1996

Florida Bar v. Went for It, Inc.: Refining the Constitutional Standard for Evaluating State Restrictions on Legal Advertising

Susan Alice Moore

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation

Available at: http://scholarship.law.edu/lawreview/vol45/iss4/9

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
The First Amendment to the United States Constitution states that Congress may not abridge the freedom of speech. Traditionally, the United States Supreme Court extended the First Amendment to political, noncommercial speech, but not to commercial speech. Indeed, in 1942,
the Supreme Court explicitly ruled that the First Amendment did not protect commercial speech.\textsuperscript{4} Over the next thirty years, however, the

Proponents of the foregoing arguments have agreed that the Framers' intent in drafting the First Amendment is, at best, unclear. Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 Ind. L.J. 1, 22 (1971) (stating that "[t]he framers seem to have had no coherent theory of free speech" and their debates at the Constitutional Convention "do not tell us what the men who adopted the first amendment intended"); Kozinski & Banner, \textit{Who's Afraid}, supra, at 634 (stating that "[t]he first amendment's text and history don't provide us with any explanation of the distinction between commercial and noncommercial speech").

Commercial speech has been defined as "speech which does 'no more than propose a commercial transaction.'" Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). Commercial speech also has been defined as "expression 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). For a discussion of the Court's varying definitions of commercial speech, see generally Kozinski and Banner, \textit{Who's Afraid}, supra note 2, at 638-48 (providing examples of noncommercial speech and highlighting definitional difficulties); Elisabeth A. Langworthy, \textit{Note, Time, Place, or Manner Restrictions on Commercial Speech}, 52 Geo. Wash. L. Rev. 127, 128 n.1 (1983) (outlining the Court's varying definitions of commercial speech); McGowan, \textit{supra} note 2, at 400-02 (arguing that the Supreme Court has defined commercial speech inadequately because the Court emphasizes the speaker's motive and not the content of the speech); Thomas W. Merrill, \textit{Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine}, 44 U. Chi. L. Rev. 205, 222-36 (1976) (describing the difficulties involved in defining commercial speech); Nadir N. Tawil, \textit{Comment, Commercial Speech: A Proposed Definition}, 27 How. L.J. 1015, 1026-30 (1984) (discussing the Court's commercial speech definitions and proposing that commercial speech be defined as "an expression designed primarily to promote a commercial product, service, or a business interest").

\textsuperscript{4} Chrestensen, 316 U.S. at 52. Without explanation or citation to legal precedent, the Supreme Court held in \textit{Chrestensen} that the First Amendment does not protect "purely commercial advertising." \textit{Id.} at 54. The Court stated that legislatures may decide the extent to which "one may promote or pursue a gainful occupation in the streets." \textit{Id}. For a brief discussion of the Court's early commercial speech cases, see generally Martin H. Redish, \textit{The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression}, 39 Geo. Wash. L. Rev. 429, 448-58 (1971); Barry S. Roberts, \textit{Toward a General Theory of Commercial Speech and the First Amendment}, 40 Ohio St. L.J. 115, 116-26 (1979) (analyzing the Court's evolving approach to commercial speech from \textit{Chrestensen} through \textit{Bigelow v. Virginia}); Weinberg, \textit{supra} note 3, at 722-24 (describing the Court's
Court gradually retreated from that holding and, in 1976, finally extended First Amendment protection to commercial speech. Nonetheless, commercial speech does not receive complete First Amendment protection. Generally, governmental restrictions on commercial speech from *Chrestensen* to *Bigelow* and arguing that the Court increasingly looked at the content of the speech when evaluating First Amendment challenges to state-imposed restrictions).


6. *Virginia State Bd. of Pharmacy*, 425 U.S. at 770 (concluding that, under the First Amendment, pharmacists could advertise prescription drug prices). The Court's holding in *Virginia State Board of Pharmacy* has been the subject of much critical and favorable commentary. See Baker, *supra* note 2, at 41-54 (criticizing *Virginia State Board of Pharmacy* as "unprincipled, or contrary to the dominant theory of first amendment rights" because the Court (1) rejected a "liberty-oriented model of the first amendment" in favor of an economic theory; (2) eliminated the distinction between commercial and noncommercial speech; (3) adopted a balancing test; and (4) found that the state failed to assert a substantial interest); Jackson & Jeffries, *supra* note 2, at 14-25 (arguing that *Virginia State Board of Pharmacy* cannot be explained under traditional First Amendment principles because commercial speech is insignificant and does not promote "individual self-fulfillment" or "contribute to political decisionmaking in a representative democracy"); Roberts, *supra* note 4, at 126-32 (arguing that, while commercial speech is entitled to less protection than noncommercial speech, *Virginia State Board of Pharmacy* fails to answer which forms of commercial speech should be fully protected); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1096-101 (applauding the Court's decision in *Virginia State Board of Pharmacy* because it promotes more rational decisionmaking and prevents states from secretly protecting discrete economic interests); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 142, 149-52 (1976) (describing *Virginia State Board of Pharmacy* and stating that it does not resolve questions regarding (1) how to distinguish between speech that is entitled to full protection and speech that should receive less protection, and (2) how existing bans on legal advertising should be treated).

7. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 n.24 (stating that "commonsense differences" between commercial and noncommercial speech entitle them to "different degree[s] of protection"); see Roberts, *supra* note 4, at 126-32 (analyzing the Court's decision in *Virginia State Board of Pharmacy* and arguing that the Court's "commonsense differences" distinction marked the first time that speech was accorded reduced protection because of its content). The Court did not elaborate on the level of protection appropriate for commercial speech until 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). In *Central Hudson*, the Court stated that if commercial speech is not misleading or does not involve an illegal activity, the state must justify restrictions on such speech by asserting a substantial state interest and demonstrating that the restriction directly advances that state interest and is "narrowly drawn." Id. at 564-65
must be narrowly tailored\(^8\) and must directly advance a substantial state interest.\(^9\)

\(^8\) Compare Central Hudson, 447 U.S. at 564 (stating that “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive”) and In re R.M.J., 455 U.S. 191, 203 (1982) (requiring restrictions to be “narrowly drawn” and stating that the “[s]tate lawfully may regulate only to the extent regulation furthers the State’s substantial interest") with Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (rejecting the requirement that a governmental restriction be the “least restrictive means” and requiring only a reasonable fit between the governmental regulation and the interest sought to be advanced). For a discussion of the Court’s modification of Central Hudson’s “narrowly tailored” requirement, see Smolla, supra note 2, at 791 n.57 (explaining that in Fox, the Court clarified that the fit between the legislature’s ends and means must only be reasonable, not perfect); Langvardt, supra note 7, at 374-76 (arguing that the Court’s test has been weakened by subsequent decisions requiring only a reasonable fit between a legislature’s ends and means); Albert P. Mauro, Jr., Comment, Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep’s Clothing, 66 TUL. L. REV. 1931, 1950-69 (1992) (arguing that the Court’s decisions in Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1985), and Fox lowered the level of scrutiny established in Central Hudson from an intermediate to a rational basis level and analyzing lower court cases that have been decided subsequent to Posadas and Fox); McGowan, supra note 2, at 380 (stating that the Court now permits a “looser fit” between a statute and its stated objective).

\(^9\) Central Hudson, 447 U.S. at 564. Among the myriad state interests that have been deemed substantial are (1) conserving energy, id. at 568; (2) maintaining standards of licensed professionals, Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 460 (1978); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2376 (1995); (3) preventing solicitation that involves “fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct,’” Ohralik, 436 U.S. at 462; (4) protecting the privacy and tranquility of the home, Florida Bar, 115 S. Ct. at 2376; and most recently, (5) preserving the reputation of the legal profession, id. But see Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647-48 (1985) (stating that the state has a substantial interest in ensuring dignified behavior in the court room, but that the state’s interest in protecting the dignity of the lawyer’s communications with the public was not substantial enough to justify restricting his free speech rights under the First Amendment). See generally John T. Ballantine, Jr., Comment, After Shapero v. Kentucky Bar Association: Much Remains Unresolved About the Allowable Limits of Restrictions on Attorney Advertising, 61 U. COLO. L. REV. 115, 142-43 (1990)
The Court first extended limited First Amendment protection to commercial speech involving price advertising of standardized products, but reserved the question of whether the First Amendment protected advertising of professional services. In 1977, the Court ruled for the first time that professional advertising by lawyers was protected speech under the First Amendment. Since then, when considering the constitutionality of

10. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 n.25 (1976). The Court characterized the constitutionally protected advertisement as “I will sell you the X prescription drug at the Y price.” Id. at 761. In a concurring opinion, Chief Justice Burger emphasized that the Court’s holding was limited to pharmacists’ ability to advertise prices for prepackaged drugs. Id. at 773-74 (Burger, C.J., concurring); see infra notes 54-67 and accompanying text (discussing Virginia State Board of Pharmacy).

11. Virginia State Bd. of Pharmacy, 425 U.S. at 773 n.25. The Court explained that doctors and lawyers “do not dispense standardized products.” Id. Rather, members of the medical and legal professions provide an “infinite variety” of professional services, and advertising for such services presents the “enhanced possibility for confusion and deception.” Id.; see also Bates v. State Bar of Ariz., 433 U.S. 350, 391 (1977) (distinguishing advertising for tangible products from advertising for legal services on the basis that the latter presents a much higher potential for deception and greater regulatory difficulties) (Powell, J., concurring in part and dissenting in part). Justice O’Connor also has sounded this theme in her opinions dissenting from the Court’s decisions invalidating state-imposed restrictions on legal advertising. Zauderer, 471 U.S. at 674, 676 (O’Connor, J., concurring in part and dissenting in part) (emphasizing the diversity and complexity of professional services as compared to standardized products and arguing that the Court should defer to state regulation of the professions); Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 487 (1988) (O’Connor, J., dissenting) (contending that one of the fundamental problems in the Court’s legal advertising cases is the “defective analogy between professional services and standardized consumer products”).

12. Bates, 433 U.S. at 384 (holding that a state may not prohibit lawyers from printing a truthful advertisement that lists the availability and prices of routine legal services).

The history of proscriptions on a lawyer’s ability to advertise and solicit can be traced to eighteenth-century England where young wealthy barristers learned the law and perceived its practice to be a public service, not a trade. Henry S. Drinker, Legal Ethics 210 (1953). See generally John B. Attanasio, Lawyer Advertising in England and the United States, 32 Am. J. Comp. L. 493, 502-03 (1984) (stating that early American advertising prohibitions often were “riddled with exceptions” and noting that even Abraham Lincoln advertised); Paul H. Francis & Jennifer J. Johnson, The Emperor’s Old Clothes: Piercing the Bar’s Ethical Veil, 13 Williamette L.J. 221, 222-24 (1977) (stating that prohibitions on legal advertising can be traced to ancient Rome and Greece); Sir David Maxwell-Fyfe, The Inns of Court and the Impact on the Legal Profession in England, 4 Sw. L.J. 391, 391-97 (1950) (describing the English Inns of the Court where young men have learned to practice law since the twelfth century).

Modern restrictions on legal advertising have their roots in the American Bar Association’s (ABA) Canons of Professional Ethics, adopted in 1908. Francis & Johnson, supra, at 226. The purpose of the Canons was to promote “absolute confidence in the integrity and impartiality” of the administration of justice through the “conduct and the motives of the members of our profession.” Preamble to the ABA Canons of Professional Ethics (1908), reprinted in Drinker, supra, app. C at 309. The ABA Canons did not completely prohibit
state regulation of lawyer advertising and solicitation, the Court has emphasized the importance of consumer access to the free flow of commercial information and has invalidated prophylactic prohibitions on legal advertising, for in 1937, the Canons were redrafted to permit the use of professional business cards. ABA, Canon 27, reprinted in Drinker, supra, at 316-17 n.6. In addition, Canon 28 declared that “stirring up” litigation by volunteering advice and offering to bring a lawsuit was “unprofessional,” and that “hunt[ing] up” causes of action and informing affected persons of them in order to obtain employment was “disreputable.” ABA Canon 28, reprinted in Drinker, supra, at 319. The Model Code of Professional Responsibility was adopted in 1969, and was superseded in 1983 by the Model Rules of Professional Conduct. Jim Rossi & Mollie Weighner, An Empirical Examination of the Iowa Bar’s Approach to Regulating Lawyer Advertising, 77 Iowa L. Rev. 179, 188-92 (1991). For a complete description of the Canons that addressed solicitation and advertising and how those Canons and subsequent amendments were interpreted, see Drinker, supra, at 215-73. See generally American Bar Association Commission on Advertising, Lawyer Advertising at the Crossroads: Professional Policy Considerations 29-39 (1995) [hereinafter ABA, Crossroads] (describing nineteenth century legal advertising practices and the advent of advertising restrictions during the twentieth century); Attanasio, supra, at 503-04 (discussing the evolution of exceptions to the advertising ban); Mylene Brooks, Lawyer Advertising: Is There Really a Problem?, 15 Loy. L.A. Ent. L.J. 1, 3-10 (1994) (providing a historical perspective on the development of proscriptions on legal advertising); Francis & Johnson, supra, at 226-36 (describing how the Canons created difficulties for lawyers attempting to provide legal assistance to members of low income groups); Rossi & Weighner, supra, at 188-92 (describing the 1969 Model Code of Professional Responsibility and how it was amended after the Supreme Court granted constitutional protection to legal advertising in Bates); Thomas E. Skowronski, Comment, Of Shibboleths, Sense and Changing Tradition—Lawyer Advertising, 61 Marq. L. Rev. 644, 647-51 (1978) (describing the history and development of modern restrictions on legal advertising).

13. The ABA defines advertising as involving “an active quest for clients, contrary to the tradition that a lawyer should not seek clientele.” Model Rules of Professional Conduct Rule 7.2 cmt., reprinted in ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct 509 (2nd ed. 1992). The ABA describes solicitation as “direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services.” Model Rules of Professional Conduct Rule 7.3 cmt., reprinted in ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct 519 (2nd ed. 1992). Although the two terms are similar, important distinctions exist. See Koffler v. Joint Bar Ass’n, 412 N.E.2d 927, 931 (N.Y. 1980), cert. denied, 450 U.S. 1026 (1981). In Koffler, the court discussed some differences between advertising and solicitation:

[n]ot all solicitation is advertising, though all advertising either implicitly or explicitly involves solicitation. To ‘solicit’ means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing . . . while ‘advertising’ is the calling of information to the attention of the public, by whatever means.

Id. (citations omitted); see also Katherine A. LaRoe, Comment, Much Ado About Barra-try: State Regulation of Attorneys’ Targeted Direct-Mail Solicitation, 25 St. Mary’s L.J. 1513, 1529 n.47 (1994) (explaining that, while the terms “solicitation” and “advertising” sometimes are used interchangeably, advertising usually involves an impersonal communication to the public, while solicitation usually refers to a personalized communication between two individuals).

14. See, e.g., Shapero, 486 U.S. at 478-80 (reversing the Supreme Court of Kentucky’s ban on targeted direct-mail solicitations and emphasizing the importance of the free flow
advertising that is not misleading or deceptive,\textsuperscript{15} or that can be regulated of commercial information); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646-47 (1985) (stating that access to commercial information is so important that it justifies requiring regulators to bear the costs of distinguishing truthful, helpful, and harmless information from that which is false, misleading, and harmful); \textit{Bates}, 433 U.S. at 374-75 (emphasizing the public's interest in having "at least some of the relevant information needed to reach an informed decision"); \textit{Peel v. Attorney Registration and Disciplinary Comm'n}, 496 U.S. 91, 108 (1990) (plurality opinion) (stating that the ability of states to restrict legal advertising is limited by the "principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information"); cf. \textit{Ohralik v. Ohio State Bar Ass'n}, 436 U.S. 447, 457-58 (1978) (finding that because in-person solicitation places pressure on a potential client to make a rushed decision, such conduct may be inconsistent with ensuring that a potential client has an opportunity to make an informed choice regarding legal services). \textit{See generally} Thomas I. Emerson, \textit{Legal Foundations of the Right to Know}, 1976 \textsc{Wash. U. L.Q.} 1 (arguing that the right to know deserves constitutional protection); Vernon R. Pearson & Michael O'Neill, \textit{The First Amendment, Commercial Speech, and the Advertising Lawyer}, 9 \textsc{U. Puget Sound L. Rev.} 293, 304-06 (1986) (describing briefly the Court's pre-Virginia State Board of Pharmacy decisions recognizing a First Amendment right to receive information); Weinberg, \textit{supra} note 3, at 733-35 (outlining the Court decisions recognizing a listener's First Amendment interest).

\textsuperscript{15} See, e.g., \textit{Shapero}, 486 U.S. at 473-80 (ruling that a state may not prohibit an attorney from sending truthful and non-deceptive letters of solicitation to potential clients who are known to have specific legal difficulties); \textit{Zauderer}, 471 U.S. at 647 (holding that states may not discipline attorneys "for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients"); \textit{In re R.M.J.}, 455 U.S. 191, 205 (1982) (holding that the following are not misleading and, therefore, could not be prophylactically banned: (1) an advertisement describing an attorney's practice areas in terminology not approved by the state supreme court's rules; (2) a listing of the states in which the attorney is licensed to practice; and (3) a statement in large capital letters that the attorney is a member of the U.S. Supreme Court Bar); \textit{Bates}, 433 U.S. at 373, 384 (refusing to find "an inherent lack of standardization in legal services" that might render legal advertisements misleading, and holding that states may not ban truthful advertising of routine legal services); cf. \textit{Zauderer}, 471 U.S. at 647 (finding that the use of an accurate illustration was not likely to mislead, deceive or confuse the public); \textit{In re Von Wiegen}, 470 N.E.2d 838, 845 (N.Y. 1984) (finding that a complete prohibition on targeted, direct-mail solicitations is not necessary because they can be presented in a non-deceptive manner); Lyon v. Alabama State Bar, 451 So. 2d 1367, 1372 (Ala.) (holding that an advertisement that listed fees for routine services along with a disclaimer that the above fees did not include court costs was not misleading), \textit{cert. denied}, 469 U.S. 981 (1984). Justices Powell and O'Connor have disagreed with the Court's finding that advertising of routine services is not misleading. \textit{See Bates}, 433 U.S. at 392-94 (Powell, J., concurring in part and dissenting in part) (arguing that even apparently simple legal services, such as divorces, often implicate more complex legal problems such as child support and custody, and that advertising is misleading if a customer thinks that an advertised service will encompass all of his needs); \textit{Shapero}, 486 U.S. at 485-86 (O'Connor, J., dissenting) (arguing that an advertisement is inherently misleading if it fails to inform potential clients that a legal service cannot be characterized as "routine" until a lawyer fully understands the scope of the legal problem).

The Court in \textit{R.M.J.} also found that states could not ban potentially misleading advertising if the information could be presented in a manner that was not misleading. 455 U.S. at 203. The Court found that an attorney's statement in large capital letters that he was a member of the United States Supreme Court Bar could be potentially misleading, but that
effectively. Conversely, the Court has sustained bans on advertising and solicitation that have a significant potential to result in overreach-

the record had made no such finding. Id. at 205-06; Peel, 496 U.S. at 106-07, 110 (plurality opinion) (finding that a statement on letterhead indicating that the attorney is certified as a specialist was neither actually nor inherently misleading). See generally Frederick C. Moss, The Ethics of Law Practice Marketing, 61 Notre Dame L. Rev. 601, 607-41 (1986) (describing how the ABA and various states have modified their model codes to define "misleading" or "false" in response to the Supreme Court's decisions on legal advertising); Douglas Whitman & Clyde D. Stoltenberg, Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification, 19 Ind. L. Rev. 497, 516-22 (1986) [hereinafter Whitman & Stoltenberg, Evolving Concepts] (discussing state court decisions defining misleading legal advertising); John Ratino, Note, In re R.M.J.: Reassessing the Extension of First Amendment Protection to Attorney Advertising, 32 Cath. U. L. Rev. 729, 753-57 (1983) (arguing that in R.M.J., the Court adopted a stricter standard for reviewing legal advertising than for other commercial speech under Central Hudson); W. Thier, Note, Peel v. Attorney Registration & Disciplinary Commission: Allowing Claims of Certification in Lawyer Advertising, 65 Tul. L. Rev. 687, 695-96 (1991) (stating that Peel has further limited the types of advertising that can be considered misleading and arguing that the Court appears to be urging state bar associations to implement stricter standards).

16. See, e.g., Shapero, 486 U.S. at 476-77 (observing that states can regulate potential abuses and mistakes in targeted, direct-mail solicitations by requiring lawyers to file sample solicitation letters with an oversight agency); Zauderer, 471 U.S. at 646 (placing the burden on state regulators to distinguish truthful from false advertising); R.M.J., 455 U.S. at 206 (invalidating a state rule restricting the persons to whom a lawyer could send professional announcements because a state can supervise an attorney's mailings by requiring such mailings to be filed with the state reviewing agency); Peel, 496 U.S. at 109-10 (plurality opinion) (invalidating a prohibition on attorneys' ability to list a certification or specialization and noting that states can prevent the public from being misled or confused by implementing screening procedures or requiring disclaimers); cf. Ohralik, 436 U.S. at 466-67 (upholding a prophylactic ban on in-person solicitation in part because the activity occurs in private and is not subject to oversight by either the state or the legal profession). See generally Rossi & Weighner, supra note 12, 202-09 (outlining Iowa's approach to legal advertising, including its direct mail advertising restrictions, which require approval by the state regulatory agency before being mailed); Ballantine, supra note 9, at 146-51 (suggesting implementation guidelines for state regulatory programs regarding direct mail solicitations); Brian S. Kabateck, Note, Attorney Direct-Target Mail Solicitation: Regulating After Shapero v. Kentucky Bar Association, 22 Loy. L.A. L. Rev. 887, 942-48 (1989) (proposing that states regulate direct-mail solicitations by: (1) implementing pre-approval procedures; (2) imposing mandatory disclosure requirements for all such communications; (3) requiring that direct-mail solicitations be sent to verifiable addresses only; and (4) imposing a waiting period on the mailing of solicitations to personal injury or wrongful death victims).
ing,\textsuperscript{17} the invasion of privacy,\textsuperscript{18} or the exercise of undue influence or fraud.\textsuperscript{19}

\textsuperscript{17} Ohralik, 436 U.S. at 464-65 (finding a greater potential for overreaching "when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person"). \textit{See generally} \textit{Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available}, 81 \textit{Yale L.J.} 1181, 1184 n.23 (1972) (stating that "[o]verreaching" refers to aggressive competition among lawyers for clients which leads to lawyers approaching clients at times when the clients are in no condition to properly consider retention of a lawyer, for example, immediately after an accident).

\textsuperscript{18} Ohralik, 436 U.S. at 465 n.25 (finding that in-person solicitation by an attorney for pecuniary gain invades a potential client's privacy because the target of the solicitation cannot avoid the attorney's advances); \textit{cf.} Florida Bar \textit{v.} Went For It, Inc., 115 S. Ct. 2371, 2381 (1995) (upholding a state ban on sending targeted, direct-mail solicitations to personal injury victims within thirty days of an accident, in part, because the public perceives such solicitation to be an invasion of privacy). \textit{But see Shapero}, 486 U.S. at 476 (finding that a targeted, direct-mail solicitation does not invade the recipient's privacy and stating that, if any invasion occurs, it happens when the attorney learns of a potential client's legal affairs); \textit{see also} Robert Anthony, \textit{Note, Protection for Attorney Solicitation Slow In Coming}, 33 \textit{U. Fla. L. Rev.} 698, 711-12 (1981) (stating that in-person solicitation implicates a person's privacy interest, but arguing that restrictions on in-person solicitation should not be too broad). \textit{See generally} Kabateck, \textit{supra} note 16, at 926-27 (explaining how in-person solicitation implicates citizens' privacy interests).

\textsuperscript{19} Ohralik, 436 U.S. at 464, 468 (upholding a ban on in-person solicitation by lawyers because such behavior is "inherently conducive to overreaching and other forms of misconduct" when it is conducted for pecuniary gain); \textit{Shapero}, 486 U.S. at 474-75 (finding that because "the mode of communication makes all the difference," targeted, direct-mail solicitations are not analogous to in-person solicitation and present much less risk of overreaching and undue influence); Zauderer, 471 U.S. at 642 (finding that a newspaper advertisement conveying information about legal services "poses much less risk of overreaching or undue influence" than in-person solicitation because an advertisement is "more conducive to reflection"); \textit{cf.} Norris \textit{v.} Alabama State Bar, 582 So. 2d 1034, 1037 (Ala. 1991) (holding that sending flowers, a letter of solicitation, and a firm brochure to a funeral home constituted improper solicitation); \textit{In re Anis}, 599 A.2d 1265, 1271 (N.J.) (holding that sending a solicitation letter to a Lockerbie plane crash victim's family the day after the body was identified violated New Jersey's ban on soliciting legal business when the attorney knew or should have known that the prospective client could not make a reasoned judgment regarding the hiring of an attorney), \textit{cert. denied}, 504 U.S. 956 (1992). \textit{See generally} Jeffrey S. Kinsler, \textit{Targeted, Direct-Mail Solicitation: Shapero v. Kentucky Bar Association Under Attack}, 25 \textit{Loy. U. Chi. L.J.} 1, 22-30 (1993) (arguing that several state court decisions holding that restrictions on direct-mail solicitations to "vulnerable" victims are unconstitutional under \textit{Shapero}'s holding that targeted, direct-mail solicitations do not create risks of undue influence and overreaching); Anthony, \textit{supra} note 18, at 709-10 (stating that bans on in-person solicitation have been justified because of inherent risks of "fraud, deception, coercion, harassment, misrepresentation, and overreaching," but arguing that not all forms of in-person solicitation present these dangers because only a small percentage of lawyers can be expected to act in bad faith); Kabateck, \textit{supra} note 16, at 927-28 (arguing that the dangers of overreaching inherent in targeted direct-mail solicitations are not eliminated by assuming that a victim can simply ignore or discard an attorney's letter).
Under the free speech clause of the First Amendment, the Court has invalidated most state restrictions on legal advertising. The Court has reasoned that the public's interest in having access to information facilitating informed decisions about legal services outweighs the various interests that states have advanced in support of their advertising restrictions. 21 Florida Bar v. Went For It, Inc. 22 presented the Court with another opportunity to address the validity of a state-imposed restriction on legal advertising. 23 For the first time in seventeen years, the Court upheld a state restriction on legal advertising, finding that the state had justified its regulation by advancing a substantial state interest. 24

At issue in Florida Bar was the validity of a Florida Bar rule prohibiting attorneys from sending targeted, direct-mail solicitations to personal injury victims or their families for thirty days after an accident or disaster. 25 In 1989, the Florida Bar completed a two-year study examining the

20. E.g., Shapero, 486 U.S. at 473-78 (holding that a state may not impose a blanket ban on the ability of attorneys to solicit legal business by targeting truthful letters at persons known to have specific legal needs); Zauderer, 471 U.S. at 647 (holding that a state may not discipline an attorney for soliciting clients through advertisements "containing truthful and non-deceptive information and advice regarding the legal rights of potential clients"); R.M.J., 455 U.S. at 204-06 (invalidating restrictions that limited the terminology lawyers could use in describing practice areas, prohibited attorneys from listing the courts and states in which they were licensed to practice, and restricted the persons to whom lawyers could send announcement cards); Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977) (holding that states may not ban truthful advertising of routine legal services); Peel, 496 U.S. at 110 (invalidating a state prohibition on attorneys' ability to list certifications or specializations). But see Ohralik, 436 U.S. at 468 (holding that states may impose blanket bans on in-person solicitation); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2374 (1995) (holding that states may "prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster").

21. Bates, 433 U.S. at 368-79, 384 (rejecting as insufficient several advanced state interests, including maintaining standards of licensed professionals and deterring litigation, and holding that lawyers may advertise prices for certain routine services); see supra note 14 and accompanying text (emphasizing the importance of consumer access to the free flow of commercial information); see also Brooks, supra note 12, at 14-15 (stating that the Court's decisions in R.M.J., Zauderer, and Shapero, "illustrate the Supreme Court's emphasis on consumer protection"); Ballantine, supra note 9, at 142-43 (discussing identified state interests and their treatment by the Court).


23. Id. at 2374.

24. Id.; see infra text accompanying notes 40 and 178-80 (discussing the Court's finding that the Florida Bar had advanced a substantial state interest).

25. Florida Bar, 115 S. Ct. at 2374. Rule 4-7.4(b)(1) of the Florida Bar states that: "[a] lawyer shall not send, or knowingly permit to be sent, ... a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless
public's opinion of attorney advertising. The study revealed that the reputation of the legal profession was suffering because the public perceived direct-mail solicitations to be an invasion of privacy. As a result

the accident or disaster occurred more than thirty days prior to the mailing of the communication.”

Id. (alteration in original) (quoting The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451, 466 (Fla. 1990)).

Similarly, Rule 4-7.8(a) prohibits an attorney from accepting referrals from a referral service “unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.” Id. For a comprehensive description and analysis the Florida Bar’s advertising restrictions and relevant case law since 1941, see Robert D. Peltz, Legal Advertising — Opening Pandora’s Box?, 19 STETSON L. REV. 43, 81-103 (1989).


27. Id. at 2376. According to the Florida Bar, the two-year study revealed that fifty-four percent of Florida’s population considered contacting personal injury victims to be an invasion of privacy. Id. at 2377. Similarly, forty-five percent of persons who had received direct-mail advertising believed that such letters were intended “to take advantage of gullible or unstable people.” Id. Thirty-four percent of those persons receiving solicitation letters were annoyed at having received them, and twenty-six percent believed that the letters constituted an invasion of privacy. Id. Finally, twenty-seven percent of those persons having received a direct-mail solicitation indicated that the experience negatively affected their opinion of the legal profession and the judicial process. Id. For a more comprehensive description of the Florida Bar’s survey, see Peltz, supra note 25, at 117-18. Mr. Peltz reports that of the twenty-seven percent of survey respondents who indicated that direct-mail solicitations adversely affected their opinion of the legal profession, eleven percent admitted that they even questioned the competency and honesty of the legal profession. Id. at 117. Furthermore, these persons reported that this lack of faith in the legal profession would compromise their ability to serve as unbiased jurors in a civil trial. Id. Mr. Peltz contends that, because most people are reluctant to admit their inability to serve as unbiased jurors, the eleven percent figure is probably low. Id. Mr. Peltz also describes a related survey, conducted by the Academy of Florida Trial Lawyers, which revealed how television advertisements have negatively affected the public’s perception of the profession and “the ability of attorneys to act as officers of the court.” Id. at 114.

The public’s negative reaction to direct-mail advertising has been reported widely. See LaRoe, supra note 13, at 1541-43 & nn.97-100. For a comprehensive analysis of an Iowa Bar survey regarding the effects of advertising on the public’s attitude toward the legal profession, see Rossi & Weighner, supra note 12, at 232-42. Rossi and Weighner analyze the “nexus theory” of legal advertising, which links the public’s perception of lawyers to the judicial system. Id. at 223-36. This theory further recognizes a state’s competing interest in regulating lawyers, thus ensuring the appearance of a just judicial system. Id. Rossi and Weighner note that the Iowa Bar survey revealed that the public rated advertising lawyers lower than lawyers in general in all of the following categories: honesty, competency, helpfulness, effectiveness, and reliability. Id. at 234-35. This perception of lawyers, however, was not reflected in the respondents’ opinion of the court system, as they reported a higher opinion of lawyers than the courts. Id. at 236-37. Rossi and Weighner, therefore, conclude that strictly regulating legal advertising is not justified by a state interest in protecting the profession’s dignity. Id. at 253.

Recently, the ABA also examined the effects of advertising on the legal profession. ABA, CROSSROADS, supra note 12. The ABA conducted public hearings around the country in 1994 and concluded that legal advertising is only one factor with a “minor influence”
of the study, the Florida Bar amended its rules in 1990 to prohibit lawyers from sending written communications, for the purpose of soliciting professional employment, to personal injury victims or their families for thirty days after an accident or disaster.\(^2\)

A Florida personal injury attorney\(^2\) and his wholly-owned referral service challenged the rule, contending that it violated the First and Fourteenth Amendments.\(^3\) In support of its rule, the Florida Bar argued that direct-mail solicitation of persons known to need legal services constitutes a "direct interpersonal encounter" that is fraught with the potential for abuse.\(^3\) Rejecting this characterization of direct-mail solicitations, the district court held that the Florida Bar's interest was insufficient to support the rule's prophylactic restriction.\(^3\) The district court also rejected the Florida Bar's contention that its rule was a valid time, place, and manner restriction.\(^3\) The court found that, not only was the rule content-based, but, unlike other forms of disruptive communications, the letters simply could be discarded by the recipient.\(^3\) Relying on similar

---

\(^1\) Id. at 66. The ABA also describes many other similar studies and surveys that have been conducted over the last 20 years by various organizations. Id. at 71-88. Regarding the Florida Bar survey, the ABA stated that "the data suggested a variety of interpretations." Id. at 73. In particular, the ABA noted that, although the Florida Bar study indicated that direct-mail solicitation affected jury pools, the study did not inquire about the "extent and nature of that affect [sic]." Id. at 87. Therefore, "it is unknown whether the affect [sic] would have been a bias against or in favor of a lawyer, a party or the judicial system. It is also unknown whether the bias would affect the decision-making even if the court admonished the juror against it." Id.

\(^2\) Florida Bar, 115 S. Ct. at 2374. The rules also prohibited lawyers from accepting clients from referral services that sent written communications to victims within thirty days of an accident. Id.; see supra note 25 (quoting the rule proscribing referral services).

\(^3\) The original petitioner, Mr. McHenry, who was disbarred after commencing this suit for reasons unrelated to the suit, was replaced by Mr. John T. Blakely. Florida Bar, 115 S. Ct. at 2374.

\(^4\) Id.

\(^5\) Id. v. Florida Bar, 808 F. Supp. 1543, 1545-46 (M.D. Fla. 1992), aff'd, 21 F.3d 1038 (11th Cir. 1994), rev'd sub nom. Florida Bar v. Went For It, Inc. 115 S. Ct. 2371 (1995). In addition, the Florida Bar argued that an attorney desiring a retainer faces a conflict of interest that may affect his initial advice to a "vulnerable" client. Id. at 1546.

\(^6\) Id. The district court relied on the Supreme Court's prior holding that "truthful straightforward direct mail lawyer advertising is constitutionally protected commercial speech." Id. (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)). In Shapero, the Supreme Court rejected the argument that direct-mail solicitation is conducive to abuse, emphasizing that the "mode of communication" and not the susceptibility of the letter's recipient was the "relevant inquiry." McHenry, 808 F. Supp. at 1546 (quoting Shapero, 486 U.S. at 474). The Shapero Court also found that the recipient of a targeted, direct-mail solicitation has the ability to reflect and to make an informed decision, thereby reducing the potential for abuse. Id. (citing Shapero, 486 U.S. at 476).

\(^7\) McHenry, 808 F. Supp. at 1547.

\(^8\) Id. The district court rejected the Florida Bar's attempts to analogize mailed solicitations to election signs, sound trucks, and picketing, which are forms of communication
grounds, the United States Court of Appeals for the Eleventh Circuit affirmed.\textsuperscript{35} Like the district court, the Eleventh Circuit rejected the Florida Bar’s contention that its rule protected traumatized personal injury victims and their families from making an uninformed decision regarding legal services.\textsuperscript{36} In addition, the Eleventh Circuit rejected the Florida Bar’s newly-asserted state interest that its rule was necessary to protect the privacy of personal injury victims.\textsuperscript{37}

subject to valid time, place, and manner restrictions. \textit{Id.} The court stated that those communications could not be avoided “simply by averting [one’s] eyes.” \textit{Id.} (quoting \textit{Ohralik} v. Ohio State Bar Ass’n, 436 U.S. 447, 465 n.25 (1978)). The two complementary purposes of valid time, place, and manner restrictions are “facilitating the exercise of the freedom of expression, while accommodating conflicting societal interests unrelated to first amendment values.” \textit{Langworthy, supra} note 3, at 130. Time, place, and manner restrictions “must be content-neutral, narrowly drawn, serve a significant governmental interest, and leave open alternative channels of communication.” \textit{Id.}; \textit{Perry Educ. Ass’n v. Perry Local Educator’s Ass’n}, 460 U.S. 37, 45 (1983); see also James A. Kushner, \textit{Freedom to Hear: The First Amendment, Commercial Speech and Access to Information}, 28 WAYNE L. REV. 137, 146 n.47 (1981) (stating that time, place, and manner restrictions are content-neutral, but that they “constrict the flow of information and ideas as a secondary effect of governmental pursuit of other objectives”). \textit{See generally} RONALD D. ROTUNDA AND JOHN E. NOWAK, \textit{TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.47 (2nd ed. 1992)}.


\textsuperscript{36} \textit{Id.} at 1042-43. The court rejected the Florida Bar’s attempts to distinguish \textit{Shapero}, in which the Court held that a State could not bar potentially abusive targeted direct-mail solicitations because a potential client may feel overwhelmed by his legal troubles and, thus, be especially vulnerable to such communications. \textit{Id.}; \textit{Shapero}, 486 U.S. at 474-75. In \textit{Shapero}, an attorney sought permission to send targeted, direct-mail solicitations to persons facing foreclosure on their homes. 486 U.S. at 469. The Court reversed the Kentucky Supreme Court’s finding that attorneys could be categorically prohibited from sending solicitations to persons known to have specific legal needs. \textit{Id.} at 473-80.

In \textit{McHenry}, the Florida Bar attempted to distinguish \textit{Shapero} based on the susceptibility of the person targeted with the solicitation, arguing that its 30 day restriction was justified because personal injury victims were more vulnerable than potential clients merely facing foreclosure. 21 F.3d at 1043. The Eleventh Circuit rejected this distinction, reasoning that \textit{Shapero} emphasized the “mode of communications,” not the sensitivity of the letter's recipient. \textit{Id.} Therefore, the Florida Bar’s contention that the “heightened sensitivity” of the personal injury victims who receive mailed solicitations did not satisfactorily justify the rule. \textit{Id.}

\textsuperscript{37} \textit{McHenry}, 21 F.3d at 1043-44. In rejecting this argument, the Eleventh Circuit again relied on \textit{Shapero} where the Supreme Court found that “a targeted letter [does not] invade the recipient's privacy any more than does a substantively identical letter mailed at large.” \textit{Id.} at 1044 (quoting \textit{Shapero}, 486 U.S. at 476). The Eleventh Circuit also noted that even though almost all direct-mail advertising “invades” the tranquility of the home, it nonetheless is protected by the First Amendment. \textit{Id.}

In an unusual postscript to its decision, however, the Eleventh Circuit alluded to Justice Powell’s dissent in \textit{Bates v. State Bar of Arizona}, noting that he had predicted correctly that attorney advertising would profoundly affect the legal profession. \textit{Id.} at 1045 (citing \textit{Bates v. State Bar of Ariz.}, 433 U.S. 350, 389 (1977) (Powell, J., concurring in part and dissenting in part)); \textit{see infra} note 100 (discussing Justice Powell’s dissent in \textit{Bates}). Finding the Flor-
The Supreme Court granted certiorari and reversed. Writing for the majority, Justice O'Connor determined that the Florida Bar's interests in protecting the privacy of personal injury victims and restricting activities that negatively affect the administration of justice were substantial interests justifying the state bar rule. The Court also held that the Florida Bar had demonstrated that the rule was narrowly tailored and that it directly and materially advanced these governmental interests. In dissent, Justice Kennedy contended that the Florida Bar had failed to articulate a substantial state interest. Moreover, even if the State's asserted interests were substantial, the rule did not advance those interests and was not narrowly tailored.

40. Id. at 2376. Justice O'Connor explained that the interest of protecting victims' privacy “factors” into the state's “paramount” interest of restricting activities that have a negative impact on the “administration of justice.” Id. As demonstrated by the Florida Bar's study, Florida's citizenry believes that direct-mail solicitations constitute an invasion of one's privacy and that such conduct has contributed to lawyers' “flagging reputations.” Id. Curbing such conduct, therefore, would improve the perception of the legal profession and preserve its integrity. Id.; see infra notes 181-84 and accompanying text (discussing the Court's finding that the Florida Bar had demonstrated that its rule directly advanced a substantial state interest). But see Rossi & Weighner, supra note 12, at 232-42 (questioning the validity of the “nexus theory” which underlies Justice O'Connor's argument).

41. Florida Bar, 115 S. Ct. at 2380-81. The Court stated that the Florida Bar rule imposed only a thirty-day ban and that information regarding the availability of legal services was available through other means. Id.
42. Id. at 2377-79. The Court found that the Florida Bar's two-year study demonstrated that direct-mail solicitations adversely affected the public's perception of the legal profession and that curtailing such activity would help reverse this trend. Id. at 2377-80; see infra notes 181-84 and accompanying text (describing the Court's finding that the Florida Bar had satisfied the second prong of the Central Hudson test by demonstrating that the rule directly and materially advanced a substantial state interest).
43. Florida Bar, 115 S. Ct. at 2382-83 (Kennedy, J., dissenting). Justice Kennedy argued that (1) protecting victims' privacy is not a substantial state interest in the context of restricting direct-mail solicitations, and (2) direct-mail solicitations actually may promote the administration of justice. Id.; see infra notes 202-08 and accompanying text (describing Justice Kennedy's contention that the Florida Bar had failed to articulate a substantial state interest in support of its rule).
44. Florida Bar, 115 S. Ct. at 2383-84 (Kennedy, J., dissenting). Justice Kennedy argued that the Florida Bar's study of legal advertising's effect on lawyers' reputations did not demonstrate that the rule directly and materially advanced the state's asserted interests. Id. Justice Kennedy also argued that the Florida Bar rule was not narrowly tailored because it suppressed more speech than necessary to achieve the state's asserted interests. Id. at 2384-86; see infra notes 209-15 and accompanying text (describing Justice Kennedy's argument that the Florida Bar had failed to satisfy the second and third prongs of the Central Hudson test).
This Note first outlines the Supreme Court's decisions granting First Amendment protection to commercial speech and legal advertising. This Note then examines the Court's decisions addressing the constitutionality of state-imposed restrictions on legal advertising and discusses the types of advertising that have been found to be permissible, as well as the Court's assessment of the various interests that states have advanced to justify restrictions on legal advertising. This Note then examines the Court's decision in Florida Bar v. Went For It, Inc. and analyzes the state interests that the Court found to be sufficiently substantial to justify the Florida Bar's restriction. This Note argues that in Florida Bar, the Court ignored established consumer interests in commercial speech and elevated certain other state interests in order to find the Florida Bar's asserted interests to be substantial. Finally, this Note argues that the Court's decision in Florida Bar is fundamentally flawed because it is premised on a public opinion survey, which is an inherently shifting standard and prone to varying interpretations. As a result, states will be able to support more restrictive rules governing legal advertising by merely commissioning their own public opinion surveys demonstrating that citizens dislike a particular practice.

I. The Evolution of the Court's Application of the First Amendment to Legal Advertising

A. The First Amendment and Commercial Speech

Until 1976, commercial speech was not entitled to First Amendment protection.\(^{45}\) In extending constitutional protection to commercial speech, including legal advertising, the Court emphasized that the free flow of commercial information is critical to consumers' ability to make informed decisions about products and services.\(^{46}\) The Court explained, however, that because "commonsense differences" existed between commercial and noncommercial speech, commercial speech was not entitled to complete First Amendment protection.\(^{47}\) Instead, the Court developed an analytical standard for determining whether an asserted state interest justifies a restriction on commercial speech.\(^{48}\)

45. See infra text accompanying notes 49-67 (discussing the development of the Court's treatment of commercial speech).
46. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (stating that the free flow of commercial information was "indispensable" to the consumer's ability to make well-informed and intelligent decisions).
47. Id. at 771 n.24.
1. Extending First Amendment Protection to Commercial Speech

In 1942, the Supreme Court held in Valentine v. Chrestensen\(^\text{49}\) that the First Amendment did not protect commercial speech.\(^\text{50}\) Upholding a New York City ordinance prohibiting the distribution of commercial advertising, the Court ruled, without explanation and without citing precedent, that the First Amendment did not protect "purely commercial advertising."\(^\text{51}\) Over the next thirty years, however, the Court's ruling in Chrestensen was criticized increasingly,\(^\text{52}\) and by the mid-1970s the Court had almost completely retreated from it.\(^\text{53}\)

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.\(^\text{54}\) marked a full retreat from Valentine, as the Court explicitly held that the First Amendment protects commercial speech.\(^\text{55}\) Virginia State Board of Pharmacy involved a challenge to a Virginia statute that prohib-

---

49. 316 U.S. 52 (1942).
50. Id. at 54 (holding that the Constitution does not protect "purely commercial advertising").
51. Id. The Court explained that, while states may not unduly burden citizens' freedoms to communicate information and to disseminate opinions in the streets, governments were not restricted when the speech involved "purely commercial advertising." Id. For a complete description of the factual circumstances surrounding Chrestensen, see R.H. Coase, Advertising and Free Speech, 6 J. LEGAL STUD. 1, 15-21 (1977). See also supra notes 4-5 and accompanying text (describing Chrestensen and the Court's subsequent retreat from its holding that the First Amendment does not protect commercial speech).
53. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 758-61 (1976) (outlining the Court's First Amendment treatment of commercial speech and stating that, since 1951, the Court had not denied First Amendment protection to any speech merely because it was commercial). For a more detailed analysis of the Court's treatment of commercial speech see McGowan, supra note 2, at 361-81. See also Farber, supra note 5, at 376-79 (describing the Court's unwillingness to rely on Chrestensen in subsequent commercial speech cases); Roberts, supra note 4, at 116-26 (describing the Court's treatment of commercial speech after Chrestensen and its reluctance to rely on the Chrestensen holding).
55. Id. at 770.
ated pharmacists from advertising prescription drug prices.\textsuperscript{56} Invalidating the statute, the Court first explained that the First Amendment protected both a speaker's right to communicate and the recipient's right to receive the communication.\textsuperscript{57} The Court then weighed the individual and societal interests in maintaining the availability of the free flow of commercial information\textsuperscript{58} against the state's interest in maintaining the professional standards of pharmacists.\textsuperscript{59} The Court decided in favor of preserving ac-

\textsuperscript{56}\textit{Id.} at 749-50. Pharmacists violating the statute could be found guilty of unprofessional conduct. \textit{Id.} Prescription drug users challenged the Virginia statute, and argued that under the First Amendment, they were entitled to receive price information from pharmacists who wished to advertise such information to the public. \textit{Id.} at 753-54; see supra note 6 (discussing commentary pertaining to the Court's decision in \textit{Virginia State Board of Pharmacy}).

\textsuperscript{57} \textit{Virginia State Bd. of Pharmacy}, 425 U.S. at 756-57. In finding that the First Amendment protects the right to receive information, the Court rejected Justice Rehnquist's contention in his dissent that the right to receive information from someone seeking to disseminate it does not exist when the information is available elsewhere. \textit{Id.} at 757 n.15. \textit{But cf.} Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380-81 (1995) (upholding a 30-day ban on direct-mail advertising by personal injury lawyers, in part because the intended recipient could obtain information about available legal services through other media).

\textsuperscript{58} \textit{Virginia State Bd. of Pharmacy}, 425 U.S. at 763-66. The Court stated that having commercial information available was indispensable to a consumer's ability to make intelligent and well-informed decisions. \textit{Id.} at 765. Society also had a "strong interest" in advertising because, even if "tasteless and excessive," advertising was "nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." \textit{Id.} at 764-65. The Court stated that an individual consumer who needed price information about necessary drugs had an interest in the free flow of commercial information that "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." \textit{Id.} at 763.

In addition, the Court stated that commercial information was necessary to promote the "proper allocation of resources in a free enterprise system." \textit{Id.} at 765. As long as the United States maintains a "free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions." \textit{Id.} Moreover, the Court stated that the free flow of commercial information was indispensable to forming opinions about how the free enterprise should be regulated or changed. \textit{Id.} The Court concluded that "[i]n the end, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." \textit{Id.} (footnotes omitted); see supra note 14 (describing the Court's decisions acknowledging consumers' right in the free flow of commercial information).

\textsuperscript{59} \textit{Virginia State Bd. of Pharmacy}, 425 U.S. at 766. The Court acknowledged the State's substantial interest in preserving pharmacists' high level of professionalism, but found that this interest should not be protected by maintaining public ignorance about drug prices. \textit{Id.} at 769. The Court stated that an alternative to the State's "highly paternalistic approach" would have been to assume that price information was not harmful, and that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." \textit{Id.} at 770. Moreover, the Court added that the State could achieve its objective of maintaining professional standards through close regulation of pharmacists.
cess to commercial information and held that a state may not suppress information regarding prescription drug prices.

The Virginia State Board of Pharmacy Court emphasized, however, that its ruling was limited to commercial advertising by pharmacists who dispensed standardized products. The Court specifically reserved the issue of whether the legal and medical professions could advertise, explaining that, because lawyers and doctors dispense an unlimited variety of professional services, advertising in these professions presented a higher risk of deception. Therefore, different factors were to be considered in determining whether these professions could advertise.

Finally, the Court noted in Virginia State Board of Pharmacy that commercial speech is entitled to only limited First Amendment protection. The Court stated that because "commonsense differences" exist between commercial speech and other varieties of speech, commercial speech should be accorded a "different degree of protection." The Court did

Id. at 768. The Court noted that the State could maintain professional standards through subsidization or by protecting pharmacists from competition. Id. at 770.

60. Id. at 770.

61. Id. at 773. In other words, the state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity." Id.

62. Id. at 773 n.25.

63. Id.

64. Id. The Court explained that the legal and medical professions provide "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." Id. The Virginia State Board of Pharmacy Court did not elaborate on the kind of advertising that posed a greater risk of confusion and deception in the legal and medical professions. See id. In Bates v. State Bar of Arizona, however, the Court indicated that, in some cases, advertising claims regarding the quality of legal services could be misleading or deceptive to the public. 433 U.S. 350, 366 (1977). In addition, the Bates Court noted that in-person solicitation, which "breeds undue influence," could pose special dangers of overreaching or misrepresentation. Id.

65. Virginia State Bd. of Pharmacy, 425 U.S. at 773 n.25. The Court did not explain those "different factors." See id.

66. For example, as the Court explained, commercial speech remains subject to time, place, and manner restrictions. Id. at 771; see supra note 34 (describing time, place, and manner restrictions). In addition, states may freely regulate untruthful, deceptive or misleading commercial speech. Virginia State Bd. of Pharmacy, 425 U.S. at 771; see supra note 15 (discussing federal and state court decisions on misleading or deceptive advertising).

67. Virginia State Bd. of Pharmacy, 425 U.S. at 771 n.24. For example, because an advertiser disseminates information about a specific product or service for which he has more information, the veracity of commercial speech is more objective and verifiable than news reporting or political commentary. Id. In addition, because commercial speech is motivated by profit, it is more durable and less likely to be "chilled by proper regulation" than other forms of speech. Id. The Court explained that these characteristics of commercial speech render inaccuracies less tolerable. Id. These characteristics also "make it appropriate to require that a commercial message appear in such a form, or include such
not, however, elaborate on the level of protection that commercial speech should receive.

2. Establishing a Standard for Evaluating State Limits on Commercial Speech

In Central Hudson Gas & Electric Corp. v. Public Service Commission, the Court articulated a standard for evaluating state restrictions on commercial speech. Central Hudson involved a utility company's challenge to a New York Public Service Commission (NYPSC) regulation prohibiting electric utilities from advertising to promote the use of electricity. Central Hudson contended that the NYPSC's regulation constituted a commercial speech restriction that violated the First and Fourteenth Amendments. The State argued that the advertising ban would facilitate energy conservation and help minimize utility costs.

The Court formulated a three-pronged analysis to evaluate the NYPSC's regulation. The Court stated that states may freely regulate additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. Id. at 563-66. The NYPSC based the regulation on its finding that New York's electric utility system lacked sufficient fuel to meet consumer demand during the winter of 1973-74. Id. The NYPSC extended the prohibition in 1977, despite arguments by Central Hudson that it violated the First Amendment. Id. at 559.

The NYPSC categorized utility advertising as either promotional or informational. Id. The NYPSC permitted informational advertising that was intended to encourage consumers to shift their electricity consumption to "off-peak" periods when demand is lower. Id. The NYPSC reasoned that informational advertising did not promote an increase in total demand, but facilitated a more consistent level of electricity use throughout the day. Id. at 560.

The NYPSC's rule was upheld at the trial, appellate, and state supreme court levels. Id. at 560-61. The New York Court of Appeals questioned whether the advertising at issue was protected commercial speech because Central Hudson held a monopoly on providing electricity. Id. at 566-67. The appellate court stated that, because consumers had no alternative source of electricity, Central Hudson's advertising contained little useful information that could promote more informed decisionmaking. Id. Rejecting this reasoning, the United States Supreme Court argued that electricity faces competition from other fuel sources such as fuel oil and natural gas. Id. at 567. Noting that monopoly providers are not likely to pay for advertising that has no value to its customers, the Court stated that even in monopoly markets, suppressing advertising reduces the availability of information to consumers and violates the purpose of the First Amendment. Id.

To maintain consistency with
commercial speech that is misleading or involves illegal activity; otherwise, the government's ability to regulate commercial speech is limited.\textsuperscript{74} The Court held that to justify a restriction on commercial speech a state must (1) advance a substantial interest to be accomplished by the restriction;\textsuperscript{75} (2) demonstrate that the regulation advances that articulated state interest;\textsuperscript{76} and (3) demonstrate that the restriction is narrowly drawn.\textsuperscript{77}

the Florida Bar Court's analysis, this Note adopts its characterization of the Central Hudson test as having three prongs.

\textsuperscript{74} Central Hudson, 447 U.S. at 564. The Court explained that because the First Amendment is concerned with the informational value of commercial speech, a state's suppression of deceptive commercial information about a lawful activity does not pose a constitutional problem. \textit{Id.} at 563 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)). Furthermore, a state's suppression of commercial speech concerning illegal activity does not violate the First Amendment. \textit{Id.} at 563-64 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973)). Similarly, in Zauderer v. Office of Disciplinary Counsel, the Court upheld a state-imposed disclosure requirement, finding that the advertised statement, "if there is no recovery, no legal fees are owed by our clients" was misleading because it did not indicate that clients would still be liable for costs, even if they lost their lawsuit. 471 U.S. 626, 652 (1985). The Court thus upheld the state's requirement that lawyers' advertisements disclose a client's potential financial liability. \textit{Id.} at 652-53; see also Richard M. Schmidt, Jr. & Robert C. Burns, \textit{Proof or Consequences: False Advertising and the Doctrine of Commercial Speech}, 56 U. CIN. L. REV. 1273, 1282-84 (1988) (observing that in Zauderer, the Court acknowledged that state restrictions on misleading speech must not be unduly burdensome and that the state may be required to demonstrate consumer deception if the misleading nature of such speech is not "self-evident"); Nan K. McKenzie, \textit{Ambiguity, Commercial Speech and the First Amendment}, 56 U. CIN. L. REV. 1295, 1300-04 (1988) (explaining that the Court's refusal to protect false or misleading commercial speech is premised on the fact that such speech is detrimental to a free market economic system).

\textsuperscript{75} Central Hudson, 447 U.S. at 564-65. In Edenfield v. Fane, the Court stated that, unlike a rational basis review, under Central Hudson the Court may not "supplant the precise interests put forward by the State with other suppositions." 507 U.S. 761, 768 (1993) (citing Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)); see supra note 9 (describing various state interests that the Court has found to be substantial).

\textsuperscript{76} Central Hudson, 447 U.S. at 564. The government bears the burden of demonstrating that the restriction advances the asserted state interest. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1995). "[M]ere speculation or conjecture" is insufficient to satisfy this burden. \textit{Edenfield}, 507 U.S. at 770. The state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." \textit{Id}.

\textsuperscript{77} Central Hudson, 447 U.S. at 564-65. In Fox, the Court held that "narrowly tailored" does not require a state to employ the least restrictive means of regulating commercial speech. 492 U.S. at 479-80. Rather, a state must demonstrate only that a reasonable fit exists between its objective and the means used to achieve that goal. \textit{Id.}; Posadas de Puerto Rico Assoc's. v. Tourism Co., 478 U.S. 328, 341 (1986) (stating that the Court requires a reasonable fit "between the legislature's ends and the means chosen to accomplish those ends"); see Langvardt, supra note 7, at 374-76 (contending that the Court has weakened the Central Hudson test by requiring only a reasonable fit between the state's ends and means); Smolla, supra note 2, at 791 n.57 (stating that in Fox, the Court explained that the legislature's ends must reasonably fit its means and that the fit need not be perfect); Mauro, supra note 8, at 1951-54 (arguing that the Court's decisions in \textit{Posadas} and \textit{Fox}
Applying this three-pronged analysis, the *Central Hudson* Court concluded that the State's interests in conserving energy and minimizing consumer costs were substantial. The Court further found that the NYPSC's regulation advanced the State's interest in promoting energy conservation. Nonetheless, the Court invalidated the regulation because it was too broad to satisfy the third prong of the analysis.

B. Extending First Amendment Protection to Legal Advertising

In its decisions addressing the constitutionality of state restrictions on legal advertising or solicitation, the Supreme Court has refused to permit states to prohibit advertising or solicitation that is not misleading, potentially misleading, false, or deceptive, especially when the activity is subject to effective oversight by either the state or the legal profession.

have reduced *Central Hudson*’s level of scrutiny from intermediate to a rational basis test); *McGowan*, supra note 2, at 380 (explaining that the Court requires a statute merely to loosely fit its stated objectives).

78. *Central Hudson*, 447 U.S. at 568-69. The Court noted that, given the nation’s dependence on energy sources that are beyond its control, “no one can doubt the importance of energy conservation.” Id. at 568. Moreover, the Court agreed that maintaining fair and equitable consumer rates also was a “clear and substantial” state interest. Id. at 569.

79. Id. at 569. The Court, however, found that the regulation did not advance the State’s second goal of minimizing consumers’ energy costs. Id. The Court found that the link between a prohibition on promotional advertising and the reasonableness of consumer’s rates was “tenuous” and “highly speculative.” Id.

80. Id. at 570. Finding that the regulation was not narrowly drawn, the Court stated that the regulation prohibited advertising that would reduce or have no effect on total energy consumption, such as the promotion of more efficient energy services. Id. For instance, the NYPSC’s regulation prohibited electric utilities from advertising the use of a heat pump, which even the State acknowledged promotes energy efficiency. Id. Furthermore, the regulation prohibited utilities from advertising electric heat as an alternative to other sources of heat, such as solar heat. Id. The Court also found that the State failed to demonstrate that it could not achieve its objectives by less restrictive methods. Id. at 570-71. The Court noted that the NYPSC could instead fashion rules that limit the format and content of Central Hudson’s advertising. Id. at 571 & n.13.

81. See, e.g., *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 480 (1988) (reversing a Kentucky Supreme Court decision prohibiting an attorney from sending targeted, direct-mail solicitation to potential clients known to face particular legal problems); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985) (holding that an “attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients”); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (holding that states may not categorically ban advertising that is potentially misleading); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (holding that states may not ban truthful advertising of routine legal services); see also infra notes 87-124 and accompanying text (describing the Court’s decisions in *Bates* and *R.M.J.*).

82. See, e.g., *Shapero*, 486 U.S. at 477-78 (finding that the record failed to demonstrate that targeted solicitations are more burdensome than printed advertisements to monitor and outlining various methods of scrutinizing direct-mail solicitations); *Zauderer*, 471 U.S. at 644-47 (imposing on the state the burden of distinguishing false or deceptive advertise-
The Court has upheld state prohibitions when advertising or solicitation presents unacceptable risks of overreaching,\textsuperscript{83} or the invasion of privacy,\textsuperscript{84} and when the form of advertising is not conducive to effective
The Court has grounded its holdings on the fundamental principle that access to the free flow of commercial information enables consumers to make informed and reasoned decisions about legal services.

1. States May Not Categorically Ban Advertising That is Not Misleading, Potentially Misleading, or Deceptive

One year after the Court decided *Virginia State Board of Pharmacy*, the Court held that the First Amendment also protects legal advertising. In *Bates v. State Bar of Arizona*, two lawyers ran a telephone directory advertisement in which they advertised that their legal clinic provided "routine" legal services at "very reasonable fees." Conceding that their advertisement violated one of the disciplinary rules of the Supreme Court of Arizona, the lawyers challenged the rule, contending that it violated the First and Fourteenth Amendments. The Court agreed and invalidated it. In *Bates*, as in *Virginia State Board of Pharmacy*, the Court emphasized the importance of consumers' interest in the free flow of commercial information, and concluded that the disciplinary rule perpetuated public ignorance about the nature and costs of available products and services.

---

85. *Ohralik*, 436 U.S. at 466-67 (upholding a ban on in-person solicitation by lawyers, in part, because such activity occurs in private and can not be regulated or monitored). See supra note 82 and accompanying text (discussing the Court's holdings that states may not prohibit non-misleading advertising that can be effectively supervised).

86. See supra note 14 and accompanying text (discussing the Court's emphasis on the importance of consumer access to the free flow of commercial information).

87. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (holding that states may not categorically ban lawyers from publishing truthful advertisements regarding "the availability and terms of routine legal services"); see The Supreme Court, 1976 Term, 91 HARV. L. REV. 188, 205-08 (analyzing the Court's decision in *Bates*).


89. Id. at 354. The routine services that the lawyers provided included uncontested divorces and adoptions, simple personal bankruptcies, and name changes. Id.

90. Id. at 355. Disciplinary Rule 2-101(B) stated, in pertinent part:

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

   Id.

91. Id. at 356. The Supreme Court of Arizona rejected the appellants' constitutional claims. Id.; *In re Bates*, 555 P.2d 640 (1976).


93. Id. at 364-65; see supra notes 57-59 (discussing *Virginia State Board of Pharmacy*'s emphasis on the importance of commercial information to individuals and to society).
The Court rejected several justifications that the State advanced in support of its restriction.\textsuperscript{94} As in \textit{Virginia State Board of Pharmacy}, the Court rejected the State’s claim that permitting lawyers to advertise their prices would adversely affect professionalism.\textsuperscript{95} The Court explained that the general public understands that lawyers earn their livelihoods practicing law, and that no client expects to receive free legal services.\textsuperscript{96} Moreover, other professions, such as bankers and engineers, advertise without being considered undignified.\textsuperscript{97} Finally, the Court suggested that the failure to advertise actually may contribute to the public’s disillusionment with the legal profession because information concerning the price and availability of legal services was unavailable.\textsuperscript{98}

The Court also rejected the State’s arguments that, because legal services are highly individualized and are not conducive to standardization, attorney advertising would be misleading.\textsuperscript{99} The Court stressed that only “routine” services could be advertised at standardized rates and that the State retains authority to specify which services must be contained in an advertized package.\textsuperscript{100} Moreover, the Court stated that an advertise-

\begin{itemize}
  \item[94.] \textit{Bates}, 433 U.S. at 368-79.
  \item[95.] \textit{Id.} at 368-72. Specifically, the State argued that allowing lawyers to advertise their prices would promote commercialism. \textit{Id.} at 368. Such commercialism would “undermine the attorney’s sense of dignity and self-worth” and threaten the lawyer’s obligation to selflessly serve the public. \textit{Id.} Similarly, the State argued that advertising would cause clients to doubt that their attorneys are pursuing the clients’ best interests. \textit{Id.} Finally, the State argued that price advertising would threaten the profession’s dignified public image. \textit{Id.}
  \item[96.] \textit{Id.} at 368-69.
  \item[97.] \textit{Id.} at 369-70.
  \item[98.] \textit{Id.} at 370-71.
  \item[99.] \textit{Id.} at 372. The State argued that advertising legal services would be misleading because (1) services are based on individualized circumstances and are not conducive to “informed comparison” based on an advertisement, (2) consumers do not know in advance what services they require, and (3) advertisements will not emphasize skill, but rather irrelevant factors. \textit{Id.}
  \item[100.] \textit{Id.} at 372-73 & n.28. The Court stated that a client is not required to understand the details of the legal services that he needs before he seeks legal assistance. \textit{Id.} at 373 n.28. The Court explained that if the complexity of a potential client’s problems is beyond “routine,” that fact usually will become apparent during an initial consultation. \textit{Id.}

Justice Powell, in his partial dissent, however, agreed with the State that advertising professional legal services would be misleading. \textit{Id.} at 391. He argued that, unlike tangible products, professional services defy attempts to be characterized as routine because they involve highly individualized circumstances. \textit{Id.} at 391-93. He criticized the Court’s attempts to divide legal services into categories labelled either unique or routine. \textit{Id.} For example, Justice Powell argued, even the simplest divorce can implicate other more complicated legal problems, including child support, alimony, child custody, and tax issues. \textit{Id.} at 392-93.

Finally, Justice Powell argued that the Court grossly had overestimated the states’ ability to effectively police the truthfulness of legal advertising. \textit{Id.} at 396-97. Not only does the sheer number of practicing attorneys in the country present difficult oversight problems,
ment’s failure to provide all information relevant to selecting an attorney does not mean that it is misleading.\footnote{101} Echoing \textit{Virginia State Board of Pharmacy}, the Court rejected the State’s attempt to facilitate public ignorance regarding the availability of legal services and argued that incomplete information about services is better than none.\footnote{102}

Similarly, the Court rejected the State’s contentions that advertising would adversely affect the administration of justice by encouraging litigation and by promoting fraudulent claims.\footnote{103} The Court stated that the need to remove obstacles to the public’s ability to seek redress for legal wrongs outweighs the risk that advertising will promote litigation.\footnote{104} Likewise, the Court rejected the argument that a causal connection exists between advertising and the filing of fraudulent claims.\footnote{105} Finally, the Court rejected the State’s argument that a wholesale ban on advertising is necessary because enforcing less comprehensive restrictions is too burdensome.\footnote{106} Rather, the Court stated, the legal profession has a vested

\begin{footnotes}
\footnote{101}{\textit{Id.} at 374; see infra notes 119-24 and accompanying text (elaborating on what constitutes misleading advertising).}


\footnote{103}{\textit{Bates}, 433 U.S. at 375-77 \& n.31.}

\footnote{104}{\textit{Id.} at 375-77. Rather, the Court argued 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’.” \textit{Id.} at 377 (quoting ABA \textsc{Code of Professional Responsibility} EC 2-1 (1976)).}

\footnote{105}{\textit{Id.} at 375 n.31. The Court stated that those who are prone to abuse the legal system will do so regardless of whether lawyers advertise. \textit{Id.}}

\footnote{106}{\textit{Id.} at 379; see \textit{In re R.M.J.}, 455 U.S. 191, 206 (1982) (holding that a State’s restriction on the persons to whom an attorney could send professional announcements cards was invalid because the State failed to demonstrate that it lacked the ability to supervise the content of such mailings); see also supra note 16 and accompanying text (discussing the Court’s holdings invalidating state restrictions when state oversight could effectively regulate potentially misleading or abusive advertising).}
\end{footnotes}
interest in policing its members and can be relied upon to expose those who violate the honor of the profession.\textsuperscript{107} 

The Bates Court ruled that the First Amendment permits lawyers to advertise the prices at which they perform certain routine services.\textsuperscript{108} The Court stressed the limits of its holding, stating that it did not address advertising touting the quality of service, which may be conducive to misleading claims.\textsuperscript{109} Nor did the Court's decision address in-person solicitation, which may be subject to restrictions because it presents opportunities for overreaching and misrepresentation that are not present in printed advertisements.\textsuperscript{110} Moreover, the Court stressed that states

\begin{itemize}
  \item \textsuperscript{107} Bates, 433 U.S. at 379. The Court expressed confidence that most lawyers will continue to "uphold the integrity and honor of their profession" by advertising in a non-deceptive and straightforward manner. \textit{Id.}
  \item \textsuperscript{108} \textit{Id.} at 384; see also \textit{R.M.J.}, 455 U.S. at 203 (stating that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment"); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 109 (1990) (plurality opinion) (holding that a state may not impose a "categorical prohibition against the dissemination of accurate factual information to the public"). The Bates Court defined "routine" legal services as "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." Bates, 433 U.S. at 372; see also supra note 15 and accompanying text (noting that states may not ban commercial speech that is not misleading or deceptive).
  \item \textsuperscript{109} Bates, 433 U.S. at 366. Such claims, the Court stated, are more likely to mislead or deceive the public. \textit{Id.} at 366, 383-84; see also Spencer v. Honorable Justices of Supreme Court, 579 F. Supp. 880, 887-88 (E.D. Pa. 1984) (holding that a state may ban the use of such subjective adjectives as "‘experienced,’ ‘expert,’ ‘highly qualified’ or ‘competent’" because they are difficult to verify), aff'd, 760 F.2d 261 (3d Cir. 1985). \textit{But see Peel}, 496 U.S. at 102 (permitting a reasonable inference of a "greater degree of professional qualification" from an attorney's claim that he has been certified in a particular specialty); see also Thier, supra note 15, at 695 (arguing that the Peel Court appears to be condoning inferences about the quality of an attorney's legal services). \textit{See generally Moss, supra note 15, at 613-16, 621-31} (discussing how the ABA and various states treat attorney statements regarding reputation, quality of service, and claims of expertise or specialization); LaRoe, supra note 13, at 1551 & n.121 (suggesting that an attorney who represents a particular expertise or specialization should be required to disclose his standing with the certifying board). For a comprehensive pre-Peel survey of how various state bar associations treat self-laudatory claims and how such claims have been treated by the courts, see Scott Makar, \textit{Note, Advertising Legal Services: The Case for Quality and Self-Laudatory Claims}, 37 U. Fla. L. Rev. 969 (1985). Mr. Makar contends that state bar associations should permit attorneys to make quality and self-laudatory claims in their advertisements. \textit{Id.} at 971-72. He argues that the definition of a quality or self-laudatory claim lacks uniformity among state jurisdictions and the result is that many truthful and non-deceptive claims are being suppressed. \textit{Id.} at 972-73. Finally, Mr. Makar argues that eliminating prohibitions on self-laudatory and quality claims will encourage lawyers to use persuasion in their advertisements and improve the flow of information to the public. \textit{Id.} at 973-74.
  \item \textsuperscript{110} Bates, 433 U.S. at 366, 383-84; see infra notes 158-67 and accompanying text (discussing the Court's decision in \textit{Ohralik})
\end{itemize}
were free to impose reasonable time, place, and manner restrictions\textsuperscript{111} on advertising and to prohibit advertising of illegal transactions.\textsuperscript{112}

Having established in \textit{Bates} that states may not prophylactically ban non-misleading legal advertising,\textsuperscript{113} the Court extended this ruling in \textit{In re R.M.J.}\textsuperscript{114} by holding that states may not prophylactically ban even po-

\textsuperscript{111} \textit{Bates}, 433 U.S. at 384. For an explanation of time, place, and manner restrictions, see \textit{supra} note 34.

The Court also suggested that, to protect against misleading the public, states could require advertisements to include disclaimers or warnings. \textit{Bates}, 433 U.S. at 384; \textit{see also} \textit{Zauderer} v. Office of Disciplinary Counsel, 471 U.S. 626, 652-53 (1985) (sustaining a state rule requiring attorneys to disclose that, although representation was based upon a contingent-fee billing system, the client would still be liable for costs if he lost the suit). In \textit{Zauderer}, the Court also held that the state's disclosure requirements need only be reasonably related to the state's interest in preventing consumer deception. \textit{Id.} at 651; \textit{see infra} note 145 (discussing the \textit{Zauderer} Court's holding that the state's disclosure requirement regarding contingent-fee representation must merely be reasonable, not the least restrictive).

\textsuperscript{112} \textit{Bates}, 433 U.S. at 384; \textit{Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations}, 413 U.S. 376 (1973) (denying First Amendment protection to an advertisement because the underlying transaction was illegal).

\textsuperscript{113} \textit{Bates}, 433 U.S. at 384; \textit{see supra} notes 99-102 and accompanying text.

\textsuperscript{114} 455 U.S. 191 (1982). \textit{In re R.M.J.} involved a constitutional challenge to a Missouri Supreme Court rule that precisely prescribed the information attorneys could place in printed advertisements. \textit{Id.} at 193-96. The Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri (Committee) had adopted Rule 4 which stated that a lawyer could include only the following information in a printed advertisement: "name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified 'routine' legal services." \textit{Id.} at 194. An addendum to that rule prescribed precisely how an attorney could list his areas of practice, should he choose to do so. \textit{Id.} at 194-95. The rule also precisely stipulated not only what information could be included in professional announcement cards, but also that cards could be sent to only "lawyers, clients, former clients, personal friends, and relatives." \textit{Id.} at 196.

A Missouri attorney was charged with unprofessional conduct for violating the Missouri Supreme Court Rule because his advertisement included information that was not specifically permitted in the rule. \textit{Id.} at 196-98. In addition to the information listed in Rule 4, the plaintiff listed the states in which he was licensed to practice, and a statement, printed in all capital letters, that he was admitted to practice before the United States Supreme Court. \textit{Id.} at 197. His advertisement also listed practice areas in language that deviated from the precise descriptions that the rule permitted. \textit{Id.} For instance, the lawyer described his practice areas as "'personal injury' and 'real estate' instead of 'tort law' and 'property law.'" \textit{Id.} In addition, the lawyer included several practice areas that had no comparable listing in the rule, such as "'contract', 'zoning & land use', 'communication,' [and] 'pension & profit-sharing plans.'" \textit{Id.} Finally, the plaintiff sent professional announcement cards to persons other than those listed in the rule. \textit{Id.} at 198. For a more extensive discussion of the Court's decision in \textit{R.M.J.}, see Joanne G. Caldwell, \textit{Note, Legal Ethics—Lawyer Advertising—Advertising That Is Not Misleading May Not Be Proscribed}, 50 TENN. L. REV. 175, 189-94 (1982) (arguing that in \textit{R.M.J.}, the Court extended the \textit{Central Hudson} analysis to time, place, and manner restrictions); Ratino, \textit{supra} note 15, 753-57 (arguing that the \textit{R.M.J.} Court applied a stricter standard to legal advertising than to other
tentatively misleading advertising if that information can be presented in a non-deceptive manner. Moreover, the Court cautioned that, despite the heightened risk of confusion presented by professional advertising, state regulation of such advertising may not extend beyond what is necessary to prevent deception. In addition, the Court emphasized that under Central Hudson, states imposing restrictions on non-misleading commercial speech must assert a substantial interest and demonstrate that the regulation is in proportion to that interest.

115. R.M.J., 455 U.S. at 203. Justice Powell summarized the Court's approach as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.

116. Id. at 203. The Court reiterated its assertion in Bates that advertising for professional services created "special possibilities for deception." Id. at 202. The Court explained that several factors contributed to the increased potential for deception, including the public's relative lack of knowledge, the profession's restricted ability to police themselves, and the lack of any product standardization in professional services. Id. But see Fred S. McChesney, Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers, 134 U. Pa. L. Rev. 45, 103-09 (1985) (arguing that deception in professional advertising is less of a problem than in other industries because professionals, like lawyers, rely on repeat business and client referrals).

117. R.M.J., 455 U.S. at 207; cf. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 466-67 (1978) (upholding an absolute ban on in-person solicitation, in part, because that form of solicitation usually occurs in private and is, therefore, nearly impossible to police). The Court subsequently has relaxed R.M.J.'s standard by requiring that a state's ends reasonably fit its means. See supra note 8 and accompanying text (describing how Fox modified Central Hudson's "narrowly tailored" requirement to require a "reasonable fit" between a legislature's ends and means).

118. R.M.J., 455 U.S. at 203-04 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980)). The Court stated that the restrictions must be
In Bates and R.M.J., the Court provided some clarification regarding what constitutes misleading or deceptive advertisements. In Bates, the Court established that an advertisement merely stating the prices at which a lawyer will perform routine legal services is not misleading. The Bates Court also found that neither the use of the term "legal clinic" nor the characterization of a price for an uncontested divorce as "very reasonable" was misleading.

In R.M.J., the Court ruled that a legal advertisement listing practice areas in terminology that deviated from language prescribed by the state bar was not misleading. The Court also found that a prominent statement published in large capital letters announcing an attorney's admission to the bar of the Supreme Court of the United States, while distasteful and uninformative, was neither misleading nor potentially misleading. Finally, the Court held that an attorney's mailed professional

narrowly drawn and that a state "may regulate only to the extent regulation furthers the State's substantial interest." Id. at 203; see Ballantine, supra note 9, at 139-40 (discussing the difficulties of determining whether speech is, in fact, deceptive, and explaining how R.M.J. supplements the Central Hudson test by adding the requirement that the Court determine whether speech is potentially misleading); see also supra notes 8-9 (discussing the requirement that restrictions on commercial speech be narrowly tailored and directly and materially advance a substantial state interest) and notes 73-77 and accompanying text (discussing Central Hudson's three-pronged analysis).


120. Bates, 433 U.S. at 372-73, 384. Moreover, the Court explained that states have the authority to stipulate the types of legal services that can be advertised in a packaged group, thereby curtailing the risks that such advertising will be misleading. Id. at 373 & n.28. In addition, the Court stated that warnings or disclaimers may be required to prevent even an advertisement of prices for routine services from being misleading. Id. at 384.

121. Id. at 381-82. The Court explained that most people understand that legal clinics specialize in providing standardized services. Id. at 381. Similarly, the attorneys' characterization of their price for an uncontested divorce as "very reasonable" was not misleading because it was within the price range established by the Arizona Bar. Id. at 382. Finally, the Court found that the failure of an advertisement to inform the reader that he could obtain a name change without a lawyer's assistance was not misleading because anyone can perform most legal services for himself. Id.; see also supra note 15 (discussing other examples of non-misleading legal advertising).

122. R.M.J., 455 U.S. at 205. The Court stated that the use of the words "real estate" instead of "property," and the attorney's listing of "contracts" or "securities" for which the bar had no comparable listing, "present[ed] no apparent danger of deception." Id. In fact, the Court noted that the attorney's descriptions were occasionally more informative than the bar's permitted language. Id.

123. Id. at 205-06. The Court noted that the record below contained no finding that this statement was either misleading or potentially misleading. Id.
announcement cards did not contain misleading or inherently misleading speech.\footnote{124}

2. **Newspaper Advertisements: States May Not Ban Truthful or Non-Deceptive Advertising Containing Legal Advice**

In *Zauderer v. Office of Disciplinary Counsel*,\footnote{125} the Court found that advertisements presenting truthful, non-deceptive information and advice regarding a potential client’s legal rights were neither misleading nor deceptive. In addition, the Court elaborated on what constitutes a substantial state interest under the *Central Hudson* analysis.\footnote{127} In *Zauderer*, an Ohio attorney placed advertisements in local newspapers.\footnote{128} In one advertisement, the attorney offered to represent women who had been injured by the Dalkon Shield Intrauterine Device.\footnote{129} The Office of Disci-

---

\footnote{124. *Id.* at 206-07. The Missouri Supreme Court rule precisely stipulated not only what information could be included in professional announcement cards, but it also stated that cards could be sent only to “lawyers, clients, former clients, personal friends, and relatives.” *Id.* at 196, 198. The plaintiff sent professional announcement cards to persons other than those listed in the rule. *Id.* at 198. The Court invalidated the state’s rule because it was not narrowly drawn. *Id.* at 207.}

\footnote{125. 471 U.S. 626 (1985).}

\footnote{126. *Id.* at 639. See generally Whitman & Stoltenberg, *Evolving Concepts*, supra note 15, at 533-54 (praising the *Zauderer* decision because it will provide the public with valuable information about their rights to bring suit); Jennifer T. Elmer, Note, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio: States’ Rights v. The First Amendment*, 46 *La. L. Rev.* 923, 939 (1986) (concluding that *Zauderer*’s affirmation of state disclosure requirements will discourage attorney advertising); Dorothy Virginia Kibler, Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses With The Zauderer Decision*, 65 *N.C. L. Rev.* 170, 194 (1986) (criticizing the Court for failing to establish guidelines that encourage attorney solicitation and advertising as a means of communicating information to consumers); Robin M. Orosz, Note, *Has Lawyer Advertising Finally Received the Protection It Deserves?*, 15 *Stetson L. Rev.* 543, 587 (1986) (arguing that in *Zauderer*, the Court finally lifted unnecessary restrictions on legal advertising); Raymond S. Sokolowski, Note, *Did You Use This IUD? Legal Advice in Lawyer Advertising: Zauderer v. Office of Disciplinary Counsel*, 36 *DePaul L. Rev.* 133, 152-57 (1986) (arguing that *Zauderer* does not give adequate deference to states’ advertising restrictions, and fails to establish clear guidelines regarding acceptable advertising standards).}

\footnote{127. *Zauderer*, 471 U.S. at 641-42; see *infra* notes 136-43 and accompanying text (discussing the *Zauderer* Court’s treatment of the state’s asserted interests).}

\footnote{128. *Zauderer*, 471 U.S. at 629-30. One advertisement informed readers that his law firm represented drunk driving defendants, and that, if convicted of drunk driving, clients would have their legal fees refunded. *Id.* Upon notification from the Office of Disciplinary Counsel of the Supreme Court of Ohio that the advertisement appeared to offer contingent-fee representation to criminal defendants, in violation of the Ohio disciplinary rules, Zauderer withdrew the advertisement. *Id.* at 630.}

\footnote{129. *Id.* at 630-31. In addition to featuring an illustration of the Dalkon Shield, the advertisement stated:}

The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hyster-
plinary Counsel (Counsel) filed a complaint charging the attorney with several disciplinary violations, including a violation of rules prohibiting self-recommendation and the acceptance of employment based on unsolicited legal advice. Relying on *Bates* and *R.M.J.*, the attorney contended that the Ohio disciplinary rules violated the First and Fourteenth Amendments.

The Court concluded that the advertisement was not false or deceptive because the attorney never promised that litigation would be successful or that he had any special expertise in handling lawsuits involving the Dalkon Shield. The State, therefore, could not prohibit the advertise-

ectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

*Id.* at 631.

130. *Id.* at 631-33. The Counsel charged that the Dalkon Shield advertisement violated several disciplinary rules. *Id.* First, the Counsel charged that, because the advertisement contained an illustration of the Dalkon Shield, it violated Disciplinary Rule 2-101(B) of the Ohio Code of Professional Responsibility, which requires the dignified presentation of information “without the use of drawings, illustrations . . . or the use of pictures, except for the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice.” *Id.* at 632 n.4 (quoting *OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)* (1970)). Second, the Counsel alleged that the Dalkon Shield advertisement violated DR 2-103(A) prohibiting an attorney from “recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.” *Id.* at 633 (quoting *OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A)* (1970)). Third, the Counsel charged that the advertisement violated DR 2-104(A), which provides “that [a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice.” *Id.* (quoting *OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)* (1970)). Finally, the complaint charged that the advertisement failed to advise clients that they would remain liable for expenses even if their claims were unsuccessful, thereby violating DR 2-101(B)(15)’s requirement that advertisements containing contingent-fee rates “disclos[e] whether percentages are computed before or after deduction of court costs and expenses.” *Id.* (quoting *OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(15)* (1970)). The violation of DR 2-101(B)(15) also constituted a violation of DR 2-101(A) because failure to accurately disclose fees made the advertisement deceptive.


132. *Id.* at 639-40. In fact, the Court stated that the statements contained in the advertisement were “completely accurate” and “verifiable.” *Id.* at 645. The Court stated that, although its prior decisions on legal advertising created the possibility that states may prohibit lawyers from asserting claims about the quality of their services, these decisions “do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.” *Id.* at 640 n.9; cf. *Peel v. Attorney Registration and Disciplinary Comm’n*, 496 U.S. 91, 102 (1990) (plurality opinion) (permitting a reasonable
The Court then applied the Central Hudson test and rejected the Counsel's alleged state interests as insufficient to support its ban on advertisements containing legal advice and information.

Addressing the State's asserted interests, the Court quickly dismissed the contention that printed advertisements constituted an invasion of privacy simply because the reader was offended by them. Likewise, printed advertisements present no risk of overreaching or undue influence. Unlike in-person solicitation, printed advertisements do not coerce the reader into making an immediate decision.

The Court also rejected arguments that restrictions on legal advertising or solicitation were valid because they advanced the State's interest in preventing unnecessary litigation. Echoing its finding in Bates that litigation is not necessarily an evil, the Court rejected the State's contention that imposing a prophylactic ban on advertisements containing inference of a "greater degree of professional qualification" from an attorney's claim that he has been certified in a particular specialty. See generally Makar, supra note 109, at 1011 (arguing that restrictions on quality and self-laudatory claims that are not false or misleading are inappropriate because they restrict the availability of information to consumers); Thier, supra note 15, at 695 (arguing that the Peel Court seems to condone inferences about the quality of an attorney's legal services based on a certification of an expertise or specialization).

134. Id. at 644. The Counsel apparently did not advance a specific interest to support its rule. See id. at 639. The Court noted that the Counsel extensively relied on the Court's decision in Ohralik, where the Court upheld a state ban on in-person solicitation because of the inherent risks of overreaching, fraud, and invasion of privacy. Id. at 641; Ohralik v. State Bar Ass'n, 435 U.S. 447, 464-65 (1978). The Court inferred from the Counsel's reliance on Ohralik that the Counsel adopted the interests asserted in that case as its own. Zauderer, 471 U.S. at 641; see infra notes 158-67 and accompanying text (discussing Ohralik).


136. Zauderer, 471 U.S. at 642. The Court commented that “[a]lthough some sensitive souls may have found the appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it.” Id.

137. Id. The Court stated that a printed advertisement does not pressure a potential client into giving an immediate response to an offer of representation because the reader has time to reflect on the offer. Id.; see supra note 19 (discussing examples of advertising that poses risks of overreaching and undue influence).

138. Zauderer, 471 U.S. at 642. The Court explained that in-person solicitation is not only a “practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,” it also “presents unique regulatory difficulties because it is not visible or otherwise open to public scrutiny.” Id. at 641 (citing Ohralik, 436 U.S. at 464-65, 466).


140. Zauderer, 471 U.S. at 642-43. The Court explained the importance of maintaining access to the civil legal system:
advice and guidance was necessary in order to prevent lawyers from generating business by running false or "ambiguous" advertisements that encourage citizens to litigate.\textsuperscript{141} The Court stated that distinguishing advertisements containing false or deceptive legal advice from advertisements that are truthful and helpful is not inherently difficult.\textsuperscript{142} The Court also found that the State's interest in ensuring that lawyers communicate with their clients in a dignified manner was not substantial enough to permit restricting the publication of a non-misleading and truthful advertisement.\textsuperscript{143}

Finally, the Court reiterated that its commercial speech decisions were grounded on the fundamental principle that protecting the free flow of commercial information justifies requiring a state to bear the burden of distinguishing false, misleading, and harmful advertising from advertising that is truthful, non-deceptive, and harmless.\textsuperscript{144} Therefore, the Court held that a state may not discipline an attorney for soliciting clients with printed advertising that conveys truthful, non-deceptive information and counsel regarding a potential client's legal rights.\textsuperscript{145}

\begin{footnotesize}
\begin{enumerate}
\item That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. \textit{Id.} at 643; \textit{see also Bates}, 433 U.S. at 375-77.
\item \textit{Zauderer}, 471 U.S. at 643-44; \textit{see supra} notes 104-05 (discussing the \textit{Bates} Court's rejection of the argument that legal advertising promotes fraudulent claims and adversely affects the administration of justice).
\item \textit{Zauderer}, 471 U.S. at 644-45. The Court reasoned that the lawyer's statement about the Dalkon Shield in the advertisement was "easily verifiable and completely accurate." \textit{Id.} at 645.
\item \textit{Id.} at 648.
\item \textit{Id.} at 646; \textit{see supra} note 14 (outlining cases where the Court emphasized the importance of consumer access to the free flow of commercial information).
\item \textit{Zauderer}, 471 U.S. at 647. Likewise, the Court invalidated the Counsel's restriction on the use of illustrations or pictures in legal advertising. \textit{Id.} The Court found that the illustration was accurate and non-deceptive. \textit{Id.} The Court explained that the State's interest in maintaining dignified courtroom behavior does not extend to the State's desire to ensure dignified communications between lawyers and the public. \textit{Id.} at 648; Whitman & Stoltenberg, \textit{Evolving Concepts}, \textit{supra} note 15, at 542.
\item The Court did find, however, that the attorney's advertisement was misleading because it failed to disclose that in contingent-fee arrangements clients are still liable for costs. \textit{Zauderer}, 471 U.S. at 652. Moreover, the Court held that the State's disclosure requirement regarding contingent-fee representation had to be reasonable, not the least restrictive means available. \textit{Id.} at 651; \textit{see also} Schmidt & Burns, \textit{supra} note 74, at 1282 (arguing that in \textit{Zauderer} the Court acknowledged that state restrictions on even misleading advertising must not be overly burdensome and that, if a misrepresentation is not "self-evident," the state may be required to provide evidence of consumer deception to justify a restriction).
\item In her partial dissent, Justice O'Connor emphasized that professional services cannot be likened to standardized products. \textit{Zauderer}, 471 U.S. at 674 (O'Connor, J., concurring in part and dissenting in part) Justice O'Connor outlined two compelling reasons why states
\end{enumerate}
\end{footnotesize}
3. Direct-Mail Advertisements and Solicitations

As in Zauderer, where the Court held that lawyers may publish advertisements containing “truthful and nondeceptive information and advice regarding the legal rights of potential clients,” the Court held in Shapero v. Kentucky Bar Ass’n that a state may not prohibit a lawyer from mailing truthful and non-deceptive letters to potential clients whom the lawyer knows to have specific legal problems. The Court reasoned that should be permitted to limit lawyers’s ability to accept employment that results from unsolicited legal advice. Id. First, the complexity and diversity of professional services result in an “enhanced possibility” of confusing and deceiving lay persons who lack the knowledge or experience to gauge the quality of the service being offered. Id. Second, because attorneys are personally interested in obtaining a client’s business, their advice offered in soliciting a client may be biased, resulting in a client making a decision based on incomplete information. Id.

Justice O’Connor also argued that states have several substantial interests entitling them to deference in regulating their licensed professions. Id. at 676-78. Lawyers, in particular, have constitutional responsibilities justifying state imposition of stricter regulation. Id. at 676-77. In addition, states have a substantial interest in preventing fraud, overreaching, and undue influence by lawyers who would use their “professional expertise to overpower the will and judgment of laypeople who have not sought their advice.” Id. at 678. States also have a substantial interest in requiring lawyers to “consistently exercise independent professional judgment on behalf of their clients.” Id. According to Justice O’Connor, even if a lawyer’s claims are accurate, these substantial interests permit a state to prohibit a professional from accepting employment that has resulted from unsolicited legal advice. Id. at 679.

146. Id. at 646; see supra notes 125-45 and accompanying text (discussing the Zauderer decision).
148. Id. at 473-74. Shapero involved an attorney who wanted to send a direct-mail solicitation to homeowners threatened with foreclosure. Id. at 469. The attorney sought to have the contents of the letter approved by the Kentucky Attorneys Advertising Commission. Id. Although the Commission did not find the letter false or misleading, it denied approval of the letter because a Kentucky Supreme Court Rule proscribed the sending of written advertisements prompted by “‘a specific event or occurrence involving or relating to the addressee’” as opposed to the general public. Id. Expressing doubts about the rule’s constitutionality, the Kentucky Supreme Court replaced it with ABA Model Rule 7.3 which prohibited an attorney from soliciting business by written communication except by “letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.” Id. at 470-71. See generally Kinsler, supra note 19, at 22-30 (describing post-Shapero attempts by state courts to impose limitations on targeted, direct-mail solicitation and arguing that such attempts are unconstitutional); Douglas Whitman & Clyde D. Stoltenberg, Direct Mail Advertising By Lawyers, U. Pitt. L. Rev., 381, 399-416 (1984) (analyzing pre-Shapero state court decisions addressing direct-mail solicitation); Ballantine, supra note 9, at 131-37, 143-51 (describing Shapero and proposing appropriate restrictions for direct-mail advertising); Drecksel, supra note 82, at 535-42 (analyzing Shapero and proposing filing and disclosure requirements for direct-mail solicitation); Kabateck, supra note 16, at 922-48 (examining ethical considerations involving direct-mail solicitation, criticizing the Court’s analysis in Shapero, and proposing stringent restrictions for targeted, direct-mail solicitation); LaRoe,
a state cannot disapprove a truthful and non-deceptive letter simply because it was sent to persons most in need of the offered service. Likewise, the Court discounted the possibility that a targeted letter might enable a lawyer to take advantage of an overwhelmed potential client who needs particular legal services. Though acknowledging that a personalized, targeted direct-mail solicitation presents a heightened risk of

 supra note 13, at 1527-53 (analyzing Shapero and predicting that the Court will find recent restrictions on direct-mail solicitations imposed by the Texas and Florida bars to be unconstitutional).

The validity of sending letters of solicitation was first addressed in In re Primus, 436 U.S. 412 (1978). Primus involved an attorney who was associated with the American Civil Liberties Union (ACLU) in South Carolina but was not compensated by that organization. Id. at 414-15. In 1973, the ACLU decided to seek an injunction against the reported practice of subjecting poor women in South Carolina to sterilization as a condition for receiving medical assistance under Medicaid. Id. at 415. After discovering that a particular plaintiff was willing to file a lawsuit, the attorney in Primus sent the potential plaintiff a letter informing her that the ACLU would offer her free representation. Id. at 416. Based on that letter, the attorney was charged with engaging in "solicitation in violation of the Canons of Ethics" and eventually was reprimanded. Id. at 417, 421. The Supreme Court found that the attorney's action was not a personal solicitation for pecuniary gain, but was a form of political expression and association fully protected by the First and Fourteenth Amendments. Id. at 422, 439. See generally John R. Welch, Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation, 30 BAYLOR L. REV. 585 (1978) (describing the Court's decisions in Bates, Ohralik, and Primus and analyzing their potential impact on state bar rules governing advertising and solicitation); Robert A. Black, Note, Constitutional Law—Attorney Advertising and Solicitation—In the Wake of Bates, 10 TEX. TECH L. REV. 166 (1978) (analyzing the impact of Ohralik and Primus in light of Bates); Joseph P. Daly, Note, In-Person Solicitation by Public Interest Law Firms: A Look at the A.B.A. Code Provisions in Light of Primus and Ohralik, 49 GEO. WASH. L. REV. 309, 326-33 (1981) (arguing that, under Ohralik and Primus, client solicitation by public interest law firms that do not charge fees remains a constitutionally protected activity because it is not motivated by pecuniary gain).

149. Shapero, 486 U.S. at 473-74. "[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." Id.

150. Id. at 474. The lower court found that a potential client facing legal troubles will feel "overwhelmed" by them and be more susceptible to a targeted letter offering legal assistance. Id. The Supreme Court noted, however, that any overwhelmed person will lack the capacity for good judgment, regardless of whether he sees a printed advertisement or receives a targeted letter. Id. The issue was not a potential client's susceptibility, but whether the attorney's form of communication exploited that susceptibility. Id. For a discussion of states' attempts to restrict lawyers' ability to send targeted, direct-mail solicitations to personal injury victims because such persons are particularly vulnerable, see, Kinsler, supra note 19, at 28-29 (contending that recent state attempts restricting targeted, direct-mail solicitation to vulnerable potential clients are unconstitutional under Shapero); Graham, supra note 83, at 825-27 (stating that after Shapero, states will have difficulty incorporating provisions in their regulations governing targeted, direct-mail solicitation to address overreaching); LaRoe, supra note 13, at 1536-39 (describing attempts by the Florida and Texas bars to impose thirty-day waiting periods on sending targeted, direct-mail solicitations to personal injury victims).
deception, the Court stated that the risk of isolated abuses or mistakes did not justify imposing a categorical ban on that form of communication. The Court observed that states have less restrictive means available and possess more precise methods of regulating such abuses.

The Court also rejected the lower court’s finding that sending a targeted letter is analogous to in-person solicitation. Instead, the Court stressed the importance of the method of communication and found targeted letters to be more comparable to the print advertisement in Zauderer, which can be ignored or discarded. Similarly, the Court found that targeted letters do not invade the recipient’s privacy any more

151. Shapero, 486 U.S. at 476. For instance, the Court stated that a personalized letter may cause the recipient to overestimate the severity of his legal problems or to overestimate the lawyer’s familiarity with his case. Id. Likewise, an inaccurate targeted letter could lead to incorrect legal advice or cause the recipient to believe that he has a legal problem that does not exist. Id.

152. Id.

153. Id. at 476-78. The Court stated that states can supervise mailings and penalize actual abuses. Id. at 476. States also may require lawyers to demonstrate the proof of any facts asserted in a letter, or to label a letter as an advertisement. Id. at 477; see Florida Bar v. Herrick, 571 So. 2d 1303, 1307 (Fla. 1990) (sustaining the requirement that the word “advertisement” appear on a mailing), cert. denied, 501 U.S. 1205 (1991).

The ABA’s Model Rules of Professional Conduct require that an attorney retain a copy or a recording of any advertisement so that it is available to resolve disputes arising regarding the advertisement’s content. Model Rules of Professional Conduct Rule 7.2(b), reprinted in Annotated Model Rules of Professional Conduct 509 (2nd ed. 1992). For a discussion of other proposed restrictions on targeted, direct-mail solicitations, see Rossi & Weighner, supra note 12, at 207 (discussing the Iowa Bar’s direct-mail solicitation regulations, which impose a pre-approval requirement); Ballantine, supra note 9, at 146-51 (discussing various approaches to regulating direct-mail solicitations); Kabateck, supra note 16, at 942-48 (proposing that states require pre-approval for targeted, direct-mail solicitations, impose mandatory disclosure requirements, require that letters be sent only to verifiable addresses, and impose a waiting period for solicitations to personal injury or wrongful death victims); LaRoe, supra note 13, at 1548-53 (discussing potential regulations that would advance a substantial state interest).

154. Shapero, 486 U.S. at 474. The lower court upheld a ban on targeted mailings because they fostered increased opportunities for undue influence, overreaching and intimidation. Id. A plurality of the Court, however, reasoned that “a truthful and non-deceptive letter, no matter how big its type and how much it speculates can never ‘shout[ ] at the recipient’ or ‘grasp[ ] him by the lapels,’ as can a lawyer engaging in face-to-face solicitation.” Id. at 479 (citations omitted).

155. Id. at 475-76; see Adams v. Attorney Registration and Disciplinary Comm’n, 801 F.2d 968, 974-75 (7th Cir. 1986) (affirming a lower court’s injunction of a state rule prohibiting attorneys from sending targeted, direct-mail solicitation because the state’s interest in protecting the public from overreaching and duress is less pressing with targeted mailings than with in-person solicitation); Graham, supra note 83, at 825-27 (stating that Shapero creates difficulty for states seeking to include overreaching provisions in their regulations governing direct-mail solicitation).
than a general, untargeted mailing. Finally, the Court reiterated the importance of ensuring that consumers have access to commercial information and of requiring states to justify restrictions on professional advertising.

4. In-Person Solicitation: Prophylactic Bans Permitted

In Ohralik v. Ohio State Bar Ass'n, the Court held that states may prohibit lawyers from engaging in in-person solicitation for pecuniary gain because such conduct presents an inherent danger of overreach.

156. Shapero, 486 U.S. at 476. Rather, the Court stated that any invasion occurs when the lawyer learns about the recipient's legal problems, not when the attorney confronts the recipient with information. Id. But see Kabateck, supra note 16, at 946 (arguing that targeted, direct-mail solicitations do implicate privacy interests and that states should require attorneys to send such correspondence only to verifiable home addresses in order to reduce the possibility that it will be delivered to the wrong person).

157. Shapero, 486 U.S. at 478 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985)). In her dissent, Justice O'Connor disagreed with the majority's conclusion that targeted direct-mail solicitation presents no greater potential for abuse than other forms of printed advertising. Id. at 481-82 (O'Connor, J., dissenting). Justice O'Connor asserted that a personalized letter is more likely to overwhelm the judgment of an unsophisticated recipient who is unfamiliar with the legal system. Id. Personalized letters mislead the recipient because they suggest that the sender is familiar with and understands the recipient's legal problems. Id. at 482. In addition, unlike a general printed advertisement, targeted letters are more likely to include advice designed to serve the lawyer's pecuniary interests. Id. Finally, although targeted letters may be reviewed by a state bar association, they usually escape peer review because they generally are not seen by a lawyer's professional colleagues. Id.

Justice O'Connor then reiterated and expanded upon the arguments she advanced in her partial dissent in Zauderer. See supra note 145 (discussing Justice O'Connor's dissent in Zauderer). Discussing the Central Hudson test, Justice O'Connor offered her opinion regarding how the test should be applied to legal advertising. Shapero, 486 U.S. at 485-87 (O'Connor, J., dissenting). She argued that states should have considerable freedom to ban not only "potentially or demonstrably misleading" advertising but also "truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession." Id. at 485. According to Justice O'Connor, the price of an initial consultation might be a protected form of advertising under Central Hudson, especially if the advertisement contains disclaimers about the costs of other services. Id. States, however, should be able to ban completely all advertising for "routine" services. Id. Such an approach, Justice O'Connor argued, would return the appropriate legislative function to the states. Id. at 487.

Finally, Justice O'Connor took issue with economic arguments that favor allowing attorney advertising because such arguments fail to recognize the importance of restrictions to "preserving the norms of the legal profession." Id. at 488. She emphasized the distinguishing features of the professions, as opposed to mere occupations, especially high ethical standards and the goal of public service. Id. at 488-89. Professional advertising is simply inimical to maintaining such high standards. Id. at 490.


159. Id. at 466-68. The Court warned that a lawyer who personally solicits clients may, even unintentionally, "subordinate the best interests of the client to his own pecuniary
The Court found that the speech component of in-person solicitation is subordinate to the conduct involved, and, therefore, deserves a lower level of protection. Emphasizing the dangers of in-person solicitation, the Court explained that lawyers often pressure a potential client to respond immediately, thereby interfering with the client’s ability to make a reasoned decision. The Court stated that pressuring potential clients into making rushed and ill-informed decisions regarding legal services is contrary to the goal of Bates and Virginia State Board of Pharmacy: promoting informed and reliable decisionmaking. In addition, in-person solicitation cannot be regulated effectively because, unlike print advertising, in-person solicitation occurs beyond the scrutiny of the legal profession and the state’s ability to regulate. Finally, the Court found that the state had an important interest in curbing in-person solicitation because “the lawyer’s ability to evaluate the legal merit of his client’s claims may falter when the conclusion will affect the lawyer’s income.”

In Ohralik, an attorney personally solicited two 18-year-old women who were injured in an automobile accident. He approached them during their hospital stay and then again while they recovered at home. After the two women dismissed the lawyer, he filed a breach of contract suit against one of them. In settlement of his breach of contract suit, he eventually received a portion of a separate settlement that the young woman had reached with the insurance company. Both women filed grievances with the local bar association, which eventually led to the lawyer’s indefinite suspension by the Supreme Court of Ohio.

The immediacy of the communication and the imminence of harm justify the reduced level of protection. But see Black, supra note 148, at 178 (criticizing the Court’s characterization of “speech” as an essential, yet subordinate, component of solicitation and arguing that speech is an “indispensable element” of all forms of solicitation).

Ohralik, 436 U.S. at 457. The Court characterized in-person solicitation as “a business transaction in which speech is an essential but subordinate component.” The immediacy of the communication and the imminence of harm justify the reduced level of protection. But see Black, supra note 148, at 178 (criticizing the Court’s characterization of “speech” as an essential, yet subordinate, component of solicitation and arguing that speech is an “indispensable element” of all forms of solicitation).

Id. at 457-58; see supra notes 57-60 and accompanying text (discussing the Court’s emphasis on the importance of the availability of commercial information to consumers).

Ohralik, 436 U.S. at 466; see supra note 160 (presenting sources criticizing the Court’s rationale in Ohralik and Primus).

Ohralik, 436 U.S. at 464-65. The Court stated that the state has a “legitimate and important interest” in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct.’” Id. at 462; see supra note 19 (describing the Court’s evaluation of what constitutes proper and improper forms of advertising and solicitation).
cause such conduct is inherently conducive to overreaching\textsuperscript{166} and the invasion of privacy.\textsuperscript{167}

II. \textit{Florida Bar v. Went For It, Inc.}

In \textit{Florida Bar v. Went For It, Inc.}\textsuperscript{168} the Court considered a Florida Bar rule prohibiting lawyers from sending targeted, direct-mail solicitations to personal injury victims or their families for thirty days after an accident or disaster.\textsuperscript{169} A Florida personal injury attorney challenged the rule, contending that it violated the First and Fourteenth Amendments.\textsuperscript{170} Relying on the Supreme Court's holding in \textit{Shapero}, the district court found the Florida Bar's rule to be unconstitutional.\textsuperscript{171} The Eleventh Circuit affirmed.\textsuperscript{172} The Supreme Court reversed in a five-to-four decision.\textsuperscript{173}

\begin{itemize}
\item \textsuperscript{166} \textit{Ohralik}, 436 U.S. at 464-65. The potential for overreaching is increased when a lawyer who is "trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." \textit{Id.} at 465 (footnote omitted). But see Anthony, supra note 18, at 712 (criticizing the Court's prophylactic ban on in-person solicitation because such solicitation enables attorneys to convey more information to a prospective client and because a categorical ban ignores situations where a potential client's decisionmaking powers are not impaired).


\item \textsuperscript{168} 115 S. Ct. 2371 (1995).
\item \textsuperscript{169} \textit{Id.} at 2374.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{172} McHenry v. Florida Bar, 21 F.3d 1038 (11th Cir. 1994), \textit{rev'd sub nom.}, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).
\item \textsuperscript{173} \textit{Florida Bar}, 115 S. Ct. at 2373, 2381.
\end{itemize}
A. The Majority Opinion: Finding the Florida Bar Rule Constitutional Under Central Hudson

Justice O'Connor's majority opinion evaluated the Florida Bar's rule by applying the Central Hudson test. After first finding that the commercial speech at issue neither misled nor involved illegal activity, Justice O'Connor applied Central Hudson's three-pronged analysis.

Applying the Central Hudson analysis, the Court examined the interests that the Florida Bar advanced in support of its rule and found them to be substantial. The Court determined that the State had a substantial interest in preserving the reputation and integrity of the legal profession by restricting activities that negatively affect the administration of justice. The Court factored into this principal concern the State's interest in shielding the privacy of personal injury victims and their families against impertinent, uninvited advances by lawyers.

174. Justice O'Connor was joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and Breyer. Id. at 2373.
175. Florida Bar, 115 S. Ct. at 2376-81. Under the Central Hudson analysis, the State must justify a restriction on commercial speech by asserting that the restriction is narrowly drawn to serve a substantial interest, and by demonstrating that the restriction "directly and materially" advances that interest. Id. at 2376; see supra notes 8-9 (elaborating on the requirement that commercial speech restrictions be narrowly tailored and directly and materially advance a substantial state interest); see also supra notes 73-77 and accompanying text (discussing the Central Hudson analysis).
176. Florida Bar, 115 S. Ct. at 2376. Justice O'Connor provided no justification for this finding. See id.
177. Id. at 2376-81.
178. Id. at 2376-77.
179. Id. at 2376. The Court explained that the Florida Bar rule was intended to protect the "flagging reputations of Florida lawyers by preventing them from engaging in conduct that . . . '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 In re Anis, 599 A.2d 1265, 1270 (N.J. 1992)).
180. Id. The Court noted that because the Florida Bar did not articulate an interest in protecting the public from overreaching and undue influence by lawyers, the Court would not consider that interest. Id. at n.1.

To support its assertion that a state has a substantial interest in protecting a potential client's privacy, the Court relied on earlier findings that a state may protect the tranquility of citizens' homes. Id. at 2376-77 (citing Edenfield v. Fane, 507 U.S. 761, 769 (1993); Frisby v. Schultz, 487 U.S. 474, 484-85 (1988); Carey v. Brown, 447 U.S. 455, 471 (1980)). But cf. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475-76 (1988) (finding that a targeted letter of solicitation does not implicate a potential client's privacy interest because such communications can be discarded); Adams v. Attorney Registration and Disciplinary Comm'n, 801 F.2d 968, 973 (7th Cir. 1986) (rejecting attempts to compare the duress associated with direct mailings to that which is associated with in-person solicitation by stating that "[i]t is easier to throw out unwanted mail than an uninvited guest").

To establish that the protection of citizens' privacy rights constitutes a substantial state interest, the Court mistakenly relied upon Frisby and Carey. See Florida Bar, 115 S. Ct. at 2376-77. In both Frisby and Carey, the Court addressed ordinances restricting the right of
Proceeding to the second prong of the *Central Hudson* analysis, the Court found that the Florida Bar successfully demonstrated that its rule directly and materially advanced the asserted state interest.\(^{181}\) The Court pointed to statistical and anecdotal evidence contained in the Florida Bar's two-year study revealing that direct-mail solicitations to personal injury victims immediately following an accident or disaster undermines the public's opinion of the legal profession.\(^{182}\) Because the Florida Bar

persons to picket outside residential homes and emphasized the importance of protecting the tranquility of the home. *Frisky*, 487 U.S. at 484-85; *Carey*, 447 U.S. at 470. In *Florida Bar*, the Court's reliance on *Frisby* and *Carey* suggests that the Court is analogizing picketing outside homes, from which the resident cannot escape, to the receipt of unpleasant mail which can be easily discarded. *See Florida Bar*, 115 S. Ct. at 2376. The Eleventh Circuit refused to accept the Florida Bar's attempt to equate the invasion created by a mailed letter to protesting picketers outside one's home. *McHenry* v. *Florida Bar*, 21 F.3d 1038, 1044 (1994), rev'd sub nom., *Florida Bar* v. *Went For It*, Inc., 115 S. Ct. 2371 (1995); *see also supra* note 34 (discussing the district court's rejection of this argument). Although the Court in *Carey* acknowledged the importance of protecting the tranquility and privacy of the home, the Court ultimately invalidated the ordinance banning picketing on equal protection, not First Amendment, grounds. *Carey*, 447 U.S. at 471. *See generally* Eberle, *supra* note 167, at 1188-93 (discussing the Court's treatment of the privacy of the home); Strauss, *supra* note 167, at 91-95 (discussing the Court's treatment of residential captive audiences); Workman, *supra* note 167, at 1064-68 (analyzing the Court's decisions in *Frisby* and *Carey*).

Finally, the Court concluded that a state has a substantial interest in maintaining standards in the legal profession. *Florida Bar*, 115 S. Ct. at 2376. The Court supported this conclusion by reference to the states' well-founded "compelling interest" in regulating licensed professionals. *Id.* (quoting *Goldfarb* v. Virginia State Bar, 421 U.S. 773, 792 (1975)). The Court noted that this interest stems from states' authority to protect the public health and safety. *Id.* (citing *Goldfarb*, 421 U.S. at 792); *Ohralan* v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) (noting that states have "a special responsibility for maintaining standards among members of the licensed professions"). *But cf.* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647-48 (1985) (stating that the state's substantial interest in ensuring that lawyers engage in appropriate conduct in the courtroom does not extend to lawyers' communications with the public in the context of restricting attorneys' First Amendment rights); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, Inc., 425 U.S. 748, 766-70 (1976) (finding that a state's interest in maintaining professional standards is substantial, but holding that this interest does not justify restrictions upon consumer access to the free flow of commercial information). For a pre-*Florida Bar* argument that the Court should reassess its finding that professionalism is not a substantial state interest, see Ellen Y. Suni, *Wanted: Advertising Rules for A Profession in Flux*, 59 UMKC L. Rev. 809, 814 (1991). *See also* Jonathan K. Van Patten, *Essay: Lawyer Advertising, Professional Ethics, and the Constitution*, 40 S.D. L. Rev. 212, 216-27 (examining the opposing arguments regarding the effect of advertising on the legal profession, and urging members of the legal profession to examine the profession to identify and address the real ethical problems that exist).


182. *Id.* at 2377-78. Specifically, the study reported that Florida citizens found such conduct to be in poor taste and considered it a violation of privacy. *Id.* at 2377. The Court also noted that the opponents of the rule had not rebutted the results of the study. *Id.* at 2378; *see supra* notes 26-27 and accompanying text (describing the Florida Bar's survey and related studies).
intended the rule to curb this behavior and thereby improve lawyers' declining reputations, the Court found that the rule materially and directly advanced the State's interest.

In concluding that the Florida Bar rule directly and materially advanced the State's interest in curbing activities that have damaged the legal profession's reputation, the Court distinguished its prior holdings that mailed advertisements or solicitations do not constitute an invasion of privacy. The Court first distinguished *Shapero*, which held that targeted direct-mail solicitations are constitutionally protected, and that they do not result in an invasion of privacy. The *Florida Bar* majority explained that, unlike the present case, *Shapero* did not address directly the issue of whether targeted solicitations constituted an invasion of privacy. *Shapero*’s treatment of privacy was, therefore, “casual” and was not controlling in *Florida Bar*. The Court further distinguished *Shapero*’s treatment of the privacy issue as inapposite because, while *Shapero* was concerned merely with victims' discomfort at receiving solicitation letters, the Florida Bar was attempting to contain reputational damage that the profession incurs when its members send offensive communications.

---

184. Id. at 2377-79.
185. Id. at 2377. The Court based this conclusion on the Florida Bar's study indicating the public's belief that targeted, direct-mail solicitations constitute an invasion of privacy. Id.
186. Id. at 2378-79.
187. Id.; *Shapero* v. Kentucky Bar Ass'n, 486 U.S. 466, 473-78 (1988); see *supra* notes 147-57 and accompanying text (discussing the *Shapero* decision).
188. *Florida Bar*, 115 S. Ct. at 2378-79; *Shapero*, 486 U.S. at 475-76; see also *supra* note 156 and accompanying text.
189. *Florida Bar*, 115 S. Ct. at 2378. The Court explained that *Shapero* addressed whether direct-mail solicitations result in overreaching and undue influence. Id.; see also *supra* notes 154-55.
191. Id. at 2378-79.
192. Id. at 2379. The Court also distinguished the present case from *Shapero* because *Shapero* involved a blanket prohibition on all direct-mail solicitations, regardless of when they were sent or the identity of the recipient. Id. at 2378. The Florida Bar's rule, however, banned targeted, direct-mail solicitations for only thirty days. Id. at 2374. Finally, the Court stated that in *Shapero* the State presented no evidence to support its contention that targeted, direct-mail solicitations present inherent dangers of overreaching and undue influence. Id. at 2378-79. By contrast, the Florida Bar submitted a study demonstrating that targeted, direct-mail solicitations invade the privacy of Florida citizens and harm the legal profession's reputation. Id.; see *supra* notes 26-27 and accompanying text (describing the Florida Bar's study).
The Court also distinguished *Bolger v. Youngs Drug Products Corp.*,\(^{193}\) where the Court had invalidated the federal government's attempts to ban all potentially offensive direct-mail advertisements for contraceptives.\(^{194}\) The Court explained that, unlike *Bolger*, where the recipient of an offending advertisement could avoid the adverse impact of viewing objectionable material by simply discarding it,\(^{195}\) the Florida Bar was not merely concerned about citizens being offended by a direct-mail solicitation in the wake of an accident.\(^{196}\) Rather, the Florida Bar was concerned that an offensive letter adversely affects the public's confidence in the legal profession, which the State regulates.\(^{197}\) Concern with the "reputational harm" that results from the mere receipt of an offensive letter shortly after an accident persuaded the Court that discarding the communication fails to alleviate its detrimental effects.\(^{198}\)

Finally, the Court found that the Florida Bar's rule satisfied the third prong of the *Central Hudson* test because the rule was sufficiently narrow.\(^{199}\) Rejecting the contention that the rule prevents those accident victims who are receptive to an attorney's advice from obtaining information, the Court explained that the public has other alternatives through which it can acquire information about obtaining a lawyer.\(^{200}\) The Court

\(^{193}\) 463 U.S. 60 (1983).

\(^{194}\) *Id.* at 61; *Florida Bar*, 115 S. Ct. at 2379.

\(^{195}\) *Bolger*, 463 U.S. at 72; see Strauss, *supra* note 167, at 91 (explaining that, in its decisions involving captive audiences of mail, the Court has preferred to impose a burden on the recipient to discard the message rather than to silence the speaker).

\(^{196}\) *Florida Bar*, 115 S. Ct. at 2379.

\(^{197}\) *Id.*; see *supra* notes 179-80 and accompanying text (discussing the Court's finding that the Florida Bar rule advanced the state's substantial interest in protecting the reputation of the legal profession).

\(^{198}\) *Florida Bar*, 115 S. Ct. at 2379. The Court explained that "the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents." *Id.*

\(^{199}\) *Id.* at 2380. Noting that the Florida Bar is not required to use the least restrictive means to achieve its objective, the Court found the rule to be "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." *Id.* The Court noted that, not only was the thirty-day ban limited in duration, but Florida citizens had a variety of other means to learn about the availability of legal services. *Id.*; see infra notes 200 and accompanying text (describing other media through which lawyers can advertise in Florida).

\(^{200}\) *Florida Bar*, 115 S. Ct. at 2380. The Court noted that the Florida Bar permits lawyers to advertise on television and radio, in newspapers, on billboards, and in the Yellow Pages. *Id.* The Florida Bar also permits lawyers to send untargeted letters to the general population. *Id.*; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, Inc., 425 U.S. 748, 781-83 (1976) (Rehnquist, J. dissenting) (suggesting that a restriction on pharmacists' ability to advertise prescription drug prices did not interfere with listeners' right to receive information because such information could be obtained by other means, such as by telephoneing the pharmacist). *Contra Virginia State Bd. of Phar-
also found that rule’s brief, thirty-day period of effectiveness did not affect the public’s ability to utilize those other methods.\textsuperscript{201}

B. The Dissent: Arguing That the Florida Bar Rule Fails Under Central Hudson

Writing for the dissent, Justice Kennedy argued that the Florida Bar’s rule failed under \textit{Central Hudson} because the State’s asserted interests in protecting citizens’ privacy and the reputation of the legal profession were not substantial. The dissent contended that the Court’s decision in \textit{Shapero} precluded privacy from qualifying as a substantial state interest in the context of direct-mail solicitations.\textsuperscript{202} The \textit{Shapero} Court emphasized the method of communication,\textsuperscript{203} and found that a targeted, direct-mail solicitation cannot invade one’s privacy because it can be easily discarded.\textsuperscript{204} Likewise, the Court’s concern for a recipient’s sensibilities was misplaced because the Court’s prior decisions clearly establish that a state...
may not suppress a communication simply because it might offend the listener.205

The dissent also contended that the State’s alleged interest in protecting the legal profession’s reputation was insupportable because the majority presumed that direct-mail solicitations are unethical and improper, and have been the sole cause of the public’s disillusionment with the profession.206 Justice Kennedy argued that, contrary to the majority’s contentions, direct solicitation is vital and promotes the administration of justice by ensuring that valuable information reaches the consumer.207 The dissent argued that the majority permitted the State to manipulate public opinion by suppressing important information about how the legal system operates.208

205. Florida Bar, 115 S. Ct. at 2383 (Kennedy, J., dissenting) (citing Carey v. Population Servs. Int’l, 431 U.S. 678, 701 (1977); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985)). The dissent also noted that this reasoning has been applied to other cases involving direct-mail advertising. Florida Bar, 115 S. Ct. at 2383 (citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 76 (1983)). Justice Kennedy explained that “[i]t is only where an audience is captive that we will assure its protection from some offensive speech.” Id. (citing Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 542 (1980)). The dissent also noted that households are not captive audiences. Id. (citing Bolger, 463 U.S. at 72)). See generally Eberle, supra note 167, at 1188-93 (describing the Court’s approaches to restricting “intolerable” speech in order to protect privacy interests); Strauss, supra note 167, at 89-99 (describing the inconsistent application of the Court’s captive audience doctrine); Workman, supra note 167, at 1063-68 (addressing the conflict between privacy in the home and the First Amendment).

206. Florida Bar, 115 S. Ct. at 2383 (Kennedy, J., dissenting). Justice Kennedy acknowledged that the offensive behavior of a few attorneys degrades the entire legal profession, but contended the majority assumed that targeted, direct-mail solicitations are the sole reason that the public has lost respect for the profession. Similarly, Rossi and Weighner noted that a 1990 ABA Survey revealed that the public’s perception of lawyers who advertised was more affected by whether a particular advertisement was dignified rather than the medium employed. Rossi & Weighner, supra note 12, at 223-24. According to Rossi and Weighner, the ABA study concluded that the most responsible, effective, and professional advertising was that which was most dignified, and that dignified advertising would benefit both the public and the profession. Id. In its 1995 report on legal advertising, the ABA concluded that “the various forms of communicating legal services are not a dominant influence in the public perception of lawyers and the justice system.” ABA, CROSSROADS, supra note 12, at 141. The ABA stated that fictional and nonfictional media images of lawyers and publicized acts of incompetence have a greater impact on the public’s perception of the legal profession than does legal advertising. Id.

207. Florida Bar, 115 S. Ct. at 2383 (Kennedy, J., dissenting). Justice Kennedy argued that “[v]ital interests in speech and expression” are implicated when an attorney is prevented from communicating with a victim to explain the importance of investigating an incident, identifying witnesses, and preserving evidence. Id. at 2381. While less informed people are kept ignorant of the importance of immediate fact-finding, more sophisticated parties already have hired attorneys and investigators, who, in turn, are free to contact victims to obtain information or seek a settlement. Id. at 2381-82.

208. Id. at 2383.
The dissent also disagreed with the majority's holding that the Florida Bar's two-year study satisfied the second prong of the *Central Hudson* test, and attacked the study on the effects of solicitation as unvalidated, incompetent, and self-serving.\footnote{Id. at 2383-84. Justice Kennedy argued that the State's summary of its study was inadequate because it contained "no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results." Id. at 2384. The study also failed to provide a "description of the statistical universe or scientific framework that permits any productive use of the information." Id.; see also ABA, *CROSSROADS*, supra note 12, at 73, 87 (stating that the Florida Bar survey is subject to varying interpretations and that some of the data is incomplete).} According to the dissent, the Florida Bar failed to demonstrate either that its study proved the existence of a harm,\footnote{Id. at 2384.} or that its rule directly and materially advanced the asserted state interests.\footnote{Id.}

Finally, Justice Kennedy argued that the rule fails under *Central Hudson*'s third prong because it is not narrowly tailored.\footnote{Id.; see supra notes 8, 77 and accompanying text (discussing *Central Hudson*’s requirement that state restrictions on commercial speech be narrowly drawn).} Specifically, the dissent argued that the rule suppresses more speech than necessary because it fails to consider the severity of a victim's injuries.\footnote{Id.} The rule also deprives all victims of potentially critical information that may be necessary to maintaining a claim.\footnote{Id.} Justice Kennedy also argued that less restrictive alternatives to the Florida Bar’s rule exist.\footnote{Id.}

\footnote{Id. at 2383-84. Justice Kennedy argued that the State's summary of its study was inadequate because it contained "no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results." Id. at 2384. The study also failed to provide a "description of the statistical universe or scientific framework that permits any productive use of the information." Id.; see also ABA, *CROSSROADS*, supra note 12, at 73, 87 (stating that the Florida Bar survey is subject to varying interpretations and that some of the data is incomplete).}

\footnote{Id. at 2384.}

\footnote{Id. The dissent argued that, while the Florida Bar's study emphasized reputational harm to lawyers, it failed to demonstrate how the rule advances the State's interest in protecting grieving and traumatized victims. Id. Justice Kennedy specifically noted that the Florida Bar's study did not even reflect the type of mailing that a typical personal injury victim receives. Id.}

\footnote{Id.; see supra notes 8, 77 and accompanying text (discussing *Central Hudson*’s requirement that state restrictions on commercial speech be narrowly drawn).}

\footnote{Id.} Justice Kennedy explained that persons with lesser injuries are not likely to become distraught at receiving communication from a lawyer. Id. at 2385. Moreover, where serious injuries occur and prompt legal representation is essential, the accident victims who are the least capable of finding legal help are those prejudiced most by the Florida Bar's rule. Id.

\footnote{Id.; see supra note 153 and accompanying text (discussing methods that states can employ to supervise and regulate legal advertising).}

\footnote{Id.}
III. THE COURT IGNORED AN ESTABLISHED STATE INTEREST, ELEVATED NEW ONES, AND INVITED STATES TO IMPLEMENT MORE RESTRICTIVE REGULATIONS ON LEGAL ADVERTISING

A. In Florida Bar v. Went For It, Inc. the Court Ignored an Established State Interest in Protecting the Free Flow of Commercial Information to Consumers

In sustaining the Florida Bar rule, the Supreme Court ignored one of the most fundamental principles that has guided its approach to legal advertising since it decided Bates in 1977: protecting the free flow of commercial information to the consumer.216 The failure of both the majority and dissenting opinions to directly confront this issue is a glaring omission.217

In Florida Bar, opponents of the Florida Bar rule argued that it would prevent willing recipients of targeted, direct-mail solicitations from obtaining valuable information.218 In response to this argument, however, the Court noted merely that the Florida Bar rule is limited in duration to only thirty days219 and that numerous alternative methods of obtaining information remain available to those victims who desire legal advice immediately after an accident.220 The Court utterly failed to distinguish its prior cases emphasizing consumers’ interest in having full access to commercial information.221

The dissent ineffectively challenged the Court’s failure by criticizing the majority’s emphasis on the profession’s reputation at the expense of ensuring that valuable information reaches the public.222 The force of the

---

216. Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977); see supra note 14 and accompanying text (discussing the Court’s repeated emphasis on the importance of consumer access to the free flow of commercial information).

217. See infra notes 221-25 and accompanying text (analyzing the failure of the majority and the dissent to adequately address the long-standing state interest in maintaining consumer access to commercial information).

218. Florida Bar, 115 S. Ct. at 2380. The Respondents argued that “[b]y prohibiting written communications to all people, whatever their state of mind’ the rule ‘keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer’s advice.’” Id. (quoting Respondents’ Brief at 14, Florida Bar, (No. 94-226)).


220. Id. The Court noted that Florida lawyers can advertise on prime time television, radio, and billboards, in newspapers and legal directories, and in the Yellow Pages, where they are listed alphabetically and by practice area. Id. The Florida Bar also permits lawyers to send untargeted solicitation letters to the general public. Id. at 2380

221. See id.; see supra note 14 (outlining the Court’s previous holdings emphasizing the importance of the availability of commercial information).

222. See Florida Bar, 115 S. Ct. at 2383 (Kennedy, J., dissenting). Justice Kennedy charged that the majority engaged in censorship, and that the Florida Bar rule prevents
dissent's argument is diminished, however, because Justice Kennedy failed to tie it to a defense of consumers' First Amendment interest in receiving commercial information.\(^\text{223}\) As a result, the majority's failure to address the consumer interest in maintaining access to the free flow of commercial information regarding the availability of legal services remains unchallenged.\(^\text{224}\) The failure of both the Court and the dissent to directly confront this issue in Florida Bar effectively eliminates a substantial hurdle for states as they undoubtedly will seek to justify more restrictive limits on legal advertising.\(^\text{225}\)

**B. The Court Elevates Two New State Interests to Support Restrictions on Legal Advertising**

The Court in Florida Bar not only avoided addressing consumers' economic interest in legal advertising, but also recognized a new substantial state interest to support the Florida Bar rule: protecting the reputation of the state-regulated legal profession.\(^\text{226}\) This newly-established state interest, in turn, is dependent on the Court's other justification to support the Florida Bar's rule: protecting the privacy of personal injury victims from unwanted intrusive solicitations.\(^\text{227}\) The Court, however, failed to distinguish victims from obtaining information necessary for them to maintain claims. Id. at 2383, 2385; see supra note 204 (noting Justice Kennedy's distinction between direct-mail advertising and in-person solicitation). Moreover, the dissent argued that ill-informed persons will be the most adversely affected by the rule. Florida Bar, 115 S. Ct. at 2385.

223. Florida Bar, 115 S. Ct. at 2383. See supra note 14 (noting the Court's emphasis on the importance of maintaining consumer access to the free flow of commercial information).

224. See Florida Bar, 115 S. Ct. at 2383.

225. See Moore v. Morales, 63 F.3d 358, 363 (5th Cir. 1995) (sustaining the Texas Bar's thirty-day ban on the solicitation of personal injury victims). In Moore, the Fifth Circuit accepted testimonial and anecdotal evidence nearly identical to that presented in the Florida Bar's study. Id. at 362-63. The Arkansas and Nevada bars also have imposed similar restrictions. Joseph Wharton, Lawyer Advertising: Solicitation Waiting Period Upheld, 82 ABA J., Jan. 1996, at 48. Similarly, New Mexico has adopted a pre-approval screening process. ABA CROSSROADS, supra note 12, at 113. For an overview of various regulatory mechanisms that states have implemented, see id. at 103-26.

226. Florida Bar, 115 S. Ct. at 2376; see supra note 179 (describing the Court's finding that states have a substantial interest in protecting the reputation of the legal profession). According to the Court, when the government seeks to protect the reputation of the entities it regulates, it "acts in its own interests." Florida Bar, 115 S. Ct. at 2379 n.2. Protecting this governmental interest is distinguishable from "paternalis[tic]" efforts to protect citizens from offensive communications that the Court has rejected previously. Id.; see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (rejecting as "paternalistic" the state's attempt to prohibit prescription drug advertising); see also supra note 59 (further explaining the Court's holding in Virginia State Board of Pharmacy).

227. Florida Bar, 115 S. Ct. at 2376-77. As the Court explained, it was the invasion of the public's privacy and resulting adverse impact on the profession's reputation that gave
guish adequately its prior findings that a state’s interests in protecting citizens’ privacy and in regulating licensed professionals are not substantial enough to justify banning published or mailed legal advertisements.228

To escape its earlier holdings that targeted, direct-mail solicitations do not constitute invasions of privacy because they can be discarded or ignored,229 and that restrictions on legal advertising cannot be justified simply because someone may find them offensive,230 the Court declared that it was not concerned with how direct-mail solicitations affect the recipient.231 Instead, the Court extended its concern beyond the individual and stated that it was concerned with the harm that is caused to the reputation of the legal profession when a traumatized and grieving victim receives a targeted letter.232 The Court explained that simply discarding or ignoring the offensive letter does nothing to alleviate the adverse impact on the profession because the real offense that must be curtailed is the rise to the government’s interest in restricting invasive behavior. Id. at 2379; see supra notes 186-98 and accompanying text (discussing the Court’s attempt to distinguish the privacy interests that were asserted in Shapero and Bolger).

228. Florida Bar, 115 S. Ct. at 2378-79 (attempting to distinguish its finding in Shapero and Bolger that direct-mail solicitations do not invade the recipient’s privacy); Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 476 (1988) (finding that targeted, direct-mail solicitations did not constitute an invasion of privacy); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985) (finding that a newspaper advertisement containing an accurate illustration of an IUD did not constitute an invasion of privacy); see supra notes 136, 156 and accompanying text (describing the Court’s findings that printed advertisements and targeted direct-mail solicitations do not constitute an invasion of privacy).

229. Shapero, 486 U.S. at 476 (finding that a targeted direct mail solicitation did not invade one’s privacy because it could be discarded or ignored and stating that the invasion, if any, occurred when the attorney learned of the potential client’s legal problems); cf. Zauderer, 471 U.S. at 642 (stating that a newspaper advertisement did not invade the reader’s privacy merely because some may have found it to be offensive); Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 465 (1978) (finding in-person solicitation to be an invasion of privacy because of the intrusiveness of the conduct and the vulnerability of the listener). See generally Strauss, supra note 167, at 91 (explaining that the Court’s decisions involving captive audiences of mail have imposed a burden on the recipient to discard the message rather than to silence the speaker).


231. Florida Bar, 115 S. Ct. at 2379; see also supra note 192 and accompanying text (explaining the Court’s distinction between Florida Bar and Shapero).

232. Florida Bar, 115 S. Ct. at 2379. “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.” Id.; see also The Supreme Court, 1994 Term, 109 Harv. L. Rev. 180, 196 n.55 (explaining that the Court in Florida Bar distinguished Bolger by arguing that Bolger addressed the intrusive offense itself, not the “derivative harm flowing from the offense”).
letter's receipt. Emphasizing the effects on the legal profession, rather than the victim, allowed the Court to identify a substantial state privacy interest that justifies the Florida Bar's ban.

C. The Dissent: An Ineffective Response to the Majority Opinion

The dissent attacked the Court's attempt to redefine the privacy interest and rejected the contention that protecting the privacy of personal injury victims is a substantial state interest. While Justice Kennedy focused on the Shapero Court's finding that targeted, direct-mail solicitations do not present risks of overreaching and undue influence, that criticism was irrelevant because the Florida Bar did not justify its rule based on the need to protect its citizens from overreaching and undue influence. Rather, the Florida Bar sought to protect lawyers from exacerbating their already unfavorable status in the eyes of the public. Similarly, Justice Kennedy failed to recognize that the majority was not attempting to protect the public from receiving offensive solicitation letters because the recipient finds them to be distasteful. The majority was concerned about the harmful effect that a recipient's response to receiving a letter has on the legal profession.

233. Florida Bar, 115 S. Ct. at 2379. "[T]he harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents." Id.

234. See id. Justice Kennedy alluded to this shift in emphasis when he remarked that, while the Florida Bar study is filled with evidence of how the reputation of the legal profession is suffering, it contains no evidence that the thirty-day ban advances the interests of those traumatized or grieving. Id. at 2384 (Kennedy, J., dissenting).

235. Id. at 2382-83.

236. Id. at 2382.

237. Id. at 2376 n.1.

238. Id. at 2379; see supra notes 179-80 and accompanying text (elaborating on the Florida Bar's asserted interests).

239. See Florida Bar, 115 S. Ct. at 2382-83 (Kennedy, J., dissenting). Although the dissent emphasized why targeted, direct-mail solicitations did not present risks of overreaching and undue influence, the dissent failed to draw an analogy as to why such communications did not also constitute an invasion of privacy. See id.

240. See id. at 2379; see also supra notes 185-98 and accompanying text (discussing the Florida Bar Court's attempts to distinguish its findings in Shapero and Bolger that mailed advertisements or solicitations did not constitute an invasion of privacy.)

241. Florida Bar, 115 S. Ct. at 2379. "The purpose of the 30-day targeted direct-mail ban 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.
D. The Court's Finding That the Florida Bar Rule Materially and Directly Advances Substantial State Interests Is Fundamentally Flawed

In addition to concluding that the Florida Bar asserted substantial state interests in preserving the reputation of the legal profession and in protecting the privacy interests of personal injury victims, the Court found that the Florida Bar demonstrated its regulation materially and directly advanced those interests. The Court based its finding on the Florida Bar's two-year study, which concluded that lawyers' reputations were suffering because the public did not approve of soliciting potential clients in the immediate wake of accidents or disasters. Regardless of one's opinion of the quality or sufficiency of the Florida Bar's evidence, the underlying problem is that the Court based its decision on a public opinion poll rather than on legal analysis.

The ramifications of the Court's approach to determining whether restrictions on legal advertising violate the First Amendment are potentially profound. First, public opinion data is subject to varying interpretations and to manipulation by those administering the survey. In addition, the pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.

The pool of responses to the Florida Bar's survey and on which the survey's results are based appears sparse. As noted in the Respondent's brief, the study was based on responses received from only 200 direct-mail recipients. Respondents' Brief at 33, Florida Bar, (No. 94-226). For a discussion of the types of distortions that can be found in social science data, see Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 143-52 (1993).

The dissent found the study to be incompetent and self-serving. Id. at 2384 (Kennedy, J., dissenting). The ABA also questioned the interpretation of the Florida Bar's data. ABA Crossroads, supra note 12, at 67.
public opinion is not static and is prone to constant shifting in response to an infinite number of both real and fictional external influences.\footnote{248} 

\textit{Florida Bar} will have the initial effect of enabling states to commission their own public opinion studies as support for justifying more restrictive regulations on legal advertising.\footnote{249} Moreover, the Court’s reliance on the fickle barometer of public opinion as support for its decision to uphold the Florida Bar’s rule bodes ill for the development of an approach to lawyer advertising that is based on sound legal principles and thoughtful strategies propounded by the profession.\footnote{250} The Court adopted a shifting
cizing the Bar’s summary of its study because it “includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results.” \textit{Florida Bar}, 115 S. Ct. at 2384 (Kennedy, J., dissenting). Moreover, Justice Kennedy continued, the summary failed to describe its “statistical universe or scientific framework.” \textit{Id.}

\footnote{248} See ABA, \textit{CROSSROADS}, supra note 12, at 66-69, 141 (describing how fictional lawyers portrayed on television and in movies and books significantly affect the public’s opinion of the law profession). Moreover, the ABA noted that non-fictional developments pertaining to the legal system, such as the Watergate scandal, influence the public’s perception of the legal profession. \textit{Id.} at 69. A more modern example of an external influence the public’s perception of the legal profession is the O.J. Simpson murder trial. Anne Krueger, \textit{Simpson trial casts shadow over Law Day[:] Poll finds many lose faith in legal system}, \textit{SAN DIEGO UNION-TRIBUNE}, May 1, 1995, at A-4 (describing how the Simpson trial has caused many to lose faith in the justice system).

\footnote{249} See \textit{Moore v. Morales}, 63 F.3d 358, 363 (5th Cir. 1995) (sustaining the Texas Bar’s 30-day ban on solicitation of personal injury victims). While the Texas Bar implemented its thirty-day restriction approximately two years before the Court decided \textit{Florida Bar}, \textit{id.} at 360, \textit{Moore} illustrates how courts likely will treat testimonial and anecdotal evidence when considering future restrictions on legal advertising. \textit{Moore} involved a Texas law that, among other things, prohibited attorneys and certain other medical professionals from sending direct-mail solicitations to accident victims or their families for 30 days after an accident. \textit{Id.} The district court enjoined the enforcement of the statute and, following an expedited bench trial, found it to be an unconstitutional restriction on commercial speech. \textit{Id.} The United States Court of Appeals for the Fifth Circuit reversed the district court’s decision to the extent that it applied to the legal profession. \textit{Id.} at 363-64. The Fifth Circuit found Texas demonstrated that its law directly and materially advanced a substantial state interest in protecting the privacy of personal injury victims. \textit{Id.} at 361-62. Following \textit{Florida Bar}, the Fifth Circuit based its finding on anecdotal evidence from outraged recipients of direct-mail solicitations who claimed direct-mail solicitations invaded their privacy and exacerbated their emotional distress. \textit{Id.} at 362. These witness claimed that “they would have been better able to cope with the intrusiveness of the solicitation letters had they not received them until at least one month after the accident.” \textit{Id.} at 362-63. In addition, the Fifth Circuit relied on the testimony of “experts” who stated that solicitation within 30 days of an accident has detrimental effects on the victim and a “30-day ban would provide reasonable protection from many of these detrimental effects.” \textit{Id.} at 362. Those “detrimental effects,” however, remained undefined and unspecified. \textit{See id.}

\footnote{250} See supra notes 247-48 (discussing the dangers of basing legal conclusions on social science data and public opinion polls). Recent articles emphasize the need to shift from a strict disciplinary approach in legal advertising and toward the use of “moral suasion” to set examples for legal advertising. \textit{See ABA, CROSSROADS, supra} note 12, at 136. The ABA recently published a report outlining eighteen considerations and forty strategies that
standard prone to many external influences and based on data subject to many interpretations.\textsuperscript{251}

IV. CONCLUSION

\textit{Florida Bar} marked the first time in seventeen years that the Supreme Court upheld a state restriction on legal advertising. To find a substantial state interest in support of the Florida Bar's rule, the Court recognized a new state interest in protecting the reputation of the legal profession and redefined and elevated a state interest in protecting citizens' privacy rights. In upholding the Florida Bar's rule, however, the Court based its decision squarely on public opinion, and consequently ignored consumers' First Amendment interest in access to the free flow of commercial information. As a result, states now will be able to justify even broader restrictions on legal advertising merely by commissioning their own public opinion surveys supporting the need for regulation.

Susan Alice Moore