Advertising activity among members of the legal profession has grown more popular as a marketing tool over the past twenty years. Lawyers no longer simply place advertisements in newspapers and the Yellow Pages. Now, they rent billboards, send out mass mailings, and broadcast radio and television commercials. In particular, the use of targeted, direct-mailings to individuals known to have an imminent legal need substantially increased during the 1980's and continues to be a common medium for lawyer advertising.

Today, lawyers are becoming more innovative and more aggressive in their attempts to solicit clients. Consequently, states are becoming more concerned with the extent to which lawyers should be allowed to reach out to individuals through various methods of advertising. The issue arises, however, of whether permitting states to regulate lawyer advertising constitutes an unwarranted suppression of commercial speech.

Prior to the mid-1970's, the First Amendment of the United States Constitution did not include commercial speech under its umbrella of protection. It was not until 1976 that the United States Supreme Court recognized the informational function of commercial speech and granted it constitutional protection. Subsequently in 1977, the Court decided the landmark case Bates v. State Bar of Arizona, in which the Court held that advertising by lawyers should be included in the category of commercial speech.

1 A.B.A. Comm'n on Advertising, Lawyer Advertising at the Crossroads 47 (1995) [hereinafter Lawyer Advertising]. A 1993 Gallup Poll commissioned by the A.B.A. Journal revealed that 61% of surveyed A.B.A. members said their firms participated in some form of advertising. Id. at 52.

2 When lawyers first began to explore advertising in the late 1970's, newspapers and Yellow Page directories were the most common media. Id.

3 Id. Other marketing devices include Christmas cards and promotional items bearing the firm's name and the sponsoring of public events. HARRY J. HAYNSWORTH, MARKETING AND LEGAL ETHICS: THE RULES AND RISKS 31-40 (1990).

4 An advertisement uses some form of mass media to convey a message to the public about a particular firm. LAWYER ADVERTISING, supra note 1, at 44. In contrast, a solicitation consists of direct contact via telephone, in-person, or through the mail. Id. Throughout this Comment, the term advertising will be used to refer to all modes of communication, including solicitations.

5 Id. The 1993 Poll reported that seven percent of surveyed lawyers use direct-mailings. Id. at 52; Larry Bodine, Advertising Acumen, NAT'L L.J., Aug. 13, 1990, at 9. This increase in the use of targeted direct-mailings is due largely in part to the cost-effectiveness of sending material through the mail, especially for new entrants into the legal profession and for small firms with low capital. See generally Al H. Ringleb et al., Lawyer Direct Mail Advertisements: Regulatory Environment, Economics, and Consumer Perception, 17 PAC. L. J. 1199 (1986).

6 See, e.g., In re Anis, 599 A.2d 1265 (N.J. 1992)(lawyer sent a solicitation letter to the father of a student killed in a plane crash just one day after his remains were identified); Norris v. Alabama State Bar, 582 So.2d 1034 (Ala. 1991)(firm sent flower wreath to funeral home along with note offering legal services to family of 19-month-old decedent).

7 See infra notes 17 and 19 and accompanying text.

8 Commercial speech is defined as speech that is related solely to the economic interests of the speaker and its audience. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

9 Valentine v. Chrestensen, 316 U.S. 52 (1942)(holding that Constitution does not restrain government from banning the distribution of handbills bearing purely commercial advertising).

10 Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)(holding that commercial speech serves not only the interests of the speaker, but also assists consumers and furthers the societal interest of full dissemination of information).

speech. The ruling in *Bates*, however, was narrow and the degree to which states may regulate advertising by lawyers has been a recurring issue before the Court. Essentially, the cases stemming from *Bates* have circumscribed state regulation of lawyer advertising so as to prevent in-person solicitation and false or misleading communications. However, *Florida Bar v. Went For It, Inc.*, the Supreme Court's most recent decision in the area of lawyer advertising, may provide a basis to permit state bars to impose further restrictions.

In *Florida Bar*, the Supreme Court upheld a proposed rule prohibiting lawyers from sending direct-mailings to injured victims and their families within thirty days following an accident or disaster. Although the decision presently applies only to Florida, many state bar associations have already initiated efforts to enforce similar restrictions.

This Comment evaluates the Supreme Court's decision in *Florida Bar* and its ramifications on states' role in regulating lawyer advertising. Part I traces the history of the Court's past rulings regarding state restrictions on lawyer advertising. Part II discusses in detail the Court's rationale in upholding the restrictions on lawyer advertising. Part III analyzes the decision as a departure from the Supreme Court's established precedent and explores its implications. Part IV considers a less restrictive alternative to the Florida Bar's thirty-day waiting period to control the use of targeted direct-mailings. This Comment concludes that the Supreme Court's recent holding represents an open door that will stimulate states to limit the means by which lawyers may advertise.

I. PRIOR LAW: BATES AND ITS PROGENY

A. Advertising General Routine Services

The issue of whether the First Amendment protects the contents of lawyer advertising was not addressed by the Supreme Court until 1977 in *Bates v. State Bar of Arizona*. The Court held that advertising by lawyers fell within the category of commercial speech and, therefore, may not be subject to blanket suppression.

In *Bates*, two lawyers established a legal clinic to provide routine services at modest fees to persons of modest income. To attract more clients, the lawyers advertised their services and fees in a daily newspaper. The state bar filed a complaint on the ground that the advertisement violated an Arizona disciplinary rule, which prohibited a lawyer from advertising his services through various means of commercial publicity, including newspapers. Despite the lawyers' claim that the disciplinary rule infringed upon their First Amendment rights, a special committee's

---

12 Id. at 364.
17 Coyle, supra note 13, at A26. Twenty-eight state and local bar associations joined in an *amicus curiae* brief asking the Supreme Court to give them more power to regulate lawyer advertising. A.B.A. COMM'N ON ADVERTISING, LAWYER ADVERTISING NEWS, June 21, 1995, at 1 (Special Supplement).
18 115 S. Ct. at 2381. The purpose of the waiting period, as explained by Justice O'Connor in the majority opinion, is to "forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered." *Id.* at 2379.
21 *Id.* at 383.
22 *Id.* at 354. "Routine services" are those such as uncontested divorces and adoptions, simple bankruptcies, and changes of one's name. *Id.*
23 *Id.* at the top of the ad in large bold print was the following: "DO YOU NEED A LAWYER? LEGAL SERVICES AT VERY REASONABLE FEES." *Id.* at 385.
24 *Id.* at 356. The rule provided:
A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do in his behalf.
17A ARIZ. RULES OF PROFESSIONAL RESPONSIBILITY DR 2-101(B), 17A ARIZ. REV. STAT., p. 26 (Supp. 1976)).
recommendation that both lawyers be sanctioned was upheld by the Arizona Supreme Court. The lawyers appealed to the United States Supreme Court, where the state bar presented numerous justifications in support of its restriction.

First, the state bar argued that price advertising of even routine legal services tarnish the public image of lawyers. Rejecting this assertion, the Court reasoned that because it is no surprise to most people that there is a charge for legal services, informing them that they may obtain such services at modest fees will not harm the reputation of the legal profession.

Second, the state bar claimed that because legal services are unique to an individual’s needs, any type of lawyer advertising would be inaccurate and inherently misleading. However, the Court determined that the prices referred to in advertisements tended to be for routine services at fixed rates, as in this case, and were not generally misleading. The Court added that legal advertisements serve an important role in helping people make informed decisions about hiring a lawyer. Although it held that truthful, nonmisleading advertising may not be subject to blanket suppression, the Court in Bates did recognize that the protection was not absolute, and that there may be “reasonable restrictions on the

## B. In-Person Solicitation

The Supreme Court took advantage of the “time, place, and manner” restriction set forth in Bates to hold in Ohralic v. Ohio State Bar Association that while lawyers may not be categorically banned from advertising, they may in fact be prohibited from engaging in direct, in-person solicitation. In Ohralic, the bar association disciplined a lawyer who approached a recent car accident victim in the hospital and convinced her to sign an agreement stating that the lawyer would represent her.

Rejecting the lawyer’s contention that his communication was similar to the advertising protected in Bates, the Court distinguished the case on two grounds. First, the Court reasoned that face-to-face solicitation by lawyers carried with it the danger of “overreaching, undue influence.” Unlike a printed advertisement, in-person solicitation exerts pressure upon the individual to respond immediately, without opportunity for reflection. Second, the Court acknowledged that the states have an interest in maintaining high standards among licensed professionals. Engaging in the intimidating solicitation of

---

38 433 U.S. at 356. The Court also rejected a claim that the rule violated the Sherman Act because of its tendency to limit competition. Id.
39 The Court does not use the terminology used in Central Hudson Gas & Electric to describe the three-pronged test for commercial speech restrictions in its opinion because Central Hudson Gas & Electric was not decided until 1980.
40 433 U.S. at 368. The state bar argued that advertising would cause a loss of trust and confidence in lawyers not only by the general public, but also by clients who would view their lawyers as being motivated solely by profit. Id. For example, one of the most negative impressions about lawyers is that they are money-hungry. LAWYER ADVERTISING, supra note 1, at 69. Further, a juror in a personal injury case in Connecticut asked to be excused because he had “no respect for damage cases and the greedy lawyers who brought them.” Gail Diane Cox, Battle on Legal Ads Comes Down to Class, NAT’L L.J., Aug. 10, 1992, at 45. When Bates was decided, lawyer advertising had long been ingrained in the minds of practitioners and the public as unethical and inappropriate. LAWYER ADVERTISING, supra note 1, at 48. Traditional notions of professionalism consisted of maintaining dignity in the pursuit of public service. Whitney Thier, In a Dignified Manner: The Bar, The Court, and Lawyer Advertising, 66 TUL. L. REV. 527, 529 (1991); see also infra Part III.A.
41 433 U.S. at 369. The Court stated that the public would likely view the legal profession negatively if it failed to advertise and reach out to the community. Id. at 370.
42 Id. at 372.
43 Id.
C. Printed Advertisement Addressing A Specific Claim

Notwithstanding the restriction on in-person solicitation, the Supreme Court continued to support First Amendment considerations in the spirit of the commercial speech doctrine. In Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio, the Court declined to permit states to ban lawyers from placing advertisements in newspapers, which are addressed to specific persons with specific claims. The lawyer in Zauderer placed an advertisement in various newspapers specifically addressed to women who suffered injuries from use of the contraceptive device known as the Dalkon Shield. The Ohio Disciplinary Council filed a complaint against Zauderer alleging that his advertisement violated rules against self-recommendation and accepting employment from unsolicited legal advice. However, the Supreme Court held that Zauderer could not be disciplined because the state bar's restrictions failed to meet the three-pronged test set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.

Commercial speech is accorded less constitutional protection than are other forms of constitutionally guaranteed expression. Consequently, state imposed restrictions on commercial speech, which is neither false nor misleading, are analyzed with intermediate scrutiny under a three-part test. First, the government must have a substantial interest that justifies the restriction. Second, the restriction must advance that interest in a direct and material way. Third, the regulation must be narrowly tailored to serve the state's interest. Under the Central Hudson Gas & Electric test, prophylactic bans have consistently been viewed as overly broad and unconstitutional.

The Ohio Disciplinary Council asserted the same two interests which the Supreme Court found to be

---

47 See, e.g., the Model Rules of Professional Conduct, a communication is false or misleading if it:

a) contains a material misrepresentation of fact or law, or
remits a fact necessary to make the statement considered as a whole not materially misleading;

b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

---

46 See, e.g., Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (holding that state's categorical ban of targeted direct-mailings was unconstitutional); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (holding that state may not prohibit truthful, nondeceptive legal advertisements directed towards specific claims).
substantial in Ohralik’s in-person solicitation - preventing overreaching, undue influence and maintaining professionalism among lawyers. Nevertheless, the Court refused to hold that the concerns regarding in-person solicitation were present when an individual merely reads an advertisement in a newspaper. Following Bates, the Court ruled that restrictions on truthful, nondeceptive advertising were unconstitutional.

D. Targeted Direct-Mailings

In accordance with prior case law limiting state regulation of lawyer advertising, the Court in Shapero v. Kentucky Bar Association broadened commercial speech protection to allow lawyers to solicit clients known to face particular legal problems through truthful, nondeceptive, direct-mailings. The lawyer in Shapero sought approval by the Kentucky Attorneys Advertising Commission for a letter he intended to send to persons who recently had a foreclosure suit filed against them.

Although the Commission did not find the letter to be false or misleading, it refused to approve it on the ground that the letter violated a then-existing disciplinary rule prohibiting lawyers from mailing advertisements “precipitated by a specific event or occurrence involving or related to the addressee... as distinct from the general public.” After the Kentucky Supreme Court affirmed the Commission’s decision, the United States Supreme Court confronted the issue of whether a blanket prohibition of solicitation that is neither false nor misleading is consistent with the First Amendment.

Reemphasizing the distinction between face-to-face and written communications, the Court held that Kentucky could not ban lawyers from sending truthful, nondeceptive letters to targeted individuals. Like the printed advertisements in Bates and Zauderer, targeted letters do not present the same substantial state interests present with in-person solicitations. The Court rejected the state bar’s contention that this case was merely “Ohralik in writing” subjecting potential clients to overreaching and undue influence that may impair their judgment. On the contrary, the Court found that recipients of direct mail solicitations did not read the letters with the “coercive force of the personal presence of a trained advocate,” and if they did not want to read the solicitation, they had the option of merely “averting [their] eyes.”

Furthermore, the Court stated that the relevant inquiry was “not whether there exist potential clients whose condition makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.” In Shapero, where the mode of communication was targeted direct-mailings, it was concluded that no such danger existed.

II. FLORIDA BAR v. WENT FOR IT, INC.

The Supreme Court has long recognized the importance of free speech in lawyer advertising, recognizing that a print advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.” Id. at 649-70.

Id. at 647; see also Peel v. Attorney Registration and Disciplinary Comm’n of Ill., 496 U.S. 91 (1990)(holding that lawyers are permitted to advertise that they are certified specialists in specific areas of the law); In re R.M.J., 455 U.S. 191 (holding that state may not prohibit lawyers from sending out announcement cards for the opening of a new office to individuals other than clients, former clients, friends and family members).


Id. at 473.

Id. at 469. The letter included the following: “You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home. Call NOW, don’t wait.” Id.

Id. at 471. The Kentucky Supreme Court did, however, upon review, decide to replace Rule 3.135(5)(b)(ii) with ABA Rule 7.3, which prohibits lawyers from soliciting business by mail or in-person, when the significant motive is pecuniary gain. Id. at 470.

Id. at 475-76. See generally Victoria J. Krasner, Shapero v. Kentucky Bar Ass’n: First Amendment Protection for Targeted Advertisements by Attorneys, 23 GA. L. REV. 545, 568 (1989)(reasoning that while the Court’s decision is in accord with prior decisions restricting state regulation, further expansion of commercially protected speech is not likely).

486 U.S. at 475.

Id. at 474-75.

Id.

Id. at 475 (quoting Zauderer, 471 U.S. at 642).

Id. at 47 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). See infra notes 107 and 111 and accompanying text.

Connecticut has a restriction that bars sending mailings to people whose physical or mental health prevents them from making reasonable judgments about hiring a lawyer. CONN. RULES OF PROFESSIONAL CONDUCT Rule 7.3 (b)(1) (1986).

486 U.S. at 474.

Cf. Florida Bar, 115 S. Ct. 2371, 2372 (explaining that the danger with direct-mailings is not undue influence, but an invasion of privacy).
restricting the states' rights to regulate such advertising except in limited circumstances.70 Now, at a time when lawyers are becoming more creative and more assertive, the Supreme Court has expressed a willingness to permit states to take additional action in order to curb abuses of lawyer advertising.

Shapero clearly stood for the principle that a state may not categorically ban truthful, non-deceptive, direct-mailings by lawyers. Yet the Supreme Court recently upheld a restraint on lawyer solicitation regardless of whether the communication was truthful or non-deceptive in Florida Bar v. Went For It, Inc.71 In late 1990, the Florida Supreme Court adopted the Florida Bar’s proposed rule prohibiting lawyers from sending direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster.72 G. Stewart McHenry and his lawyer referral service, Went For It, Inc., filed an action challenging the rules as being violative of the First Amendment.73

The United States District Court for the Middle District of Florida upheld the Florida Bar’s disciplinary rule as constitutional under the First Amendment.74 Relying on Bates and its progeny, the Court of Appeals for the Eleventh Circuit reversed.75 The United States Supreme Court applied the three-part test from Central Hudson Gas & Electric and concluded, in a 5-4 decision, that despite established precedent, the disciplinary rules were constitutional.76

The Court accepted two interests asserted by Florida Bar as substantial under the first prong of the test. First, the state has a substantial interest in “protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.”77 Second, because the general public would view such intrusive conduct upon vulnerable victims as unprofessional, the reputation of lawyers would deteriorate.78

The Court subsequently concluded that Florida Bar’s detailed empirical data supported its contention that the thirty-day waiting period would in fact advance the state’s interests in a direct and material way, thereby meeting the second prong of the test.79 Finally, the Court rejected the argument that less restrictive means were available to serve the state purported interest and held that the thirty-day waiting period was “reasonably well-tailored.”80

Although Shapero struck down a ban on targeted direct-mailings, the Court distinguished the case in three respects. First, Shapero focused more on the issue of overreaching, undue influence, whereas the main concern in Florida Bar was avoiding an invasion of privacy.81 Second, the ban in Shapero was a complete ban, regardless of the time or the recipient. In contrast, the Florida Bar rules only prohibited targeted, direct-mailings to injured accident victims and their families for thirty days.82 Finally, unlike the Florida Bar, the Kentucky Bar Association in Shapero offered no concrete empirical data that direct-mail solicitations would result in any of the harms it alleged in support of its complete ban.83

In dissent, Justice Kennedy84 argued that the majority’s opinion amounted to an unconstitutional censorship of commercial speech.85 According to Kennedy, the majority’s attempt to distinguish Shapero (1988) (stating whether condition of recipients may subject them to undue influence is not appropriate line of inquiry).

---

70 See supra, part I.A.
72 Id. at 2374. The rules were proposed after the completion of a two year study by the Florida Bar on the effects of lawyer advertising. The report included the fact that out of the 700,000 direct-mail advertisements sent out in 1989 by personal injury lawyers, 40% went to accident victims and their families. Id. Also included were letters from angry recipients who characterized the solicitations as “an invasion of privacy” and “annoying and irritating.” Id. at 2377.
73 Id. McHenry was disbarred in 1992 for sexual misconduct and John T. Blakely took his place during the course of this action. Id.; Coyle, supra note 13, at A26.
75 Went For It, Inc. v. Florida Bar, 21 F.3d 1038 (11th Cir. 1994).
76 115 S. Ct. 2371.
77 Id. at 2376.
78 Id. Before the lower courts, the Florida Bar also asserted that it had an interest in protecting vulnerable, grief-stricken individuals from overreaching, undue influence. 21 F.3d at 1042-43. Cf. Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 474
79 115 S. Ct. 2378. But see infra note 88 and accompanying text.
80 Id. at 2380. Respondents proposed distinguishing recipients based on the severity of injuries and of grief, allowing direct-mailings to those whose pain and suffering was relatively minor. Id. Such lines, in the Court’s opinion, would be difficult to draw. Id. Justice Kennedy, in his dissent, while criticizing this reasoning as irrelevant, pointed out that similar distinctions are made in criminal law regarding degrees of bodily harm. Id. at 2385 (Kennedy, J., dissenting).
81 Id. at 2378.
82 Id.
84 Justices Stevens, Souter, and Ginsburg joined in the dissenting opinion. 115 S. Ct. at 2381 (Kennedy, J., dissenting).
85 Id. at 2383. According to Justice Kennedy, it is the public, not the state, who has the right and power to decide which
III. NEW INTERESTS WILL SPUR NEW RESTRICTIONS

The Supreme Court’s ruling in Florida Bar, while ideas and information are deserving of their audience. Id. at 2386; see also Edenfield v. Fane, 113 S. Ct. 1792 (1993)(determining that the speaker and the audience assess the value of the information presented, not the government).

Kennedy first argued that the mere potential for an invasion of privacy upon victims and their families during their time of grief was not a sufficient justification for suppressing speech.87 Second, the “self-serving,” “selective” data offered by the Florida Bar fails to establish either that a real danger exists or that the thirty-day ban would directly and materially help cure the danger.88 Third, the ban was not reasonably tailored to advance the state’s interests because it suppressed far more speech than was necessary.89 As a result, victims who wanted and needed to begin assessing their legal positions were being deprived of communication that could be informative of their rights and options.90

Kennedy also attacked the majority’s attempt to shield the legal profession from public criticism91 and responded that “real progress begins with more rational speech, not less.”92 He concluded that not only was the majority’s decision a departure from prior decisions, “but also from the principles that govern the transmission of commercial speech.”93

A. Lawyers and Their Flagging Reputations

In the eyes of the legal community, the public’s image of the legal profession has declined over the past ten years.94 In particular, there has been a dramatic decline in the past two years as lawyer advertising has increased.95 Although it did not alter the three-part test governing the regulation of commercial speech set forth in Central Hudson Gas & Electric, the Supreme Court has, for the first time, found that the reputation of the legal profession is a substantial state interest that justifies suppressing truthful, printed commercial speech.96

In Bates, the Supreme Court expressly rejected the Florida Bar’s assertion that allowing lawyers to advertise would harm the reputation of the legal profession. Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 491 (1988) (O’Connor, J., dissenting).
fession. In the Court's opinion, “the postulated connection between advertising and the erosion of true professionalism [was] severely strained.” Furthermore, the Court acknowledged that members of other professions such as bankers and engineers advertise, yet they are not scrutinized by the public eye. Similarly, in *Virginia Pharmacy Board*, the Court held that while Virginia has an interest in maintaining professional standards among its licensed pharmacists, the interest does not justify the suppression of drug price advertisements. Although the state is free to “require whatever professional standards it wishes of its pharmacists . . . it may not do so by keeping the public in ignorance . . .”

While the Court recognized in *Ohralik* that the reputation of the legal profession is a substantial state interest, this recognition arose solely because of the sufficient link to the unique concerns present in the limited instances of face-to-face solicitations. More than mailed solicitations, knocking on house and hospital doors of vulnerable, traumatized victims and pressuring them to seek legal representation comes closer to falling below acceptable levels of professional conduct and common decency. Here, the connection between the conduct and the erosion of true professionalism was not so strained. But it was in the unique case of in-person communication that the Court was willing to appreciate the preservation of the legal profession’s image as justification for imposing state restrictions on lawyer advertising.

However, the Court in *Florida Bar* was willing to recognize the protection of the legal profession as a serious one. *Preserving the Sanctity of the Mailbox, Legal Times*, July 31, 1995, at 40. While the receipt of a single solicitation letter may be annoying, it is not a serious threat to privacy. *Id.* The Court of Appeals in *Florida Bar* reasoned that any invasion “occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.” *Went For It, Inc. v. Florida Bar*, 21 F.3d 1038 (11th Cir. 1994) (quoting *Shapero*, 486 U.S. at 476).

### B. Privacy and Tranquility

The Court also held that potential invasions of privacy present a substantial state interest which justifies upholding the thirty-day ban. The initial question is whether the mere receipt of a direct-mailing actually results in an invasion of one's privacy. A targeted letter may be viewed as resulting in no more of an invasion of privacy than that which occurs while reading a newspaper or a letter mailed to the public at large. The Court reasoned that “a brief journey to the trash can” does little to prevent the recipient from being offended. Thus, it appears the Court’s main concern, more than preventing an invasion of privacy, was to protect a vulnerable reader from what may be considered offensive speech.

However, as Kennedy pointed out in his dissent, prior rulings have established that the government cannot obstruct the flow of mailings to protect recipients who might be potentially offended. In *Zauderer*, the Supreme Court stated, “[a]lthough some sensitive souls may have found appellant’s advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it.” While some may view the thirty-day grace period as

---

89 Dave Decker, president of the Illinois State Bar Association, believes that lawyer advertising has become sleazy, damaging the image of the profession. He stated, “efforts at soliciting people who have just been victimized by terrible injury or death are totally indefensible.” Crawford Greenburg, supra note 94, at 1.
90 433 U.S. at 368.
91 Id.
93 Id. at 770. As in later cases, *Virginia Pharmacy Board* declined to hold that commercial speech could never be regulated. *Id.*
95 Id. at 461.
97 Florida Bar v. Went For It, Inc., 115 S. Ct. at 2376.
98 Eugene Volokh, a professor at UCLA Law School believes that to protect privacy by restricting speech, the intrusion into privacy should be a serious one. *Preserving the Sanctity of the Mailbox, Legal Times*, July 31, 1995, at 40. While the receipt of a single solicitation letter may be annoying, it is not a serious threat to privacy. *Id.* The Court of Appeals in *Florida Bar* reasoned that any invasion “occurs when the lawyer discovers the recipient’s legal affairs, not when he confronts the recipient with the discovery.” *Went For It, Inc. v. Florida Bar*, 21 F.3d 1038 (11th Cir. 1994) (quoting *Shapero*, 486 U.S. at 476).
99 115 S. Ct. at 2376.
100 Preserving the Sanctity of the Mailbox, supra note 108, at 40.
101 115 S. Ct. at 2383 (Kennedy, J., dissenting) (citing Bolger v. Drug Prod. Corp., 463 U.S. 60, 72 (1983)). In *Bolger*, a manufacturing company sent pamphlets out to members of the general public advertising its contraceptive devices. Although the Court realized that some recipients might find them offensive, the advertisements were deemed protected commercial speech under the First Amendment. *Bolger*, 463 U.S. at 71; see also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977)(holding that where obscenity is not involved, offensiveness is not a valid justification for suppressing speech).
a way to curb a sleazy form of ambulance chasing, others, including Kennedy, view it as denying access to legal representation to those who may not be offended.

Furthermore, any invasion of privacy that may occur from mailings sent by interested lawyers immediately after an accident is just as likely to occur from the immediate contact victims have with insurance companies.\(^\text{114}\) Insurance adjusters are often quick in their attempt to persuade injured victims or family members to settle their claims before they have had a chance to seek legal representation.\(^\text{118}\) Also, in an effort to gather relevant, fresh evidence, opposing counsel often begins immediate investigation in contemplation of litigation.\(^\text{110}\) There is no reason to believe that an individual suffering a recent trauma is going to be any less irritated by the badgering of insurance adjusters and opposing counsel than by lawyers offering their services. Therefore, unless a similar ban is enforced against other groups, the thirty-day ban against lawyers will not succeed in protecting the privacy and tranquility of traumatized victims.\(^\text{117}\)

C. Impact of Florida Bar

The effects of the Florida Bar decision are already emerging. As in Florida, the Texas Legislature proposed to curb abuses of direct-mail solicitations by including in the state’s Penal Code a provision preventing lawyers from sending targeted mailings to victims for the first thirty days following an accident.\(^\text{116}\) A group of attorneys challenged the constitutionality of the provision on the ground that it hinders their communication with potential clients.\(^\text{119}\)

The United States District Court for the Southern District of Texas held that the provision was unconstitutional under the First Amendment as violative of commercial freedom of speech.\(^\text{120}\) However, in light of Florida Bar, the United States Court of Appeals for the Fifth Circuit applied the three-part test from Central Hudson and reversed, concluding that the provision was constitutional.\(^\text{121}\)

Comparing these facts to Florida Bar, the Court of Appeals reasoned that Texas had a substantial interest in protecting the privacy of recently injured victims and their families from unsolicited contact by lawyers, and that the penal code provision directly and materially advanced that interest.\(^\text{122}\) The challenging lawyers distinguished Florida Bar by arguing that, unlike Texas, the Florida Bar produced sufficient empirical data to establish that its interests were substantial.\(^\text{123}\) Nevertheless, the Court of Appeals accepted the numerous complaints and testimonies regarding the effects of direct-mail solicitations as ample evidence to satisfy the first two prongs of the Central Hudson test.\(^\text{124}\)

The lawyers also attacked the third prong of the test, arguing that because accident victims in Texas may indicate on the accident report that they do not want to be solicited, the provision is not narrowly tailored to advance the state’s interest in protecting their privacy.\(^\text{125}\) Rejecting this contention, the Court of Appeals explained that the goal of the provision is to protect not only the victims, but also their family members, whose signatures do not appear on the accident report.\(^\text{126}\)

Following this framework, other states will most likely be successful in imposing similar thirty-day waiting periods for direct-mail solicitations. It is uncertain, however, as to how effective and flexible Florida Bar will be in supporting restrictions on other forms of advertising such as television commercials. Taylor, supra note 115, at 3.

---

\(^{118}\) Preserving the Sanctity of the Mailbox, supra note 107, at 39.


\(^{116}\) Id.; see also Gary Taylor, Texas Solicitation Ban is Voided, NAT’L L.J., Feb. 7, 1994, at 3. In one instance similar to that of the lawyer in Ohralik, an insurance adjuster came to the hospital room of a victim just one day after a car accident. Id.

\(^{117}\) Fein, supra note 88, at A28.

\(^{119}\) In addition, because Florida Bar applies only to personal injury lawyers, a lawyer may still send solicitation letters at any time to those who are thought to have an immediate need for legal representation, such as individuals on the verge of bankruptcy or who have been arrested for drunk driving. Hladky, supra note 88, at A1.

\(^{120}\) Mooney v. Morales, 843 F.3d 1124 (5th Cir. 1993). The provision also applied to physicians, surgeons, chiropractors, and private investigators, but no other group challenged the ban. Id. at 360. The lawyers also challenged proposed provisions which restricted access to accident reports for 180 days and prevented direct-mailings from being sent to criminal and civil defendants for 30 days. However, only the provision regarding the solicitation of accident victims was on appeal. Id. at 360.

\(^{121}\) Moore v. Morales, 843 F.3d 358 (5th Cir. 1995). The provision also applied to physicians, surgeons, chiropractors, and private investigators, but no other group challenged the ban. Id. at 360. The lawyers also challenged proposed provisions which restricted access to accident reports for 180 days and prevented direct-mailings from being sent to criminal and civil defendants for 30 days. However, only the provision regarding the solicitation of accident victims was on appeal. Id. at 360.

\(^{123}\) Id.

\(^{124}\) Id. at 362.

\(^{125}\) Id. at 363.

\(^{126}\) Id.

\(^{127}\) Id. The court of appeals also noted that “narrowly tailored” does not necessarily mean the least restrictive means. Id.
IV. "ATTENTION: THE FOLLOWING CONTAINS ADVERTISING MATERIAL"

Florida's thirty-day ban is too broad, suppressing more speech than is necessary to achieve the purposed interests. Therefore, it is appropriate to consider other means by which states could safeguard the public while still abiding by the First Amendment protections. A less restrictive alternative to banning targeted, direct-mailings may be a pre-screening of solicitations, by requiring lawyers to send a copy of their proposed letters to the state or local bar association.138

However, this procedure poses three problems. First, pre-screening would require reviewers to distinguish "the truthful from the false, the helpful from the misleading, and the harmless from the harmful."139 This task would not only be burdensome and time-consuming, but such a task would also require the hiring and instruction of an experienced, competent staff.140 Second, there would inevitably be challenges that the advance review constitutes prior restraint because the review is being used to suppress constitutionally protected speech.141 Third, the reviewing committee's speculation as to an intrusive invasion of privacy upon a person may not in fact be how the targeted recipient would react.142 No individual can better assess his or her emotional state of mind than him or herself. Consequently, as Kennedy anticipated, those individuals who might welcome the information will be deprived of receiving it.

A second alternative would in fact provide a safeguard against a serious invasion of one's privacy and still allow the solicitation to get to those who need and want the information. Currently enforced in proxy solicitations before distribution to security holders). Currently, Iowa requires that a copy of the communication be sent to the Commission on Professional Ethics and Conduct contemporaneously with the mailing. A.B.A. COMM'N ON ADVERTISING, Provisions of State Codes of Professional Responsibility Governing Lawyer Advertising and Solicitation (1994 Supp.). Kentucky offers lawyers the option of either conforming their communications to what is specifically allowed under the rules, or delivering a copy of their proposed communication to the Attorneys Advertising Commission for approval prior to mailing. Id.

138 486 U.S. at 478 (quoting Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio, 471 U.S. 626, 646 (1985)).

139 Perschbacher & Hamilton, supra note 132, at 276. But see Shapero, 486 U.S. at 477 (determining that there is no evidence that the scrutiny of targeted solicitation letters will be more burdensome or less reliable than the scrutiny of advertisements).

140 Perschbacher and Hamilton, supra note 133. However, commercial speech does not warrant full protection under the First Amendment. See, e.g., Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio, 471 U.S. 626, 646 (1985) (commercial speech is entitled to the protection of the First Amendment, albeit to protection somewhat less than that afforded non-commercial speech); Bolger v. Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) (Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression).

141 The Florida Bar opinion itself did not contain an example of what a restricted solicitation letter might look like because the suit did not arise out of a particular disciplinary action over a specific letter. Barret, supra note 19, at B1.

127 Because the Court emphasized that a wide range of alternatives to direct mailings are available to lawyers,128 the decision may not support other types of restrictions.129

However, Florida Bar does leave some room for flexibility. Although the decision is limited to targeted direct-mailings by personal injury lawyers,130 Florida Bar at least established that state regulations are no longer limited to deceptive or misleading advertising as they have been for the past eighteen years.131
some states, the practice entails requiring the words “ADVERTISEMENT” or “ADVERTISING MATERIAL” to be included on the front of the envelope and at the top of the first page of the written solicitation, no matter when it is sent. Upon receipt of the direct-mailing, an inquisitive victim or relative may read on, while a traumatized person may discard it.

The advertising label alerts readers and prevents solicitation of automatic encroachments upon the private suffering of accident victims and their families. The Court in Florida Bar noted that while a recipient may simply throw away the solicitation, offense has already been taken as a result of the recipient having already read the letter in order to decide what to do with it. The advertising label alleviates this problem by notifying the recipient of the nature of the communication without requiring any further reading.

At the same time, individuals, if they so choose, are free to read on and determine what alternatives and resources are available to them. Ideally, this method meets the concerns of both the majority and dissenting opinions, and is far less restrictive than is Florida’s thirty-day ban.

V. CONCLUSION

Direct-mail solicitations, whether targeted or generalized, provide a means of ensuring access to legal representation to the public. In addition, by informing persons in need of legal representation as to the available resources, direct-mail solicitations serve to benefit those who are unaware of their options.

In recent years, however, states have been anxious to enforce new and improved disciplinary rules to shield the public from what the states consider to be distasteful and unprofessional behavior. Previously, First Amendment protections outweighed these concerns, but with the Supreme Court’s most recent decision, the scale may begin to tilt in the other direction.

187 See, e.g., Alaska Rules of Professional Conduct Rule 7.3 (c) (1993); Haw. Rules of Professional Conduct Rule 7.3 (c) (1994)(a copy of the communication must also be forwarded to the Disciplinary Council); Iowa Code of Professional Responsibility DR 2-101 (B)(4)(d) (1989)(the words must appear in red ink); La. Rules of Professional Conduct Rule 7.2 (b) (iii)(B) (1994)(the solicitation must be “plainly marked”); Minn. Rules of Professional Conduct Rule 7.2 (f) (1993)(the words must appear “clearly and conspicuously”). These provisions follow the Model Rules of Professional Conduct which provide:

Every written or recorded communication from a lawyer soliciting professional employment from a prospective cli-


189 However, this method would not be satisfactory to those who are of the opinion that the mere receipt of the solicitation is a serious invasion of their privacy.