that states may not prohibit lawyers from contacting potential clients through direct-mail solicitation.<sup>17</sup> In 1995, however, Justice O'Connor's majority opinion in *Went For It* reflects the Court's intention to scale back the amount of First Amendment protection previously enjoyed by attorney advertising.<sup>18</sup> *Went For It* represents a serious departure from prior Supreme Court decisions, which limited the ability of the states to regulate lawyer solicitation.<sup>19</sup>

This Note argues that the Supreme Court erred in *Went For It* by limiting the First Amendment protection available to attorneys who utilize direct-mail advertising. Part I contains a brief history of commercial free speech under the First Amendment. Part II provides an overview of *Went For It*, including a procedural history. Part III analyzes whether the Court correctly applied the *Central Hudson* test, the standard used by the Court in commercial speech cases since 1980. Finally, Part IV suggests that the Court has reduced the amount of First Amendment protection available to attorneys by giving states more ability to regulate commercial free speech.

## I. COMMERCIAL FREE SPEECH UNDER THE FIRST AMENDMENT

### A. *The Supreme Court and Commercial Free Speech*

Prior to its 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>20</sup> the Supreme Court had held

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regulations); Linda Greenhouse, *High Court Backs Florida Restriction on Solicitation of Accident Victims by Lawyers*, N.Y. TIMES, June 21, 1995, at A22 (observing that New York and Connecticut have restrictions barring mail solicitation to people whose physical or mental health may hinder them in exercising reasonable judgment when hiring lawyers).

16. See TEX. PENAL CODE § 38.12(D)(2)(a) (West 1993) (making it felony to send targeted direct-mail solicitation for personal injury or wrongful death to victim or victim's family within 30 days of accident); see also Mark Hansen, *Texas Makes Solicitation a Felony*, 79 A.B.A. J., Sept. 1993, at 32 (commenting on Texas law that also restricts written solicitations by prospective lawyers and other professionals within 30 days of lawsuit, accident, or arrest).

17. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 468 (1988) (maintaining that, under First Amendment, state may not prohibit lawyers from soliciting business by sending "truthful and nondeceptive letters to potential clients known to face particular legal problems"); see also Richardson, *supra* note 1, at 38 (noting that written solicitation by lawyers has received significant protection from Supreme Court).

18. See *Went For It*, 115 S. Ct. at 2375 (emphasizing that Court affords commercial speech lesser degree of protection than other First Amendment speech).

19. See Richardson, *supra* note 1, at 38 (explaining that Florida Bar asked Supreme Court to overrule its earlier decisions); Marcia Coyle, *Ad Decision Could Spur a Rollback*, NAT'L L.J., July 3, 1995, at A1 (asserting that prior to *Went For It*, states had been allowed to regulate advertising only to prevent false and misleading communications or to ban in-person solicitation).

20. 425 U.S. 748 (1976).

that the First Amendment offered little protection for commercial speech.<sup>21</sup> In that landmark case, the Supreme Court struck down a Virginia statute preventing pharmacists from advertising drug prices.<sup>22</sup> The Court held for the first time that the First Amendment protected purely commercial speech and that consumers have a strong interest in the free flow of commercial information.<sup>23</sup> The Court, however, did not enunciate a standard for First Amendment protection and limited its holding to commercial speech that is truthful and non-deceptive to the consumer.<sup>24</sup>

The Court articulated a standard for commercial speech protection four years later in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>25</sup> In *Central Hudson*, the Court examined the constitutionality of a state restriction prohibiting electric utilities from advertising.<sup>26</sup> While the Court found that the Constitution provides lesser protection to commercial speech than to other forms of protected expression,<sup>27</sup> the Court nonetheless held that the advertisements served an informational function and required some First Amendment protection.<sup>28</sup> The Court developed a four-part analysis to determine whether restrictions on commercial free speech violate the First Amendment.<sup>29</sup>

Under *Central Hudson*, the threshold inquiry is whether the speech concerns lawful activity and is not misleading.<sup>30</sup> Once this element

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21. See *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (prohibiting distribution of handbills on New York city streets as violation of New York Sanitary Code); Jerry Elliott, Comment, *The First Amendment, In Re R.M.J., and State Regulation of Direct Mail Lawyer Advertising*, 34 BAYLOR L. REV. 411, 414-18 (1982) (providing overview of commercial speech doctrine); cf. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding ban on street distribution of advertising notices and observing that Constitution imposes no restraint on government when regulating commercial advertising). *Valentine* was the standard on commercial advertising until the Court granted First Amendment protection in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). See Jeffrey M. Brandt, Note, *Attorney In-Person Solicitation: Hope for a New Direction and Supreme Court Protection After Edenfield v. Fane*, 25 U. TOL. L. REV. 783, 786 n.27 (1994) (providing overview of commercial speech prior to *Virginia Pharmacy* decision in 1976).

22. *Virginia Pharmacy*, 425 U.S. at 773.

23. *Id.* at 765; see also *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (recognizing for first time that commercial information is important to efficient exchange of resources in free market).

24. *Virginia Pharmacy*, 425 U.S. at 773.

25. 447 U.S. 557 (1980).

26. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 558 (1980).

27. *Id.* at 562-63.

28. See *id.* at 562 (recognizing that even when advertising communicates only incomplete version of relevant facts, First Amendment presumes that some accurate information is better than none at all).

29. *Id.* at 566; see also *infra* notes 30-31 and accompanying text (presenting *Central Hudson's* four-part test).

30. *Central Hudson*, 447 U.S. at 566. If the commercial speech concerns unlawful activities or is misleading, it will not be entitled to constitutional protection. *Id.* at 566 n.9; see Shapiro

is satisfied, the Court then analyzes the restriction under a three-prong test: (1) the purported government interest must be substantial; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances its interest; and (3) the regulation must not be more extensive than is necessary to serve that interest.<sup>31</sup> Relying on this test, the Court in *Central Hudson* struck down restrictions on promotional advertising by New York electric companies because the restrictions were not narrowly tailored to the government's interests.<sup>32</sup> The Court found that the restrictions reached all promotional advertising, regardless of the impact on overall energy use.<sup>33</sup> In addition, no showing was made that a more limited restriction on the content of promotional advertising would adequately serve the state's interests.<sup>34</sup> Since 1980, the Court has consistently utilized the *Central Hudson* standard in all commercial speech cases.<sup>35</sup>

In 1993, the Court used the *Central Hudson* test to strike down a Florida regulation on solicitation by certified public accountants (CPAs).<sup>36</sup> In *Edenfield v. Fane*,<sup>37</sup> a commercial speech restriction precluded accountants from soliciting potential business clients by telephone even though the information conveyed was truthful and

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v. Kentucky Bar Ass'n, 486 U.S. 466, 485 (1988) (O'Connor, J., dissenting) (explaining standardized test used to determine constitutional protection of commercial speech).

31. *Central Hudson*, 447 U.S. at 566; see also *id.* at 565 (explaining that "regulatory technique may extend only as far as the interest it serves"). The test for commercial speech articulated by the Court in *Central Hudson* is not to be confused with the analysis used in Fourteenth Amendment equal protection cases. As Justice Scalia pointed out in *Board of Trustees, State University of N.Y. v. Fox*, the test for commercial speech is much less permissive of government regulation than the Fourteenth Amendment rational basis test. 492 U.S. 469, 480 (1989).

32. *Central Hudson*, 447 U.S. at 566-67. In *Central Hudson*, the Court found that the state's interest in energy conservation did not justify the suppression of all promotional advertising by public utilities. *Id.* at 570. The Court noted that the ban on advertising prevented Central Hudson from promoting its products that decreased energy consumption, thus directly conflicting with the state's interest. *Id.* at 570-71.

33. *Id.* at 570.

34. *Id.*

35. See Brandt, *supra* note 21, at 789 n.44 (asserting that all commercial speech cases after *Central Hudson* have utilized that test); see, e.g., *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (using *Central Hudson* test to evaluate Florida Rule governing solicitation by certified public accountants); *Peel v. Attorney Regulation & Disciplinary Comm'n*, 496 U.S. 91, 101 (1990) (analyzing lawyers' use of designation in advertisement under *Central Hudson*); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988) (weighing restriction on direct-mail advertising under *Central Hudson*); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985) (analyzing targeted newspaper advertisement under *Central Hudson* test); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (balancing *Central Hudson* factors in determining whether prohibition on attorney advertisement was constitutional); see also *Went For It*, 115 S. Ct. at 2375-76 (analyzing restrictions on commercial speech under *Central Hudson* framework).

36. *Edenfield*, 507 U.S. at 767.

37. 507 U.S. 761 (1993).

non-deceptive.<sup>38</sup> The Court in *Edenfield* found that Florida had a substantial interest in protecting consumers from fraud and maintaining standards of ethical conduct for licensed professions.<sup>39</sup> The Court found that the restriction on solicitation failed to satisfy the second prong of the analysis, however, because it did not "directly advance the state interest involved."<sup>40</sup> The Court reasoned that part of the restriction's shortcoming was due to Florida's failure to present studies suggesting that personal solicitation of prospective business clients by accountants creates dangers of fraud or overreaching.<sup>41</sup> Thus, the Court held that, because the regulation did not advance Florida's interest, it unconstitutionally suppressed legitimate commercial speech.<sup>42</sup>

### B. *The Supreme Court and Legal Advertising*

A year after the Supreme Court allowed pharmacist advertising in *Virginia Pharmacy*, it extended the same commercial free speech protection to lawyer advertising in *Bates v. State Bar of Arizona*.<sup>43</sup> In *Bates*, the state bar disciplined attorneys for advertising their legal clinic in a local newspaper in violation of an Arizona Bar rule prohibiting attorney advertising.<sup>44</sup> In striking down the restriction, the Court held that states could no longer absolutely prohibit attorneys from advertising.<sup>45</sup> The Court reasoned that even though advertising should not be a client's only basis for selecting an attorney, advertising provides useful information that may enable a client to make a more informed decision.<sup>46</sup> While *Bates* opened the door to permissible attorney advertising, its precise holding was limited to routine legal services, resulting in additional litigation over attorney solicitation.<sup>47</sup>

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38. *Edenfield v. Fane*, 507 U.S. 761, 764-65 (1993).

39. *Id.* at 770.

40. *Id.* at 770-71; see also *id.* at 770 (articulating penultimate prong of *Central Hudson*, which requires that regulation impinging upon commercial expression "may not be sustained if it provides only ineffective or remote support for the government's purpose" (quoting *Central Hudson*, 447 U.S. at 564)).

41. *Id.* The Court maintained that the Florida Board of Accountancy failed to provide any anecdotal evidence to validate the Board's suppositions about fraud or overreaching. *Id.*

42. *Id.* at 777.

43. 433 U.S. 350 (1977).

44. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354-56 (1977).

45. See *id.* at 383-84 (maintaining that only false, deceptive, or misleading lawyer advertising is subject to restraint).

46. See *id.* at 375-76 (explaining that advertising is "the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange").

47. See Peltz, *supra* note 3, at 50 (commenting that Court was careful to limit holding to issue of "whether lawyers . . . may constitutionally advertise the prices at which certain routine

The Court attempted to define the scope of constitutionally acceptable restrictions on attorney advertising in *Ohralik v. Ohio State Bar Ass'n*.<sup>48</sup> In *Ohralik*, the Ohio State Bar brought disciplinary proceedings against an attorney because he personally solicited accident victims who he sought to represent on a contingent fee basis.<sup>49</sup> In *Ohralik*, the Supreme Court permitted restrictions on lawyer advertising and distinguished *Bates* because the potential for overreaching in a face-to-face encounter was greater than in a public advertisement for legal services.<sup>50</sup> The Court reasoned that unlike a public advertisement that provides information and gives the recipient time to think about responding, in-person solicitation may "exert pressure and often demands an immediate response," with no time for reflection.<sup>51</sup> The Court suggested that the need to restrict attorneys from in-person solicitation was perhaps greater than the need to restrict other professions because lawyers' persuasive skills enhance their ability to convince potential clients that a lawyer's services are needed.<sup>52</sup>

Finding that the nature of the state's interest differed from that in *Ohralik*, in *In re Primus*,<sup>53</sup> the Court sought to further define the scope of permissible restrictions on lawyer advertising. The Court in *Primus* struck down a South Carolina restriction and held that a non-profit organization, the American Civil Liberties Union (ACLU), could use direct-mail advertising to solicit prospective litigants.<sup>54</sup> The Court reasoned that, unlike the political speech at issue in *Primus*, *Ohralik* involved in-person solicitation for pecuniary gain.<sup>55</sup>

services will be performed" (citing *Bates*, 433 U.S. at 367-68)).

48. 436 U.S. 447 (1978).

49. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 450-51 (1978). The attorney had one accident victim sign a contingency fee agreement during a visit to her hospital room as she lay in traction. *Id.* at 450. He then visited the other accident victim at her home, without invitation, and persuaded her to enter into a similar agreement. *Id.* at 451.

50. See *id.* at 457 (contending that, unlike public advertisement that provides information and gives recipient time to think about responding, in-person solicitation may "exert pressure and often demands an immediate response," with no time for reflection).

51. *Id.*

52. See *id.* at 465 (explaining that unsophisticated, injured, or distressed laypeople may place trust in lawyer "in response to persuasion under circumstances conducive to uninformed acquiescence").

53. 436 U.S. 412 (1978). In *Primus*, a South Carolina lawyer, cooperating with a branch of the American Civil Liberties Union (ACLU), sent a follow-up letter to a woman who had been sterilized as a condition of receiving public assistance. *Id.* at 415. This woman had participated in a group discussion that the lawyer, invited by the ACLU, had led. *Id.* The letter addressed the legal rights relating to the woman's sterilization and informed her that the ACLU would represent her pro bono in a lawsuit against the doctor who had performed the sterilization. *Id.* at 416 & n.6. The Court distinguished this type of solicitation from that in *Ohralik*, where the attorney stood to profit financially from solicitation of the potential client. *Id.* at 422.

54. *Id.* at 439.

55. *Id.* at 434-36.



The Court also emphasized that *Primus* involved mail solicitation rather than face-to-face solicitation, as in *Ohralik*.<sup>56</sup>

In subsequent decisions concerning legal advertising, the Court has generally narrowed the category of permissible bar association restrictions.<sup>57</sup> These cases have held that restrictions on attorneys who utilize Yellow Pages,<sup>58</sup> targeted newspaper advertisements,<sup>59</sup> and attorney letterheads denoting legal specialization,<sup>60</sup> violate the First Amendment.<sup>61</sup> All of these cases relied on the *Central Hudson* test<sup>62</sup> to test the validity of a restriction on attorney commercial free speech.<sup>63</sup>

In *Shapero v. Kentucky Bar Ass'n*,<sup>64</sup> the Supreme Court first addressed whether the First Amendment protects direct-mail solicitation

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56. *Id.* at 435-36.

57. See Kinsler, *supra* note 4, at 12 (commenting that Supreme Court continued to narrow scope of permissible restrictions on lawyer advertising in 1980s).

58. *In re R.M.J.*, 455 U.S. 191, 194, 206-08 (1982). In *R.M.J.*, the Supreme Court struck down a prohibition on attorney advertisements that identified the jurisdictions where the attorney was licensed as well as the areas of specialization. *Id.* at 196-97. Finding that the speech was neither misleading nor deceptive, the Court applied the *Central Hudson* test. *Id.* at 203. Under the *Central Hudson* analysis, the Court held that the state failed to identify any substantial interest in prohibiting lawyers from identifying the jurisdictions where they are licensed to practice. *Id.* at 205.

59. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629 (1985). In *Zauderer*, the attorney placed an advertisement in 36 Ohio newspapers, indicating his willingness to represent women who had suffered injuries after using the Dalkon Shield contraceptive device. *Id.* at 630. The Ohio Office of Disciplinary Counsel filed a complaint against Zauderer, alleging that his advertisements violated Ohio Rule DR 2-103(A), which prohibited an attorney from "recommending employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer," and DR 2-104(A), which prohibited a lawyer from accepting employment resulting from unsolicited advice given to a person. *Id.* at 633. The Court held that application of these rules to Zauderer's advertisement violated his First Amendment rights because the state failed to show that it had a substantial interest in prohibiting truthful, non-deceptive advertising. *Id.* at 648-49.

60. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 94 (1990). In *Peel*, disciplinary proceedings were brought against an attorney for violation of a rule prohibiting an attorney from holding himself out as a civil trial specialist certified by the National Board of Trial Advocacy. *Id.* at 97. The Court held that states may not ban a lawyer from advertising his or her certification by a nationally recognized organization as a trial specialist, but that states might consider requiring that disclaimers about the certifying organization accompany such an advertisement. *Id.* at 110.

61. See Kinsler, *supra* note 4, at 14 (stating that Court's decisions in *Bates*, *Ohralik*, *Primus*, *R.M.J.*, and *Zauderer* demonstrate that states cannot place "blanket prohibitions" on certain types of attorney advertising).

62. See *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-81 (1989) (replacing least restrictive means standard under *Central Hudson* test with requirement that regulation not "burden substantially more speech than is necessary to further the government's legitimate interests" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989))).

63. See Brandt, *supra* note 21, at 789 (maintaining that *Central Hudson* test has become modern determination of constitutionality in reviewing state restrictions on lawyer advertising and solicitation).

64. 486 U.S. 466 (1988).

of potential clients with known legal problems.<sup>65</sup> In this case, an attorney applied to Kentucky's Attorney Advertising Commission for approval of a letter he intended to send to potential clients.<sup>66</sup> Although the Commission did not find the letter false or misleading, the Commission would not approve it because a Kentucky Supreme Court Rule prohibited targeted direct-mail advertisements.<sup>67</sup> In striking down the prohibition, the Court distinguished *Shapero* from *Ohralik*, finding that a targeted letter "'poses much less risk of overreaching' . . . than does in-person solicitation."<sup>68</sup> In *Shapero*, the Court concluded that targeted, direct-mail solicitation does not compromise the privacy rights of victims.<sup>69</sup> The Court found that the State could regulate advertising using much less restrictive means, such as requiring the lawyer to file prospective solicitation letters with a state agency.<sup>70</sup> Although some lower courts have held that direct-mail advertising should not fall within the scope of protected speech under the First Amendment,<sup>71</sup> *Shapero* remained the leading decision on this subject until the Supreme Court decided *Went For It* in 1995.<sup>72</sup> In 1989, *Central Hudson* was slightly modified by *Board of Trustees, State University of New York v. Fox*,<sup>73</sup> which held that the least restrictive means test is no longer a requirement in commercial

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65. See Kinsler, *supra* note 4, at 15 (noting that issue in *Shapero* was one of first impression for Court).

66. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 469 (1988). *Shapero*, a member of the Kentucky Bar, wanted to target potential clients who had foreclosure suits filed against them and were about to lose their homes. *Id.* The Commission declined to approve the letter on the ground that a then-existing Kentucky Supreme Court Rule prohibited the mailing or delivery of direct-mail advertisements targeted to recipients with unique circumstances. *Id.* at 469-70 & n.2. *Shapero* then sought an advisory opinion as to the Rule's validity from the State Bar Association's Ethics Committee, which upheld the Rule as consistent with Rule 7.3 of the ABA's Model Rules of Professional Conduct. *Id.* at 470. On review of the Ethics Committee's advisory opinion, the Kentucky Supreme Court replaced the Kentucky rule with the ABA's Rule 7.3. *Id.* Rule 7.3 prohibits "targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading." *Id.* at 471 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983)).

67. *Id.* at 470.

68. *Id.* at 475 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985)).

69. See *id.* at 476 (observing that targeted letter does not invade recipient's privacy any more than substantively identical letter mailed to public).

70. *Id.*

71. *Norris v. Alabama State Bar*, 582 So. 2d 1034, 1037 (Ala. 1991) (upholding suspension of attorney for sending flowers to funeral home along with note to decedent's family offering assistance and brochure describing law firm's services), *cert. denied*, 502 U.S. 957 (1991); see *In re Anis*, 599 A.2d 1265, 1269-72 (N.J. 1992) (finding attorney's letter soliciting family of Lockerbie plane-crash victim offensive and undeserving of commercial speech protection), *cert. denied sub nom. Anis v. New Jersey Comm. on Attorney Advertising*, 504 U.S. 957 (1992).

72. See Richardson, *supra* note 1, at 38 (asserting that *Shapero* is leading case providing significant protection to lawyers who engage in direct-mail solicitation).

73. 492 U.S. 469 (1989).

speech cases. Therefore, as Justice Scalia articulated in *Fox*, the final element in the *Central Hudson* analysis is now whether the regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests."<sup>74</sup> As *Fox* illustrates, a state's ability to regulate commercial speech has increased significantly since the Court has done away with the least restrictive means test.

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

In 1990, the Florida Supreme Court, at the urging of the Florida Bar, enacted Rule 4-7.4(b)(1),<sup>75</sup> which prohibits lawyers from sending targeted letters to solicit employment from victims or survivors of an accident resulting in personal injury or wrongful death within thirty days of such accident.<sup>76</sup> The thirty-day moratorium on direct-mail solicitation was precipitated by a two-year Florida Bar Study that surveyed the effects of lawyer advertising on public opinion.<sup>77</sup> G. Stewart McHenry, a Florida lawyer, challenged this rule as violative of the First Amendment.<sup>78</sup> McHenry and his lawyer referral service, Went For It, Inc.,<sup>79</sup> filed an action for declaratory and injunctive

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74. Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

75. See The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451, 466 (Fla. 1990) (enacting Rule 4-7.4(b)(1)). Rule 4-7.4(B)(1) provides:

A lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if: a. The written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.

*Id.*

76. See *Went For It*, 115 S. Ct. at 2374 (discussing Florida Bar Rules creating 30-day blackout period after accident during which lawyers may not single out accident or disaster victims or their relatives to solicit their business); *Florida Bar: Petition to Amend*, 571 So. 2d at 472 (re-numbering Rule 4-7.7 to Rule 4-7.8(a)). Rule 4-7.8(a) states that

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

*Went For It*, 115 S. Ct. at 2374 (citing amendments to *Florida Bar: Petition to Amend*, 571 So. 2d at 451).

77. See *Went For It*, 115 S. Ct. at 2374 (noting two-year Florida Bar study involving hearings, commissioning of surveys, and reviewing extensive public commentary on effects of lawyer advertising on public opinion, and recommending that advertising rules be changed).

78. *Id.* The respondent, Went For It, Inc., and John T. Blakely, another Florida lawyer, were substituted for Stewart McHenry when McHenry was disbarred in October 1992 for reasons unrelated to this suit. See *Florida Bar v. McHenry*, 605 So. 2d 459, 460 (Fla. 1992) (disbarring McHenry for sexual misconduct, including masturbation in presence of clients).

79. See Greenhouse, *supra* note 15, at A22 (explaining that McHenry, owner of Went For It, Inc., made his living finding clients for personal-injury lawyers by soliciting accident victims).

relief in the United States District Court for the Middle District of Florida.<sup>80</sup>

Relying on *Shapero*, the district court entered summary judgment for the plaintiffs<sup>81</sup> and the Eleventh Circuit affirmed on similar grounds,<sup>82</sup> noting that it was bound by precedent to affirm the district court's decision.<sup>83</sup> The Eleventh Circuit indicated that the Florida Bar's attempt to regulate lawyer solicitation was reasonable and recognized Florida's interest in protecting the privacy of accident victims, but nevertheless felt compelled by Supreme Court precedent to affirm the lower court ruling in favor of *Went For It, Inc.*<sup>84</sup> The United States Supreme Court granted certiorari and reversed.<sup>85</sup>

The Supreme Court held that the Florida restriction withstood First Amendment scrutiny under the *Central Hudson* test for restrictions on commercial speech.<sup>86</sup> The Court found that the Florida Bar had a substantial interest in protecting the privacy of accident victims from invasive contact by lawyers and in preventing the erosion of confidence in the legal profession.<sup>87</sup> The Court determined that the restriction was sufficiently narrow in scope and duration to address the purported harms caused by direct-mail solicitation.<sup>88</sup>

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80. *McHenry v. Florida Bar*, 808 F. Supp. 1543 (M.D. Fla. 1992), *aff'd*, 21 F.3d 1038 (11th Cir. 1994), *rev'd sub nom. Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

81. *Id.* at 1548. The case came before the district court on the recommendation of a magistrate that the parties' competing summary judgment motions be decided in favor of the defendant, the Florida Bar. *Id.* at 1544. The district court held 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" and violated the First, Fifth, and Fourteenth Amendments to the Constitution. *Id.* at 1548. Therefore, the district court granted summary judgment for the plaintiffs. *Id.*

82. *McHenry v. Florida Bar*, 21 F.3d 1038 (11th Cir. 1994), *rev'd sub nom. Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

83. *See id.* at 1045 (referencing Supreme Court's holding in *Bates* and noting that "[w]e are disturbed that *Bates* and its progeny require the decision we reach today").

84. *Id.* at 1045. The Eleventh Circuit noted that it was forced to recognize the existence of members of the legal profession who solicit accident victims during periods of grief. *Id.*

85. *Went For It*, 115 S. Ct. at 2381 (finding that Florida Bar has substantial interest in protecting injured Floridians, preventing erosion of confidence in profession of law, and that rules designed by Florida Bar to prevent these harms are narrow in scope and duration).

86. *Id.*

87. *Id.* The Court observed that repeated invasions of privacy by lawyers have caused people to lose confidence in the legal profession. *Id.*

88. *Id.*

### III. ANALYSIS OF *FLORIDA BAR V. WENT FOR IT, INC.*: LIMITED PROTECTION FOR ATTORNEY ADVERTISING UNDER THE FIRST AMENDMENT

#### A. Justice O'Connor's Majority Opinion

Justice O'Connor's majority opinion in *Went For It* signified that lawyers are not entitled to the same constitutional protection as other professionals who advertise.<sup>89</sup> The Court limited the holding in *Virginia Pharmacy* to pharmacists<sup>90</sup> and found that the type of products offered by attorneys and physicians, unlike pharmacists, are not standardized and are therefore more likely to confuse or deceive the consumer through advertising.<sup>91</sup> Moreover, in *Went For It*, the Court determined that the advertising at issue in *Bates v. State Bar of Arizona* was protected commercial speech because the attorneys were only advertising "routine" legal services.<sup>92</sup> In *Went For It*, however, the Court implied that representing accident victims is not a "routine" legal service and, therefore, is more susceptible to regulation.<sup>93</sup>

This distinction, however, is without merit because the Court ignores the acceptance in *Bates* of the usefulness of legal advertising.<sup>94</sup> *Bates* stands for the proposition that while consumers may not use advertising as the sole criterion when selecting an attorney, it is unfair to deny consumers the relevant information conveyed by advertising when deciding whether to retain an attorney or when choosing which attorney to retain.<sup>95</sup> Further, as stated by the Court in *Virginia Pharmacy*, "[a]dvertising, however tasteless and excessive it may seem, is nonetheless dissemination of information as to who is producing

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89. *Id.* at 2375 (asserting that because lawyers provide services of infinite variety, legal advertising is not entitled to same protection as other professionals who advertise standardized products).

90. *See id.* (observing that *Virginia Pharmacy* applied only to pharmacists and noting that, unlike pharmacists, doctors and lawyers do not dispense standardized products).

91. *See id.* (explaining that professional services offered by doctors and lawyers are of almost infinite variety and thus entail more possibility for confusion and deception in certain kinds of advertising (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n.25 (1976))).

92. *See id.* (maintaining that only "routine" legal services such as "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, and the change of name" lend themselves to advertising (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977))).

93. *See id.* (stating that commercial speech enjoys limited protection, and is subject to modes of regulation that might not be permissible for non-commercial speech).

94. *See Bates*, 433 U.S. at 373-74 (noting that legal advertising provides consumers with relevant information needed to make informed decisions).

95. *Id.* at 374-75 & n.30.

and selling what product, for what reason, and at what price."<sup>96</sup> Protection of commercial speech stems from the recognition of its important role in the development of consumer awareness in a free enterprise economy.<sup>97</sup> The fact that some people might find legal advertising offensive or beneath the dignity of the bar cannot justify suppressing it.<sup>98</sup>

Before analyzing the Florida Bar regulation in *Went For It*, the Court distinguished commercial speech from other types of speech protected by the First Amendment.<sup>99</sup> The majority pointed out that commercial speech enjoys less First Amendment protection than other forms of speech and, therefore, is more readily subject to government regulation.<sup>100</sup> The Court observed that if commercial and non-commercial speech are both given equal First Amendment protection, the force of the First Amendment's guarantee would be diminished.<sup>101</sup> The Court reasoned that "to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process of the force of the Amendment's guarantee with respect to the latter kind of speech."<sup>102</sup> With these concerns in mind, the Court analyzed the Florida Bar restriction on direct-mail advertising under the "intermediate" scrutiny analysis set forth in *Central Hudson*.<sup>103</sup>

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96. *Virginia Pharmacy*, 425 U.S. at 765; see also Brief of Amicus Curiae the Media Institute, the Freedom of Expression Foundation, and the Thomas Jefferson Center for the Protection of Free Expression in Support of Respondents at 6, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (No. 94-226) [hereinafter Media Institute Brief] (advocating that advertising is important form of speech that government should not censor unless it is false or misleading).

97. See *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (acknowledging that seller has strong financial incentive to educate market and stimulate demand for his or her product or service); *Virginia Pharmacy*, 425 U.S. at 763-65 (suggesting that advertising is indispensable to proper allocation of resources in free enterprise system).

98. See *Edenfield*, 507 U.S. at 767 (suggesting that government should not censor particular commercial message because some members of population believe message to be of slight worth); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) (questioning degree of purported state interest in having attorneys maintain dignity in their communications with public and for holding that mere possibility that some members of public or Ohio Bar might find attorney advertising embarrassing cannot justify suppressing it (citing *Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977))); *Bates*, 433 U.S. at 369-70 (disputing assertion that advertising diminishes attorney's reputation in community).

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

100. See *id.* (pointing to commercial speech's "subordinate position on scale of First Amendment values" (citing *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989))).

101. *Id.*

102. *Id.*

103. *Id.* at 2375-76. The Court considers the *Central Hudson* test an intermediate standard because of the term "substantial government interest," and because the fit between the ends and means is "not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 2380. In the non-commercial speech First Amendment context, "narrowly tailored" is used to describe the means of achieving the regulation. See *Ward v. Rock*

### B. *Application of the Central Hudson Test*

Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading.<sup>104</sup> Commercial speech that does not fall into either of these categories, like the advertising at issue in *Went For It*, may be regulated if the government satisfies the three-part *Central Hudson* test.<sup>105</sup>

#### 1. *Central Hudson's first prong*

To show a substantial government interest in regulating direct-mail solicitations by lawyers—the first prong of the *Central Hudson* analysis—the Florida Bar relied on the need to protect the privacy and tranquility of personal injury victims and their families against “intrusive, unsolicited contact by lawyers.”<sup>106</sup> The Bar maintained that because the public perceived direct-mail solicitations as intrusive, the reputation of the legal profession in Florida had suffered.<sup>107</sup> According to the Florida Bar, in addition to protecting injury victims and their families, the regulation was also designed to protect the reputations of Florida lawyers by preventing them from engaging in

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Against Racism, 491 U.S. 781, 799 (1989) (defining regulation as “narrowly tailored” if it promotes substantial governmental interest that would be achieved less effectively absent regulation). In the equal protection arena, a regulation will be upheld under rational basis review as long as another branch of government arguably had a legitimate basis for creating the classification. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 574 (4th ed. 1991). Under strict scrutiny, the Court will not accept every permissible government purpose as sufficient to support the classification. *Id.* at 575. Rather, the government must show that it is pursuing a compelling end. *Id.* Under an intermediate standard of review, the government can satisfy its burden with less than a compelling interest, although not as much deference is given to the legislature as in rational basis review. *Id.* at 576.

104. *Went For It*, 115 S. Ct. at 2376 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980)).

105. *Id.*; see also *Central Hudson*, 447 U.S. at 564-65 (listing three-prong test as “first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be ‘narrowly drawn’”). Before analyzing the regulation, the Court was careful to differentiate the *Central Hudson* intermediate scrutiny standard from the “rational basis” test used primarily in equal protection cases. *Went For It*, 115 S. Ct. at 2376 (citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993)); see also *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (noting difference between *Central Hudson* standard and rational basis review).

106. *Went For It*, 115 S. Ct. at 2376; see also Brief for Petitioner at 8, 25-27, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (No. 94-226) [hereinafter *Petitioner's Brief*] (arguing that State has substantial interest in protecting personal privacy and tranquility of recent accident victims or victims' families).

107. *Went For It*, 115 S. Ct. at 2376; see Linda Greenhouse, *High Court's Opinions on Lawyers' Ads: Sharp Words and Sharp Scrutiny*, N.Y. TIMES, June 23, 1995, at A23 (observing that amicus brief filed by Trial Lawyers of America argues that disrespect for legal profession from solicitation results in lower damages awarded by juries).

direct-mail solicitation.<sup>108</sup> The Supreme Court had little difficulty crediting these interests as substantial.<sup>109</sup>

In finding that Florida has a substantial interest in protecting the privacy of accident victims and their relatives from lawyer solicitation, the Court cited *Frisby v. Schultz*<sup>110</sup> and *Carey v. Brown*.<sup>111</sup> Both cases involved government regulation of picketing in residential neighborhoods.<sup>112</sup> In *Went For It*, the Court used these cases to support the argument that because protecting the privacy of the home is of utmost importance, the Court should give deference to the state when it legislates in this area.<sup>113</sup>

The Court's analogy, however, between the privacy interests at stake in *Went For It* and those in *Frisby* and *Carey*, is flawed.<sup>114</sup> An essential element in the government's protection of privacy interests in *Frisby* and *Carey* was the inability of the residents to avoid the communication at issue.<sup>115</sup> In *Frisby*, the residents could not avoid the loud protestors picketing outside the residents' home.<sup>116</sup> In contrast, the recipient of direct-mail solicitation can easily disregard the communication by throwing it away.<sup>117</sup> Unlike the complaining residents in *Frisby* and *Carey*, the direct-mail recipients, to avoid the intrusion of privacy, must simply "avert[] their eyes."<sup>118</sup> Consequently, the

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108. *Went For It*, 115 S. Ct. at 2376.

109. *Id.* On other occasions, the Court has accepted the proposition 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." *Id.* (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)).

110. 487 U.S. 474 (1988). In *Frisby*, abortion protesters brought suit seeking to enjoin enforcement of a municipal ordinance prohibiting picketing around the residence or dwelling of any individual. *Id.* at 477.

111. 447 U.S. 455 (1980). In *Carey*, the plaintiff brought an action for declaratory and injunctive relief barring enforcement of the Illinois residential picketing statute. *Id.* at 458.

112. See *Frisby*, 487 U.S. at 476-77 (upholding ban on picketing of particular residence); *Carey*, 447 U.S. at 457 (striking down statute that prohibited picketing of residences or dwellings, but exempted peaceful picketing of place of employment involved in labor dispute).

113. *Went For It*, 115 S. Ct. at 2376-77.

114. See Brief of Amicus Curiae Public Citizen in Support of Respondent at 6, Florida Bar v. *Went For It*, Inc., 115 S. Ct. 2371 (1995) (No. 94-226) [hereinafter Public Citizen Brief] (disputing Florida Bar argument that mail solicitation at issue in *Went For It* is as invasive as sound truck at issue in *Kovacs v. Cooper*, 336 U.S. 77 (1949), or residential picketing in *Frisby*, 487 U.S. at 476).

115. See *Frisby*, 487 U.S. at 484-85 (noting that citizens have right to avoid intrusions such as unwanted picketing); *Carey*, 447 U.S. at 471 (reinforcing citizen's right to be let alone in privacy of own home); see also Public Citizen Brief, *supra* note 114, at 6 (describing unavoidable communications in *Frisby* and *Carey*).

116. See *Frisby*, 487 U.S. at 486-87 (indicating that picketing in residential area has devastating effect on quiet enjoyment of home).

117. Public Citizen Brief, *supra* note 114, at 6.

118. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).



"short, regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."<sup>119</sup>

The First Amendment prohibits the government from regulating commercial speech unless the objectionable speech is directed unavoidably toward a captive audience.<sup>120</sup> The Court has never held that the "government itself can shut off the flow of mailings to protect those recipients who might potentially be offended."<sup>121</sup> Moreover, household residents, the targeted audience in *Went For It*, are by no means captive and can easily avoid the direct-mail advertising at issue.<sup>122</sup> Therefore, Florida's ban on direct-mail advertising by attorneys is an unconstitutional restriction on free speech.<sup>123</sup>

The Florida Bar also asserted that the State of Florida had a substantial government interest in improving the reputation of the legal profession.<sup>124</sup> Acting as the regulatory agency for lawyers in the State,<sup>125</sup> the Florida Bar adopted this restriction to curtail "ambulance chasing."<sup>126</sup> The ban was designed to "protect the flagging reputations of Florida lawyers" by preventing them from soliciting accident victims and their families.<sup>127</sup> In *Went For It*, the Supreme Court agreed with the Florida Bar and determined that these interests satisfied the first prong of the *Central Hudson* test.<sup>128</sup>

Although the Bar's restriction may be legitimate, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented."<sup>129</sup> The possibility that some people may find the particular commercial message offensive should not empower the government to deprive attorneys of their right to

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119. *Id.* (citing *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)); see also Public Citizen Brief, *supra* note 114, at 6 (contending that burden of direct-mail solicitation is trivial and cannot justify serious abridgement of First Amendment rights); *Went For It*, 115 S. Ct. at 2382 (Kennedy, J., dissenting) (maintaining that Court in *Shapiro* reasoned that recipient of letter can readily ignore, discard, or place letter in drawer).

120. *Bolger*, 463 U.S. at 72 (citing *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980)).

121. *Id.*

122. *Went For It*, 115 S. Ct. at 2383 (Kennedy, J., dissenting) (explaining that household occupants are not captive audience (citing *Consolidated Edison*, 447 U.S. at 542)).

123. *Id.* (Kennedy, J., dissenting).

124. *Id.* at 2376 (noting outrage of Florida citizens who received mail solicitations from attorneys within days of deadly accidents and commenting that such outrage has tainted general perception of legal profession).

125. See Richardson, *supra* note 1, at 38 (noting that Florida Bar adopted 30-day ban under its regulatory powers).

126. *Went For It*, 115 S. Ct. at 2378; see also Petitioner's Brief, *supra* note 106, at 28 (asserting that conduct sought to be regulated in *Shapiro* differed from universally condemned conduct in this case).

127. *Went For It*, 115 S. Ct. at 2376.

128. *Id.* (recognizing that Florida Bar's asserted interests are substantial and compelling).

129. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

inform the public about their services through truthful, non-deceptive speech.<sup>130</sup> Therefore, the restriction does not satisfy the first prong of *Central Hudson*.<sup>131</sup>

## 2. Central Hudson's second prong

After finding the Florida Bar's interest substantial, the majority addressed the second prong of the *Central Hudson* test. Under that prong, the state must demonstrate that the challenged regulation "advances the government's interest in a direct and material way,"<sup>132</sup> that the harms sought to be avoided are real, and that the government's restriction will materially alleviate those harms.<sup>133</sup> In *Went For It*, the Court relied on statistics gathered by the Florida Bar for a two-year study of lawyer advertising and solicitation.<sup>134</sup> The Bar submitted a summary of this study to the record to support its contention that the Florida public views direct-mail solicitation of accident victims by lawyers as an intrusion on privacy that harms the reputation of the legal profession.<sup>135</sup>

As Justice Kennedy points out in his dissent, however, the summary prepared by the Florida Bar contains many flaws overlooked by the majority opinion.<sup>136</sup> First, the summary only obtained responses from 200 Floridians, all of whom had received direct-mail advertising

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130. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) (recognizing that, while state may have substantial interest in ensuring dignity of legal profession, Court questions whether this behavior warrants abridgement of First Amendment rights); Media Institute Brief, *supra* note 96, at 6 (arguing that under Petitioner's theory, government can censor virtually any form of speech by claiming to act for benefit of vulnerable people).

131. See *Went For It*, 115 S. Ct. at 2383 (Kennedy, J., dissenting) (maintaining that mere possibility that expression might offend listener does not justify speech restrictions).

132. *Id.* at 2377 (citing *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1588 (1995)); see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (determining that regulation must be in proportion to state's interest in restricting speech).

133. *Went For It*, 115 S. Ct. at 2377 (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

134. See Summary of the Record in No. 74,987 (Fla.) on Petition to Amend the Rules Regulating Lawyer Advertising, App. H, p. 2 (cited in *Went For It*, 115 S. Ct. at 2377). A survey of Florida adults commissioned by the Bar indicated that Floridians have a negative opinion about attorneys who use direct-mail advertising. *Went For It*, 115 S. Ct. at 2377. Fifty-four percent of the population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. *Id.* A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people;" 34% found such tactics "annoying or irritating;" 26% found it "an invasion of your privacy;" and 24% reported that it "made you angry." *Id.* Twenty-seven percent of surveyed direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail. *Id.*

135. See *Went For It*, 115 S. Ct. at 2377 (finding that Bar survey effectively bolstered argument that mail solicitations foster public resentment of legal profession).

136. See *id.* at 2384 (Kennedy, J., dissenting) (observing that Court relied on document containing statistical information, which was prepared by adverse party, Florida Bar).

from lawyers.<sup>137</sup> Second, the summary included no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of extended results.<sup>138</sup> Third, the summary contained only negative responses, omitting favorable opinions on lawyer advertising.<sup>139</sup> While the majority describes the Bar's record as "noteworthy for its breadth and detail,"<sup>140</sup> the dissent argues that it is "noteworthy for its incompetence."<sup>141</sup>

The majority distinguished *Shapero* and *Edenfield* from *Went For It* because no empirical data, studies, or anecdotes were offered to support the ban on solicitation in these latter cases.<sup>142</sup> In *Went For It*, the Court found that the Florida Bar assembled evidence sufficient to justify the restriction.<sup>143</sup> The Court relied exclusively on this evidence to satisfy the second prong of the *Central Hudson* test.<sup>144</sup>

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137. Brief for Respondents at 32, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (No. 94-226) [hereinafter Respondent's Brief]. Among the 200 direct-mail recipients, 83% said they would be impartial jurors in spite of receiving direct-mail advertising from a lawyer. *Id.* Sixty-six percent of the recipients claimed that their opinion of the legal profession and the judicial process has not changed since receiving direct-mail advertising from an attorney. *Id.*

138. *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting) (asserting that because summary contains "selective synopses of unvalidated studies," it is unreliable and incompetent).

139. Respondent's Brief, *supra* note 137, at 33; see also *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting) (observing that Florida Bar survey, unlike submitted summary, also contained positive comments regarding attorneys and direct-mail advertising). Justice Kennedy noted that the selective synopses of unvalidated studies were carried out, for the most part, on television and phone book advertising, and not direct-mail solicitations. *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting). Of the 34 pages discussing direct-mail solicitation, only two contained a synopsis of a study concerning the attitudes of Floridians toward such solicitations. *Id.*

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

141. See *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting) (attacking validity of studies because they deal primarily with television advertising and phone book listings, and not direct-mail solicitations).

142. See *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (noting that State Board of Accountancy offered no studies validating Board's arguments that CPA solicitations endangered legitimacy of profession). The Board presented no studies indicating that in-person solicitation of potential business clients by certified public accountants creates danger of fraud or overreaching. *Id.* at 770-71; see also *Went For It*, 115 S. Ct. at 2378 (asserting that in *Shapero*, Kentucky Bar Association assembled no statistical evidence demonstrating any actual harm caused by direct-mail advertising by lawyers).

143. *Went For It*, 115 S. Ct. at 2378-79 (citing to Bar study as main reason why Court decided to uphold ban on direct-mail solicitation).

144. See *id.* ("[W]e are satisfied that the ban on direct-mail solicitation . . . targets a concrete, non-speculative harm."). The Florida Bar also could have argued that a significant difference exists between targeting people whose mortgages have been foreclosed, as in *Shapero*, and targeting accident victims, as in *Went For It*. While accident victims and persons facing foreclosure may both need timely legal representation, accident victims and their families may deserve more privacy in the wake of an accident or disaster. Accident victims may have suffered both severe physical and emotional trauma. Persons whose mortgages have been foreclosed are not likely to have suffered physical injury.

The Court in *Went For It* stated that direct-mail solicitation is different than other forms of permissible advertising.<sup>145</sup> Writing for the majority, Justice O'Connor argued that untargeted letters are less harmful than direct-mail solicitations because untargeted letters do not invade the privacy of injured parties or their families.<sup>146</sup> In the majority's view, targeted letters harm the legal community more than untargeted letters.<sup>147</sup>

The majority contends that recent accident victims and their families are especially vulnerable and may therefore require greater protection than other citizens.<sup>148</sup> But Florida rules already provide increased protection to recipients of lawyer solicitation,<sup>149</sup> the envelope and every 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> With this warning, the recipients are only exposed to the solicitation if they take the affirmative step of opening the envelope and reading its contents.<sup>151</sup>

Prior to *Went For It*, the only form of solicitation that states had the ability to regulate was in-person solicitation.<sup>152</sup> The Court in *Ohralik* found that in-person solicitation places pressure on the recipient because an immediate response is often demanded.<sup>153</sup> The Court also reasoned that the potential for overreaching is greater "when a lawyer, a professional trained in the art of persuasion, personally

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145. *Id.* at 2379 (observing that direct-mail solicitation is more obtrusive than untargeted letter).

146. *Id.* (stating that, unlike untargeted solicitations, direct-mail solicitations confront grieving individuals while their "wounds are still open").

147. *Id.*

148. See Public Citizen Brief, *supra* note 114, at 5 (asserting that direct-mail solicitations upset tranquility of vulnerable, bereaved persons). For an account of one "scavenger lawyer's" contact with a family while coping with the father's job-related death, see T.L. Henion, *Victims' Families Strive to Cope*, OMAHA WORLD HERALD, Dec. 15, 1994, at 10 (observing that out-of-state lawyer telephoned victim's family shortly after explosion).

149. See The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar-Advertising Issues, 571 So. 2d 451, 467 (Fla. 1991) (discussing Rule 4.7-4(b)(6), which requires notice of advertisement); see also Public Citizen Brief, *supra* note 114, at 5 (discussing Florida Rule 4.7-4(b)(6), which provides guidelines for direct-mail material).

150. See The Florida Bar: Petition to Amend, 571 So. 2d at 467 (enacting Rule 4.7-4(b)(6), which requires clearly marked envelope and letter with word "advertisement" printed in red ink). This rule intends to give the recipient the choice of whether or not to read the letter. Public Citizen Brief, *supra* note 114, at 5.

151. See Public Citizen Brief, *supra* note 114, at 5-6 (observing Court's finding in several cases that those who do not want to be troubled by such advertisements can readily discard them unopened).

152. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (upholding regulation because of state's well-founded perception of potential for overreaching by lawyers during in-person solicitations).

153. *Id.* at 457.

solicits an unsophisticated, injured, or distressed lay person.”<sup>154</sup> Moreover, the Court found that people would be more likely to place their trust in a lawyer in response to face-to-face solicitation.<sup>155</sup> *Ohralik* concerned a face-to-face encounter, however, which, unlike the direct-mail solicitation at issue in *Went For It*, leaves the recipient little time to react to the services being offered.<sup>156</sup>

In *Bolger v. Youngs Drug Products Corp.*,<sup>157</sup> the Court struck down a regulation prohibiting the mailing of unsolicited contraceptive advertisements despite the government’s argument that recipients were likely to find the materials offensive.<sup>158</sup> In *Bolger*, the Court emphasized the value of disseminating truthful information to the public.<sup>159</sup> Moreover, the Court has consistently held that the right to use the mails for advertising purposes is protected by the First Amendment.<sup>160</sup> A truthful and non-deceptive letter, such as the advertisement at issue in *Went For It*, has never before been subject to the same level of scrutiny as in-person solicitation.<sup>161</sup> Therefore, *Went For It* represents a substantial departure from previous cases where direct-mail solicitation had been a protected medium for communication.

### 3. Central Hudson’s *third prong*

Under *Central Hudson*’s third prong, the Court in *Went For It* examined whether the means used to enforce the Florida Bar restriction on advertising were narrowly tailored to fit the goal of protecting accident victims from invasive conduct by lawyers.<sup>162</sup> The Court explained that the fit between the legislature’s ends and the

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154. *Id.* at 465.

155. *Id.*

156. *Id.* at 457 (concluding that person receiving face-to-face solicitation has little chance to reflect or consider options).

157. 463 U.S. 60 (1983).

158. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983) (finding that First Amendment protected mailing of contraceptive advertisements as free speech).

159. See *id.* at 74 (asserting that impeding truthful flow of information on contraception is constitutionally invalid). The Court in *Bolger* also observed that, in light of statistics showing that a high percentage of the adolescent female population in 1978 was sexually active, adolescent children have a pressing need for information on contraception. *Id.* at 74 n.30.

160. *Id.* at 76; see also *Went For It*, 115 S. Ct. at 2383 (Kennedy, J., dissenting) (illuminating Court’s protection of mail advertising by discussing *Bolger*); see also *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 476 (1988) (protecting attorney’s right to engage in direct-mail advertising).

161. See *Shapero*, 486 U.S. at 479 (distinguishing between permissible direct-mail solicitation and unconstitutional in-person solicitation).

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

means chosen to accomplish those ends need not be perfect, but must be reasonable.<sup>163</sup>

In finding that the means chosen to accomplish the restriction on solicitation were reasonable, the Court ignores the ban's failure to afford differing degrees of protection according to the severity of injury sustained by accident victims who receive direct mail from lawyers.<sup>164</sup> The ban applies to all recipients of direct-mail solicitation, regardless of whether the accident victim sustained a serious injury.<sup>165</sup> Prior Supreme Court opinions have only upheld restrictions on lawyer solicitation that were narrowly tailored to achieve the government's interest.<sup>166</sup> The Court has not upheld overly broad regulations.<sup>167</sup> For example, in *Central Hudson*, the Court struck down restrictions on advertising as too excessive in their limitation of commercial speech.<sup>168</sup> Some injuries cause very little pain or suffering to the accident victim. In situations where the victim sustains a minor injury, the state's interest in protecting the victim's privacy is not as substantial as in cases where the victim sustains a serious injury. This is because minor injuries do not tend to traumatize accident victims or their families to the extent of more serious injuries. Therefore the necessity for peace and tranquility following a less serious accident is not as strong. Thus, by enacting a blanket prohibition on all direct-mail advertising without regard to the severity of the injury, the reasonable fit requirement is not satisfied.<sup>169</sup>

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163. See *id.* (asserting that in *Board of Trustees v. Fox*, Court made clear that "least restrictive means" test has no role in commercial speech context). The Court also pointed out that the least restrictive means test is not equivalent to the rational basis test which would present the Florida Bar with a much smaller obstacle for its regulation to overcome. *Id.* (citing *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993)).

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

165. See *id.* at 2384-85 (Kennedy, J., dissenting) (observing that criminal law routinely distinguishes between degrees of bodily harm to argue that majority's decision to apply ban to all injuries based on difficulty of making this type of distinction is unjustified); UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL § 1B1.1, cmt., n. 1(b), (h), & (j) (Nov. 1994) (providing sentencing guidelines).

166. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (determining that restriction on direct-mail solicitation was more extensive than necessary to serve government's interest because state can regulate solicitation through less restrictive means).

167. See *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (striking down Florida Board of Accountancy's ban on in-person solicitation because "broad prophylactic rules in the area of free expression are suspect" (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))).

168. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 569-70 (1980). The Court determined that the New York Public Service Commission failed to demonstrate that a more limited restriction would not have adequately served the state's interests. *Id.* at 570.

169. See *Went For It*, 115 S. Ct. at 2385 (Kennedy, J., dissenting) (asserting that if delineation between degrees of bodily harm is workable in criminal law context, it should have been done with Florida Bar restriction).

C. *Florida's Ban on Direct Mail Is Underinclusive*

Neither party in *Went For It* raised the argument that the ban on solicitation is underinclusive and, therefore, violates the Fourteenth Amendment guarantee of equal protection.<sup>170</sup> The ban applies only to lawyers seeking to represent accident victims or the victims' families.<sup>171</sup> It does not prohibit insurance adjusters or defense lawyers from contacting accident victims at any time following an accident or disaster.<sup>172</sup> Moreover, insurance companies and defense lawyers are not restricted in their mode of communication and are free to make in-person visits and telephone calls.<sup>173</sup> The ban does little, therefore, to accomplish its goal of insulating accident victims and their families from potentially unwelcome intrusions.<sup>174</sup>

Florida's ban on direct-mail solicitations deprives victims of information concerning legal representation at the time they need it most: when defense attorneys and insurance companies are urging victims to settle or waive their claims.<sup>175</sup> Many accident victims will forego their opportunity to initiate a lawsuit or will accept settlements far below what their claim is worth because they lack information on whether they should file a lawsuit. As a result, large corporations and manufacturers will face fewer lawsuits from accident victims and pay less in legal damages. These companies will have less incentive to make safer products because the risk of multi-million dollar lawsuits is reduced.<sup>176</sup>

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170. See Public Citizen Brief, *supra* note 114, at 7 (advancing argument that because ban operates only against plaintiffs' lawyers seeking to represent accident victims and their families and not against defense lawyers, it is underinclusive). While the goal of protecting citizens during a time of deep personal trauma is commendable in the abstract, it is not advanced by the mailing ban. *Id.*

171. Public Citizen Brief, *supra* note 114, at 7.

172. Public Citizen Brief, *supra* note 114, at 7; see also *Went For It*, 115 S. Ct. at 2385 (Kennedy, J., dissenting) (noting that victims should be warned not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties).

173. Public Citizen Brief, *supra* note 114, at 7.

174. Public Citizen Brief, *supra* note 114, at 7.

175. Public Citizen Brief, *supra* note 114, at 7; see, e.g., John Saunders & Jack Kresnak, *Putting a Price Tag on Life: Insurers Talk with Crash Victims Families*, DETROIT FREE PRESS, Mar. 7, 1987, at 1A (discussing tactics used by insurance companies to settle claims with victims' families in aftermath of tragic disasters); John Spelich, *Air Disasters Pit Insurers Against Lawyers*, DETROIT FREE PRESS, Aug. 18, 1987, at 12B (observing that immediately after Pan Am airline crash, representatives of Pan Am's insurance company began contacting victim's families to settle claims).

176. See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 8-9 (1982) (discussing deterrent effect of punitive damages on manufacturers and large corporations); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 43 (1983) (observing that punitive damages in mass tort litigation provide incentives for companies to design safer products).

*D. Effect of Florida Bar v. Went For It, Inc.*

Since the Court's opinion in *Went For It*, lower courts have had more freedom to uphold restrictions on not only legal advertising, but on other types of commercial speech. This Term, the Court will determine whether a Rhode Island law prohibiting off-premises liquor price advertising is constitutional.<sup>177</sup> In the legal arena, the Fifth Circuit recently upheld an almost identical Texas law that creates a thirty-day ban on direct-mail solicitation of accident victims.<sup>178</sup> In South Carolina, the State Supreme Court relied on *Went For It* to uphold a statute that prohibits the release of motor vehicle reports for commercial solicitation purposes.<sup>179</sup>

IV. ADDITIONAL CONSIDERATIONS AND RECOMMENDATIONS

In recent years, the public has criticized personal injury lawyers for their assertive efforts to represent accident victims. The practice of "ambulance chasers," who aggressively seek out potential clients in the wake of fires, collisions, and other disasters, has been particularly scrutinized.<sup>180</sup> In response to these practices, bar associations have conducted public information campaigns and have even sent their own teams of lawyers to sites of major disasters to provide objective information to victims.<sup>181</sup> Other states have imposed significant restrictions on lawyer solicitation of accident victims.<sup>182</sup> Although bar associations may have good intentions behind the solicitation regulations, the courts must weigh the regulations against the guarantees of the First Amendment.

*A. Benefits of Attorney Advertising*

In *Bates v. State Bar of Arizona*, Justice Powell predicted that establishing First Amendment protection for lawyers would "effect profound changes in the practice of law."<sup>183</sup> These changes have

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177. 44 Liquormart, Inc. v. Rhode Island, 115 S. Ct. 1821 (1995) (granting certiorari).

178. Moore v. Morales, 63 F.3d 358, 363 (5th Cir. 1995).

179. Walker v. South Carolina Dep't of Highways & Public Transp., 466 S.E.2d 346, 348 (S.C. 1996).

180. See Richardson, *supra* note 1, at 38 (recounting public criticism of quick arrival of plaintiffs' lawyers after recent airplane crashes as overt and inappropriate solicitation).

181. See Richardson, *supra* note 1, at 38 (acknowledging that bar associations have sought to provide objective information to accident victims after major accidents and disasters).

182. See Richardson, *supra* note 1, at 38.

183. Bates v. State Bar of Ariz., 433 U.S. 350, 389 (1977) (Powell, J., concurring in part and dissenting in part) (asserting that decision will weaken power of courts over members of bar).



improved our justice system by increasing access to the legal system.<sup>184</sup> Before *Bates*, middle-class citizens were often excluded from the legal system because they were not poor enough to have counsel appointed yet were too poor to afford high legal costs.<sup>185</sup> *Bates* enabled attorneys to contact this segment of the population to offer basic legal services for routine matters, such as drafting wills and handling divorces.<sup>186</sup> Permitting attorney advertising has contributed to a more competitive marketplace for legal services. Increased competitiveness can lower costs for legal services, and therefore provide greater access to the justice system.<sup>187</sup>

Advertising also enables consumers to discover the available legal options. As the Supreme Court recently noted, "[A] principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems."<sup>188</sup> Banning direct-mail solicitation hurts those who most need legal representation: people with injuries and victims who do not know that an attorney would be interested in their claim.<sup>189</sup> Moreover, a thirty-day ban disadvantages victims who are not aware that time is of the essence in gathering evidence and investigating the cause of injury.<sup>190</sup>

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184. See Brief of Hyatt Legal Services as Amicus Curiae in Support of Respondents at 2, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (No. 94-226) [hereinafter *Hyatt Legal Services Brief*] (arguing that *Bates* decision, which permits attorneys to advertise to large portion of nation's population, has improved access to legal system for Americans).

185. *Id.*

186. *Id.*; see also *Bates*, 433 U.S. at 372 (commenting that routine legal services such as uncontested divorce, personal bankruptcy, and adoption lend themselves to advertising).

187. *Hyatt Legal Services Brief*, *supra* note 184, at 2. See generally 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, 1107-09 (1983) (suggesting that increase in attorney advertising should lead to decrease in price of "standardized" legal services).

188. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 n.18 (1990); see also FEDERAL TRADE COMMISSION, STAFF REPORT ON IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS OF TRUTHFUL ADVERTISING 126-27 (1984) (concluding that empirical data in study establishes strong evidence for relaxing restrictions on truthful, non-deceptive advertising prices).

189. *Went For It*, 115 S. Ct. at 2385 (Kennedy, J., dissenting). The telephone book and general advertisements may provide information for accident victims who need to obtain a lawyer, but the effect of the ban on direct-mail solicitation will fall on those who most need legal representation—for those with minor injuries, the victims too ill-informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill-informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations. *Id.*

190. *Id.* (explaining that, where serious injuries are sustained by accident victims, it is crucial to quickly assemble evidence and not to engage in evidentiary discussions with investigators for opposing parties).

*B. Lawyers Should Be Treated Like Other Professionals*

It is apparent from the decision in *Went For It* that the Court now intends to hold lawyers to a higher standard than other professionals in the advertising arena. In *Ibanez v. Florida Department of Business & Professional Regulation*<sup>191</sup> and *Edenfield*, the two commercial speech cases preceding *Went For It*, the Court rigorously applied the *Central Hudson* test in striking down restrictions on speech.<sup>192</sup> In both *Ibanez* and *Edenfield*, the Court emphasized the constitutional value of commercial speech and the heavy burden on the government to satisfy the *Central Hudson* test.<sup>193</sup> In *Went For It*, however, the Court circumscribes the constitutional value of commercial speech by reducing the First Amendment protection afforded to legal advertising.

While the Court has employed the *Central Hudson* test in all commercial speech cases since 1980, in *Went For It*, the Court applied the test less rigorously than it has before. To satisfy the second prong of the *Central Hudson* test, the state must show that the restriction seeks to eliminate real dangers and advances the state's interest in a "direct and material way."<sup>194</sup> But in *Went For It*, the Court allowed Florida to satisfy this burden with insufficient evidence—an unpublished study prepared by the Bar, which merely reflected the opinions of 200 select people on attorney advertising.<sup>195</sup> The Florida Bar failed to demonstrate that the ban would adequately protect the privacy of accident victims or improve the reputation of the legal profession.<sup>196</sup> In *Shapero*, *Ibanez*, and *Edenfield*, the Court correctly

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191. 114 S. Ct. 2084 (1994). In *Ibanez*, the Florida Board of Accountancy reprimanded an attorney for advertising that she was a Certified Public Accountant and an authorized member of the Certified Financial Board of Standards. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2086 (1994). The Court overturned the Board's decision censuring *Ibanez*, as a violation of First Amendment commercial speech protection. *Id.* at 2092.

192. *See id.* at 2088 (stating that state can restrict commercial speech only if state demonstrates that restriction serves substantial state interest and restriction is no more extensive than necessary); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (stating that regulation must advance substantial state interest and be reasonably proportional to that interest); *see also* Media Institute Brief, *supra* note 96, at 8 (commenting that in past two years, Court has strictly applied *Central Hudson* test in cases involving advertising by professionals). Neither *Ibanez* or *Edenfield* are cited in Petitioner's Brief.

193. *See Ibanez*, 114 S. Ct. at 2089 (recognizing that state's burden in justifying restriction on speech is not slight).

194. *Went For It*, 115 S. Ct. at 2383-84 (Kennedy, J., dissenting) (citing *Edenfield*, 507 U.S. at 770).

195. *See id.* at 2384 (Kennedy, J., dissenting) (asserting that Bar's study is based on pages of self-serving statements by state). The state needs to offer more evidence when regulating truthful and non-deceptive speech. *Id.*

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

concluded that the State did not meet its burden under *Central Hudson*. By upholding Florida's restriction, the Court diminishes the *Central Hudson* standard, and gives states more latitude in regulating commercial speech.

States have a legitimate interest in regulating commercial speech that is misleading and deceptive.<sup>197</sup> The right to advertise is not absolute and states should use their regulatory powers to protect consumers from non-truthful advertisements.<sup>198</sup> States also have a strong interest in maintaining the privacy and tranquility of their citizens.<sup>199</sup> When lawyers seek to invade the privacy of accident victims through in-person solicitation, as in *Ohralik*, states have appropriately regulated this behavior. In *Went For It*, however, a clearly marked advertisement provided information to accident victims about the availability of legal services. Informative advertisements do not merit the same regulation as in-person solicitation.

The dissemination of truthful information is constitutionally protected commercial speech.<sup>200</sup> "[U]nder the First Amendment, the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence."<sup>201</sup> The Court should not permit states to predetermine the information that is available.<sup>202</sup>

Perhaps lawyers should be held to a higher standard than other professionals because lawyers are officers of the court and have a duty not only to their clients, but to the public.<sup>203</sup> Unlike many other professions, a specific code of conduct prescribes a lawyer's actions.<sup>204</sup> Lawyers may have a greater responsibility than other

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197. Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 471 (1991) (stating that commercial speech is second-order category of speech that states have strong interest in regulating so that when false and misleading aspects are removed, this speech will be less likely to pose harm).

198. See Natalie Abrams, Note, *The Sham Exception to the Noerr-Pennington Doctrine: A Commercial Speech Exception*, 49 BROOK. L. REV. 573, 588 (1988) (discussing early lawyer solicitation cases and stating that First Amendment protection is limited to protecting truthful commercial speech).

199. Carolyn Doozan Cowan, *Frisby v. Schultz: Where Do the Picketers Go Now? 'We'll Just Have to Wait and See'*, 11 GEO. MASON U. L. REV. 227, 231 (1989) (explaining that individual states are charged with obligation to protect citizen's right to be let alone).

200. Abrams, *supra* note 198, at 588.

201. *Went For It*, 115 S. Ct. at 2386 (Kennedy, J., dissenting).

202. *Id.*

203. See Media Institute Brief, *supra* note 96, at 22 (detailing petitioner's claim that states have special interest in advertising by lawyers because of their "public function" and that lawyers relinquish their right to commercial speech in exchange for privilege of serving judicial system).

204. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) (providing ethical standards for attorneys and describing specific code of conduct).

professionals because their work is essential to the fair administration of justice.<sup>205</sup>

It is ironic that in *Went For It*, the Florida Bar suppressed information about the legal system to improve the public image of lawyers. This logic is counterintuitive. To promote the legal system, or any service, consumers should be given more information, not less. When states restrict the amount of information given to consumers, options become more limited. Ultimately, this will make the marketplace less competitive because fewer attorneys will be permitted to compete for the market of legal service consumers. Under the Florida Bar rule, accident victims and their families are potentially at a disadvantage because a large segment of the legal profession cannot contact them for thirty days.

### C. Recommendations

Florida has a number of alternatives that would better achieve its goal in a manner more consistent with the *Central Hudson* test. One option would be to allow accident victims a reasonable period of time to void an attorney agreement solicited shortly after an accident.<sup>206</sup> This option would advance Florida's interest in assuring that vulnerable accident victims, whose judgment might be impaired, are not exploited. It would also give accident victims time to explore the options available to them before retaining counsel. Further, replacing a thirty-day ban on solicitation with a provision allowing the client to void the agreement would serve both parties' interests. This alternative would allow a victim's attorney to conduct a prompt investigation of the accident and preserve any crucial evidence. In many instances, an immediate inspection of the accident scene will enhance claims that are later filed by accident victims.<sup>207</sup>

Another alternative is to limit the ban to potential wrongful death claimants.<sup>208</sup> To fully protect victims and their families, however, a more limited ban on direct mail should apply to defense lawyers, insurance adjusters, and agents, not only to attorneys seeking to

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205. See Richardson, *supra* note 1, at 38 (observing that Florida Bar suggested that lawyers are different from other professionals because their work is essential to fair administration of justice).

206. See Public Citizen Brief, *supra* note 114, at 9 (suggesting that voidable agreement would serve as viable alternative to existing 30-day ban on solicitation).

207. See *Went For It*, 115 S. Ct. at 2381 (Kennedy, J., dissenting) (maintaining that it is often necessary to investigate accident immediately to identify witnesses and preserve evidence).

208. See Public Citizen Brief, *supra* note 114, at 10 (arguing for narrow application of ban to preclude solicitation only in wrongful death cases, thereby remedying ban's unjustifiably broad sweep).

represent accident victims.<sup>209</sup> Limiting the restriction to wrongful death cases would protect the most vulnerable victims and families—those who are most likely to suffer emotional trauma after an accident. Victims whose injuries are less serious do not warrant special protection by the state from direct-mail solicitation. Unlike the ban at issue, this alternative ban would more directly serve Florida's intended goal of protecting the privacy interests of its citizens.

The Florida Bar should consider investing more resources to educate the public about access to the legal system. The Bar could set up training sessions or send literature to people describing legal options available to them in certain situations. Broadcasting public service advertisements on radio and television is another way to reach a large segment of the population. A well apprised citizenry can make informed decisions. This will improve the efficiency of the justice system and enhance the reputation of the legal profession.

#### CONCLUSION

The recent decision in *Florida Bar v. Went For It, Inc.* indicates that the Supreme Court is more willing to exact a higher level of scrutiny on legal advertising than on other forms of commercial speech. Most states now have some form of restriction on lawyer solicitation. *Went For It* will give state and local bar associations more leverage to regulate legal advertising. Before using this authority to implement more restrictions, states should consider whether the regulation really protects the privacy of accident victims and their families.

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209. A state bar association, however, does not have the authority to regulate insurance companies. Therefore, the body that governs insurance companies must regulate independently insurance agents who negotiate with accident victims.

