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Privacy and Popularity: The Supreme Court Attempts to Polish the Public Image of the Legal Profession in Florida Bar v. Went For It, Inc.

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> *Come to Major Hopkins to get full satisfaction. I win nine-tenths of my cases. If you want to sue, if you have been sued, I am the man to take your case. Embezzlement, highway robbery, felonious assault, arson, and horse stealing don't amount to shucks if you have a good lawyer behind you. My strong point is weeping as I appeal to the jury, and I seldom fail to clear my man. Out of eleven murder cases last year I cleared nine of the murderers. Having been in jail no less than four times myself, my experience cannot fail to prove of value to my clients. Come early and avoid the rush.*[1]

Solicitation by attorneys has become part of the vast onslaught of commercial information that Americans are exposed to on a daily basis. With increased levels of communication with the public, however, comes heightened public skepticism and criticism of the legal profession. The negative connotation of the term "ambulance chasers" evidences the general public's suspicion of the practice of attorney solicitation.[2] While this disapproval may actually be the result of several underlying factors,[3] recent public criticism of the legal profession routinely focuses on attorney advertising as a means

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1. JESS M. BRALLIER, LAWYERS AND OTHER REPTILES 94-95 (1992) (quoting an advertisement for Arizona lawyer Major Hopkins, circa 1895).

2. *See, e.g.*, *Ban Legalized Ambulance-Chasing*, FORT LAUDERDALE SUN-SENTINEL, July 14, 1995, at A14 (" 'Ambulance chaser' is one of the nastiest insults aimed at lawyers. It implies ghoulish, insensitive, unscrupulous behavior by a few legal vultures who feed on the newly injured or even the dead."); Robert A. Clifford, *ABA Needs More Than Professional Responsibility to Polish Tarnished Legal Image*, CHI. LAW., Aug. 1995, at 15 ("He's not an ambulance chaser. He gets there before the ambulance."). *But see* David J. Nagle, *The Real Enemies of Lawyer Advertising*, TEX. LAW., June 14, 1993, at 20 (tracing the origin of the term "ambulance chaser" to Depression-era insurance companies "who did not want to deal with lawyers representing injured people").

3. *See, e.g.*, Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 85-95 (1994) (warning that while dissatisfaction with the legal profession is not new, several factors—including the "hired gun" approach to litigation, increased materialism, the focus on billable hours, and the recent litigation explosion—have combined to make this dissatisfaction "widespread and pervasive," and more than the "normal amount").

to advance the lawyer's own pecuniary interests.[4] This simple appraisal, however true it may be in some circumstances, fails to consider important aspects of constitutionally protected liberties[5] and attorneys' professional responsibility.[6] Attorneys, like other people, have a constitutional right to free speech.[7] Additionally, as officers of the court, attorneys have an obligation to abide by the ethical standards set forth by bar associations. The limits of these rights and professional standards define the spectrum of actions an attorney can take. Thus, any evaluation of the propriety of attorney advertising must extend far beyond accusations of self-interest.

Attorney advertising receives constitutional protection as commercial speech.[8] This protection has only recently been recog-

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4. *See, e.g.*, Colin Covert, *Lawyers Losing Case With Public*, STAR TRIB., May 29, 1994, at E1 ("Lawyers who advertise are sleazy. . . . Many see ads as a way lawyers drum up business . . . ."); *Scavenger Lawyers*, MIAMI HERALD, Sept. 29, 1987; *Solicitors Out of Bounds*, ST. PETERSBURG TIMES, Oct. 26, 1987. *But see* Bates v. State Bar of Arizona, 433 U.S. 350, 370-71 (1977) ("[C]ynicism with regard to the legal profession may be created by the fact that it has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients."). For a more recent discussion of how some attorneys structure their leisure activities to attract business, see Amy Stevens, *Use Your Kids, and Other Tips for Hungry Lawyers*, WALL ST. J., Nov. 27, 1995, at B1 (describing how "practitioner[s] of the booming trade known as legal marketing consulting" direct clients to "[t]hink of every social encounter as an opportunity to do business").

5. One such liberty is the freedom of speech. *See Bates*, 433 U.S. at 379-82. The First Amendment provides: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

6. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1994) ("[A] lawyer should seek improvement of the law, the administration of justice and the quality of services rendered by the legal profession."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1981) ("A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."). The organized bar has long recognized the disparity between the need for legal services and their availability:

> A wide gap separates the need for legal services and its satisfaction, as numerous studies reveal. Looked at from the side of the layman, one reason for the gap is poverty and the consequent inability to pay legal fees. Another set of reasons is ignorance and fear on the part of those who could pay. There is ignorance of the need for and the value of legal services, and ignorance of where to find a dependable lawyer. There is fear of the mysterious processes and delays of the law, and there is fear of overreaching and overcharging by lawyers . . . .

Elliott E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 438 (1965).

7. *See, e.g.*, *Bates*, 433 U.S. at 379 (holding a regulation prohibiting price advertising by attorneys unconstitutional under the First Amendment).

8. *See id.* at 367-79. Some early commentators distinguished between the terms "advertising" and "solicitation" by categorizing the former as "activities which seek to

nized and attorneys have responded rapidly.[9] This protection often conflicts with the ethical standards developed by the various state bar associations.[10] A ringing, and often constitutionally insufficient, justification for restrictions on attorney solicitation is the bar's interest in maintaining the professionalism and dignity of attorneys.[11] The removal of some of these restrictions has undeniably provided the public with greater access to attorneys and removed some of the mystery surrounding the profession.[12]

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inform, notify or persuade the public . . . without the use of a person-to-person encounter" and the latter as "similar activities involving personal contact." Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1181 n.4 (1972); *see* David A. Rabin, *Attorney Solicitation: The Scope of State Regulation After* Primus *and* Ohralik, U. MICH. J.L. REFORM 144, 144 n.1 (1978) ("There is often only a very fine line between advertisement and solicitation."). While the Court has found complete prohibition of the form of "solicitation" contemplated by these works to be constitutionally acceptable, *see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the distinctions have generally blurred and this Note will use the terms interchangeably to refer to attorney conduct, other than "in-person solicitation," aimed at entering business arrangements with potential clients.

9. Prior to the Court's decision in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 728, 770 (1976), commercial speech, of which attorney advertising is a subcategory, did not receive First Amendment protection. The decision in *Bates* extended this protection to attorney advertising for the first time. *See Bates*, 433 U.S. at 384. Legal advertisements currently appear on television and radio broadcasts, in newspapers and legal periodicals, and even on billboards.

10. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 478-80 (1988) (invalidating complete prohibition on targeted direct-mail solicitation); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 639-47 (1985) (protecting attorney's right to solicit clients known to have a specific legal problem through newspaper advertisement); *In re* RMJ, 455 U.S. 191, 204-07 (1982) (striking a limitation on the permissible content of an attorney's newspaper advertisement). For an analysis of the *In re* RMJ decision and a predictive application of its reasoning to direct-mail solicitation, see Jerry Elliot, *The First Amendment*, In Re RMJ, *and State Regulation of Direct Mail Lawyer Advertising*, 34 BAYLOR L. REV. 411, 424-40 (1982).

11. *See Zauderer*, 471 U.S. at 648 ("[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar find beneath their dignity."); *Bates*, 433 U.S. at 368 ("[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained.").

12. In *Zauderer*, the attorney presented testimony from two witnesses who admitted that they would not have learned of their legal claims if they had not seen his advertisement. 471 U.S. at 634; *see Lawyer Solicitation: Does It Invade Privacy*, N.J. L.J., at 25 (reprint of commentary of Stephen Gillers, professor, New York University Law School) ("I was in practice in New York when *Bates* was decided and saw with my own eyes that the effect of advertising was to reduce the price of routine legal services by as much as 50 percent or more."). For an economic argument in favor of advertising, see Geoffery C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983). Professor Hazard views legal services as falling into two categories, standardized and individualized. *Id.* at 1090-91. Regarding standardized legal services, those involving relatively low risk to the client, he argues that

The Supreme Court recently considered the constitutionality of restrictions on lawyer solicitation of accident victims in *Florida Bar v. Went For It, Inc.*[13] The Court held that a thirty-day ban on direct-mail solicitation of accident victims and their families was constitutionally permissible.[14] This Note presents the Court's decision in light of the traditional prohibitions on lawyer advertising and the recent constitutional protection afforded it.[15] Also, this Note discusses the historical basis for these proscriptions and examines essential decisions regarding both the commercial speech doctrine and its application to attorney advertising.[16] Finally, this Note analyzes the Court's decision in light of precedent and, particularly, questions the wisdom of allowing regulations to be justified on the basis of a potential improvement of the legal profession's image.[17]

The regulations at issue in *Went For It, Inc.* created a thirty-day prohibition on direct-mail solicitation of accident victims and their families by attorneys.[18] The first part of the challenged regulation provides:

> [A] lawyer shall not send, or knowingly permit to be sent . . . a written communication to a prospective client for the purposes 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.[19]

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advertising could lower costs by increasing consumer awareness and allowing producers to achieve economies of scale. *Id.* at 1090-98. Conversely, advertising individualized legal services involving high client risk is not cost effective because it "cannot communicate information likely to influence potential purchasers." *Id.* at 1105.

13. 115 S. Ct. 2371 (1995).

14. *Id.* at 2381.

15. *See infra* notes 18-78 and accompanying text.

16. *See infra* notes 79-195 and accompanying text.

17. *See infra* notes 196-250 and accompanying text.

18. *Went For It, Inc.*, 115 S. Ct. at 2374. The Florida Supreme Court adopted the restrictions in 1990 after the Florida Bar petitioned it to amend the rules regulating attorney conduct. The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990). The Florida Bar made these recommendations after completing a two-year study of the effects of lawyer advertising on public opinion. *Went For It, Inc.*, 115 S. Ct. at 2374.

19. R. REGULATING FLA. BAR 4-7.4(b)(1).

The second part of the regulation states:

> 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.[20]

A Florida attorney and his personally owned referral service, Went For It, Inc., challenged these restrictions as violations of the First and Fourteenth Amendments to the Constitution.[21] In requesting injunctive relief, the plaintiffs asserted that they regularly engaged in targeted direct-mail solicitation of accident victims or their survivors within thirty days after accidents and wished to continue the practice.[22] They contended that the rules were unconstitutional as content-based restrictions on commercial speech that did not serve a substantial government interest.[23] The courts below found that Florida's asserted interests in protecting the heightened sensitivities and privacy of its citizens, and the tranquility of their homes, were insufficient to justify such a "prophylactic rule."[24] The United States Supreme Court reversed.[25]

Writing for the majority, Justice O'Connor[26] stated that the regulations passed constitutional scrutiny under the *Central Hudson* test for content-based restrictions on commercial speech.[27] Purely

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20. *Id.* at 4-7.8(a).

21. McHenry v. Florida Bar, 808 F. Supp. 1543, 1544-48 (M.D. Fla. 1992). The attorney, G. Stewart McHenry, was subsequently disbarred for unrelated events, Florida Bar v. McHenry, 605 So. 2d 459, 460 (Fla. 1992), and another Florida attorney was substituted in his place. *Went For It, Inc.*, 115 S. Ct. at 2374.

22. *See Went For It, Inc.*, 115 S. Ct. at 2374.

23. Both the district court, 808 F. Supp. at 1547-48, and the Court of Appeals for the Eleventh Circuit, *McHenry v. Florida Bar*, 21 F.3d 1038, 1044-45 (11th Cir. 1994), rejected the government's assertion that the regulation should be upheld as a reasonable time, place and manner restriction. The Eleventh Circuit agreed with the district judge in holding that the restriction was "unambiguously content-based," noting that it prohibited letters concerning personal injury actions but allowed letters concerning probate representation. McHenry v. Florida Bar, 21 F.3d at 1044-45; *see* McHenry v. Florida Bar, 808 F. Supp. at 1547-48. The time, place and manner analysis is explained in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984). The Supreme Court did not consider this argument.

24. *McHenry*, 21 F.3d at 1042-44; *McHenry*, 808 F. Supp. at 1545-47.

25. *Went For It, Inc.*, 115 S. Ct. at 2381.

26. Justice O'Connor was joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and Breyer. *Id.* at 2373.

27. *Id.* at 2381. For an explanation of this analysis, see Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 566-71 (1980). *See also infra* notes 144-51 and

commercial speech that is truthful, nondeceptive, and concerns a lawful activity receives some constitutional protection, albeit to a lesser degree than political speech, which is "at the First Amendment's core."[28] The Florida Bar did not contend that the proposed letters would be untruthful or misleading, or that they related to unlawful activities.[29] Under *Central Hudson*, the Court had to determine if the restriction: (1) served a substantial government interest; (2) directly and materially advanced that interest; and (3) was "narrowly drawn."[30]

In considering the first part of the analysis, the majority agreed with the Florida Bar that the state had a substantial interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers."[31] The Court observed that the State's interest in protecting the privacy and tranquility of the home from unwanted intrusions had consistently been recognized as a substantial state interest.[32] The majority also mentioned the broad authority with which states may regulate professions in order to protect " 'public health, safety, and other valid interests.' "[33] The historically strong protection accorded the privacy

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accompanying text (discussing the *Central Hudson* analysis).

28. *Went For It, Inc.*, 115 S. Ct. at 2375. Commercial speech enjoys " 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " Board of Trustees of State University of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)). It is well settled that the government may regulate commercial speech "that concerns unlawful activity or is misleading." *Went For It, Inc.*, 115 S. Ct. at 2376; *see Central Hudson*, 447 U.S. at 563-64.

29. *Went For It, Inc.*, 115 S. Ct. at 2376. When questioned about the content of the proposed communication at oral argument, counsel for the Florida Bar responded: "That's not in the record . . . and I don't know the answer to that question." *Id.* at 2384 (Kennedy, J., dissenting) (quoting Tr. of Oral Arg. 25).

30. *Id.* at 2376 (citing *Central Hudson*, 447 U.S. at 564-65).

31. *Id.* (citing Brief for Petitioner at 8, 25-27). The Court noted that the *Central Hudson* analysis did not allow it to " 'supplant the precise interests put forward by the State with other suppositions.' " *Id.* (quoting Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993)). The Court also recognized:

> The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, "is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families."

Id. (quoting Brief for Petitioner at 28).

32. *Went For It, Inc.*, 115 S. Ct. at 2376 (citing *Edenfield*, 113 S. Ct. at 1799; Frisby v. Schultz, 487 U.S. 474, 484-85 (1988); Carey v. Brown, 447 U.S. 455, 471 (1980)).

33. *Id.* (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)).

and tranquility of citizens within their homes persuaded the majority that this interest was substantial.[34]

In considering whether the thirty-day prohibition advanced these interests in a "direct and material"[35] way, Justice O'Connor noted that the State's burden would not be satisfied by speculation and conjecture, but would require a showing that the restriction would alleviate the alleged harms "to a material degree."[36] Based on the results of a two-year study of attorney advertising and solicitation, the majority believed that the restriction would do so.[37] The study contained statistical and anecdotal evidence "supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession."[38] The anecdotal record contained examples of the media's negative portrayal of direct-mail solicitation, as well as comments from several disgruntled Floridians whose families had received such solicitations at traumatic times.[39] Noting that Went For It, Inc. had failed to substantively contest the study's results, Justice O'Connor concluded that the evidence

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34. *Id.* at 2376-77.

35. *Id.* at 2377 (internal quotation marks omitted).

36. *Id.* (internal quotation marks omitted). In the past, the Court struck down a restriction supported by substantial state interests because the state failed to submit statistical or anecdotal evidence showing that the restriction advanced the interests in a material manner. *Edenfield*, 113 S. Ct. at 1800-02. *But cf.* Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 358-60 (1995) (arguing that in the context of restrictions on attorney advertising, the Court has given strong consideration to governmental claims that were unsupported by evidence).

37. *Went For It, Inc.*, 115 S. Ct. at 2377.

38. *Id.* Of the general population surveyed, 54% felt that contacting persons concerning accidents or similar events was a violation of privacy. *Id.* (citing Magid Associates, *Attitudes & Opinions Toward Direct Mail Advertising by Attorneys* (Dec. 1987), Summary of Record, App. C(4), p.6). In a random sample of direct-mail attorney advertisement recipients,

> 45% believed that direct-mail solicitation is designed to take advantage of gullible or unstable people; 34% found such tactics annoying or irritating; 26% found it an invasion of your privacy; 24% reported that it made you angry.... Significantly, 27% of the direct mail recipients reported that their regard for the legal profession and for the judicial process as a whole was lower as a result of receiving direct mail.

Id. (citing Magid Associates, *Attitudes & Opinions Toward Direct Mail Advertising by Attorneys* (Dec. 1987), Summary of Record, App. C(4), p.7 (internal quotation marks omitted)).

39. *Id.* at 2377-78. The citizens were "appalled and angered," "astounded," "very angry," and viewed the practice as "despicable and inexcusable," "beyond comprehension," and "of the rankest form of ambulance chasing." *Id.*

demonstrated that the restrictions materially advanced the State's interest.[40]

The majority distinguished regulations stricken in *Shapero v. Kentucky Bar Association*[41] and *Bolger v. Youngs Drug Products Corp.*[42] The majority concluded that *Shapero* was not controlling because the state interest asserted there was the prevention of overreaching rather than the protection of privacy, and the ban in question prohibited "*all* direct-mail solicitations, whatever the time frame and whoever the recipient."[43] The contested restrictions, in contrast, targeted the intrusion occurring when attorneys "confront" the recently injured or bereaved.[44] Further, the *Went For It, Inc.* majority was not persuaded by the reasoning presented in *Bolger* that " 'recipients of objectionable mailings . . . may effectively avoid further bombardment of their sensibilities simply by averting their eyes.' "[45] This technique could not be employed to avoid the "outrage and irritation with the state-licensed legal profession" caused by direct mail solicitation in the wake of an accident.[46] Although the restriction on mailing "objectionable contraceptive material" in *Bolger* was unacceptable, the "unrefuted empirical and anecdotal" evidence presented by the Florida Bar justified the thirty-day ban.[47]

Having found that the Florida Bar satisfied the first two parts of the *Central Hudson* analysis, the majority next considered the "relationship between the Florida Bar's interests and the means chosen to serve them."[48] Went For It, Inc. challenged the restriction as overinclusive because it failed to "distinguish between victims in terms of the severity of their injuries," and thus prohibited solicitation of victims with minor injuries and correspondingly low levels of

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40. *Id.*

41. 486 U.S. 466, 472-80 (1988) (striking a complete prohibition on direct-mail advertising by attorneys).

42. 463 U.S. 60, 75 (1983) (striking a prohibition on mailing of advertisements for contraceptive paraphernalia).

43. *Went For It, Inc.*, 115 S. Ct. at 2378. The Court noted that because a privacy interest was not asserted in *Shapero*, the empirical showing made on that issue was irrelevant. *Id.* at 2378-79.

44. *Id.* at 2379. Justice O'Connor wrote: "[T]he untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession . . . ." *Id.*

45. *Id.* at 2379 (quoting *Bolger*, 463 U.S. at 72).

46. *Id.* ("The Bar is concerned not with citizens' 'offense' in the abstract, but with the demonstrable detrimental effects that such 'offense' has on the profession it regulates.").

47. *Id.*

48. *Id.* at 2380.

grief.[49] The majority found it "hard to imagine the contours of a regulation" making this distinction and noted the difficulty of categorically parsing injuries based on relative grief.[50] Additionally, Went For It, Inc. contended that the regulation would prevent people from learning their legal options.[51] The ban's limited time period and the various alternative informational channels, however, persuaded the majority that the restriction would not be a large obstacle to Floridians in need of legal advice.[52] Finding that the thirty-day prohibition was a reasonable fit for the State's asserted interest, the majority upheld the regulation against the First Amendment challenge.[53]

In dissent, Justice Kennedy charged the majority with "unsettl[ing] leading First Amendment precedents, at the expense of those victims most in need of legal assistance."[54] Characterizing the majority's concerns for the victims' privacy and the legal profession's reputation as "misplaced and self-defeating," Justice Kennedy maintained that these concerns did not warrant the restriction in light of the need to "investigate the occurrence, identify witnesses, and preserve evidence" in the immediate aftermath of an accident.[55] In this respect, victims who did not learn of the availability of legal services through more "sophisticated and indirect" means could be taken advantage of by other parties with superior knowledge of or access to legal representation.[56] The dissent agreed that the *Central Hudson* analysis was necessary but disputed each of the majority's conclusions.[57]

Noting that the dangers of "overreaching and undue influence" that accompany in-person solicitation do not exist in direct-mail solicitation, the dissent considered the Bar's asserted privacy interest

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49. *Id.*

50. *Id.* ("The Bar's rule is reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.").

51. *Id.*

52. *Id.* at 2381.

53. *Id.* ("The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered.").

54. *Id.* at 2381 (Kennedy, J., dissenting). Justice Kennedy was joined by Justices Stevens, Souter, and Ginsburg. *Id.* (Kennedy, J., dissenting).

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

56. *Id.* at 2381-82 (Kennedy, J., dissenting).

57. *Id.* at 2382-86 (Kennedy, J., dissenting). "As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry." *Id.* at 2382 (Kennedy, J., dissenting).

invalid.[58] The Court had recognized the privacy interest, generally, but the dissent argued that " 'the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it.' "[59] According to Justice Kennedy, the privacy interest had traditionally been a justification only when the offended audience was "captive, " which mail recipients are not.[60] To avoid offensive material, he felt, all that was required of recipients was to take the " 'short, though regular, journey from mail box to trash can.' "[61] In his view, considering the restriction's resulting prejudice to the rights of would-be recipients to "petition the courts for redress of grievances," this was an acceptable burden.[62]

Further, the dissent addressed another interest that had persuaded the majority—"protecting the reputation and dignity of the legal profession."[63] The dissent criticized the majority's conclusion that the prohibited solicitation constituted an "unethical or improper" practice and thereby created unpopularity for the profession.[64] Justice Kennedy noted that while unpopularity would spring from unethical behavior, "direct solicitation may serve vital purposes and promote the administration of justice."[65] By regulating speech deemed offensive by some—in the name of the profession—the Florida Bar was essentially "manipulating the public's opinion by suppressing speech that informs us how the legal system works."[66]

In considering the second prong of the *Central Hudson* analysis, the dissent did not agree that the restrictions advanced the State's asserted interest in a direct and material way.[67] Particularly, the dissent criticized the majority's reliance on the "document" containing the statistical and anecdotal evidence.[68] Unsatisfied by the "[lack of] actual surveys, few indications of sample size or selection procedures,

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58. *Id.* (Kennedy, J., dissenting) (citing Shapero v. Kentucky Bar Ass'n., 486 U.S. 466, 475 (1988)).

59. *Id.* at 2383 (Kennedy, J., dissenting) (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985)).

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

61. *Id.* (Kennedy, J., dissenting) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983)).

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

63. *Id.* at 2383 (Kennedy, J., dissenting).

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

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

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

67. *Id.* at 2383-84 (Kennedy, J., dissenting).

68. *Id.* at 2384 (Kennedy, J., dissenting). Justice Kennedy was apparently unwilling to call the collection of information submitted by the Florida Bar a "survey."

no explanation of methodology, and no discussion of excluded results,"[69] Justice Kennedy noted that the Bar's burden on this issue required more than "a few pages of self-serving and unsupported statements."[70] Further, the dissent determined that even if this record's validity were accepted, the "essential thrust" of the material was directed to the reputational concerns of the Bar and did not make "clear that this regulation advances the interest of protecting persons who are suffering trauma and grief."[71]

Finally, the dissent concluded that the "wild disproportion between the harm supposed and the speech ban enforced," signified the regulation was not narrowly drawn.[72] In the case of lesser injuries the dissent argued that there was little chance that a solicitation letter would cause victims to become distraught.[73] With regard to more serious injuries, the dissent noted the necessity of "prompt" legal representation.[74] Regardless of the feasibility of drawing a regulation that differentiated between these classes of injuries, the dissent refused to agree that "in all or most cases an attorney's advice would be unwelcome."[75] In contrast to those victims whose education or familiarity with the legal system allowed them quick access, the dissent claimed that those victims who lacked access to legal representation due to their "lack [of] education, linguistic ability, or familiarity with the legal system" would benefit from direct solicitation.[76] By restricting communication in both instances, the majority had prejudiced the legal rights of "the very persons who most need legal advice."[77] Because the restriction "depriv[ed] accident victims of information which may be critical to their right to make a claim for compensation," the dissent contended

69. *Id.* (Kennedy, J., dissenting) ("There is no description of the statistical universe or scientific framework that permits any productive use of the information . . . .").

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

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

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

73. *Id.* at 2385 (Kennedy, J., dissenting).

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

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

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

77. *Id.* (Kennedy, J., dissenting). Justice Kennedy argued that the majority's suggestion that alternative channels of communication were available disclosed "latent protectionism for the established bar" and conceded the "necessity for the very representation the attorneys solicit and the State seeks to ban." *Id.* (Kennedy, J., dissenting).

that the thirty-day ban on direct-mail solicitation of all accident victims did not satisfy the "reasonable fit" requirement.[78]

The *Went For It, Inc.* decision marks the first time a restriction on written communication by attorneys has been upheld by the Court since 1977, when constitutional protection of attorney advertising was recognized in *Bates v. State Bar*.[79] Historically, attorney advertising and commercial speech were not protected by the First Amendment.[80] Recently, however, the Court acknowledged that both commercial speech[81] and attorney advertising[82] deserve some protection and defined the extent of this protection.

Went For It, Inc. arises from a line of cases in direct conflict with traditional views regarding attorney advertising. Indeed, proscriptions on attorney advertising have existed for centuries.[83] Some proscriptions were inspired by the intimate nature of the English bar in the eighteenth and nineteenth centuries, an intimacy that would have been impossible "for men who were continually blowing their professional horns and plotting to steal away one another's clients."[84] This atmosphere discouraged advertising, as the respect of the lawyer's peers was critical to his success. However, as the practice of law developed, these internal incentives against advertising were eliminated[85] and many nineteenth-century American attorneys advertised their services.[86] Nevertheless, proscriptions on advertising, viewed by many as a component of the high ethical standards necessary to maintain the valued "professionalism" of attorneys,[87] soon resurfaced.

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78. *See id.* at 2384-85 (Kennedy, J., dissenting).

79. 433 U.S. 350 (1977).

80. *See* Breard v. Alexandria, 341 U.S. 622, 641-45 (1951) (addressing commercial speech); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (same). Attorney advertising, which is essentially a proposal to enter a business arrangement, is considered commercial speech. *See Bates*, 433 U.S. at 363-66.

81. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976).

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

83. HENRY S. DRINKER, LEGAL ETHICS 210-15 (1953).

84. *Id.* at 210 ("They were a select fraternity who lived together and met one another every day, both at dinner and in the court, on a friendly basis.").

85. *Id.* at 210-11. As the familiarity among members of the legal profession evaporated and societal emphasis on competition developed, attorneys became less reliant on their peers in their quest for professional and personal success. *See id.* at 210-12.

86. *See* Hazard et al., *supra* note 12, at 1085 n.2. For a brief discussion of famous American attorneys, including Abraham Lincoln, who advertised in the 1800s, see *id.*

87. *See* DRINKER, *supra* note 83, at 214-15. By decreasing public confidence in attorneys, it was argued, advertising would hurt the profession's ability to render high quality services, and thus adversely affect the administration of justice. *Id.* at 211-12.

The American Bar Association first adopted standards prohibiting attorney advertising in 1908[88] and continued to discourage most forms of advertising for many years.[89] These standards were greatly influenced by the ABA's goal of maintaining "professionalism" within the legal profession.[90] Although some alterations in the rules against advertising were made to allow the publication of authorized legal listings intended to increase public access to the legal profession, the ABA and the organized bar historically were strongly opposed to attorney advertising.[91] Case law concerning advertising and commercial speech in general supported the proposition that states could regulate attorney advertising at will.

Prior to 1976, the review of regulations on commercial speech had been guided by a terse statement made by Justice Roberts in *Valentine v. Chrestensen*.[92] In upholding a ban on "purely commercial" speech, the Court recognized constitutional protection of the "freedom of communicating information and disseminating opinion," but reasoned that "the Constitution imposes no such restraint on government as respects purely commercial advertising."[93] As a subcategory of commercial speech, attorney advertising was thereafter considered a proper subject of the traditional restrictions.

The Court departed from this doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[94] Although the Court had previously suggested that the *Valentine* rule was obsolete,[95] the decision in *Virginia State Board of Pharmacy* completely

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88. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

89. DRINKER, *supra* note 83, at 212-81.

90. *See id.* at 212-15. Other evils traditionally thought to be inherent in legal advertising included the stirring up of litigation, undue influence, and the "temptation and probability that the lawyers who advertise and solicit would use improper means to make good their extravagant inducements." *Id.* at 214.

91. *Id.* at 211-20; *cf.* Snyder, *supra* note 36, at 360-67 (arguing that while the organized bar has restricted advertising and client solicitation by attorneys "under the guise of protecting professional values," the establishment's real interest is the preservation of the status quo).

92. 316 U.S. 52 (1942).

93. *Id.* at 54; *see also* Breard v. Alexandria 341 U.S. 622, 641-45 (1951) (upholding an ordinance prohibiting door-to-door solicitation of magazine subscriptions due to its "commercial feature").

94. 425 U.S. 748 (1976).

95. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 819 (1975) (striking down a Virginia statute prohibiting the circulation of any publication designed to encourage or promote abortion). In *Virginia State Board of Pharmacy*, the Court noted that the subject matter in *Bigelow* was a matter of "clear 'public interest,' " and that this circumstance might have left "[s]ome fragment of hope for the continuing validity of a 'commercial speech' exception." 425 U.S. at 760 (quoting *Bigelow*, 421 U.S. at 822).

abrogated it. The Court inquired "whether speech which does 'no more than propose a commercial transaction' is so removed from any 'exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection."[96] In striking down the statute, which prohibited price advertising by pharmacists, the Court reasoned that to achieve the proper allocation of resources in a free-enterprise economy, society has a strong interest in the free flow of information as a mechanism to inform buyers and sellers of their options.[97] Thus, the Court declared that commercial speech, at least with regard to pure price advertising of products, deserved First Amendment protection.[98]

The Court also considered the argument that allowing such advertising would adversely affect both the quality of services provided by pharmacists and the reputation of the profession.[99] The Court discounted these concededly valid interests by recognizing that "high professional standards . . . are guaranteed by the close regulation to which pharmacists . . . are subject."[100] Further, the unscrupulous pharmacist would not be deterred from cutting corners merely because he could not advertise.[101] In trying to protect its citizens from a decline in professional standards, Virginia employed means that rested "in large measure on the advantages of their being kept in ignorance."[102] Criticizing this approach, the Court suggested that the State's fears could be alleviated because "people will perceive their own best interests, if only they are well enough informed."[103]

The Court did not foreclose regulation on commercial speech entirely. The State retained the power to enact reasonable time, place, and manner restrictions, as well as the authority to prohibit

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96. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting, in order, Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Roth v. United States, 354 U.S. 476, 484 (1957)). For one commentator's view in support of this decision, see Thomas M. Schneider, *Prior Restraints and Restrictions on Advertising After* Virginia Pharmacy Board: *The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64, 74-87 (1978).

97. *Virginia State Bd. of Pharmacy*, 425 U.S. at 765. Given the First Amendment's strong protection for dissemination of political speech, the interest of the individual consumer "in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

98. *Id.* at 765.

99. *Id.* at 766.

100. *Id.* at 768.

101. *Id.* at 769.

102. *Id.*

103. *Id.* at 770.

commercial speech that was false or misleading or concerned an illegal activity.[104] With this in mind, the Court explicitly limited its ruling to pharmacists, leaving open the constitutionality of advertising regulation of other professions.[105] However, as predicted by Justice Rehnquist in dissent, this extension of logic was not far off.[106]

One year later in *Bates v. State Bar*,[107] the Court relied on the reasoning in *Virginia State Board of Pharmacy* to upset traditional ideology and extend First Amendment protection to attorney advertising.[108] The challenged regulation prohibited attorneys from advertising " 'through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity.' "[109] Two Arizona attorneys had violated the rule by placing a newspaper advertisement offering "legal services at very reasonable fees, and list[ing] their fees for certain services."[110] The Court considered and dismissed six justifications for the complete ban on price advertising by attorneys.[111]

In considering the first purported justification—advertising's adverse effect on professionalism—the Court found "the postulated connection between advertising and the erosion of true professionalism to be severely strained."[112] The Court reasoned that price

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104. *Id.* at 771-72.

105. *Id.* at 773 n.25 ("Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.").

106. *Id.* at 785 (Rehnquist, J., dissenting). Justice Rehnquist criticized the majority for ignoring past constitutional interpretation: "[T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession." *Id.* at 784 (Rehnquist, J., dissenting.) He also argued that the Court had created a standard whereby, absent a showing that communication was untruthful or misleading, the states were unable to "restrict in any way commercial efforts." *Id.* at 788 (Rehnquist, J., dissenting).

107. 433 U.S. 350 (1977).

108. *Id.* at 363-79.

109. *Id.* at 355 (quoting Rule 29(a) of the Supreme Court of Arizona, 17A ARIZ. REV. STAT. ANN. (Supp. 1976)). The Arizona rules did permit qualified legal assistance organizations and their members to employ means of dignified commercial publicity. *Id.* n.5.

110. *Id.* at 354 (internal quotation marks omitted).

111. *Id.* at 368-79; *see* Tiffany S. Meyer & Robert E. Smith, *Attorney Advertising:* Bates *and a Beginning*, 20 ARIZ. L. REV. 427, 443-56 (1978); Note, *Attorney Advertising Is Commercial Speech Protected by the First Amendment:* Bates v. State Bar, 37 MD. L. REV. 350, 361-71 (1977).

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

advertising might provide better access to the legal system to those persons who, although they recognized a need for legal services, failed to obtain counsel "because of the feared price of services or because of an inability to locate a competent attorney."[113] Further, advertising's allegedly negative effect on the public reputation of the profession was questionable; the dignified engineering, banking, and medical professions had embraced advertising without adverse reputational consequences.[114] Noting the origin of the rules against attorney advertising,[115] the Court determined that "habit and tradition" could not justify such an infringement on First Amendment liberties.[116]

The Court responded to the next justification—the inherently misleading nature of attorney advertising—by stating that in the case of "routine" legal services,[117] the advertisement would not be misleading "so long as the attorney does the necessary work at the advertised price."[118] The argument that legal services are inherently unique and thus do not lend themselves to standardized rates was weakened by the existence of the Arizona State Bar's Legal Service Program, in which participating attorneys agreed to perform certain services at standardized rates.[119] Further, the fact that advertising could not provide a "complete foundation" for attorney selection did not mean that advertisements did not provide at least "some of the relevant information needed to reach an informed decision."[120] To this end, the Court "view[ed] as dubious any justification that [was] based on the benefits of public ignorance."[121]

Next, the Court considered advertising's effect on the administration of justice, particularly the contention that advertising

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113. *Id.* at 370. In light of the American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1976), which encouraged lawyers to reach a fee agreement with clients "[a]s soon as feasible after a lawyer has been employed," the Court observed the inconsistency that would be created by requiring prompt disclosure of the "commercial basis" of the relationship "once the client is in the office" while condemning the "candid revelation of the same information before he arrives at that office." *Bates*, 433 U.S. at 369.

114. *Bates*, 433 U.S. at 369-70.

115. *Id.* at 371; *see supra* notes 83-90 and accompanying text.

116. *Bates*, 433 U.S. at 371.

117. *Id.* at 372. These "routine" services included "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." *Id.*

118. *Id.* at 373.

119. *Id.*

120. *Id.* at 374.

121. *Id.* at 375 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 769-70 (1976)).

would "stir[] up litigation."[122] Given the Court's opposition to the notion that "it is always better for a person to suffer a wrong silently than to redress it by legal action," the possibility that advertising would "encourage the assertion of legal rights" actually weighed in favor of advertising.[123] Similarly, advertising's alleged adverse economic effect was discounted by the reality that "[t]he ban . . . serves to increase the difficulty of discovering the lowest cost seller of acceptable ability."[124] Given these two undesirable results of the ban—reduced access and less competition—the Court held that "allowing restrained advertising would be in accord with the bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.' "[125]

Finally, the Court considered the potentially detrimental effect of advertising on the quality of legal service and the difficulties of enforcing a more limited restriction.[126] The Court did not agree that restricting advertising would deter "shoddy work" and observed that "attorney[s] . . . inclined to cut quality will do so regardless of the rule on advertising."[127] Further, the bar's concern about the additional burden that overseeing advertising placed on bar agencies was mitigated by the Court's belief that most attorneys would continue to behave with "integrity and honor."[128]

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122. *Id.*

123. *Id.* at 375-76.

124. *Id.* at 377. The result of the ban was to remove an incentive for attorneys to price competitively. The Court noted that with regard to products, price advertising had actually served to lower retail prices dramatically. *Id.*

125. *Id.* (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1976)).

126. *Id.* at 378-79.

127. *Id.* at 378.

128. *Id.* at 379 ("It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort."). Realizing the "problems in defining the boundary between deceptive and non-deceptive advertising," especially in the context of advertising legal services, the Court suggested that attorney advertising could be subject to some regulation. *Id.* at 383-84. Justice Powell, in dissent, was unpersuaded that price advertisement of routine legal services could exist without being inherently misleading. *Id.* at 391-95 (Powell, J., concurring in part and dissenting in part). He conceded that alternative forms of attorney advertising could be nondeceptive, and found the majority's suggestion that advertisements might be required to contain a "warning or disclaimer . . . so as to assure that the consumer is not misled" consistent with his opinion that "price advertisement of legal services . . . will require the most particularized regulation." *Id.* at 402 (Powell, J., concurring in part and dissenting in part). Thus, Justice Powell would have allowed legal advertising limited to those forms that could be presented in a nondeceptive manner. *Id.* at 399 (Powell, J., concurring in part and dissenting in part). Justice Rehnquist, writing separately, was "unwilling to take even one step down the 'slippery slope' " away from the "constitutionally sound and practically

With its decision in *Bates*, the Court took a major step, but the limits of the First Amendment's protection of attorney advertising remained uncertain. The scope of this protection was developed in a series of cases that both clarified the Court's doctrinal analysis of commercial speech and addressed regulations of attorney advertising within this framework. During this evolving process, the Court had the opportunity to consider the constitutionality of regulations on two distinct forms of attorney advertising: in-person solicitation in *Ohralik v. Ohio State Bar Association*[129] and solicitation by letter "of a client for a non-profit organization which, as its primary purpose, renders legal services" in *In re Primus*.[130] Though these cases were decided on distinct grounds, they foreshadowed the Court's general treatment of regulations on attorney advertising.[131]

The Court upheld a prohibition on in-person solicitation in *Ohralik* on the basis that in-person solicitation presented the danger of undue influence and overreaching that did not exist in the advertisement considered in *Bates*.[132] Despite the constitutional protection recognized in recent cases, the Court noted that the commercial nature of the proposed transaction reduced "the level of appropriate judicial scrutiny."[133] Observing that due to the profession's role in the " 'primary governmental function of administering justice' " the states traditionally had broad authority to regulate the profession, the Court looked to particular state interests to justify the restriction.[134] The indisputable contention that Ohio had a "legitimate and indeed 'compelling' interest in preventing those aspects of solicitation that involve[d] fraud, undue influence, intimidation, [and] overreaching,"[135] coupled with the increased potential for overreaching "when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person,"[136] convinced the Court that a prophylactic ban on in-person

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workable" *Valentine* rule, which withheld First Amendment protection from commercial speech. *Id.* at 404-05 (Rehnquist, J., dissenting in part).

129. 436 U.S. 447 (1978).

130. 436 U.S. 412, 420 (1978).

131. For an extensive discussion of these decisions, see Rabin, *supra* note 8, at 152-87 (proposing liberalization of then-existing regulations on legal advertising).

132. *Ohralik*, 436 U.S. at 455-59.

133. *Id.* at 457.

134. *Id.* at 460-62 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)).

135. *Id.* at 462.

136. *Id.* at 465.

solicitation was justified.[137] Although the constitutionality of prophylactic bans on in-person solicitation have not been challenged since *Ohralik*, states have had only minimal success in restricting other forms of truthful, nondeceptive advertising.[138]

In *In re Primus*, the Court specifically considered whether South Carolina could discipline an attorney for " 'solicit[ing] a client for a non-profit [legal services] organization ... where [the attorney's] associate is a staff counsel for the non-profit organization.' "[139] The attorney had sent a letter to an individual to whom the attorney had given unsolicited legal advice; the letter advised the individual that the ACLU, with whom both the attorney and her associates were affiliated, would provide free legal assistance.[140] The Court subjected the regulation to exacting scrutiny because the attorney was "seeking to further political and ideological goals through associational activity."[141] Under this standard, the restriction swept too broadly by proscribing solicitation that did not contain "undue influence, overreaching, misrepresentation," or any of the other dangers that the state claimed to fear.[142] The Court distinguished the letter from in-person solicitation on grounds that it permitted the recipient to make a deliberate decision, "involved no appreciable invasion of privacy," and afforded no "significant opportunity for overreaching or coercion."[143] Although the Court struck down the regulation on First Amendment associational grounds rather than commercial speech grounds, it became apparent that allowable

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137. *Id.* at 467. The Court also noted that less restrictive limitations on in-person solicitation would be difficult for the state to police, due to the lack of evidence. *Id.* at 466.

138. *See* Snyder, *supra* note 36, at 364-67. Disclosure requirements on attorney advertising have been upheld because the First Amendment's protection of commercial speech stems from the value of the information contained therein; requiring disclosure of more information, when "reasonably related to the State's interest in preventing deception of consumers," is not repugnant to that protection. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

139. 436 U.S. 412, 427 (1978) (quoting *In re*Smith, 233 S.E.2d 301, 306 (S.C. 1977)).

140. *Id.* at 414.

141. *Id.*; *see also* NAACP v. Button, 371 U.S. 415, 431-33 (1963) (holding that the NAACP's solicitation of prospective litigants for the purpose of furthering the civil rights objectives of the organization invoked associational freedoms at the core of First Amendment protection, which required that regulations of this activity pass "exacting scrutiny").

142. *Primus*, 436 U.S. at 432-33.

143. *Id.* at 435. Further, the existence of written communication would decrease the difficulty of policing valid regulations of this type of attorney advertising. *Id.* at 435-36.

regulation of attorney advertising would require a strong showing by the state.

Two years later, the Court clarified its analytical framework for testing the constitutionality of commercial speech regulations in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[144] In striking down a complete ban on promotional advertising by electric utilities, the Court set forth a four-part test. First, because constitutional protection for commercial speech is based on its informational function, communication that is deceptive or related to an illegal activity may be freely banned.[145] If the communication falls into neither of these categories, a restriction will be constitutionally valid only if it: (1) serves a "substantial" governmental interest,[146] (2) "directly advances the governmental interest asserted,"[147] and (3) "is not more extensive than is necessary to serve that interest."[148] Applying this analysis, the *Central Hudson*

144. 447 U.S. 557 (1980).

145. *Id.* at 563-64. The extent to which the First Amendment permits prohibition of attorney communication that is misleading was clarified recently by the Court's decision in Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990). In striking down ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(a)(3) (1988), which forbade attorneys from holding themselves out as "certified" or "a specialist," the plurality conceded that inserting those claims on an attorney's letterhead was potentially misleading. *Peel*, 496 U.S. at 106-11; *id.* at 111 (Marshall, J., concurring in the judgment); *id.* at 118 (White, J., dissenting). While inherently misleading commercial speech can be freely banned, however, the Court was not willing to extend this principle to cover commercial speech with only the potential to deceive, at least when the risk could be averted by narrower regulations such as a disclosure requirement. *Id.* at 110 n.17; *id.* at 111 (Marshall, J., concurring). Thus, if commercial speech with the potential to mislead can be made nondeceptive by a disclosure requirement, it cannot automatically be restricted under the first part of the *Central Hudson* analysis.

146. *Central Hudson*, 447 U.S. at 564, 566.

147. *Id.* at 564-66. The Court noted that in both *Bates* and *Virginia State Bd. of Pharmacy*, restrictions indirectly advancing a state interest were struck down. *Id.* at 564. The Court further elaborated upon this requirement in Edenfield v. Fane, 507 U.S. 761, 800-01 (1993), where the Court struck down a regulation that prohibited in-person solicitation by accountants. Finding that the State had failed to satisfy its burden of showing that the restriction directly advanced a substantial governmental interest, as no statistical or anecdotal evidence was offered, the Court stated: "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*

148. *Central Hudson*, 447 U.S. at 564-66. In requiring speech restrictions to be "narrowly drawn," the First Amendment does not allow complete suppression of "information when narrower restrictions on expression would serve [the state's] interest as well." *Id.* at 565. The Court suggested that, despite its recent rulings invalidating complete prohibitions of certain types of commercial speech, "more carefully drawn restrictions" could survive. *Id.* (citing Bates v. State Bar, 433 U.S. 350, 384 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678, 701-02 (1977); Virginia State Bd. of Pharmacy v.

Court accepted as substantial New York's interest in energy conservation[149] and found that the regulation "directly advanced" this interest.[150] The Court struck down the "complete suppression of Central Hudson's advertising," however, due to the "absence of a showing that more limited speech regulation would be ineffective."[151] Thus, a standard by which to evaluate commercial speech restrictions had developed; the standard's application to the context of legal advertising would require further refinement.

The Court first applied this commercial speech standard in the context of attorney advertising in *In re RMJ*.[152] The regulation under scrutiny was a revision of Missouri's restrictions on attorney advertising that permitted certain forms of advertising and allowed only certain categories of information to be advertised.[153] Further,

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Virginia Citizens Consumer Council, 425 U.S. 748, 773 (1976)). Justice Rehnquist, continuing to disagree with the Court's determination that commercial speech should be afforded any First Amendment protection, was particularly critical of the majority's inclusion and interpretation of this requirement: "The final part of the Court's test thus leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them . . . ." *Id.* at 599-600 (Rehnquist, J., dissenting). However, in Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989), the Court distinguished the requirement that commercial speech regulations be "narrowly drawn" from the "least-restrictive-means" requirement employed in other contexts. Because the stricter "least-restrictive-means" standard was inconsistent with the subordinate position held by commercial speech in the scale of First Amendment values, the Court interpreted the "narrowly drawn" component to require a "fit between the legislature's ends and the means chosen to accomplish those ends—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.* at 480 (internal quotation marks omitted); *see* Mark A. Conrad, Board of Trustees of the State University of New York v. Fox—*The Dawn of a New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61, 85-88 (1990) (summarizing the Court's constitutional analysis in *Fox*).

149. *Central Hudson*, 447 U.S. at 568. The Court did not question the advertising's relation to deception or illegal activity. *Id.* at 566.

150. *Id.* at 569 ("There is an immediate connection between advertising and demand for electricity.").

151. *Id.* at 571. Justice Blackmun, writing separately, expressed his opinion that the test adopted by the Court did "not provide adequate protection for truthful, nonmisleading, non-coercive commercial speech," and argued that restriction of commercial speech should not be allowed "absent clear and present danger." *Id.* at 573-75 (Blackmun, J., concurring in the judgment).

152. 455 U.S. 191, 203-07 (1982).

153. *Id.* at 193-94. Rather than abandon the historical regime of restricting attorney advertising, most states had adopted revised regulations thought to comply with the Court's decision in *Bates*. The permissible media for attorney advertising were newspapers, periodicals, and the yellow pages. *Id.* at 194. The categories of information allowed were: "name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial

attorneys wishing to advertise areas of practice were required to select the advertisement's description from an enumerated list of practice areas.[154] Finally, the restriction allowed mailing of professional announcement cards to " 'lawyers, clients, former clients, personal friends, and relatives,' " but prohibited general mailings.[155] The attorney challenging the regulation had published advertisements that listed unapproved areas of practice and other unpermitted information—namely the courts before which the attorney was licensed to practice.[156] Additionally, the attorney had sent announcement cards to persons outside of the permissible categories.[157] Noting that the *Bates* decision had emphasized that some regulation of attorney advertising was still constitutionally acceptable, the Court subjected the regulation to the commercial speech standard as set forth in *Central Hudson*.[158] The *RMJ* Court unanimously held the restrictions unconstitutional.[159] Because none of the attorney's advertising was misleading, the State's failure to assert a valid interest rendered the regulation impermissible.[160]

Although the Court continued to propose a permissible realm of regulation, the Court remained committed to its determination that the First Amendment protected commercial speech and attorney advertising. In *Bolger v. Youngs Drug Products Corp.*,[161] the Court clarified the requirements necessary for a commercial speech restriction to survive this scrutiny. The regulation at issue prohibited the mailing of " '[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception.' "[162] The Court accepted as substantial the government's asserted interest in "aiding parents' efforts to discuss birth control with their

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consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified 'routine' legal services." *Id.* at 194.

154. *Id.* at 195.

155. *Id.* at 196 (quoting Sup. Ct. Rule 4, DR 2-102(A)(2) MO. REV. STAT. (1978) (Index Vol.)).

156. *Id.* at 198.

157. *Id.*

158. *Id.* at 203-07.

159. *Id.* at 207.

160. *Id.* at 204-07. Again, the Court observed that "[t]here may be other substantial state interests . . . that will support carefully drawn restrictions." *Id.* at 207.

161. 463 U.S. 60 (1983).

162. *Id.* at 61 (quoting 39 U.S.C. § 3001(e)(2)). The Postal Service had interpreted the restriction not to apply to "advertisements in which the mailer has no commercial interest." *Id.* at 62.

children,"[163] but concluded that the "marginal degree of protection . . . achieved by purging all mailboxes of . . . material that is entirely suitable for adults" did not warrant the restriction.[164]

Justice Rehnquist, writing separately, agreed that the restriction had not been "adequately justified."[165] Justice Rehnquist disagreed with the majority's assessment of the government's asserted privacy interest but conceded that "a mailed advertisement is significantly less intrusive" than the invasions that had justified prior restrictions.[166] Finally, Justice Stevens, also concurring in the judgment, felt that when "offensiveness" is the governmental interest asserted, a distinction between "offensive" content and "offensive" form was necessary.[167] He acknowledged that while restriction of a specific viewpoint was improper, "regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment."[168]

The Court had another opportunity to apply this developing analysis to the attorney advertising context in *Zauderer v. Office of Disciplinary Council.*[169] In violation of an Ohio regulation that "forbade soliciting or accepting legal employment through advertisements containing information or advice regarding specific legal problems," the attorney had published a newspaper advertisement advising that he was willing to represent women in claims against the

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163. *Id.* at 73. The Court also considered and dismissed the government's asserted interest in "shield[ing] recipients of mail from materials that they are likely to find offensive." Noting that it had "never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended," the Court reasoned that "the short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Id.* at 71-72 (internal quotation marks omitted).

164. *Id.* at 73-75. This is essentially an application of the requirement that commercial speech restrictions directly advance the asserted interest. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1800-01 (1993).

165. 463 U.S. at 80 (Rehnquist, J., concurring in the judgment).

166. *Id.* at 78 (Rehnquist, J., concurring in the judgment). Justice Rehnquist agreed that the restriction did not directly advance the asserted state interest. Given his past criticism of the Court's granting First Amendment protection to commercial speech, it is interesting that Justice Rehnquist adjusted his analysis to encompass the recently adopted doctrine.

167. *Id.* at 83 (Stevens, J., concurring in the judgment).

168. *Id.* at 84 (Stevens, J., concurring in the judgment). Justice Stevens did not feel that this was a regulation of "form and context." *Id.* (Stevens, J., concurring in the judgment).

169. 471 U.S. 626 (1984) (plurality opinion).

makers of the Dalkon Shield contraceptive device.[170] The plurality agreed that print advertising did not involve the dangers of overreaching, invasion of privacy, undue influence, and fraud, which were presented by in-person solicitation.[171] Additionally, the plurality found invalid the state's contention that the difficulty of differentiating between deceptive and nondeceptive legal advertising justified a prophylactic ban.[172] Justice O'Connor disagreed with the plurality because of her concern that "the attorney's personal interest in obtaining business may color the advice offered in soliciting a client."[173] In this regard, she felt that "permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office," a practice that would implicate the same concerns for overreaching and undue influence that justified the prophylactic ban on in-person solicitation in *Ohralik*.[174]

The Court did, however, uphold a disclosure requirement relating to litigation costs because it was reasonably related to the State's interest in preventing deception of consumers.[175] As the Court had previously suggested, regulations on attorney advertising that "required [attorneys] to provide somewhat more information than they might otherwise be inclined to present," might be permissible "in

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170. *Id.* at 639-40. Litigation concerning the Dalkon Shield was estimated at several thousand cases. *Id.* at 640 n.10. The advertisement at issue successfully attracted 106 clients. *Id.* at 631.

171. *Id.* at 641-42. The Court similarly dismissed the notion that advertising's allegedly harmful effect of "stirring up" litigation could justify the restriction. *Id.* at 642-44.

172. *Id.* at 644-47 ("An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.").

173. *Id.* at 674 (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

174. *Id.* at 678-79 (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice O'Connor agreed with the majority's invalidation of a complete ban on the use of illustrations in legal advertising. *Id.* at 673 (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part). The majority held that the prohibition on illustration did not survive the protection afforded to commercial speech for the same reason that the prohibition on "advice regarding specific legal problems" failed—namely, the lack of a substantial state interest. *Id.* at 647-49. In considering Ohio's interest in ensuring that attorneys act in a "dignified manner," the Court noticed some distinction between the strength of this argument as justification for restriction on courtroom behavior and its strength with regard to restrictions on communications with the public. *Id.* The Court also reasoned that "the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id.* at 648.

175. *Id.* at 650-51.

order to dissipate the possibility of consumer confusion or deception."[176] The Court observed that because the First Amendment's protection of commercial speech was based primarily on its informational value, the constitutional protection for "*not* providing any particular factual information in [legal] advertising is minimal."[177]

The Court considered the constitutionality of a complete prohibition on targeted direct-mail advertising by attorneys for pecuniary gain in *Shapero v. Kentucky Bar Association*.[178] The Court distinguished targeted direct-mail advertising from in-person solicitation on the grounds that print advertising " 'poses much less risk of overreaching and undue influence' "[179] and does not implicate the " 'regulatory difficulties' that are 'unique' to in-person solicitation."[180] The Court acknowledged the potential for an "increased risk of deception" in letters that were "personalized" rather than merely targeted, but felt that complete prohibition of targeted direct-mail advertising was not justified.[181] The Court suggested that the State could adopt a more narrow regulation aimed at combating this danger, noting that "[t]he State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency."[182]

In dissent, Justice O'Connor criticized the majority for relying on "the reasoning ... of cases built on defective premises," and suggested that the Court reexamine its analytical framework.[183] Justice O'Connor argued that the *Central Hudson* standard gave states "considerable latitude to ban advertising that is *potentially* or

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176. *Id.*

177. *Id.* at 651.

178. 486 U.S. 466 (1988). For a discussion of *Shapero*, see Ralph J. Mauro, *Constitutional Regulation of "Targeted Direct-Mail Solicitation" by Attorneys After* Shapero*—A Proposed Rule of Conduct*, 34 VILL. L. REV. 281, 304-24 (1989).

179. *Shapero*, 486 U.S. at 475 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1984)). The Court also noted that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.* at 475-76.

180. *Id.* at 476 (quoting *Zauderer*, 471 U.S. at 641 (1984)).

181. *Id.*

182. *Id.*

183. *Id.* at 480 (O'Connor, J., dissenting). Justice O'Connor felt that targeted direct-mail advertising was different from the newspaper advertising in *Zauderer* in that targeted mailings were "more likely to overpower the will and judgment of laypeople" and were "more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer." *Id.* at 481-82 (O'Connor, J., dissenting) (internal quotation marks omitted).

demonstrably misleading, *as well as* truthful advertising that undermines the substantial government interest in promoting the high ethical standards that are necessary in the legal profession."[184] Applying this reasoning, she argued that the Court's decision in *Bates v. State Bar*[185] was inconsistent with her interpretation of the analysis.[186]

Although she acknowledged that some forms of legal advertising might be protected, Justice O'Connor maintained that the complete prohibition on targeted direct-mail advertising was justified by the state's "substantial interest in preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards."[187] Ultimately, the dissent contended that "the relentless natural force of economic self interest" necessitated "fairly severe constraints on attorney advertising" to ensure compliance with the "heightened ethical demands on [attorneys'] conduct towards those they serve."[188]

Thus, before the decision in *Went For It, Inc.*, the Court had developed a relatively defined framework within which to analyze the constitutional validity of restrictions on legal advertising. In applying the *Central Hudson* standard, the Court considered the interests asserted by the state and determined if the regulations directly advanced those interests in a manner that was not overly restrictive. The Court repeatedly acknowledged as substantial the governmental interests in preventing both overreaching and undue influence.[189] Other justifications had been unsuccessful.[190] Advertising's alleged

184. *Id.* at 485 (O'Connor, J., dissenting).

185. 433 U.S. 350 (1977).

186. *Shapero*, 486 U.S. at 485 (O'Connor, J., dissenting) (arguing that advertising prices for "routine" legal services is inherently misleading if "it fails to inform the potential clients that they are not necessarily qualified" to evaluate whether their problems are "routine").

187. *Id.* at 486 (O'Connor, J., dissenting).

188. *Id.* at 489-91 (O'Connor, J., dissenting) ("These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers . . . from the peculiar power of the specialized knowledge that these professionals possess.").

189. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457-62 (1978).

190. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476-77 (1988) (stating that the regulatory difficulties presented by in-person solicitation do not apply to written solicitation); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642-43 (1985) (dismissing the "stirring up" of litigation as a justification for regulations); Bates v. State Bar, 433 U.S. 350, 377-79 (1977) (dismissing advertising's alleged adverse effects on the cost and quality of legal services as justifications for a prophylactic ban on attorney

adverse effect on professionalism, strongly urged as an acceptable justification by Chief Justice Rehnquist and Justice O'Connor in several dissents,[191] had been questioned and dismissed when presented to the Court.[192] Further, although given strong consideration in other contexts,[193] the privacy interest implicated by direct-mail advertisement of legal services and other products had been an insufficient justification for content-based commercial speech restrictions.[194] Within this limited framework, however, the opinions of the Justices varied greatly; the many dissents illustrate a policy disagreement respecting attorney advertising.[195]

The recent development and proliferation of permissible advertising by the legal profession has been criticized by the general public, the established bar,[196] and even former Supreme Court Chief

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advertising, and questioning the veracity of these assertions in general).

191. *See Shapero*, 486 U.S. at 488-89 (O'Connor, J., dissenting) ("[S]pecial ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours."); *Zauderer*, 471 U.S. at 676-80 (O'Connor, J., dissenting).

192. *See Bates*, 433 U.S. at 368 ("The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community . . . ."); *Zauderer*, 471 U.S. at 647-48 ("[W]e are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights.").

193. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1800-02 (1993); Frisby v. Schultz, 487 U.S. 474, 484-85 (1988); Carey v. Brown, 447 U.S. 455, 471 (1980).

194. *See Shapero*, 486 U.S. at 476. Although the *Shapero* Court did not squarely confront the privacy issue, it observed that "[t]he invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." *Id.*; *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 ("[W]e have never held that the Government itself can shut off the flow of mailings to those who might potentially be offended.").

195. *See Shapero*, 486 U.S. at 480-91 (O'Connor, J., dissenting); *Zauderer*, 471 U.S. at 673-80 (O'Connor, J., dissenting); *In re* Primus, 436 U.S. 412, 440-46 (1978) (Rehnquist, J., dissenting); *Bates*, 433 U.S. at 389-404 (Powell, J., concurring in part, dissenting in part); *id.* at 404-05 (Rehnquist, J., dissenting).

196. *See* Re, *supra* note 3, at 98-104; Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177, 190 (Nelson et al. eds., 1992)

> The Georgia Committee on Professionalism singles out advertising as both evidence of the decline of professionalism and a major cause of this decline: "The Committee shares the remorse, indeed the indignation, of much of the bar over the shameless commercialism of some advertising by lawyers. It is artless, crude, and, in a word, unprofessional."

Id. Even a truly enlightening work, which recognizes the value of some advertising, contains the ironic statement of an elderly attorney: " 'This was a better world and a better profession . . . when clients didn't know what other law firms charged and lawyers didn't know what other lawyers made.' " SOL M. LINOWITZ, THE BETRAYED PROFESSION

Justice Warren Burger.[197] A common theme among these criticisms—and one particularly emphasized in the Court's decision in *Went For It, Inc.*—is that attorney advertising has a detrimental effect on "professionalism."[198] The heightened ethical standards that govern attorneys are necessary to ensure that members of the legal profession behave in a manner consistent with their stated dedication to public service and the administration of justice. Advertising, it is generally argued, adversely effects the reputation of the bar, thus lowering public confidence in the legal system.[199] Further, although the Court has decided the constitutionality of several forms of attorney advertising, there remains a virtual consensus on the part of established members of the legal profession that advertising is beneath the professional dignity of attorneys. Both the traditional prohibitions and the natural inclination toward self-preservation may contribute to

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32 (1994).

197. *See* Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949 (1995).

198. *Went For It, Inc.*, 115 S. Ct. at 2376-81; *see* Burger, *supra* note 197; Nelson & Trubek, *supra* note 196, at 191 ("[O]ne could argue that for many bar leaders the problem of professionalism would be solved if tasteless advertising and overzealous litigation could be controlled."); Robert D. Peltz, *Legal Advertising—Opening Pandora's Box*, 19 STETSON L. REV. 43, 116 (1989).

199. *See* Kathy Sawyer, *Lawyers Compound Disaster Grief; Complaints of Ambulance-Chasing After Dallas Jet Crash Probed*, WASH. POST, Aug. 16, 1985, at A14 ("[C]ritics and supporters agree that unseemly behavior by a few reinforces the stereotype of all lawyers as callous, money-grubbing vultures."); Neil T. Shayne, *Advertising by Lawyers*, N.Y. L.J., Apr. 10, 1990, at 3 (discussing some unappealing methods of attorney advertising involving the gas leak in Bhopal, India, the use of obituary pages for mailing lists, and describing the verbal exchange in one television commercial: "A convict in a prison uniform is led down a long hallway by two guards. The chaplain asks, 'Any last words my son?' The convict looks skyward and says, 'Yes, I wish I had called the legal clinic.' ").

this attitude.[200] An analysis of the decision in *Went For It, Inc.* reveals the persuasiveness of this ideology.

In applying the *Central Hudson* test to the Florida Bar's prohibition on direct-mail solicitation of accident victims and their families for a period of thirty days following an accident, the majority found that the regulation was supported by the substantial government interests in protecting victims' privacy and maintaining professionalism.[201] The majority relied heavily on a compilation of statistical and anecdotal evidence prepared for the Florida Bar in making the determination that the regulation was a reasonably restrictive means of directly advancing these interests.[202] The context of the Court's previous statements concerning the validity of the asserted privacy interest,[203] when coupled with the reality that

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200. Another possible impetus behind the opposition to lawyer advertising can be found in Hazard et al., *supra* note 12, at 1112:

> If the advertising problem were only one of economic competition within the bar, however, it might not have generated such heated controversy. One must look deeper, even if only to speculate. Perhaps the underlying anxiety about advertising stems from its tendency to portray legal services as a "business" rather than a "profession." Of course, the practice of law manifestly is both a profession and a business, and a highly competitive business at that. Why the passion to deny its character as a business? The answer derives from the notion, basic to our legal ideals, that justice cannot be sold. This notion is central to the ideology of the bar. A group for which that notion is so important inevitably would find it difficult to recognize that access to justice is in any sense a question of buying and selling. Nevertheless, lawyers differ in skill, knowledge, and the time they can devote to a case, and individuals with more resources are usually able to purchase both a superior lawyer and more of his time. Therefore, justice—actual outcomes in the legal system—is related to the quality of lawyering that a client can afford; justice at the margin can often be bought.

Professor Hazard recognized that advertising's exposure of this contrast between the ideal and the reality makes the legal profession uncomfortable, but he dismissed the possibility that advertising itself might widen the gap. *Id.* at 1112-13.

201. *Went For It, Inc.*, 115 S. Ct. at 2376-81.

202. *Id.* at 2377-79.

203. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1802-04 (1993) (striking a prohibition on in-person solicitation by accountants, but recognizing as substantial the state's interest in protecting its citizens from solicitation that would "intimidate, vex, or harass the recipient"); Frisby v. Schultz, 487 U.S. 474, 484-85 (1988) (upholding a content-neutral prohibition on residential picketing due to the state's substantial interest in protecting the domicile); Carey v. Brown, 447 U.S. 455, 471 (1980) (striking a prohibition on residential picketing as content-based despite recognition that "protecting the well-being, tranquility, and privacy of the home is certainly of the highest order"); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (dismissing the state's assertion that a ban on potentially offensive contraceptive material was supported by an interest in protecting recipients' privacy and stating that "[r]ecipients of objectionable mailings ... 'may effectively avoid further bombardment of their sensibilities simply by averting their eyes' ").

the thrust of the data relied upon was aimed at legal advertising's negative effect on public opinion,[204] indicates that the majority's opinion was motivated by its desire to preserve professionalism within the legal practice.[205]

Although general political processes in our country are governed democratically, it is unlikely the Court, or organized bar associations, would support basing the ethical standards of the legal profession on public opinion. Given the average layperson's limited knowledge regarding legal processes, this idea instantly appears unwise. Yet the Court gave strong consideration to the public opinion survey that indicated that attorney advertising was viewed by some members of the general public as an invasion of privacy and as a practice that diminishes respect for the legal profession.[206]

The plight of recent accident victims and their families deserves recognition. Indeed, it is the distinguishing factor in the Court's decision that the regulation was constitutionally permissible.[207] While the states' interest in protecting against offensive mailings had been considered previously,[208] the compelling situation that the Florida Bar sought to protect, and the time limit, made this regulation somewhat different than the complete prohibition on direct-mail advertising in *Shapero v. Kentucky Bar Association*.[209] To assume that this distinction was the primary basis for the decision in *Went For It, Inc.*, however, would be to ignore the underlying motivation to protect the dignity of the legal profession.[210]

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204. *Went For It, Inc.*, 115 S. Ct. at 2377-78.

205. This notion is supported by the majority's statement that the regulation in *Went For It, Inc.* was different from the one stricken in *Bolger* because the harm targeted was not the offense, but the consequent injury to the legal profession. *See Lawyer Solicitation: Does It Invade Privacy?*, N.J. L.J., Aug. 7, 1995, at 25 (reprint of commentary of Eugene Volokh, acting professor, UCLA School of Law) (recognizing that this distinction essentially reduces the asserted privacy interest to the protection of professionalism).

206. *Went For It, Inc.*, 115 S. Ct. at 2377-79.

207. *Id.* at 2378-79.

208. *See* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 71-72 (1982) (holding that the asserted state interest of protecting mail recipients from material they might find offensive was insufficient justification for a complete prohibition on the mailing of contraceptive advertisements).

209. 486 U.S. 466 (1988).

210. Before subjecting the regulation to the *Central Hudson* analysis, the majority acknowledged that the restriction was an "effort to protect the flagging reputations of Florida lawyers by preventing" conduct that the Florida Bar felt was " 'deplorable and beneath common decency.' " *Went For It, Inc.*, 115 S. Ct. at 2376 (quoting Brief for Petitioner 28 (quoting *In re* Anis, 599 A.2d 1265, 1270, *cert. denied*, 504 U.S. 956 (1992))).

In regard to the Florida Bar's asserted interest in protecting the privacy of recent accident victims and their families, the majority found precedential recognition of the need to preserve the " 'well-being, tranquility, and privacy of the home.' "[211] Repeatedly acknowledged in the context of content-neutral time, place and manner restrictions, the heightened protection afforded the homestead has generally been justification for restricting forms of communication that are offensive, rather than restricting communication with offensive content.[212] As the dissent noted, the Court has explicitly refused to justify restrictions on speech on the basis that the idea itself might offend the listener.[213] Further, in considering prohibitions of direct-mail solicitation in *Shapero v. Kentucky Bar Association*[214] and *Bolger v. Youngs Drug Products Corp.*,[215] the Court noted the ease with which mail recipients could avoid potentially offensive material simply by throwing it away.[216] This implicit protection of mail recipients was enhanced by an unchallenged Florida Bar regulation that required attorneys' solicitation letters to bear the marking "advertising material" in red.[217] Thus, the state's interest in protection of privacy appears to be of little import.

Further, the evidence supporting a conclusion that the regulations directly and materially advanced the privacy interest was not overwhelming. In addition to the dissent's criticisms of the presented

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211. *Id.* (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

212. *See* Kovacs v. Cooper, 336 U.S. 77, 81-89 (1949) (upholding a restriction on the use of sound trucks to disseminate opinions). In Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980), Justice Stevens wrote:

> [A] communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting. . . . The fact that the offensive form of some communication may subject it to appropriate regulation surely does not support the conclusion that the offensive character of an idea can justify an attempt to censor its expression.

Id. at 546-47 (Stevens, J., concurring).

213. *Went For It, Inc.*, 115 S. Ct. at 2383 (Kennedy, J., dissenting) (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 76 (1983); Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977)).

214. 486 U.S. 466 (1988).

215. 463 U.S. 60 (1983).

216. *See Shapero*, 486 U.S. at 475-76; *Bolger*, 463 U.S. at 72 (internal quotation marks omitted) (stating that recipients of objectionable mailings could "avoid further bombardment of their sensibilities simply by averting their eyes").

217. *See* McHenry v. Florida Bar, 21 F.3d 1038, 1042 n.8 (11th Cir. 1994) (citing R. REGULATING FLA. BAR 4-7.4(b)(2)(A)), *rev'd*, 115 S. Ct. 2371 (1995)).

survey's lack of statistical definition,[218] the statistics themselves are unimpressive. Of the statistics cited by the majority, the two related to the privacy interest are: twenty-six percent of a random sampling of people who had received direct-mail advertising by lawyers in 1987 thought it was an invasion of privacy and fifty-four percent of the general population surveyed felt the same.[219] While the first statistic suggests that direct-mail advertising may implicate a privacy interest, it is interesting that actual direct mail recipients were less than half as likely as the general population to feel that the practice was an invasion of privacy.[220] The effect on the general population's opinion seems to be more persuasive to the Court than the reality that actual recipients were more amenable to the practice after receiving the letters. This contrast indicates that recipients often benefit from direct mail solicitation, or at least that they perceive the practice more positively after they experience it.[221]

Somewhat more related to the privacy interest is the anecdotal evidence presented by the Florida Bar, which cataloged the comments of several direct-mail recipients who were angered by the solicitation.[222] Essentially, however, the brunt of this information was aimed at correlating direct-mail solicitation and declining public opinion of the legal profession.[223] Thus, the majority's opinion must have been strongly influenced by the public's negative view of the practice of direct-mail solicitation.

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218. *Went For It, Inc.*, 115 S. Ct. at 2384 (Kennedy, J., dissenting); *see supra* notes 68-70 and accompanying text (noting several of Justice Kennedy's objections to the survey).

219. *Id.* at 2377. Other statistics showed that 34% of direct-mail recipients found it annoying or irritating and 24% said they were angered. *Id.*

220. *Cf.* James Podgers, *Image Problem: Burned by the Fall in Public Favor, the Organized Bar Turns Up the Heat on Lawyer Advertising*, 80 A.B.A. J. 66, 68 (Feb. 1994) (discussing the results of a Gallup poll of 400 random ABA members and noting that "a whopping 87 percent of the respondents said they believe advertising has a negative effect on the image of the legal profession").

221. The irony apparent from this situation, which the majority failed to recognize, is that this evidence, offered to sustain the validity of the Florida Bar's asserted privacy interest, impeaches the validity of the 30-day ban as an effective means of promoting the reputation of the legal profession.

222. *Id.*. at 2377-78; *see supra* note 39 (providing examples of citizen comments).

223. For an interesting critique of the Supreme Court's evidentiary requirements regarding justifications for restrictions on speech by attorneys, see Snyder, *supra* note 36, at 357-60 (arguing that decisions are often based on policy opinions and speculation rather than empirical data). Interestingly, none of the statistical or anecdotal data relied upon by the majority indicated that attorneys participating in direct-mail solicitation engaged in unethical behavior or that the practice of direct-mail solicitation encouraged such behavior. *See Went For It, Inc.*, 115 S. Ct. at 2377-78.

The strong consideration of the legal profession's image is not surprising in light of the constant criticism that influential members of the established bar direct toward advertisers.[224] More important, however, is the possibility that a majority of the Court might agree that protecting the dignity and reputation of the legal profession is an acceptable justification for restricting attorney advertising. In the past, Justice O'Connor contended that the states have a valid interest in regulating professions.[225] Her persistent adherence to this belief, consistently joined by conservative members of the Court,[226] generally focused on the "enhanced possibility for confusion and deception in marketing professional services" and the danger that the "attorney's personal interest in obtaining business [might] color the advice offered in soliciting a client."[227] However, in *Went For It, Inc.* the proposed communication's potential for creating these dangers was not at issue. Rather, the "erosion of confidence in the profession" allegedly caused by direct-mail solicitation appears to be the most influential factor in the majority's decision.[228]

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224. *See* Burger, *supra* note 197, at 953-57; Nelson & Trubek, *supra* note 196, at 190 ("[L]eaders of the bar seem to agree about what specific conduct constitutes 'unprofessional' behavior: advertising and litigation 'abuse.' "); Re, *supra* note 3, at 98-104.

225. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1804 (1993) (O'Connor, J., dissenting) ("In my view the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large."); Peel v. Attorney Disciplinary Comm'n, 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting) ("Failure to accord States considerable latitude in this area embroils this Court in the micromanagement of the State's inherent authority to police the ethical standards of the profession within its borders."); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 487 (1988) (O'Connor, J., dissenting) ("The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulation."); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 676 (1985) (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit.").

226. *See Peel*, 496 U.S. at 119 (O'Connor, J., dissenting) (joined by Chief Justice Rehnquist and Justice Scalia); *Shapero*, 486 U.S. at 480 (O'Connor, J., dissenting) (same); *Zauderer*, 471 U.S. at 473 (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Chief Justice Burger and Justice Rehnquist).

227. *Zauderer*, 471 U.S. at 674 (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

228. *Went For It, Inc.*, 115 S. Ct. at 2381. It should be noted that Justice Breyer was the swing vote in this decision. At least one commentator has suggested that his decision to join the majority was predicated on the privacy interest. *Lawyer Solicitation: Does It Invade Privacy?*, N.J. L.J., Aug. 7, 1995, at 25 (reprinting online Lexis Counsel Connect comments made by Peter Strauss, professor, Columbia University School of Law).

Indeed, the majority candidly recognized that the actual harm the Florida Bar sought to prevent was not the invasion of privacy, but rather the "outrage and irritation with the state licensed legal profession" caused by direct-mail solicitation.[229] This harm could not be avoided by throwing the letter away, because the "simple receipt" of such an advertisement was enough to elicit contempt and distrust for the legal profession.[230] This concern is certainly predicated on the traditional notion of legal professionalism. When lawyers behave in an unprofessional manner, public confidence in and respect for the legal profession decline, and, the argument goes, the vitality of our legal system will suffer a corresponding decline. On its face, this argument is entirely plausible; without competent, trustworthy, and ethical legal representation, citizens would be unable to exercise the very legal rights upon which the system is based. In this regard, true professionalism is required to sustain our justice system.

The problem encountered in *Went For It, Inc.* is the origin of the definition of true professionalism. The Florida Bar's interpretation of professionalism places high value on the reputation of its members.[231] While competent practice and ethical dedication deserve a high degree of respect, the dynamics of the legal profession—an atmosphere fraught with conflict and controversy—have historically subjected attorneys to public criticism.[232] The representation of unpopular clients, the adversarial nature of court proceedings, and the high fees accompanying legal representation are examples of professional behavior that contribute to the general public's poor opinion of the legal profession. A regulation aimed at improving this opinion can be only marginally successful because some segment of society will be unhappy with the legal profession at any given time. Additionally, the wisdom behind a scheme to improve public opinion is questionable: Is the legal profession guided by the opinion of

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229. *Went For It, Inc.*, 115 S. Ct. at 2379; *see supra* notes 218-21 and accompanying text (noting the inconsistency between evidence presented in support of the privacy interest and the conclusion drawn).

230. *Went For It, Inc.*, 115 S. Ct. at 2379.

231. The Florida Bar commissioned a public opinion survey to determine advertising's effect on public attitudes regarding the legal profession and, based on the survey's results, petitioned the Florida Supreme Court to amend regulations on attorney advertising. *Went For It, Inc.*, 115 S. Ct. at 2374 (citing The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990)).

232. *See* Re, *supra* note 3, at 86 (citing EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENT (1770), and Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395 (1906), for the proposition that dissatisfaction with the legal profession is "as old as the law itself").

society? The Model Rules of Professional Conduct, promulgated by the American Bar Association, are silent as to a lawyer's obligations with regard to his popularity.[233] Instead, the Model Rules emphasize the lawyer's duty to public service and the administration of justice.[234]

The fact that Went For It, Inc. was motivated entirely by financial self-interest does not necessarily indicate that its use of direct-mail solicitation is inconsistent with professionalism.[235] The provision of legal services to those without ready access to legal representation is consistent with professional values. As noted by the dissent, direct solicitation "may serve vital purposes and promote the administration of justice."[236] Particularly benefited by direct-mail solicitation are those who lack exposure to the legal system and who are in need of timely representation.[237] Other parties with better access to legal representation, as well as their insurance companies, are able to contact accident victims in the immediate aftermath of the accident; but attorneys wishing to provide them with legal advice are prohibited from doing so.[238] Further, the fact that Florida attorneys were sending over 280,000 letters per year[239] to accident victims or their families indicates that many recipients found the services offered by the direct-mail solicitors valuable; if recipients did not respond to the letters, the economic incentive for direct-mail solicitation would be removed and the practice would probably cease.[240] It is ironic

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233. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1994).

234. *Id.* at Preamble: A Lawyer's Responsibilities.

235. As the Court noted in Bates v. State Bar, 433 U.S. 350, 368-69 (1977), attorneys earn their livelihood at the bar, and thus much legal work is the product of self-interest.

236. *Went For It, Inc.*, 115 S. Ct. at 2383 (Kennedy, J., dissenting).

237. *See* Snyder, *supra* note 36, at 385-86. The dissent argued that the restriction upheld in *Went For It, Inc.* would prejudice the rights of victims in need of legal representation. 115 S. Ct. at 2385 (Kennedy, J., dissenting). Regarding minor injuries, the dissent argued that victims unaware of the possibility of a legal claim would be harmed by the restriction. *Id.* (Kennedy, J., dissenting). Likewise, in the case of major injuries, victims "too ill-informed to know that time is of the essence" would be prejudiced. *Id.* (Kennedy, J., dissenting).

238. *See Went For It, Inc.*, 115 S. Ct. at 2381 (Kennedy, J., dissenting) (noting the urgent need for legal representation immediately following an accident); *see also* Monroe H. Freedman, *Advertising and Soliciting: The Case for Ambulance Chasing*, *in* VERDICTS ON LAWYERS 94, 94 (Ralph Nader & Mark Green eds., 1976) (describing the facts of Gunn v. Washek, 176 A.2d 635 (Pa. 1961), a case in which a young boy's claim against a negligent driver was barred by the statute of limitations after his mother unwittingly relied on the assurance of an insurance adjuster that no attorney was necessary).

239. *Went For It, Inc.*, 115 S. Ct. at 2377.

240. Further, as noted by Justice Kennedy in dissent, the practice is self-policing in that "[p]otential clients will not hire lawyers who offend them." *Id.* at 2385 (Kennedy, J.,

that these benefits of direct mail solicitation were overshadowed by the Florida Bar's interest in maintaining "professionalism."[241] As noted by Justice Kennedy in dissent, an essential link is missing in the chain that supposedly connects direct-mail solicitation with a decline in professionalism.[242] Unethical behavior will surely result in both a decreasing reputation and a loss of efficacy within the legal system. Because public opinion of the legal profession is adversely affected by some practice, however, does not mean that the practice is inherently unethical. Careful consideration, far beyond the superficial inquiry by the layperson, is necessary to determine the proper standards within the profession. The formation of these standards must be guided not by an interest in popularity, but by the profession's primary objective—to provide legal services to the public.

In light of the *Went For It, Inc.* majority's protection of the dignity and reputation of the legal profession, the future of currently permissible forms of attorney advertising is questionable. If the public's negative opinion of direct-mail solicitation of accident victims persuades the Court to allow this severe infringement of attorneys' First Amendment liberties, restrictions on other forms of attorney

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dissenting).

241. Another group that will feel the impact of this regulation is the small practitioner. *See Lawyer Solicitation: Does It Invade Privacy?*, N.J. L.J., Aug. 7, 1995, at 25, 41 (reprinting online Lexis Counsel Connect comments made by solo practitioner Don Boswell of Palm Beach, Florida). Mr. Boswell's stated:

> By prohibiting [direct-mail] contact within this period, the only firms that will contact an accident victim, albeit indirectly, are those that are already spending fortunes on TV and Yellow Pages advertising, and those that wine and dine emergency room physicians, EMS personnel, tow-truck drivers, and police officers, and employ various other methods of attracting business. At least, direct mail contact allowed an inexpensive way (and much more ethical than giving cards to ER docs, etc.) for small firms to compete with the big boys. Once again, the Florida Bar is out to protect the already established firms, and the Supreme Court has just given it a stamp of approval. Neither really cares about the consumers.

Id.; *see also* Lisa Brennan, *The Enemies of Lawyer Advertising: Other Lawyers*, N.J. L.J., May 22, 1995, at 5. Ms. Brennan reported the views of one attorney:

> "Many of the most bitter opponents of lawyer ads are lawyers at big firms that put lots of money into separate marketing departments," says David Vladeck, lead counsel at the Public Citizens Litigation Group in Washington. "Lawyers ads make [lawyers] feel like shoe salesmen, but their firms are doing the same thing on a grander scale. It's sheer hypocrisy."

Id.

242. *Went For It, Inc.*, 115 S. Ct. at 2383 (Kennedy, J., dissenting). Justice Kennedy criticized the Florida Bar for "manipulating the public's opinion by suppressing speech that informs us how the legal system works." *Id.* (Kennedy, J., dissenting).

advertising may be supported by a similar rationale.[243] It is more likely, however, that the compelling situation of recent accident victims and their families enabled the majority to secure the swing vote that it needed. Justice O'Connor did not criticize the Court's analytical framework for regulations on legal advertising, or the precedents within that framework, as she had done in the past.[244] Instead, while clearly holding the protection of the profession's image to be a valid justification, she also invoked the asserted privacy interest. If the particularly sympathetic state of recent accident victims and their families was the factor that persuaded Justice Breyer to join Justice O'Connor,[245] then protection of professional dignity may not be a valid justification for other restraints on attorney advertising. Several states have responded to the *Went For It, Inc.* decision by considering the enactment of similar temporary bans on direct-mail solicitation of accident victims.[246] For example, the Council of the North Carolina State Bar approved for publication a proposed amendment to the North Carolina Rules of Professional Conduct that would expand the thirty-day ban to cover not only accident victims, but any person " 'the lawyer knows or should know

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243. For example, if the public finds that certain television commercials denigrate the profession's reputation, the majority's rationale indicates that increased restrictions would be appropriate. *Cf. Cyberspeak: Voices from the Reader Network*, NETWORK WORLD, May 23, 1994, at 7 (listing opinions of Internet users with regard to legal advertising over the information superhighway).

244. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 480 (1988) (O'Connor, J., dissenting) ("I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning.").

245. This is indicated simply by its inclusion in the majority opinion. Justice O'Connor's professed belief that consumers would not "benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundation" suggests that the privacy interest was unnecessary to her decision. *See Shapero*, 486 U.S. at 491 (O'Connor, J., dissenting).

246. *See, e.g.*, Rocco Cammarere, *New Ambulance-Chasing Prohibitions on the Way*, N.J. LAW., July 31, 1995, at 1 (stating that the only issues concerning the inevitable ban in New Jersey are "who will do the banning—the New Jersey Supreme Court or the State Legislature—and the duration of the cooling off period"); Mark A. Cohen, *MBA May Seek 30-Day Ban on PI Solicitation*, MASS. LAW. WKLY., July 10, 1995, at 1 (describing the Massachusetts Bar Association's serious consideration of the 30-day "waiting period"). Meanwhile, states that have already enacted rules similar to Florida Bar's should succeed at the appellate level if they can muster evidentiary support to sustain a claim of governmental interest in protecting the privacy of citizens. *See* Moore v. Morales, 63 F.3d 358, 362-63 (5th Cir. 1995). In *Moore*, the Fifth Circuit applied the *Went For It, Inc.* analysis to Texas' asserted interest of protecting privacy and found the evidence submitted by the state sufficient to justify a similar 30-day direct-mail restriction. *Id.* The state did not assert, and the court did not address, legal professionalism.

. . . may be in need of legal services in a particular matter unless the event giving rise to the need for legal services occurred more than thirty days prior to the mailing of the communication.' "[247] It is unlikely that such a wide-sweeping restriction would be justified by a privacy interest similar to that asserted in *Went For It, Inc.* due to its inclusion of far less serious invasions.[248] The Court should not permit reputational concerns to sustain such serious infringement of First Amendment rights.

By allowing the Florida Bar to justify its standards with its professed concern for the reputation of its members, the Court overestimated both the importance of and the potential for the legal profession's popularity within the community. Given that some level of dissatisfaction is a function of the system itself, Justice Kennedy argued that the best way to improve the professional image of attorneys was to improve the "substance of its practice."[249] True professionalism requires that " 'the ethical standards of lawyers are linked to the service and protection of clients.' "[250] By protecting the "flagging reputations" of Florida attorneys, the regulation at issue in *Went For It, Inc.* prevents potential clients from receiving information necessary to assert their legal rights. This unseemly justification suggests that the Florida Bar is willing to sacrifice the legal claims of injured parties to ensure its own popularity.

TODD MITCHELL

247. *Council Proposes Change to Mail Solicitation Rule*, N.C. ST. B. NEWSL., Fall 1995 at 1, 8. The Council has also approved funding for a public-opinion survey to determine "[t]he effect of lawyer solicitation and advertising on privacy interests and the reputation of the bar," the results of which will be used to guide decisions relating to ultimate revisions. *Id.* at 8.

248. *See id.* at 8. For example, a recipient of a traffic citation seems much less likely to view a letter from an attorney as an invasion of his privacy than the family of an accident victim, yet both letters would be prohibited by the proposed amendment.

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

250. *Id.* (Kennedy, J., dissenting) (quoting Ohralik v. Ohio Bar Ass'n 436 U.S. 447, 461 (1978)).