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Florida Bar v. Went For It, Inc.: Restricting Attorney Advertising to Preserve the Image of the Legal Profession

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Florida Bar v. Went For It, Inc.: Restricting Attorney Advertising to Preserve the Image of the Legal Profession

I. INTRODUCTION

Judicial regulation of the [legal] profession is essential to both the courts and the profession. Professional responsibility is equally essential. Lawyers should never forget that they are members of a profession, not a business. Lawyers' primary responsibility is to serve the client, the justice system and the public.

Attorney advertising has traditionally been a heated topic in the area of professional responsibility. Lawyers were first granted the right to advertise nearly two decades ago. Since that time, states have attempted to ascertain their constitutional role in the regulation of attorney advertising. Until Florida Bar v. Went For It, Inc., the Supreme Court had rejected the vast majority of attempted state regulations. In Went For It, however, the Court upheld a regulation requiring attorneys to wait thirty days before sending targeted, direct-mail solicitations to victims of an accident.

1. CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 9 (1992) [hereinafter CENTER FOR PROFESSIONAL RESPONSIBILITY].

2. COMMISSION ON ADVERTISING, AMERICAN BAR ASS'N, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 1 (1995) [hereinafter CROSSROADS] (discussing how attorney advertising has set off an "unabated and unresolved" debate within the legal field).


6. See, e.g., Shapero, 486 U.S. at 473-74 (holding that an outright ban on truthful, non-deceptive mailings is unconstitutional); Zauderer, 471 U.S. at 647 (holding that truthful advertising in a newspaper cannot be suppressed through regulation that does not directly advance a substantial state interest).

7. Went For It, 115 S. Ct. at 2381. A targeted, direct-mail solicitation is "a mailing sent by a lawyer to a person with a specific legal problem, which mentions or discusses that problem. The mailing usually advises the recipient of her legal rights, and suggests that she contact the sender . . . to discuss representation." Debra Antzis, Professionalism, the First Amendment and Targeted Direct Mailing by Attorneys: Shapero v.
In the twenty years preceding *Went For It*, the Supreme Court had the opportunity to review a number of cases addressing the limits of attorney advertising.\(^8\) During these years, the Court indicated a willingness to expand the sphere of constitutionally protected speech in the areas of attorney advertising,\(^9\) and states continued to "push the envelope" in testing these parameters.\(^10\) However, the Court repeatedly struck down state regulations, holding that they violated an attorney's right to free commercial speech under the First Amendment.\(^11\) Until *Went For It*, no state proffered a substantial interest, nor devised a regulation sufficiently related to such an interest, that justified encroaching upon attorneys' First Amendment rights.\(^12\) In *Went For It*, the Court found a significant state interest—protecting the image of the legal profession—and an acceptable regulation—a thirty-day moratorium on targeted, direct-mail solicitation.\(^13\)

This Note examines the origin and development of the commercial speech doctrine under the First Amendment.\(^14\) Next, this Note discusses the extension of commercial speech protections to attorney advertising,\(^15\) and the Court's attempts to define the limits of that protection.\(^16\) Subsequently, this Note discusses the facts of *Went For It* and the opinions of the lower courts and the United States Supreme Court.\(^17\) This Note then analyzes the *Went For It* decision, illustrating the consistency of this opinion with past precedent.\(^18\) Next, this Note

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8. For a discussion of the development of law in this area, see infra part II.


10. See, e.g., The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451, 452 (Fla. 1991) (imposing restrictions on advertising for members of the Florida Bar). See infra part II.B.

11. See infra part II.A.1 for a discussion of the commercial speech doctrine.

12. See infra part II.

13. *Went For It*, 115 S. Ct. at 2381. The Bar asserted that protecting the privacy and tranquility of accident victims would help protect the image of the legal profession. Id. For an example of the Court's approval of use of a state's power to regulate speech in the interest of protecting the privacy of its citizens, see *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (holding that the state's interest in protecting the privacy of a doctor's personal residence justified the prohibition of abortion picketers outside his home). This Note will focus on the asserted state interest of protecting the legal profession.

14. See infra part II.A.

15. See infra part II.B.1.

16. See infra part II.B.2.

17. See infra part III.

18. See infra part IV.
II. BACKGROUND

A. The First Amendment: Protecting Certain Classes of Speech

On its face, the First Amendment to the United States Constitution appears to be straightforward and explicit. It states:

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

Despite the facial simplicity of the First Amendment, courts recognize that the First Amendment does not confer upon Americans the unequivocal right to say anything they want. Rather, courts have interpreted the Constitution to protect only certain classes of speech.

The division of speech into classifications, some protected and some not, is rooted more in the social structure of early American history than in formal legislation. When the founding fathers first drafted the Bill of Rights, its freedoms theoretically applied to all citizens. Realistically, however, the protections of the Bill of Rights were primarily enjoyed by the white male establishment. In the years following the adoption of the First Amendment, for example, Congress

19. See infra part V.
20. See infra part VI.
22. Konigsberg v. State Bar, 366 U.S. 36, 49-50 (1961) ("[W]e reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes' . . . . [T]his Court has consistently recognized . . . ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk.") (citations omitted).
23. GERALD GUNTHER, CONSTITUTIONAL LAW 994 (12th ed. 1991). For example, the Court has consistently protected political speech because of its role in the process of self government. See infra note 34 and accompanying text. The Court, however, has historically been reluctant to afford protection to speech that has little social utility, such as provocative or offensive speech. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1944) (establishing that the public's interest in order supersedes an individual's right to engage in "fighting words").
25. Id. at 42.
26. Id. at 40.
enacted legislation to protect the status quo by forbidding certain groups from speaking out against "the establishment." 27

The question of the constitutionality of speech classifications did not reach the Supreme Court until 1919. 28 In Schenck v. United States, 29 a unanimous Court upheld a man's conviction for distributing pamphlets urging men to resist the military draft. 30 The Court reasoned that the defendant's actions presented a "clear and present danger" to the public and the government. 31 The Schenck decision set the stage for the Court to uphold restrictions on "harmful" speech, including some advertisements, in subsequent cases. 32

1. The Commercial Speech Doctrine:
Constitutional Protection of Advertising

Early First Amendment scholars argued that advertising possessed little social value. 33 Scholars determined that advertising, unlike political speech, which was perceived as informative in nature, performed no function "essential to the process of self government." 34 Scholars

27. Id. Slaves and aliens were the targets of these first restrictions on speech. Id. For example, the slave code forbade black preachers from preaching without the presence of a white man, and the Alien and Sedition Acts were widely used to prevent aliens from publicly speaking. Id. at 41, 43.


29. Id.

30. Id. at 52. In Schenck, the circuit court convicted the general secretary of the Socialist Party of violating the Espionage Act. Id. at 49. The Espionage Acts were originally passed primarily to prevent the transmission of military secrets to enemies of the United States. TEDFORD, supra note 24, at 69. However, the Acts were widely used to suppress any anti-war speech. Id. The May 16, 1918 amendment to the Act stated in relevant part:

[W]hoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States ... or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies ... shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both ... Id. at 70-71 (quoting the Espionage Act of 1917, 40 Stat. 557 (1918) (repealed by 50 U.S.C. § 205 (1954))). The defendant argued that the Act violated his First Amendment rights. Schenck, 249 U.S. at 49.

31. Schenck, 249 U.S. at 52.

32. TEDFORD, supra note 24, at 234. The author argues that deceptive advertising throughout history caused a deep mistrust of commercial advertising. Id.

33. Id. An early First Amendment scholar, Alexander Meiklejohn, postulated that "the constitutional status of a merchant advertising his wares,' or of a 'paid lobbyist fighting for the advantage of his client is utterly different from that of a citizen who is planning for the general welfare."' Id. at 236 (quoting ALEXANDER MEIKLEJOHN, Free Speech and Its Relation to Self-Government, in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 37 (1965)).

34. Id. at 234; see also New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)
and courts viewed advertising as a type of speech that was calculated to enable the speaker to earn money. The Supreme Court dubbed such discourse "commercial speech."

The Court first addressed the constitutionality of state restrictions on commercial speech in Valentine v. Chrestensen. In Valentine, a unanimous Court refused to recognize any constitutional protection for commercial speech. The Court stated that "the Constitution imposes no such restraint on government as respects purely commercial advertising." The Court, however, declined to elaborate on the factors distinguishing purely commercial speech from speech that the First Amendment did protect. Although the advertisement at issue contained both political and commercial information, because of the specific facts of the case, the Court declined to address whether the political portion of such communications was entitled to any First Amendment protections.

(holding that political advertisements were protected under the First Amendment because they "communicated information, expressed opinion, recited grievances, protested claimed abuses ... on behalf of a movement whose existence and objectives are matters of the highest public interest and concern").


36. Id.

37. 316 U.S. 52 (1942).

38. Id. at 54-55. At issue was the New York City Sanitary Code, which forbade the distribution of "commercial and business advertising matter." Id. at 53. The respondent, a Florida businessman seeking to advertise his traveling business, printed a two-sided handbill. Id. He owned a decommissioned United States Navy submarine, which he exhibited in various cities. Id. at 52. The handbill solicited visitors to his exhibit. Id. at 53. On one side was a solicitation for business; on the reverse was a political protest. Id. Valentine was protesting the city's recent refusal to allow him to dock at a nearby wharf. Id.

39. Id. at 54. The Supreme Court opined that distribution of the political protest alone would be protected under the Constitution, reasoning that the Constitution protected speech that "communicat[ed] information and disseminat[ed] opinion." Id.

The Court stated:

This court [sic] has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege for the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares.

40. Id.

41. Id. at 54. The Court determined that Valentine intentionally printed the political protest as a deliberate attempt to evade the statute, and on that ground affirmed his conviction. Id. at 55.
In the thirty years that followed, Valentine proved invincible. Not until 1975 did the Court indicate a willingness to reconsider constitutional protection for commercial speech. In Bigelow v. Virginia, the Supreme Court for the first time held that commercial speech did in fact enjoy some First Amendment protections. The Bigelow Court overturned a state law forbidding the publication of materials that encouraged women to have abortions, holding that the statute infringed on constitutionally protected expression. The Court rejected the lower courts' reliance on Valentine, finding that case to be distinguishable. The Court emphasized that while the advertisement at issue in Valentine contained noncommercial information, the sole purpose for issuing the leaflet was for pecuniary gain. In contrast, the Bigelow advertisement "did more than simply propose a commercial transaction." The Bigelow advertisement conveyed information of public interest to seekers of that knowledge. The Court found that the First Amendment protected such communication.

42. LOUISE L. HILL, LAWYER ADVERTISING 24-28 (1993) (explaining that the Valentine holding effectively precluded any successful argument for First Amendment protection for commercial speech for 30 years).


44. Id. at 822. "The fact that the particular advertisement . . . had commercial aspects . . . did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or 'solicitation,' . . . or because . . . the motive of the advertiser may have involved financial gain." Id. at 818 (citations omitted).

45. Id. at 829. A Virginia statute forbade the publication of any material encouraging abortions. The statute read: "'If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.'" Id. at 812-13 (quoting Va. Code Ann. § 18.1-63 (Michie 1960)).

In Bigelow, the circuit court convicted the managing editor of a Virginia newspaper of a misdemeanor for publishing an advertisement for a women's health services organization which provided legal abortions. Id. at 814. The editor appealed the circuit court decision, arguing that the advertisement was informational and did not encourage or prompt abortions, in violation of the statute. Id.

46. Id. at 819-21 (stating that the Valentine holding is limited to the manner in which commercial advertisements could be distributed).

47. Id. at 819.

48. Id. at 822.

49. Id. The Court was specifically referring to a portion of the advertisement announcing: "Abortions are now legal in New York. There are no residency requirements." Id.

50. Id. at 822. The Court stated that the advertisement in Bigelow "involve[d] the exercise of the freedom of communicating information and disseminating opinion." Id. This classification of speech is exactly the kind defined by the Valentine Court as being protected by the First Amendment. See supra note 39 and accompanying text.
The Bigelow Court held that speech does not necessarily lose First Amendment protection merely because it is in the form of a commercial advertisement. The Court made it clear that commercial speech that is informative in nature warrants First Amendment protection. The Court did not specify, however, the precise scope of this protection.

Within one year, the Court clarified and expanded its holding in Bigelow. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court again held that the First Amendment affords some protection to commercial speech. The Court also found, however, that commercial speech was protected even where the advertiser’s interest was solely pecuniary. Thus, Virginia Pharmacy marked the first time the Court acknowledged significant constitutional protection for commercial speech.

The Court, recognizing the limited application of Bigelow, framed the issue before it as whether the First Amendment protected commercial speech that, unlike in Bigelow, contained no information pertain-
In deciding this issue, the Court rejected the commercial speech analysis in *Valentine*,\(^5\) holding that a state cannot completely suppress the dissemination of truthful material concerning lawful activities, despite its purely commercial nature.\(^6\) The Court emphasized the rights of state citizens to receive such information.\(^6\) The Court stated that the public interest in having an "intelligent and well informed consumer" renders commercial advertising "indispensable."\(^6\)

2. The *Central Hudson* decision: Establishing Guidelines for Evaluating Commercial Speech

While the Court found that the First Amendment protected commercial speech, the Court determined in subsequent cases that such speech was not entitled to the higher levels of protection given other forms of speech, such as communications that involve political or public policy issues.\(^6\) The Court found that although state laws inhibiting the latter would be examined with the highest scrutiny, those restricting commercial speech would be considered under the intermediate scrutiny standard.\(^6\)

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court articulated a four-pronged test to implement this intermediate standard:\(^6\)

1. states may freely regulate any material that is misleading, deceptive, or that relates to illegal activity; (2) states

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58. *Id.* at 760-61 (stating that "the question whether there is a First Amendment exception for 'commercial speech' is squarely before us"). According to the Court, pharmacists simply wished to communicate, and consumers wished to hear, the following message: "I will sell you the X prescription drug at the Y price." *Id.* at 761.

59. See *supra* notes 37-41 and accompanying text for a discussion of the *Valentine* decision.


61. *Id.* at 756-57. The Court explained that freedom of speech protection is afforded to the recipients of the communication as well as the speaker and the source. *Id.*

62. *Id.* at 765.

63. *See* Central Hudson Gas and Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 563 (1980) (determining that intermediate scrutiny was appropriate because "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-63 (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978))).

64. *Id.*

65. *Id.* at 566. The *Central Hudson* test is sometimes referred to as a three-pronged test. Courts that construe *Central Hudson* to have only three prongs generally do not address the first prong unless the accuracy or legality of the material is an issue in the case. *See*, e.g., Florida State Bar v. Went For It, Inc., 115 S. Ct. 2371, 2376 (1995). *See infra* note 159 for a discussion of the *Went For It* Court's interpretation of *Central Hudson*. 
seeking to regulate commercial speech must assert a substantial state interest; (3) restrictions on commercial speech must directly advance the asserted state interest; and (4) the regulation may not be more extensive than necessary to serve that interest.66

In 1985, the Court had the opportunity to apply Central Hudson in Bolger v. Young Drug Products Corp.67 At issue in Bolger was whether a state could constitutionally prohibit an advertiser from mailing potentially offensive materials.68 The Court, holding that a state could not prohibit such advertising, noted that unlike other forms of advertising, offensive material received in the mail could easily be disposed of by the recipient.69

B. Extension of First Amendment Protection to Attorney Advertising

1. Attorney Advertising Cases Before Central Hudson

In 1977, three years before the Court decided Central Hudson, the Court first extended the scope of First Amendment protection to the legal profession.70 The early commercial speech cases concerning

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66. Central Hudson, 447 U.S. at 566. Under Central Hudson, a state could fail the last prong if another manner of regulating existed that was less restrictive. Id. at 564. This "least restrictive means" test was later broadened. Board of Trustees v. Fox, 492 U.S. 469, 469-71 (1989) (upholding a state university policy that prohibited private commercial enterprises from operating in the university's facilities and expanding the test articulated in Central Hudson). Id. Because there almost always exists some conceivable means that is less restrictive, the Court held that a reasonably fit test was more appropriate. Id. at 477.


68. Id. at 62. In Bolger, a contraceptive manufacturer undertook a marketing effort that involved mailing the public various unsolicited materials about the contraceptives. Id. The federal government subsequently prosecuted Bolger for violating a federal law prohibiting such mailings. Id. at 61. Bolger challenged the law as violating his right to free speech. Id. at 63. Cognizant of the Central Hudson requirements, the government argued that it had a substantial interest in the law for two reasons: (1) it had an interest in protecting recipients from offensive material, and (2) it had an interest in helping parents regulate the manner in which their children learn about sensitive and important subjects such as contraceptives. Id. at 71.

69. Id. at 72. The Court rejected both asserted government interests. Id. Disposal of offensive advertisements "[was] an acceptable burden, at least so far as the Constitution [was] concerned," to place upon the recipient. Id. (quoting 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)). Concerning parental regulation of children's knowledge about contraception, the Bolger Court stated that parents already possessed the ability to regulate such knowledge because they have control over the mail they receive. Id. at 73. Thus, the minute protection offered by banning all contraceptive advertisements did not materially advance the asserted interest, and, therefore, the regulation failed under the second prong of Central Hudson. Id.

attorney advertising illustrate how the Court struggled with applying existing case law to differing fact patterns.\textsuperscript{71}

The Supreme Court, in initially granting commercial speech constitutional protection, made a material qualification.\textsuperscript{72} In a footnote to \textit{Virginia Pharmacy}, the Court alluded to the legal profession as a distinct profession where advertising would remain inappropriate.\textsuperscript{73} In response to this footnote, the American Bar Association ("ABA") amended Disciplinary Rule ("DR") 2-101(B) to prohibit attorney advertising.\textsuperscript{74} Following the lead of the ABA, the State of Arizona incorporated DR 2-101(B) into its state supreme court rules.\textsuperscript{75} In \textit{Bates v. State Bar}, however, the Supreme Court held that the Arizona regulation was impermissible, reasoning that attorney advertising, as a form of commercial speech, deserved First Amendment protection.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{72} \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748, 773 n.25 (1976).
\item \textsuperscript{73} \textit{Id.} at 773 n.25. For the text of this footnote, see \textit{supra} note 57.
\item \textsuperscript{74} \textit{See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976)}.
\item \textsuperscript{75} \textit{Bates}, 433 U.S. at 355. Arizona adopted DR 2-101(B) as Rule 29(a) of the Supreme Court of Arizona. The disciplinary rule provided:

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

\textit{Id.} (citing ARIZ. REV. STAT. ANN. § 17(A) (Supp. 1976)).
\item \textsuperscript{76} \textit{Id.} at 350. "Advertising, though entirely commercial, may often carry information of import to significant issues of the day." \textit{Id.} at 364 (citing \textit{Bigelow v. Virginia}, 421 U.S. 809, 826 (1975)).

In \textit{Bates}, two attorneys opened a legal clinic with the intent of providing legal services at reasonable fees to middle class citizens who did not qualify for legal aid, yet still needed legal representation. \textit{Id.} at 354. The clinic handled only "routine matters," such as uncontested divorces and adoptions, simple personal bankruptcies, and name changes. \textit{Id.} Because their fees were to be lower, the attorneys felt the need to advertise to obtain a certain volume of business. \textit{Id.} Consequently, they placed an advertisement in an Arizona newspaper, knowingly violating the Arizona statute. \textit{Id.} The Arizona disciplinary board sanctioned both after the president of the State Bar Association filed a complaint. \textit{Id.} at 355-56.

Arguing violations of the First Amendment, the attorneys appealed to the Supreme Court of Arizona. \textit{Id.} at 356. Specifically, the attorneys contended that their advertisement was indistinguishable from the one in \textit{Virginia Pharmacy} because both advertised for the prices of routine services. \textit{Id.} at 354, 358.
\end{itemize}
Applying *Virginia Pharmacy* to *Bates,* the Court held that a state could not prohibit truthful newspaper advertisements that disseminated the prices of routine legal services. The Court reiterated the interest of the consumer in the free flow of information, a point the Court had similarly emphasized in *Virginia Pharmacy.* The Court then balanced this interest against the State's multiple justifications for the advertising ban. The Court concluded that no proffered justification, including concern for the adverse effects on the profession, warranted a complete ban on attorney advertising. The Court rejected the argument that advertising would erode the legal profession, because the public knows that lawyers make a living off of their profession. Thus, the Court in *Bates* brought attorney advertising into the realm of protected commercial speech.

Once the Court established that the First Amendment also protected attorney advertising, the debate shifted to how that advertising could be regulated by states. Because the *Bates* Court narrowed the issue, the states had the opportunity to promulgate regulations on attorney advertising that would test the constitutional limits on the regulation of attorney advertising.

State regulation evolved in response to the ABA's amendment modifying the Model Rules of Professional Conduct ("MRPC"),

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77. The Supreme Court conducted an extensive review of the *Virginia Pharmacy* case and stated that it had reserved judgment on the constitutional issue of attorney advertising in *Virginia Pharmacy* because of the differences between the legal and pharmaceutical professions. *Id.* at 363-66.

78. *Id.* at 384. The Court explicitly reserved judgment on the issue of in-person solicitation of accident victims for a future date. *Id.* at 366 (declining to address the issue of "in-person solicitation of clients at the hospital room or the accident site, or in any other situation that breeds undue influence by attorneys or their agents").

79. *Id.* at 364. "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue . . . . [C]ommercial speech serves to inform the public of the availability, nature and prices of products, and services . . . ." *Id.* (citations omitted).

80. *Id.* The state offered six reasons for the restriction of price advertising: (1) the adverse effect on professionalism; (2) the inherently misleading nature of attorney advertising; (3) the adverse effect on the administration of justice; (4) the undesirable economic effects of advertising; (5) the adverse effect of advertising on the quality of services; and (6) the difficulties of enforcement. *Id.* at 368-79. See *id.* for an in-depth discussion of each proffered reason.

81. *Id.* at 379.

82. *Id.* at 368. The Court advised that a client will not lose confidence and trust in his attorney by learning that the attorney is motivated by financial concerns. *Id.* at 368-69.

83. HILL, *supra* note 42, at 59 (relying on David W. Parr, Note, *Direct-Mail Solicitation By Attorneys: Bates to R.M.J.,* 33 SYRACUSE L. REV. 1041, 1051 (1982)).

84. *Bates,* 433 U.S. at 359-60 n.11 (explaining that the Court never intended to diminish the authority of the state to regulate anti-competitive conduct).
which were changed to permit attorney advertising, keeping in line with Bates. Nearly two thirds of the states followed the ABA's lead and created rules regulating the professional conduct of attorneys based upon the MRPC. Although the MRPC served as a guideline, numerous jurisdictions adapted their rules to reflect individual toleration for various types of advertising. States placed responsibility for ensuring the professional conduct of attorneys in the hands of state disciplinary committees. States gave these committees the power to bring charges against violating members. The first state regulations to reach the Supreme Court prohibited in-person solicitation, an issue the Court had previously declined to address.

In 1978, the Court heard two cases challenging state rules prohibiting in-person solicitations by attorneys. The Court overturned the regulation in one case, and upheld a similar regulation in the other. First, in In re Primus, the Court granted complete First Amendment protection to an American Civil Liberties Union ("ACLU") attorney who personally solicited clients whose constitutional rights she believed may have been violated. The Court found that the attorney

85. HILL, supra note 42, at 90.
86. Id.
87. Id.
88. CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 1, at 2. Thirteen states expressly provide for judicial regulation of attorneys in their state constitutions. Id. The remainder of the states have created this authority judicially. Id.
89. Id. at xvii (stating that "[disciplinary agencies] can (1) negotiate a private admonition or public reprimand with the respondent's consent, or (2) hold a formal hearing").
90. See In Re Primus, 436 U.S. 412, 418-21 (1978) (determining the permissibility of the in-person solicitation of women who were forced to undergo sterilization procedures as a condition of receiving welfare); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 453 (1978) (determining the permissibility of the in-person solicitation of accident victims). See also supra note 78 for a discussion of the Court's reservation of judgment on the issue of in-person solicitations.
91. Primus, 436 U.S. at 439 (granting protection); Ohralik, 436 U.S. at 459, 467 (denying protection).
92. Primus, 436 U.S. at 431-32. In Primus, the ACLU learned that some pregnant mothers receiving Medicaid benefits were being threatened with sterilization as a condition of receiving those benefits. Id. at 415. A local organization requested Edna Smith Primus, an ACLU attorney, to speak at a meeting of concerned women. Id. Following the meeting, the local organization again contacted Primus, informing her that one of the women wished to file a lawsuit. Id. at 415-17. Primus subsequently sent the woman a letter, informing her of the ACLU's willingness to undertake the representation. Id. at 416-17.

The state disciplinary committee filed a formal complaint against Primus, alleging that she violated state regulations prohibiting the solicitation of clients. Id. at 418-21. The committee privately reprimanded Primus. Id. at 420. The Supreme Court of South Carolina affirmed the private reprimand, and sua sponte, ordered public reprimand. Id. at
engaged in constitutionally protected political speech. The Court determined that her speech was motivated by both personal political beliefs and the ACLU's political agenda, rather than any pecuniary interest. Thus, because the motivation for the solicitation was not pecuniary gain, the Court held that the in-person solicitation warranted protection under the First Amendment.

In contrast, the Court upheld a regulation prohibiting in-person solicitations in *Ohralik v. Ohio State Bar Ass'n*. The Court heard *Ohralik* on the same day as *Primus*, allowing for a careful comparison of the two cases. In *Ohralik*, an attorney personally visited two young accident victims shortly after the accident occurred. The Court held that the state bar properly forbade such actions, and upheld sanctions against the attorney. The Court distinguished *Ohralik* from *Primus*, noting that the lawyer's hope of financial gain in *Ohralik* posed possible dangers to potential clients, because the financial gain was the sole motivation for the solicitation. The Court determined that the state bar appropriately issued a regulation prohibiting such conduct, and properly assumed responsibility for maintaining standards in the legal profession. The Court therefore upheld the disciplinary action against the attorney.

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93. *Id.* at 427-32. "Appellant's letter . . . comes within the generous zone of First Amendment protection reserved for associational freedoms." *Id.* at 431.

94. *Id.* at 428-29.

95. *Id.* at 434. The Court noted "[the record does not support South Carolina's] contention that undue influence, overreaching, misrepresentation or invasion of privacy occurred in this case." *Id.* at 435. Because the ACLU attorney's activity did not subvert any of these state interests, she could not be disciplined. *Id.* at 434-35.


97. *Id.* at 449-51. Upon learning of the accident, the attorney phoned the mother of one of the victims and learned that the victim remained in the hospital. *Id.* at 449. The attorney then visited the victim in the hospital, where she lay in traction. *Id.* at 450. At the hospital, the attorney asked the victim to sign an agreement allowing him to serve as her attorney. *Id.* Subsequently, the attorney visited the second victim the day she arrived home from the hospital. *Id.* at 451. The second victim told the attorney that she did not understand what was going on; nonetheless, the attorney pursued the matter until she agreed to hire him on a contingency basis. *Id.* The parents of both victims filed complaints with the local bar association. *Id.* at 452.

98. *Id.* at 468.

99. *Id.* at 458. The dangers involved included overreaching and undue influence, as well as "using information as bait" to obtain clients. *Id.*

100. *Id.* at 464.

101. *Id.* at 468.
2. Applying Central Hudson to Attorney Advertising

The Supreme Court first applied Central Hudson to attorney advertising in In re R.M.J. The R.M.J. decision addressed the constitutionality of a state bar regulation that restricted the use of mass mailings from lawyers to an untargeted population. The Court struck down the regulation, holding that the state bar impermissibly prohibited attorney advertisements.

Applying the Central Hudson factors, the Court first determined that the advertisements placed by an attorney were not misleading simply because they failed to quote verbatim the regulation’s permissible areas of practice list; therefore, the advertisements fell within the scope of commercial speech and were entitled to First Amendment protection. Second, the Court looked for a substantial state interest to justify the regulation. Finding that the bar failed to assert any interest, much less a substantial interest in promulgating its regulation, the Court concluded that an absolute prohibition on advertisements was unwarranted.

Subsequently, in Zauderer v. Office of Disciplinary Counsel, the Court again overturned a state bar’s restriction of legal advertisements placed in newspapers. Applying Central Hudson, the Court first...

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103. Id. at 194-98. Missouri Supreme Court Rule 4 allowed attorneys to mail professional announcement cards to a limited population, including personal friends, relatives, other attorneys, existing clients, and former clients. Id. at 196. Additionally, Rule 4 provided that if an attorney wished to advertise an area of practice, that attorney would have to use the descriptions set forth in the statute, verbatim. Id. at 194-95. A Missouri attorney was charged with violating Rule 4 for publishing advertisements in the yellow pages, and for mailing advertisements to individuals outside of the proscribed list in the regulation. Id. at 196-97. The advertisements described the attorney’s areas of practice as “real estate,” but Rule 4 required the term “property law.” Id. at 197. The attorney also included “contracts,” “zoning and land use,” and “communication” areas of practice not included in the permissible areas of practice list. Id.
104. Id. at 207.
105. Id. at 205. The Court reasoned that there was no danger of public deception in classifying an area of practice as “real estate” instead of “property law.” Id. See supra part II.A.2. for a discussion of Central Hudson.
106. R.M.J., 455 U.S. at 205.
107. Id.
109. Id. at 655-56. In Zauderer, an attorney placed an ad which included a drawing of an intrauterine device, and the slogan: “DID YOU USE THIS IUD?” to inform the public of his willingness to represent women injured by the device. Id. at 630-31. The advertisement violated Ohio Disciplinary Rule 2-101. Id. at 632-33. The Ohio rule prohibited deceptive advertising, prohibited the use of illustrations in advertisements, and mandated that lawyer advertisements be dignified. Id. at 631-32. The State Bar
concluded that the advertisement was not misleading or untruthful. The bar, however, asserted an interest in preventing “the use of false or misleading advertising to stir up meritless litigation against innocent defendants.” The Court retorted that it would not view litigation as an evil. The Court also noted that the bar failed to offer any evidence supporting its contentions. Thus, the Court again failed to find a substantial state interest warranting a complete ban on attorney advertising, and the Court again struck down an attempt to regulate attorney advertising.

In 1988, the Supreme Court invalidated yet another regulation of attorney advertising in Shapero v. Kentucky Bar Ass’n, holding that a rule banning all direct-mail solicitation was impermissibly broad. The Court distinguished in-person solicitations, which a state bar could ban, from targeted direct-mail solicitations. Initially, the Court noted that direct-mail advertising presented less of a risk than the forbidden in-person solicitation. The Court reasoned that a letter, unlike an in-person solicitation, does not pressure the recipient to answer immediately.

Association sought to discipline Zauderer. Id. at 631, 636. Zauderer appealed the disciplinary action, arguing that it violated his First Amendment rights. Id.

10. Id. at 639-40.
11. Id. at 643. The Court did not strike down the entire regulatory statute, but did strike down the restrictions on the use of illustrations in advertisements. Id. at 655-56.
12. Id. at 643. “[W]e cannot endorse the proposition that a lawsuit, as such, is an evil . . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.” Id.
13. Id. at 648-49.
14. Id. at 648, 655-56.
16. Id. at 479-80. In Shapero, the attorney applied to the Kentucky Attorney’s Advertising Association for approval to solicit potential clients. Id. at 469. The attorney requested permission to send a letter to members of a class of persons who recently had foreclosure suits filed against them. Id. The advertising association conceded that the letter was not misleading, but nevertheless denied the attorney’s request to send the letter. Id. The board reasoned that Kentucky’s Supreme Court Rules prohibited Shapero from sending advertisements to clients known to have specific legal problems. Id. at 469-70. The board further contended that it had a substantial interest in preventing the potential abuse resulting from the solicitation of clients known to have particular legal needs. Id. at 474.

On review, the Kentucky Supreme Court, with no explanation, replaced the Supreme Court rule affecting Shapero with ABA Model Rule of Professional Conduct 7.3, banning all direct mail solicitation of prospective clients. Id. at 470-71.

19. Id. at 475.
20. Id. “Unlike the potential client with a badgering advocate breathing down his
Additionally, the Court disagreed with the bar’s contention that protecting the privacy of the recipients constituted a substantial state interest.\(^2\) According to the Court, direct-mail advertising was not as invasive as an in-person solicitation.\(^2\) The Court emphasized that the invasion of privacy in direct-mail solicitations occurred when the lawyer learned of the recipient’s situation, not when he solicited the individual.\(^2\) Thus, the Court based its holding on the view that the direct-mail advertisement in *Shapero* was less problematic than the in-person solicitation in *Ohralik*.\(^2\) Absent a showing that a complete ban on targeted, direct-mail advertisements advanced a state interest, the Court concluded that the state interest could not be substantial, and thus violated the *Central Hudson* test.\(^2\) The Court therefore held that the regulation violated the attorney’s First Amendment rights.\(^2\)

In the attorney advertising cases from *Bates* to *Shapero*, the Supreme Court firmly established that a complete ban on truthful, non-deceptive attorney advertising violated the First Amendment.\(^2\) At the same time, the Court continued to reiterate that regulation of attorney advertising would be permissible if a state bar could show that the regulation materially advanced a substantial state interest and was narrowly tailored to meet that interest.\(^2\) In essence, the Court continued to express its willingness to allow regulation of attorney advertising, but state bar associations repeatedly failed to promulgate a regulation that met the level of scrutiny required by *Central Hudson*.

\(^{121}\) *Id.* at 476.
\(^{122}\) *Id.* at 475-76.
\(^{123}\) *Id.* at 476.
\(^{124}\) *Id.* at 475-76. Justice O’Connor vehemently dissented on this point. *Id.* at 480-83 (O’Connor, J., dissenting). She argued that unsolicited legal advice, regardless of the form of its receipt, must be carefully monitored. *Id.* at 481 (O’Connor, J., dissenting). Justice O’Connor also explained that because the public views attorneys as having authority, a personalized letter from an attorney may be more difficult to ignore than unsolicited advertisements for commercial products. *Id.* at 481-82 (O’Connor, J., dissenting).

\(^{125}\) *Id.* at 479. See *supra* part II.A.2 for a discussion of the *Central Hudson* test.
\(^{127}\) See *supra* part II.B.
\(^{128}\) See *supra* part II.B.
III. DISCUSSION

A. The Facts of the Case

In 1989, the Florida State Bar commissioned a two-year study on the effects of attorney advertising on public opinion. The study revealed that “the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly on the profession.” Following the completion of this study, the Florida State Bar petitioned the Florida Supreme Court to amend its rules pertaining to attorney advertising in an attempt to improve the image of the legal profession and promote a more efficient system of justice. Subsequently, the Florida Supreme Court approved two rules prohibiting personal injury lawyers from soliciting new clients by means of targeted, direct mail solicitation within thirty days after an accident. These rules generally provide that no attorney, or attorney referral agency, could contact an accident victim or surviving family member by mail for thirty days.

130. Id. at 2377.
131. The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1991). The Bar contended that its proposed changes would address problems unearthed by its study. Id. at 455. The Florida Bar Commission on Advertising and Solicitation found two particular problems to be: (1) advertising that appeals to a prospective client’s emotions over rational decision-making, and (2) advertising that hinders the administration of justice, namely direct mail solicitations.
132. RULES REGULATING THE FLORIDA BAR, Rule 4-7.4(b)(1)(A) (amended 1995); RULES REGULATING THE FLORIDA BAR Rule 4-7.8(a) (amended 1995). Rule 4-7.4(b) states as follows:

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer’s behalf or on behalf of the lawyer’s firm, or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, a written communication to a prospective client for the purpose of obtaining professional employment if: (A) The written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

RULES REGULATING THE FLORIDA BAR, Rule 4-7.4(b)(1)(A) (amended 1995). Rule 4-7.8(a) provides:

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

RULES REGULATING THE FLORIDA BAR, Rule 4-7.8(a) (amended 1995).
133. See supra note 132 for the full text of the Bar rules.
In March 1992, G. Stewart McHenry filed suit against the Florida Bar (the "Bar") on behalf of himself and Went For It, Inc., his wholly owned attorney referral agency. McHenry stated that both he and his attorney referral agency normally obtained new business in the manner now prohibited by the new Bar regulations. He sued to enjoin enforcement of the new rules, arguing that the regulation of direct-mail solicitation violated his First Amendment right to free speech, because the rules prevented the free flow of important information to particular consumers who needed to become aware of their legal rights.

The Bar, on the other hand, argued that it had a substantial interest in "maintaining the professionalism of the bar and public confidence in the administration of justice." The Bar requested the court to give states the authority needed to regulate attorney advertising, which adversely affected their interests in maintaining the integrity of the legal profession.

B. Lower Court Holdings

The United States District Court for the Middle District of Florida entered summary judgment on behalf of McHenry. The court held that the proposed state interests in the case at hand were indistinguishable from those rejected by the Supreme Court in Shapero. The

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135. Went For It, 115 S. Ct. at 2374.

136. Id.

137. Id. at 2377-78.

138. Id. at 2376-77.

139. Id.

140. McHenry 1, 808 F. Supp. at 1548. Both parties had filed motions for summary judgment. Id. at 1544. The District Court referred the motions to a magistrate judge, who recommended that summary judgment be entered in favor of the Bar. Id. The magistrate determined that the Bar had substantial interests in protecting both the privacy and tranquillity of accident victims from possible overreaching or undue influence of lawyers. Id. See also Florida Bar v. Went for It, Inc., 115 S. Ct. 2371, 2374 (1995) (recognizing that the magistrate was concerned with the tranquillity of accident victims and the possibility of undue influence). He cited the Bar's study as evidence of the tailored nature of the regulation to the problem. Id.

141. McHenry 1, 808 F. Supp. at 1546. The Court in Shapero held that "the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 473-74 (1988). See supra notes 115-26 and accompanying text for a discussion of Shapero.
court therefore concluded that no substantial state interest existed to validate the regulation of direct-mail solicitation.\(^\text{142}\)

Furthermore, the court rejected the Bar’s argument that the regulation should be upheld because it did not completely ban direct-mail solicitation.\(^\text{143}\) The court found that even if the Bar offered a substantial state interest to support the regulation, the thirty-day ban was not sufficiently narrowly tailored.\(^\text{144}\) Thus, the district court held that the State’s regulation violated the First Amendment.\(^\text{145}\)

The United States Court of Appeals for the Eleventh Circuit affirmed the district court’s holding.\(^\text{146}\) The appellate court agreed that \textit{Shapero} was the leading case on point concerning targeted direct-mail solicitation.\(^\text{147}\) In deciding the case, the court asserted that the mode of communication was the relevant inquiry in determining whether the regulation satisfied the constitutional analysis.\(^\text{148}\) According to the Eleventh Circuit, unlike other forms of communication, a letter was not invasive or coercive, even where the recipient was overcome with grief or personal injury.\(^\text{149}\)

The court of appeals, interpreting Supreme Court precedent, also agreed that the Bar had no substantial interest in preserving the person-
al privacy and tranquillity of accident victims or their surviving families. The court determined that the attorney violated the victim’s privacy when the attorney first learned of the accident, not when he solicited the victim for business. A targeted, direct-mail solicitation would therefore not invade the recipient’s privacy any more than a mass mailing. Thus, the court upheld the district court’s decision overturning the regulation as a violation of the attorney’s First Amendment Rights.

C. The United States Supreme Court Opinion

A divided Supreme Court narrowly overturned the decisions of both lower courts by a vote of five to four. The Court held that the thirty-day restriction on targeted direct-mail solicitations did not violate the First Amendment rights of Florida attorneys or attorney referral agencies. Thus, for the first time since Primus, the Court upheld a regulation of attorney advertising.

150. Id. at 1044. The court also rejected any comparison of direct-mail solicitation to recent Supreme Court cases prohibiting home privacy invasion in anti-abortion protests or loud noises from trucks. Id. (referring to Frisby v. Schultz, 487 U.S. 474 (1988) (anti-abortionists picketing in front of the home of doctor who performs abortions); and Kovacs v. Cooper, 336 U.S. 77 (1949) (trucks blasting loud noises at residential homes)).

151. Id. The Court did recognize that the letter may be offensive, however, and it stated that it “appreciate[d] the Bar’s attempt to protect an individual’s personal privacy, and to preserve the integrity of the legal profession, by eliminating offensive solicitations such as these.” Id. at 1043-44.

152. Id. (quoting Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 476 (1988)).

153. Id. at 1038. The court concluded, however, by stating:

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

Id. at 1045.


155. Went For It, 115 S. Ct. at 2371.


157. Went For It, 115 S. Ct. at 2381.
1. The Majority Opinion

The Court, applying Central Hudson, first examined whether the Bar asserted a substantial interest in promulgating the restriction on commercial speech. The Bar asserted that preserving the integrity of the legal profession, by protecting the privacy and tranquillity of accident victims and their families from intrusive direct-mail solicitation, constituted such an interest.

The majority did not directly determine that the State had a substantial interest in protecting the image of its profession. Rather, the Court focused on past precedent, which "[left] no room for doubt" that professional regulation and client privacy were substantial state interests. The Court emphasized that states not only have an interest in protecting consumers and regulating commercial transactions, but that states also play a special role in regulating the practice of professionals. Combined with the Court's previous statement that these interests "obviously [factor] into the Bar's paramount (and repeatedly professed) objective of curbing activities that 'negatively affect[ ] the administration of justice,'" the Court construed a substantial state interest in protecting the image of the legal profession.


159. The Bar conceded that the advertisement was not misleading or deceptive, thus removing the necessity for judicial debate over the first prong of Central Hudson. Went For It, 115 S. Ct. at 2376. The Court therefore focused on the second, third, and fourth components of the Central Hudson analysis. Id. See supra notes 65-66 and accompanying text for a discussion of the Central Hudson factors.


161. Went For It, 115 S. Ct. at 2376.

162. Id. "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Id. (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)).

163. Went For It, 115 S. Ct. at 2376. See also Frisby v. Schultz, 487 U.S. 474, 484-85 (1988) ("[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions."); Carey v. Brown, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); Goldfarb, 421 U.S. at 792 (recognizing that states may regulate the ethics of a profession).

164. Went For It, 115 S. Ct. at 2376 (quoting the Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451, 455 (Fla. 1991)).
Upon finding a substantial state interest, the Court proceeded to the third *Central Hudson* prong, and found that the thirty-day restriction on direct-mail solicitation materially advanced the Bar’s asserted interest.\(^{165}\) The Court relied heavily on the Bar’s study commissioned to uncover the effects of direct-mail solicitation on the legal profession.\(^{166}\) Laud ing the study for its “breadth and detail,” the Court referred to excerpts of complaints from recipients of direct-mail solicitation which, according to the majority, highlighted the animosity of the public toward attorneys as a result of this kind of advertising.\(^{167}\) Because the results of the study were never refuted by Went For It, Inc., the Court found the third *Central Hudson* prong satisfied.\(^{168}\)

The Court then turned to the fourth *Central Hudson* prong, examining whether the regulation served the Bar’s interests. In deciding this issue, the Court emphasized the distinction between ordinary First Amendment rights, and the protection granted to commercial speech.\(^{169}\) The Court stated that restrictions on direct-mail solicitations, as commercial speech, need not be the least restrictive available.\(^{170}\) Rather, the Court simply required that the fit be reasonable.\(^{171}\)

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166. *Went For It*, 115 S. Ct. at 2377. Fifty-four percent of the population at large felt that direct-mail advertisements constituted an invasion of privacy. *Id.* Twenty-seven percent of recipients of the advertising felt it reflected negatively on the legal profession. *Id.*

167. *Id.* One recipient described that he was “appalled and angered by the brazen attempt” to obtain his business after he was injured in an automobile accident in which his fiancee was killed. *Id.* at 2377-78 (quoting from Summary of Record, App. I(1), at 2). Others found such conduct “despicable and inexcusable,” and “beyond comprehension.” *Id.* at 2378 (quoting from Summary of Record, App. I (1), at 2).

168. *Id.* at 2378. The dissent questioned the validity of the study, based on the lack of empirical data to support the alleged substantial interest. *Id.* at 2384 (Kennedy, J., dissenting). The majority responded to this questioning by asserting that no case precedent required the Bar to produce such data. *Id.* at 2378. Furthermore, the Court cited numerous cases where the Court justified speech restrictions by merely referring to other studies, or by using “simple common sense.” *Id.* (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992)). See also Barnes v. Glen Theater, Inc., 501 U.S. 560, 584-85 (1991) (stating that “legislation need not await local proof,” but may rely on other studies); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 50-51 (1986) (holding that a party was entitled to rely on a study described in detail in another case).


170. *Id.* For an in-depth discussion of this issue, see Board of Trustees v. Fox, 492 U.S. 469, 476-81 (1989) (holding that governmental restrictions on commercial speech need not be the least restrictive means available).

The Court dismissed the attorney’s assertion that the restriction was overly broad because it prohibited the solicitation of all victims, regardless of their subjective state of mind or the severity of their injury. The Court asserted that tailoring a regulation to account for the varying levels of injury, or to account for differing levels of animosity towards receiving direct-mail solicitations, exceeded the level of specificity required by the Constitution. The Court further concluded that the State was not presented with ‘numerous and obvious less-burdensome alternatives’ to its thirty-day ban. Thus, the Court found that the regulation was narrowly tailored to serve the state interest.

The Court also disagreed with the attorney’s assertion that the regulation prevented the necessary dissemination of legal information to those who need it most. The attorney argued that accident victims needed to learn of their rights as quickly as possible, because opposing counsel and insurance collectors would begin to examine evidence immediately. The Court dismissed this concern, reasoning that the brevity of the restriction, and the numerous other channels available to disseminate legal options to accident victims provided adequate avenues for victims to learn of their legal rights.

In addition to evaluating the regulation under Central Hudson, the Supreme Court addressed the lower courts’ reliance on the Shapero decision. The Court took special issue with the lower courts’ finding that a targeted mailing would not invade the recipient’s privacy any more than a mass mailing advertisement. The majority argued that a mass mailing is sent to the public at large, with no special knowledge of the particular legal needs of the recipients. In such a situation, an accident victim receiving a general mailing is less likely to develop animosity toward the sender, because the lawyer did not seek out the

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172. Id. The Court also noted the impossibility of creating a regulation so narrowly tailored that it would allow for differing regulations based on the severity of injury and willingness of the recipient to receive the solicitation. Id.

173. Id.

174. Id. (quoting Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510 n.13 (1993)).

175. Id.

176. Id.

177. Id. Under Florida law, lawyers are not restricted from advertising on television, in newspapers, on billboards, through mass mailings or legal directories. Id.

178. Id. at 2378.

179. Id. The Eleventh Circuit had found that the invasion of privacy occurred when the lawyer learned of the accident, not when the accident victim received the direct mailing. See supra notes 146-53 and accompanying text.

180. Went For It, 115 S. Ct. at 2379.
victims' tragedy to profit financially. On the other hand, a targeted, direct-mailing involves a "willful or knowing affront to . . . the tranquillity of bereaved or injured individuals" at the time that it is received.

The majority further distinguished Shapero from Went For It in three fundamental ways. First, the Court emphasized that Shapero focused on a state's interest in preventing overreaching and undue influence on potential clients. In comparison, Went For It hinged on a finding that Florida had a substantial interest in protecting client privacy and in professional regulation. Second, the Court emphasized that in Shapero, the state attempted to ban targeted mailings outright and indefinitely. In Went For It, on the other hand, Florida merely imposed a thirty-day delay. Lastly, the Court found that the state, in Shapero, did not offer evidence to support its contention that the ban was necessary. In contrast, in Went For It, the Bar submitted the results of a two-year study showing the negative effects of attorney advertising on the public image of the legal profession.

The Court similarly dismissed the lower courts' reliance on the Bolger decision. It reasoned that the demonstrable effect of direct-mail solicitations to accident victims and their families, during their time of bereavement shortly after an accident, could not be eliminated by simply discarding a letter. The Court stated that the harm caused

181. Id.
182. Id. The Court stated that a lawyer does not invade the victim's privacy when first learning about the victim's accident for two reasons: (1) the victim does not know when the lawyer learns of the accident, and (2) the lawyer often initially learns of accidents through a public source. Id.
183. Id. at 2378.
184. Id. The Court asserted that in Shapero, the state attempted to justify restrictions on targeted, direct mailings to avoid "the special dangers of overreaching inherent in targeted solicitations," not to protect the privacy of the intended recipient. Id. Overreaching is defined as: "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." BLACK'S LAW DICTIONARY 763 (6th ed. 1991).
185. See supra notes 161-64 and accompanying text.
186. See supra notes 115-26 and accompanying text.
187. Went For It, 115 S. Ct. at 2374.
188. Id. at 2378-79.
189. See supra notes 129-30 and accompanying text.
190. Went For It, 115 S. Ct. at 2379. In Bolger, the Court found the government's allegations of harm to be lacking, because recipients of direct-mail advertisements for contraceptives could simply avert their eyes and dispose of any unwanted solicitation. Bolger v. Young's Drug Prods. Corp. 463 U.S. 60, 72 (1983). See supra notes 67-69 and accompanying text for a discussion of the Bolger decision.
191. Went For It, 115 S. Ct. at 2379. The Court further asserted that the harm was as much a result of receiving the letter as it was in reading its contents. Id.
resulted not only from the contents of the letter, but also by its mere receipt. Simply "averting one's eyes" from the letter by placing it in a drawer, or by throwing it away, would not diminish the emotions triggered by an uninvited solicitation immediately following a traumatic accident. The Court found that the very act of receiving the letter triggers emotions and engenders animosity toward the legal profession, adversely affecting the image of the legal profession.

Concluding that the State's regulation of targeted direct-mail solicitation withstood scrutiny under Central Hudson, and was distinguishable from past precedent, the Court reversed the appellate court's decision and declared the regulation to be within the scope of the Constitution.

2. The Dissenting Opinion

The dissent agreed with the majority's contention that the Central Hudson decision provided the appropriate basis for scrutinizing restrictions on commercial speech. However, the dissent disagreed with the majority's application of the Central Hudson factors.

The dissent analyzed the Bar's proposed interest in two parts: (1) protecting the privacy of the accident victim and family, and (2) improving the unfavorable reputation of the legal profession. Addressing the privacy interest first, the dissent acknowledged the Court's previous recognition of a similar interest in some of the Court's past decisions. The dissent argued, however, that in light of Shapero, a privacy interest could not justify the prohibition of targeted direct-mail. Because the Court in Shapero held that restrictions on direct-mail solicitation were impermissible to avoid 'over-reaching and undue influence,' the dissent argued that restrictions to protect personal privacy were likewise unwarranted. In the dissenters' opinion, Shapero

192. Id.
193. Id.
194. Id.
195. Id. at 2381.
196. Justice Kennedy filed the dissenting opinion in which Justices Stevens, Souter and Ginsburg joined. Id. (Kennedy, J., dissenting).
197. Id. at 2382 (Kennedy, J., dissenting).
198. Id. at 2382-86 (Kennedy, J., dissenting).
199. Id. at 2382-83 (Kennedy, J., dissenting).
200. Id. at 2382 (Kennedy, J., dissenting).
201. Id. (Kennedy, J., dissenting).
202. Id. (Kennedy, J., dissenting) (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475 (1988)). "We reasoned that '[a] letter, like a printed advertisement... can readily be put in a drawer to be considered later, ignored, or discarded.'" Id. (Kennedy, J., dissenting) (citing Shapero, 486 U.S. at 475-76).
stood for the proposition that direct-mail solicitation, as a mode of communication, did not give rise to any substantial state interest warranting regulation.\textsuperscript{203}

The dissent further argued that the majority attempted to evade \textit{Shapero} by emphasizing a distinguishable privacy interest stemming from the offensive nature of direct-mail solicitations.\textsuperscript{204} In response, the dissent stated that the Court had repeatedly denied suppression of speech based upon the offensiveness of the advertisement.\textsuperscript{205}

The dissent also asserted that recipients of direct-mailings are not "a captive audience," and are therefore not entitled to protection from offensive speech.\textsuperscript{206} Rather, the dissent argued that recipients of targeted, direct-mail solicitations could choose to discard any offensive mailing, as opposed to the captive target of an in-person solicitation who had no such option.\textsuperscript{207} Thus, consistent with \textit{Bolger}, the dissent found that attorney solicitation should be entitled to commercial speech protection.\textsuperscript{208} Furthermore, the dissent criticized the majority for not explicitly overruling the cases concerning offensive advertisements.\textsuperscript{209} The dissent asserted that the Court should have overruled those cases if it intended to forbid restrictions on offensive advertisements in the future.\textsuperscript{210}

The dissent next addressed the second proposed interest: protecting the favorable reputation of the legal profession.\textsuperscript{211} The dissent dismissed this interest by arguing that direct-mail solicitations are not inherently unethical or improper.\textsuperscript{212} Rather, the dissent argued that direct-mail solicitation may actually "serve vital purposes and promote the administration of justice" by informing the public about how the
legal system operates.\textsuperscript{213} The dissent acknowledged that the image of the legal profession was adversely affected by unethical and improper practices, but denied that direct-mail solicitation was such a practice.\textsuperscript{214} Thus, the dissent determined that the Bar failed to show it possessed a substantial state interest in enacting the regulation.\textsuperscript{215}

Proceeding to the next prong of \textit{Central Hudson}, the dissent attacked the credibility of the Florida Bar’s empirical study.\textsuperscript{216} The dissent noted that the State failed to present evidence of the sample sizes or selection procedures used.\textsuperscript{217} Furthermore, the dissent argued that only two pages of the study’s summary pertained directly to direct-mail solicitation.\textsuperscript{218}

In addition to questioning the study, the dissent argued that a restriction on direct-mail solicitation did not advance any offered state interest in a direct and material way.\textsuperscript{219} The dissent concluded that the State did not offer adequate evidence to indicate that the restriction would benefit potential recipients of the solicitation.\textsuperscript{220}

Carrying its conclusion into the last \textit{Central Hudson} prong, the dissent asserted that the regulation was not narrowly tailored.\textsuperscript{221} The dissent argued that the regulation constituted a flat ban, and did not differentiate on the basis of the seriousness of the injury or the subjective state of the victim’s mind.\textsuperscript{222} If any restriction was required at all, argued the dissent, the restriction should be tailored to the severity of the victim’s injury.\textsuperscript{223} Additionally, the dissent found no reason to assume that all accident victims would find a targeted, direct-mail solicitation offensive.\textsuperscript{224} Thus, the dissent found the regulation to be

\begin{footnotesize}
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\item \textsuperscript{213} \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{214} \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{215} \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{216} \textit{Id.} at 2384 (Kennedy, J., dissenting).
\item \textsuperscript{217} \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{218} \textit{Id.} (Kennedy, J., dissenting). While the remaining 32 pages of the study discussed direct-mail solicitation, they were primarily excerpts from comments made by lawyers and the public. \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{219} \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{220} \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{221} \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{222} \textit{Id.} at 2384-85 (Kennedy, J., dissenting).
\item \textsuperscript{223} \textit{Id.} at 2385 (Kennedy, J., dissenting). “With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them.” \textit{Id.} (Kennedy, J., dissenting).
\item \textsuperscript{224} \textit{Id.} (Kennedy, J., dissenting). “There is, moreover, simply no justification for assuming that in all or most cases an attorney’s advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal
\end{itemize}
\end{footnotesize}
overly broad because it prohibited solicitation to even the willing recipient.\textsuperscript{225}

The dissent concluded by offering two additional reasons why it felt the regulation of direct-mail solicitations was unnecessary.\textsuperscript{226} First, the dissent argued that any potential problem was self-policing.\textsuperscript{227} Individuals who found the solicitation untasteful would simply not do business with the offending lawyer.\textsuperscript{228} Offending lawyers, in turn, would find themselves lacking business and change their practices.\textsuperscript{229} Lastly, the dissent suggested that restrictions on direct mail solicitation were harmful because they prevented the dissemination of information to “victims too ill-informed to know an attorney may be interested in their cases.”\textsuperscript{230}

IV. ANALYSIS

The United States Supreme Court properly restricted targeted, direct-mail solicitations to accident victims and their family members. Both the majority and the dissent agreed on the appropriateness of applying the \textit{Central Hudson} test to the facts of \textit{Went For It}. The Court split, however, on how each of the three prongs of the test that were at issue should be applied.

\textbf{A. Protecting the Image of The Legal Profession: A Substantial State Interest}

The majority opinion correctly concluded that protecting the public image of the legal profession constitutes a substantial state interest.\textsuperscript{231} The Supreme Court has repeatedly held that states have a substantial interest in the regulation of professions within their state.\textsuperscript{232} The legal profession is no exception to this rule. Furthermore, where the regu-

\begin{itemize}
\item \textsuperscript{225} Id. (Kennedy, J., dissenting).
\item \textsuperscript{226} Id. (Kennedy, J., dissenting).
\item \textsuperscript{227} Id. (Kennedy, J., dissenting).
\item \textsuperscript{228} Id. (Kennedy, J., dissenting).
\item \textsuperscript{229} Id. (Kennedy, J., dissenting). The dissent also emphasized that most states allow a disgruntled client to fire his or her attorney if the client does not like the attorney. Id. (Kennedy, J., dissenting).
\item \textsuperscript{230} Id. (Kennedy, J., dissenting). The dissent claimed that the regulation would most affect those who, “because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services.” Id. (Kennedy, J., dissenting).
\item \textsuperscript{231} Id. at 2381.
\item \textsuperscript{232} See supra notes 162-63 and accompanying text.
\end{itemize}
lation of the legal profession is at issue, the State has reason for a heightened interest in regulation.\footnote{233}{See Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 481 (1988) (O'Connor, J., dissenting). In her dissent, Justice O'Connor distinguished unsolicited legal advice from other unsolicited material that is granted First Amendment protection for three reasons: (1) the typical consumer will have a more difficult time evaluating the quality of legal services, and the consequences of mistaken evaluation are more severe; (2) targeted direct-mail solicitations suggest that the sender has a particular knowledge of, and concern for the recipient, which a typical consumer may believe because a lawyer is supposed to put the client's interests before the lawyer's own interests; and (3) targeted solicitations have an enhanced tendency to contain advice that will induce the consumer to act in a manner which is in the lawyer's best financial interest. \textit{Id.} at 481-82. \textit{See supra} note 124.}

This heightened interest in the regulation of the legal profession derives from the unique relationship between the lawyer and the public. Lawyers "are engaged in the vital task of protecting [the] rights of individuals and serving as the caretakers of the country's justice system."\footnote{234}{COMMISSION ON ADVERTISING, \textit{REPORT ON THE SURVEY OF LAWYERS IN ADVERTISING} 3 (1990).} Simply put, lawyers provide the public with access to the legal system.\footnote{235}{In their amicus curiae brief to the Supreme Court on behalf of the Florida Bar, the Association of Trial Lawyers of America said, "If lawyers sold cars, or computers or corn futures, this would not be a troublesome case . . . . Preserving the integrity of the judicial system and the impartiality of jurors are clearly substantial state interests." Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Petitioner, \textit{Florida Bar v. Went For It, Inc.}, 115 S. Ct. 2371 (1995) (No. 94-226) (LEXIS, Genfed library, US PLUS File).} The legal system, in turn, exists to serve the public by enforcing justice.

Somewhere in time, however, lawyers lost society's respect.\footnote{236}{See \textit{supra} note 124.} Mistrust and disrespect for the legal profession deter the public from accessing the legal system.\footnote{237}{\textit{Cf. id.} at 3. The authors note that the role of advertising in shaping the image of the legal profession is not certain. \textit{Id.} See \textit{infra} part IV.B for an analysis of the relationship of advertising to the public image of the legal profession.} Therefore, any attempt to improve the image of the legal profession necessarily improves service to the public.\footnote{238}{\textit{Cf. id.} at 3. The authors note that the role of advertising in shaping the image of the legal profession is not certain. \textit{Id.} See \textit{infra} part IV.B for an analysis of the relationship of advertising to the public image of the legal profession.}

The dissent argued that protecting the public image of lawyers through the regulation of targeted direct-mail solicitation cannot be a substantial state interest, because those restrictions hinder the free-flow
of information to the consumer.\textsuperscript{239} This argument operates on the assumption that direct-mail solicitation always falls within the protected realm of commercial speech. Under the commercial speech doctrine, courts strike down advertising restrictions that hinder the free flow of information because that free flow is necessary to allow the consumer to make an educated and informed decision.\textsuperscript{240} However, advertisers do not send targeted direct-mail solicitations to inform consumers of their available options; such solicitations are therefore not always entitled to First Amendment protection.\textsuperscript{241} Rather, these solicitation letters encourage the recipient to employ the lawyer sending the solicitation, not to offer a comparison of legal services available to the recipients.\textsuperscript{242}

Likewise, the free flow of information is not hindered simply because personal injury attorneys are temporarily prohibited from soliciting accident victims. If the dissemination of legal information is truly the concern of the attorney, the victim can be mailed a purely informational letter without a solicitation.\textsuperscript{243} Other methods of informing

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\item \textsuperscript{239}Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2383 (1995) (Kennedy, J., dissenting). The dissent states that "direct solicitation may serve vital purposes and promote the administration of justice." \textit{Id.} (Kennedy, J., dissenting). Furthermore, the dissent argues that any ban based on protection of "lawyers' reputations . . . suppress[es] speech that informs how the legal system works." \textit{Id.} (Kennedy, J., dissenting). Note that the dissent construes the regulation as protecting the image of individual lawyers, rather than the asserted state interest of protecting the image of the legal profession by "curbing activities that 'negatively affec[t] the administration of justice,'" namely the intrusive invasion of accident victims' privacy. \textit{Id.} at 2376 (quoting The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451, 455 (Fla. 1991)).
\item \textsuperscript{241}Where an attorney's sole motivation is financial gain, the Court has held that the state may regulate such communication. Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 457-59 (1978). \textit{Cf.} Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988) (finding that financial gain is an acceptable motivation to engage in advertising practices).
\item \textsuperscript{242}John Weber, Note, Shapero v. Kentucky Bar Association: United States Supreme Court Gives First Amendment Protection to Ambulance Chasing Through the Mail, 26 Cal. W. L. Rev. 201, 216 (1990). In its conclusion, the dissent argued that the ban on direct-mail solicitation will most harm "those who most need legal representation: . . . the . . . too ill-informed." \textit{Went For It}, 115 S. Ct. at 2385 (Kennedy, J., dissenting). The dissent effectively argued that the recipient may not be capable of making an informed decision. \textit{Id.} (Kennedy, J., dissenting). Ironically, this argument emphasizes the harms of direct-mail solicitation and the need for other, more effective means of educating the public.
\item \textsuperscript{243}See supra note 132 for the text of the new Florida Bar regulations. The prohibition against sending communications to victims only applies where the attorney is attempting to solicit that victim as a potential client. \textit{Id.}
victims of their options exist as well. The Florida regulation does not prohibit billboard or television advertising, for instance.\textsuperscript{244}

Furthermore, the need for lawyers to begin immediately soliciting victims decreases when victims become more aware of their legal rights and responsibilities through methods other than direct-mail solicitation.\textsuperscript{245} An informed victim, for example, will be less likely to make incriminating statements to opposing counsel, and will be better equipped to hire an attorney, if the victim recognizes the need to have evidence examined expeditiously.\textsuperscript{246}

More and better consumer education about the legal system is needed. Although targeted, direct-mail solicitations propose to serve this function, consumer education has become a pretext behind which personal injury lawyers are hiding. The dissemination of consumer education should not be motivated by the pecuniary self-interests of lawyers.

\textbf{B. Regulation of Targeted Direct-Mail Solicitation Directly and Materially Advances the State's Interest}

The majority correctly determined that a temporary ban on direct-mail solicitation advances the state’s interest in protecting the image of the legal profession.\textsuperscript{247} Restricting targeted direct-mail solicitation directly and materially advances the state’s interest by improving the public image of the legal profession.\textsuperscript{248} To this end, the Florida Bar submitted the results of its two-year study on attorney advertising and solicitation.\textsuperscript{249}

The undertaking of the study before the attempt to regulate attorney advertising distinguishes \textit{Went For It} from previous, unsuccessful regulations.\textsuperscript{250} The study included scientifically conducted surveys as

\begin{footnotes}
\textsuperscript{244} See \textit{supra} note 132 for the text of the regulations.
\textsuperscript{245} CROSSROADS, \textit{supra} note 2, at 6. In 1995, the ABA Commission on Advertising undertook a comprehensive review of advertising and its effects on the bar. \textit{Id.} at i. After compiling their information, the ABA developed a list of strategies to help improve the bar’s failing image. \textit{Id.} at 5-6. One of their strategies stated as follows: “There is a need for better public education about the legal system, legal services and their role in meeting individual solutions. The bar needs to explore ways in which advertising can contribute toward meeting that need.” \textit{Id.} at 6.
\textsuperscript{246} \textit{Id.} at 144-45 (“There continues to be a need ... for information to help determine whether people have a legal need and, if so, whether they would benefit from legal representation in addressing that need.”).
\textsuperscript{248} \textit{Id.} at 2377.
\textsuperscript{249} \textit{Id.}
\textsuperscript{250} Amicus Curiae Brief of the Dade County Trial Lawyers Association and the American Board of Trial Advocates in Support of the Petitioner's Brief on the Merits at
well as the results of polls and studies, which provided substantial
evidence addressing the specific advertising method at issue. The
study concluded that the public views attorneys who engage in direct-
mail solicitation as having “sacrifice[d] professionalism to promote
their own pecuniary self-interest.” Twenty-seven percent of direct-
mail recipients indicated that they regarded the legal profession less
highly after receiving the solicitation. Eleven percent admitted that
the advertising affected their opinions about the legal system to such an
extent that it might influence their ability to serve as jurors in a civil
trial.

In its analysis under Central Hudson, the dissent questioned the
credibility of the study conducted by the Florida Bar. The Central
Hudson test required the Bar to show that its thirty-day restriction
would serve the State’s interest by protecting the image of the legal
profession. Even if the evidence accumulated by the Florida Bar were
in fact empirically weak, however, no Supreme Court precedent re-
quires extensive empirical data. On the contrary, the Court has pre-
viously justified restrictions on speech by accepting mere reference to


Rather than attempting to justify overbroad restrictions on advertising by
relying upon nebulous concepts of professional dignity, like the State of
Arizona in Bates, the Florida Bar instead undertook a detailed and
comprehensive two year study of attorney advertising, which identified
particular problems that needed to be addressed and then carefully crafted its
regulations to remedy the specific problems identified as a result of its study.

Id. [alterations added].

251. See id. for a detailed explanation of the studies relied upon by the Florida Bar.


253. Trial Lawyers Amicus Curiae Brief, supra note 250, at *7-*8 (citing Frank N. Magid Assocs., Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys (1987)).

254. Id.

statements by the State.” Id. (Kennedy, J., dissenting). It continued to argue that “the essential thrust of all the material adduced to justify the State’s interest is devoted to the
reputational concerns of the Bar.” Id. (Kennedy, J., dissenting). It can be argued, however,
that even if the motivation behind the Bar’s regulation is purely a self-serving
reputational concern, the effects of the regulation will still benefit the public. See supra
section IV.A.

256. Went For It, 115 S. Ct. at 2378. “In any event, we do not read our case law to
require that empirical data come to us accompanied by a surfeit of background
information.” Id.
other studies not conducted by the parties, or by merely relying on common sense. 257

C. Regulation of Targeted Direct-Mail Solicitation is Narrowly Tailored to Serve the State Interest

Lastly, the majority correctly held that the thirty-day proscription of soliciting accident victims was narrowly tailored to protecting the image of the legal profession. 258 The dissent argued that "the Bar's rule create[d] a flat ban that prohibits far more speech than necessary to serve the purported state interest." 259 In making this claim, the dissent argued two points. Initially, the dissent argued that the ban was overly broad because it applied to all accident victims, no matter how severe the injury. 260 Expressing its concern over this matter, the dissent essentially recognized that there are some circumstances where targeted, direct-mail solicitations may be inappropriate. Yet, in response, the dissent advocated a regulation that distinguishes the amount of regulation based upon the severity of the injury. 261

Where, then, is the line drawn? At one end of the spectrum exist injuries so severe that restrictions on solicitation are unquestionable. 262 Logic suggests that trivial injuries lie on the opposite end of the spectrum. The dissent suggested that attorneys be able to solicit those whose injuries are insignificant. 263 Yet, if the injuries are insignificant, there is no need to persuade the victim to litigate—only a need to inform the victims of their rights. 264 Victims can naturally still litigate, if they so choose. Once again, improved consumer education

257. Id.
258. Id. at 2380.
259. Id. at 2384 (Kennedy, J., dissenting).
260. Id. (Kennedy, J., dissenting).
261. Id. at 2384-85 (Kennedy, J., dissenting). The dissent argued that if the criminal law system can distinguish between varying degrees of bodily harm, then the same can be accomplished in the civil system. Id. (Kennedy, J., dissenting).
262. If the regulation were indeed excessive, as the dissent argues, then the dissent effectively concedes that an argument could be advanced supporting the regulation of severely injured victims. Id. at 2385 (Kennedy, J., dissenting). Cf. id. (Kennedy, J., dissenting) (responding to the argument that attorneys should still be permitted to solicit those severely injured, because that is when prompt legal representation is essential).
263. Id. at 2385 (Kennedy, J., dissenting). "With regard to lesser injuries . . . [i]t is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them." Id. (Kennedy, J., dissenting).
265. See supra notes 243-46 and accompanying text for a discussion of the benefits of consumer legal education.
about the legal system would better serve the victim than a targeted, direct-mail solicitation following an accident.266

Furthermore, defining the insignificance of an injury is fraught with difficulties.267 A minor injury in the eyes of one victim can be a catastrophic injury to another.268 A broken leg, for example, may be considered insignificant by the average citizen. For the professional basketball player, however, this injury is catastrophic and translates into large sums of lost income.269 Thus, for a lawyer to make a determination of which injury is significant enough to warrant a ban on solicitation, the lawyer would have to seek out additional information about the victim, violating the very privacy that the state’s regulation sets out to protect.

Requiring legislation tailored so narrowly as to exclude those severely injured, or not injured enough, would be appropriate if the Central Hudson standard included a “least restrictive means” test.270 In order to pass constitutional muster, however, the Court requires only a reasonable fit between the regulation chosen and the end result the state wishes to achieve.271 A thirty-day ban on all targeted direct-mail solicitation, as opposed to a ban without a time limit, is a reasonable fit because it prohibits solicitation during a time period where victims and their families are likely to be grieving, recovering, or otherwise distracted.

The dissent also argued that the regulation is not narrowly tailored because it does not distinguish permissible regulation based on the subjective state of the victim's mind.272 The dissent argued that some victims may wish to be contacted, or at least may not be offended by a

266. See supra notes 243-46 and accompanying text.

267. Cf. Went For It, 115 S. Ct at 2385 (Kennedy, J., dissenting) (stating that the delineation of degrees of bodily harm is feasible because it has been accomplished in the criminal context).

268. See BRIAN F. HOFFMAN, ET AL., THE EMOTIONAL CONSEQUENCES OF PERSONAL INJURY: A HANDBOOK FOR PSYCHIATRISTS AND LAWYERS 86-87 (1992) (stating that “there is still a need to develop better descriptive language and assessment tools that will help clinicians and the insurance or legal systems to assess the changes in a person’s life that are caused by a specific trauma or injury”).


270. See supra notes 170-71 and accompanying text for a discussion of the least restrictive means test.

271. Went For It, 115 S. Ct. at 2380. The fit required is “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served.’” Id. (quoting Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)).

272. Id. at 2384-85 (Kennedy, J., dissenting).
solicitation. If this is the case, however, those victims who would welcome legal advice have certainly not been prohibited from seeking it. The rules regulating the Florida Bar still permit numerous other methods of legal advertising. The restriction is reasonable in that it protects those who do not want the solicitation, while permitting those who do to do so at their own initiative.

V. IMPACT

As was the case following other attorney advertising decisions, states will undoubtedly continue to regulate the field. After *Went For It*, states may enact limited bans on targeted, direct-mail solicitation for thirty or fewer days. Beyond that, states can begin to test the limits of how far the Court is willing to justify an asserted state interest in protecting the image of the legal profession.

The *Went For It* decision marks the beginning of a new era for attorney advertising. The decision generated widespread interest from the beginning, as evidenced by the fact that twenty-nine amicus curiae briefs were filed by local and state bar associations on behalf of the Florida Bar. As a result, the decision will likely encourage states to clamp down on attorney advertising in the name of image, but, "[j]ust how far other limits will go remains to be seen.

Some of these states, such as Texas, previously enacted similar laws, which had been declared unconstitutional by their highest state courts. After the *Went For It* decision, however, Texas created an

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273. *Id.* at 2385 (Kennedy, J., dissenting).
274. See supra note 177 and accompanying text.
275. See supra part II.B for a discussion of states' attempts to regulate attorney advertising.
276. Marcia Coyle, *Ad Decision Could Spur a Rollback*, NAT'L.L.J., July 3, 1995, at A1 (stating that up until the *Went For It* decision, "lawyer advertising—entitled to First Amendment commercial speech protection—has been relatively unrestrained; states have been allowed to regulate it only to prevent false and misleading communications and to ban in-person solicitation").
279. Alicia Philley, *Ad Review Begins at $50 a Pop; Cheered by the Florida Bar Decision, State Bar Leaders Set a Lower Fee and Await Avalanche of Applications. Eighty Percent of the First 90 Applications Violated at Least One of the New Texas Rules*, TEX. LAW., July 3, 1995, at 4 (stating that although state lawyer advertising laws had previously been declared unconstitutional, the "[c]ourt's tougher stance on lawyer advertising [was] a green light for the State Bar of Texas' new advertising review committee"). The Fifth Circuit has since held that a 30-day ban prohibiting attorneys from employing targeted, direct mail to solicit potential clients is permissible. Moore v. Morales, 63 F.3d 358, 363 (5th Cir. 1995). The Fifth Circuit remanded the case for
advertising review board to vigorously scrutinize all attorney advertising. The New Jersey Supreme Court and the State's Committee on Attorney Advertising are considering the adoption of a similar law.

Before the *Went For It* decision, many states had prohibited the solicitation of any potential client, if the attorney had reason to believe that the client's mental state would prevent him from making a rational decision. This type of regulation, classified as a "know or should have known" rule, could now be more specifically tailored. States could now prevent attorneys from soliciting accident victims who have impaired judgment immediately following a catastrophe.

The most significant impact of *Went For It*, however, could very well be its influence on First Amendment cases involving different facts. For instance, a recent case cited *Went For It* to resolve the issue of soliciting established law firm clients after the firm dissolved. In addition, although they have not yet done so, courts may extend the *Went For It* holding beyond the legal profession to other professions, such as the journalism profession.

The journalism profession, like the legal profession, currently suffers from a negative public image. Regulation of journalists, however, differs from the regulation of the legal profession in two

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further inquiry to determine if the limitation was constitutional as applied to chiropractors, physicians, surgeons, private investigators and health care personnel. Id. at 363-64.


282. Jane Bowling, *High Court Ruling Invites New Wave of Curbs on Lawyer Ads: A Deeply Divided Supreme Court Reinstates Florida Rule Restricting Lawyers from Sending Targeted Mailings to Recent Accident Victims*, DAILY REC., June 22, 1995, at 1. Maryland is 1 of approximately 15 states that employ this rule. Id.

283. Id.


285. Jon Shure, *Media Should Police Themselves Before Courts Impose Standards*, N.J. LAW., July 3, 1995, at 3 (discussing the factual issues that need to be addressed in attorney solicitation cases to determine whether an attorney has ethically chosen to inform his or her clients of their rights to choose their own counsel, or whether an attorney has secretly tried to lure his or her clients to his or her new firm, without informing them of their rights in the matter).

286. Id. "Lawyers and journalists have more in common than the fact that the public tends to hold both professions in low esteem." Id.
ways: (1) the journalism profession is not governed by industry-wide standards, and (2) journalists opposing regulation of their profession rely on the specific protection granted to the press by the Constitution. Nevertheless, litigation on a case by case basis has created an ad hoc code of professional standards for journalists. Some of the behaviors of journalists that have been regulated are: using an unreliable source; repeating false information; not including pertinent information; and intentionally slandering someone.

While the *Went For It* decision explicitly gave state bar associations permission to regulate the direct-mail solicitation of lawyers, the impact of the decision should be limited to the legal profession because of a lawyer's unique public duties. In addition, the journalism profession can be distinguished from the legal field in its primary purpose. While both ultimately serve the public, the manner in which they serve is vastly different. Lawyers are "officers of the court" and members of the judicial process. Journalists, on the other hand, serve the public by disseminating information. Public opinion toward journalists and other professionals outside the legal field is not as important as protecting the public itself.

**VI. CONCLUSION**

The Supreme Court properly held that a thirty day moratorium on targeted, direct-mail advertising does not infringe upon the First Amendment rights of personal injury attorneys. Preserving the public's faith in the legal system is a substantial state interest, and a ban on direct mail solicitation in the immediate wake of an accident directly and materially advances that interest. Furthermore, such regulation is narrowly tailored when applied to the legal profession. Caution should be taken, however, in extending this holding outside the legal profession. The legal profession has a unique relationship to the judicial system that warrants more prohibitive regulation. Recog-

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290. *See generally id.* at 12 (discussing numerous behaviors of journalists that have been litigated).
292. *See supra* notes 233-35 and accompanying text.
293. *But see* Shure, *supra* note 285, at 3 (postulating that the media is leaning more and more toward entertainment than informing the public).
nition of this difference will help ensure justice by focusing attention on the needs of the people instead of the financial interests of attorneys.

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