THE FLORIDA BAR *WENT FOR IT*, BUT IT WENT TOO FAR: HOW LIMITING TARGETED, DIRECT-MAIL SOLICITATION OF CLIENTS HARMS THE REPUTATION OF ATTORNEYS MORE THAN IT HELPS[*]

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

Douglas W. Swalina[**]

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** Bachelor of Science-Business, Virginia Polytechnic Institute and State University, 1993; Juris Doctor, Stetson University College of Law, expected May 1997; Lead Notes & Comments Editor, *Stetson Law Review*.

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INTRODUCTION

In December 1990, the Florida Supreme Court approved, with some modification, changes to the rules regulating the Florida Bar concerning attorney advertising.[1] In general, the rules prohibit personal-injury attorneys from contacting, either in person or via telephone, telegraph, or facsimile transmission, prospective clients with whom they have no previous professional or familial relationship.[2]

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1. *See* The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar — Advertising Issues, 571 So. 2d 451 (Fla. 1990) [hereinafter *Petition to Amend*].

2. Rule 4-7.4(a) provides:

> (a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone,

Florida Bar Rule 4-7.4(b)(1)(a) to (f) outlines the specific requirements which a personal-injury attorney must follow when soliciting potential clients through written communications.[3] In particular, subsection (a) prohibits an attorney from sending a written communication to a potential client regarding an action for personal injury or wrongful death, if the written communication is sent within thirty days of the injury-causing event and is for the purpose of obtaining professional employment.[4]

The Florida Bar extended the provisions of the rule regarding written communications by attorneys to lawyer referral services in Rule 4-7.8(a)(1), which forbids an attorney from accepting a referral client if the referral service communicated with the client in a manner inconsistent with the rules which apply to attorneys.[5]

In *Florida Bar v. Went For It, Inc.*,[6] a clearly divided Court[7] upheld the Florida Bar Rules which forbid attorneys and lawyer referral services from using direct-mail in order to solicit potential clients for tort actions arising out of an accident or disaster within

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telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of paragraph (b) of this rule.

Petition to Amend, 571 So. 2d at 466.

3. *Id.* at 466–67.

4. Rule 4-7.4(b)(1) to (b)(1)(a) provides:

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

Petition to Amend, 571 So. 2d at 466.

5. Rule 4-7.8(a)(1) provides:

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

R. REGULATING FLA. BAR 4-7.8(a)(1).

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

7. The five-member majority included Justices O'Connor, Scalia, Thomas, and Breyer, as well as Chief Justice Rehnquist. The four-member dissent was comprised of Justices Kennedy, Stevens, Souter, and Ginsberg. *Id.* at 2373.

thirty days of the injury-causing accident or disaster.[8] HELD: In the circumstances presented to the Court, the Rules of the Florida Bar prohibiting targeted, direct-mail solicitation of victims and their relatives within thirty days of the injury-causing accident or disaster, withstand the scrutiny of the three-part test set forth and devised by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[9] to determine the constitutionality of restrictions on commercial speech.[10] The Court reasoned that the Bar had a "substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the [legal] profession."[11] The Court also held that the Rules were sufficiently narrow to achieve the Bar's purposes.[12]

Part I of this Note reviews the factual and procedural development of this case. Part II then reviews the historical origins and development of commercial speech as it is related to lawyer advertising and targeted, direct-mail solicitation. Next, Part III explains and critically analyzes the Supreme Court's decision in *Florida Bar v. Went For It, Inc.* This Part demonstrates how the majority misapplied the three-part *Central Hudson* test and allowed the Florida Bar to essentially censor the commercial speech of Florida's attorneys, thus opening the door for state bar associations nationwide to restrict attorneys' communications with potential clients. Part IV of this Note then explores the ramifications of the Court's decision by pointing out that the thirty-day ban on direct-mail solicitation will eventually harm the reputation of attorneys more than it helps by forcing personal injury attorneys to use more public forms of communication to solicit clients, thus exposing a much larger segment of the citizenry to what the Florida Bar deems inappropriate advertising tactics. Part IV also points out the devastating effect the Florida Bar Rules have on injured persons' right to receive information about their legal rights and remedies during a time period when

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8. Original plaintiffs, McHenry and Went For It, Inc., challenged Rule 4-7.4(b)(1), which prohibits attorneys from contacting accident or disaster victims and their relatives within 30 days of the injury-causing event, as well as Rule 4-7.8(a)(1), which prohibits attorneys from accepting clients from lawyer referral services which violate Rule 4-7.4(b)(1). See *supra* notes 4–5 for the text of Rules 4-7.4(b)(1) and 4-7.8(a)(1).

9. 447 U.S. 557 (1980). See *infra* text parts III.A. and III.B. for a discussion of the application of the *Central Hudson* test.

10. *Went For It*, 115 S. Ct. at 2381.

11. *Id.*

12. *Id.*

the tortfeasor's attorney and insurance representatives are not restricted from contacting them. Finally, this Note offers recommendations on how the reputation of attorneys can be preserved without the imposition of a thirty-day ban on direct-mail solicitation.

I. FACTUAL AND PROCEDURAL DEVELOPMENT OF FLORIDA BAR v. WENT FOR IT, INC.

In March of 1992, G. Stewart McHenry (McHenry), then a member of the Florida Bar,[13] and Went For It, Inc. (WFI), a lawyer referral service owned by McHenry, filed an action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida.[14] After the case became moot as to McHenry, WFI sought to enjoin the Florida Bar from enforcing Rules 4.7-4(b)(1) and 4.7-8(a)(1) governing targeted, direct-mail solicitation of accident victims and their relatives, asserting that the two rules violated the First, Fifth, and Fourteenth Amendments to the Constitution.[15] After conferring with opposing counsel regarding the lack of dispute as to any material facts, WFI withdrew its motion for an injunction, and both parties filed cross-motions for summary judgment stipulating that there were no genuine issues of material fact.[16]

The United States District Court Judge, Elizabeth A. Kovachevich, in reviewing the Report and Recommendation of the United States Magistrate Judge[17] who heard the cross-motions for

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13. McHenry was disbarred for reasons unrelated to this case in October of 1992. *Went For It*, 115 S. Ct. at 2374 (citing The Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992)). As a result of his being disbarred, the case became moot as to McHenry. McHenry v. The Florida Bar, 21 F.3d 1038, 1041 (11th Cir. 1994), *rev'd sub nom.* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995). The circuit court determined that Went For It, Inc. (WFI) had sufficient standing to maintain the suit on its own; however, on limited remand from the circuit court, the district court allowed WFI to add John T. Blakely, another Florida attorney, as a party plaintiff. *Id.* at 1041 n.7.

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

15. *Id.* at 1544–45.

16. *Id.* at 1545.

17. McHenry v. The Florida Bar, No. 92-370-CIV-T-17A, 1992 U.S. Dist. LEXIS 20421, at *1 (M.D. Fla. Aug. 5, 1992), *rev'd*, 808 F. Supp. 1543 (M.D. Fla. 1992), *aff'd*, 21 F.3d 1038 (11th Cir. 1994), *rev'd sub nom.* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

summary judgment,[18] rejected the magistrate's finding that Rules 4-7.4(b)(1) and 4-7.8(a)(1) were constitutional.[19] The magistrate had concluded that "the Florida Bar had substantial government interests, predicated on a concern for professionalism, . . . in protecting the privacy . . . of recent accident victims . . . and in ensuring that [the victims] d[id] not fall prey to undue influence or overreaching."[20]

Citing Justice Stevens' opinion in *Peel v. Attorney Registration & Disciplinary Commission*,[21] the district court agreed with the proposition that targeted, direct-mail advertising by attorneys was within the scope of First Amendment protection[22] and gave several reasons to support its decision to grant summary judgment for WFI. First, the court concluded that the thirty-day restriction was not narrowly tailored[23] to advance the Florida Bar's proffered substantial governmental interest in protecting accident victims and their relatives from undue influence, intimidation, and overreaching.[24] The district court stated that "[t]he relevant inquiry is not whether . . . [a] potential client[']s `condition' makes [him or her] susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."[25] The court concluded that "a letter, unlike a `badgering advocate,' can be avoided merely by placing it in a drawer to be considered later, ignored or discarded," thus making it unlikely that the recipient will be subject to any undue influence or overreaching.[26]

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18. *McHenry*, 808 F. Supp. at 1544. The magistrate judge had authority to hear the motions pursuant to 28 U.S.C. § 636(b)(1). *Id.*

19. *McHenry*, 808 F. Supp. at 1544.

20. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2374 (1995).

21. 496 U.S. 91 (1990).

22. *McHenry*, 808 F. Supp. at 1545.

23. The Supreme Court in *Board of Trustees, State University of N.Y. v. Fox* defined narrowly tailored means as those means which are a "reasonable fit" rather than "no less drastic means." Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989). *See also infra* notes 66–68 and accompanying text. This definitional change allowed the government more freedom to restrict commercial speech since the means no longer had to be the best method for the government to achieve its purpose; so long as the means were reasonably likely to achieve the government's interest, they could withstand constitutional scrutiny.

24. *McHenry*, 808 F. Supp. at 1547.

25. *Id.* at 1546 (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)).

26. *Id.*

The second reason which the district court advanced for granting WFI summary judgment was that the thirty-day restriction was not a content-neutral, time, place, and manner restriction as the Florida Bar had argued,[27] because it was the *content* of the speech which was being banned for thirty days.[28] The court used the example of a probate attorney being allowed to contact the family of a victim via targeted, direct-mail solicitation, during a time period when the personal-injury attorney is restricted from doing so, to support its conclusion that it is the content of the attorney's solicitation letter which is being restricted.[29] While the restriction of content is not an issue in the Florida Bar's first commercial speech argument, it is an important factor when evaluating the Bar's contention that the thirty-day ban was a proper content-neutral, time, place, and manner restriction.

The district court rejected the Florida Bar's contention that letters are the functional equivalent of political speech manifested in election signs or picket signs which the government can restrict, since, as the court noted, "targeted lawyer letters . . . are clearly marked in red as `advertisement' and can be discarded by the recipient without any fear of legal recourse or filed away until a consumer desires to read the letter."[30]

The district court also rejected the Florida Bar's contention that the Supreme Court had authorized limitations such as the thirty-day ban when it held in *Peel v. Attorney Registration & Disciplinary Commission*[31] that such a rule will be permitted when it is only a limited regulation.[32] The district court pointed out that the proposi-

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27. *McHenry*, 808 F. Supp. at 1547. The Florida Bar had tried to justify the 30-day rule on both commercial speech and content-neutral, time, place, and manner arguments.

28. *McHenry*, 808 F. Supp. at 1547.

29. *Id.*

30. *Id.* at 1547 (citing R. REGULATING FLA. BAR 4-7.4(b)(2)(a)). Rule 4-7.4(b)(2)(a) provides:

> Each page of such written communications shall be plainly marked "advertisement" in red ink, and the lower left corner of the face of the envelope containing a written communication likewise shall carry a prominent, red "advertisement" mark. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark in red ink shall appear on the address panel of the brochure or pamphlet. Brochures solicited by clients or prospective clients need not contain the "advertisement" mark.

Petition to Amend, 571 So. 2d at 467.

31. 496 U.S. 91 (1991).

32. *McHenry*, 808 F. Supp. at 1546–47.

tion in *Peel* which the Florida Bar referred to concerned "ensur[ing] that the information is presented in a nonmisleading [sic] manner,"[33] and that waiting thirty days to mail a targeted, direct-mail letter would not make it more or less misleading.[34]

Because it found that the thirty-day ban was not a content-neutral, time, place, and manner restriction, and because it found that the possibility of undue influence did not exist in targeted, direct-mail letters from lawyers to accident victims, the district court concluded that the rules in question "substantially impair[ed] and impede[d] the availability of truthful and relevant information . . . to consumers in need of such legal services."[35] Therefore, the court granted summary judgment for WFI and declared the rules violated the First, Fifth,[36] and Fourteenth Amendments of the United States Constitution.[37]

The Eleventh Circuit Court of Appeals heard the case on appeal and applied a similar rationale. The Florida Bar presented the circuit court with two substantial government interests:

> (1) protecting persons traumatized by recent injury to themselves or members of their family who are likely to be in a state of mind which inhibits objective evaluation of a [personal] solicitation . . . , and
>
> (2) protecting the personal privacy and tranquility of persons who were themselves, or whose loved ones were, recent victims of personal injury or death.[38]

The Eleventh Circuit relied on the reasoning offered in *Shapero v. Kentucky Bar Ass'n*, and rejected the first purpose of protecting traumatized victims and family members from undue influence. Quoting the United States Supreme Court's holding in *Shapero*, the Eleventh Circuit stated that letters do not present "`the coercive force of the personal presence of a trained advocate or . . . the pres-

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33. *Id.* at 1547 (citing *Peel*, 496 U.S. at 110–11).

34. *Id.*

35. *McHenry*, 808 F. Supp. at 1548.

36. The district court never directly addressed its reasoning for declaring the rule violative of the Fifth Amendment. Arguably, the 30-day ban represented a taking of the attorney's liberty interest to solicit clients via targeted, direct-mail without due process.

37. *McHenry*, 808 F. Supp. at 1548.

38. McHenry v. The Florida Bar, 21 F.3d 1038, 1042 (11th Cir. 1994), *rev'd sub nom.* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

sure . . . for an immediate yes-or-no answer to the offer of representation.'"[39] The Eleventh Circuit also rejected the second governmental purpose which the Florida Bar proffered and concluded that under Supreme Court precedent, targeted, direct-mail solicitation letters clearly identified in red ink as *advertising material* did not constitute an "invasion of the constitutionally protected well-being, tranquility, and privacy of the home" which the Florida Bar claimed to be protecting.[40]

The Eleventh Circuit further rejected the Florida Bar's contention that the restriction was a reasonable, time, place, and manner restriction for the same reasons espoused by the district court. The court, relying on *Clark v. Community for Creative Non-Violence*,[41] dismissed this argument because the restriction was clearly based on the content of the letter and was therefore, under the rule in *Clark*, unconstitutional.[42] The court concluded that since the Bar would have to examine the contents of a targeted letter to determine whether the attorney violated the rule, application of the rule is dependant upon the content of the letter.[43] The circuit court stated that it found the Florida Bar's reasons for wanting to restrict intrusive mailings understandable; however, in order to preserve the constitutional guarantees of freedom of speech, the court reasoned that self-restraint and an attorney's conscience should control the decision of when a targeted, direct-mail solicitation is appropriate, not the Florida Bar.[44] For all of the aforementioned reasons, the circuit court affirmed the grant of summary judgment in favor of WFI.[45]

Following the decision by the Eleventh Circuit Court of Appeals, the United States Supreme Court granted certiorari to determine with finality whether the Florida Bar Rules regarding targeted, direct-mail solicitation were constitutional.[46]

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39. *Id.* at 1042 (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 473 (1988) (citations omitted)).

40. *McHenry*, 21 F.3d at 1044 (citing Frisby v. Schultz, 487 U.S. 474, 483 (1988)).

41. 468 U.S. 288 (1984).

42. *McHenry*, 21 F.3d at 1044 (citing *Clark*, 468 U.S. at 294).

43. *Id.* at 1045.

44. *Id.*

45. *McHenry*, 21 F.3d at 1045.

46. McHenry v. The Florida Bar, 115 S. Ct. 42 (1994) (granting certiorari).

II. HISTORY OF LAWYER SOLICITATION CASES

Lawyers have used advertising for the purpose of soliciting specific clients since the early nineteenth century; in fact, Abraham Lincoln solicited clients via direct-mail letters in the 1850s.[47] Despite its prevalent use, the American Bar Association first prohibited attorney advertising in the early 1900s.[48] The 1969 enactment of the *Model Code of Professional Conduct* reaffirmed the prohibition of attorney advertising and solicitation.[49] These prohibitions amounted to almost a total ban on attorney advertising.[50]

A. Lawyer Advertising

In the 1970s, the Supreme Court began to recognize the value of commercial speech in a free society and extended some degree of constitutional protection to commercial speech.[51] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, the Court struck down a prohibition against pharmacists' advertising of prices.[52] The Court reasoned that commercial speech may assist consumers by allowing the fullest possible dissemination of commercial information which the consumers can use to make an intelligent economic decision.[53] The Court further found that, however tasteless and excessive advertising may sometimes seem, it "is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."[54] The *Virginia State Board* Court specifically excluded physicians and lawyers from its holding since they do not dispense standardized products, but rather render professional services of almost infinite varieties and

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47. Jeffrey S. Kinsler, *Targeted, Direct-Mail Solicitation:* Shapero v. Kentucky Bar Association *Under Attack*, 25 LOY. U. CHI. L.J. 1, 5 nn.21–22 (1993).

48. Kinsler, *supra* note 47, at 5 nn.23–24.

49. Kinsler, *supra* note 47, at 5 n.25.

50. *See* Kinsler, *supra* note 47, at 5.

51. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

52. *Id.* at 761. The Court commented that the pharmacist in *Virginia State Bd.* was not seeking to make observations of specific or general facts regarding commercial matters, rather he sought only to convey his willingness to "sell you the X prescription drug at the Y price." *Id*.

53. *Virginia State Bd.*, 425 U.S. at 765 (stating that the free flow of commercial information is indispensable for consumers in order that they be able to make intelligent, well-informed commercial decisions).

54. *Id.*

natures, thus creating a greater risk for confusion in certain kinds of advertising.[55]

One year after the *Virginia State Board* decision, the Supreme Court decided *Bates v. State Bar of Arizona*[56] which presented the Court with a ban on advertising by lawyers of "routine" legal services such as uncontested divorces and adoptions, simple personal bankruptcies, and name changes.[57] The Court held that the State's justifications for the restriction were insufficient to support the suppression of truthful commercial speech regarding the availability and price of routine legal services.[58]

B. Personal Solicitation

The United States Supreme Court was faced once again with a case concerning a lawyer's solicitation of clients in the year that followed the *Bates* decision.[59] In *Ohralick v. Ohio State Bar Ass'n*,[60] the Court upheld as constitutional a complete prohibition of in-person solicitations of unsophisticated, injured, or distressed lay persons by a professional trained in the art of persuasion.[61] The Court held that the Bar, acting with the authorization of the State, may discipline attorneys who solicit potential clients in person for their own financial gain "under circumstances likely to pose dangers that the State has a right to prevent."[62]

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55. *Id.* at 773 n.25. The Court stated that the historical and functional distinctions between various professions would necessarily require a court to consider different factors. *Id*.

56. 433 U.S. 350 (1977).

57. *Id.* at 354. The appellant lawyers left their positions with the Maricopa County Legal Aid Society and, in March 1974, opened their own legal clinic with the goal of providing legal services at reduced prices for moderate income clients ineligible for subsidized legal services. *Id*. The appellants hoped to attract a large volume of clients to offset a lower profit margin on services by placing an advertisement in the local daily newspaper which informed potential clients of their reduced fees. *Id*.

58. *Bates*, 433 U.S. at 384 (holding that the application of Arizona Disciplinary Rule 2-101(B) against the appellants violated the First Amendment).

59. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

60. *Ohralick*, 436 U.S. at 447.

61. *Id*. at 464–68. Appellant Ohralick was an Ohio attorney who contacted the parents of a driver involved in a car accident and who later visited their injured daughter in the hospital to secure a contingent-fee agreement from her; he also contacted the 18-year-old female passenger at her home when she returned from the hospital to secure a contingent-fee agreement from her as well. *Id*. at 449–52.

62. *Id.* at 449.

According to the *Ohralick* Court, one of the dangers associated with in-person solicitation is that it may place the recipient under pressure to provide an immediate response to the solicitor without allowing adequate time for reflection or comparison.[63] The Court went on to say that speech is "an essential but subordinate component" of the business transaction which results from in-person client solicitation; the Court further concluded that while the speech is protected by the First Amendment, according to *Bates* and *Virginia State Board*, the "level of appropriate judicial scrutiny" of the speech is thereby lowered.[64]

In 1985, the Supreme Court held that, as protected commercial speech, lawyer advertising which is not "false or deceptive" may only be restricted in service of a substantial governmental interest through means which directly advance that interest.[65] In *Board of Trustees, State University of New York v. Fox*,[66] the Court defined the means which directly advance the interest as those means which are "narrowly tailored to achieve the desired objective."[67] The Court stated that in a commercial speech context, the "no less drastic means" standard is inappropriate; instead, the Court did not require a necessarily perfect fit between the means chosen to accomplish the government's objectives and those objectives, but rather a "reasonable fit" which is in proportion to the interest sought to be served, even though it may not be the single best disposition.[68]

C. Targeted, Direct-Mail Solicitation

In 1988, the Supreme Court faced the issue of restrictions on targeted, direct-mail solicitation. Richard Shapero, a member of the Kentucky Bar, wanted to send a truthful, non-misleading letter directly to potential clients involved in foreclosure proceedings, and he applied to Kentucky's Attorney Advertising Commission for ap-

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63. *Id.* at 457. The Court stated that personal solicitation may "provide a one-sided presentation and . . . encourage speedy[,] . . . uniformed decisionmaking . . . [with] no opportunity for intervention or counter-education." *Id*.

64. *Id.*

65. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) (citing Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)).

66. 492 U.S. 469 (1989).

67. *Id*. at 480.

68. *Id.*

proval of his proposed letter.[69] The Commission, relying on a Kentucky Supreme Court Rule prohibiting targeted, direct-mail communication to potential clients when the communication was precipitated by a specific event involving or relating to the addressee, forbade Shapero from sending his letter.[70] However, the Commission registered its view with the Board of Governors of the Kentucky Bar that the Kentucky Supreme Court Rule banning targeted, direct-mail solicitation violated the First Amendment, and it further recommended that the Rule be amended.[71] Despite the Commission's recommendation, the Board of Governors adopted an Ethics Committee advisory opinion and upheld the Rule as constitutional.[72]

The *Shapero* Court distinguished the targeted, direct-mail solicitation involved in *Shapero* from the in-person solicitation in *Ohralik* on two grounds: first, that the potential for overreaching, fraud, and undue influence was more prevalent in a face-to-face meeting than in a letter; and second, that the written communication was open to public scrutiny and regulation which would not require a complete ban in order to be effective.[73]

The Court noted that since the State can use means that are less restrictive than a total ban to achieve its purpose of preventing overreaching, such as requiring all solicitation letters to be labeled as an "advertisement"[74] or requiring all letters to be approved by the local bar association, the Kentucky Rule which banned targeted, direct-mail solicitation letters violated Shapero's constitutional right

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69. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 469 (1988).

70. *Id.* at 469–70. The Commission did not find the letter false or misleading, but forbade Shapero to send the letter based on Kentucky Supreme Court Rule 3.135(5)(b)(i) which provide as follows:

> "A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."

Shapero, 486 U.S. at 470 n.2 (quoting KY. SUP. CT. R. 3.135(5)(b)(i)).

71. *Id.* at 470.

72. *Id.* The Ethics Committee also concluded that Shapero's letter was neither false nor misleading despite its refusal to amend the Rule as recommended by the Attorney Advertising Commission. *Id*.

73. *Shapero*, 486 U.S. at 475–76.

74. See *supra* note 30 and accompanying text for a discussion of the "advertisement" label on letters solicitating potential clients. *See also Petition to Amend*, 571 So. 2d at 467 (referring to Florida Bar Rule 4-7.4(b)(2)(a)).

of free speech.[75] The *Shapero* Court concluded that a ban on a particular letter is unconstitutional if the ban is based on the theory that it is inherently objectionable to mail the letter only to those persons who may be most interested in it.[76]

III. ANALYSIS OF THE SUPREME COURT'S DECISION IN FLORIDA BAR v. WENT FOR IT, INC.

A. The Majority's Analysis Under *Central Hudson*

In June 1995, the Supreme Court had the opportunity once again to decide the issue of whether targeted, direct-mail solicitation of potential clients deserves First Amendment protection as commercial speech, and whether the means which the Florida Bar employed to achieve its proffered substantial governmental interest in restricting that commercial speech were sufficiently narrow to achieve that purpose.[77] The Court began its analysis with a review of the factual and procedural background of *Florida Bar v. Went For It, Inc*.[78]

The Court then summarized the relatively recent history of cases involving constitutional protection of commercial speech and lawyer advertising.[79] The Court noted that commercial speech receives a lesser amount of First Amendment protection than non-commercial speech, and that the limited protection it receives is "commensurate with its subordinate position in the scale of First Amendment values."[80] In keeping with the lower level of protection afforded commercial speech, the Court used an "intermediate" level of scrutiny[81] when it analyzed restrictions on commercial speech by

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75. *Shapero,* 486 U.S. at 476–77.

76. *Id.* at 473–74.

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

78. See *supra* text part I. and accompanying notes for the procedural and factual background of *Florida Bar v. Went For It, Inc.*

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

80. *Id.*

81. The intermediate level of scrutiny which the Court applied fell between the two extremes on the spectrum of protection afforded speech by the First Amendment. For private speech in a non-public forum which does not resemble a public forum (for example, teachers' mailboxes at a school), the lightest level of scrutiny is applied. The government may restrict the time, place, and manner of this type of private speech when the means chosen for doing so are rationally related to the government's interest in restricting the speech which itself needs only be non-violative of the Constitution. *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983).

applying "the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*."[82] The *Central Hudson* test provides that the government can only regulate commercial speech which does not concern unlawful activity and is not misleading when the government meets the requirements of a three-pronged test: [1] the government must articulate a substantial interest to support the regulation; [2] the restriction on commercial speech must directly and materially advance the government's interest; and [3] the regulation must be narrowly tailored to reasonably achieve the government's interest.[83]

1. First Prong of the Central Hudson *Test*

In this case, the Florida Bar asserted that its interest was in not only protecting the privacy and tranquility of personal injury victims, but also in protecting the flagging reputations of attorneys in Florida by preventing them from engaging in conduct which the Bar contends is "deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families."[84] The Court accepted the proposition that individual states have broad power to regulate professional practices because they have a compelling interest in those professions which benefit residents within their state boundaries.[85] The Court also recognized that the State has a substantial interest in preserving the

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On the other end of the spectrum, content-based restrictions on non-commercial print-media expression receive the strictest level of scrutiny. In order to withstand constitutionality, the government's interest in restricting the speech must be compelling, and there can be no less drastic means to achieve the government's interest than those chosen by the government. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

The intermediate level of scrutiny adopted by the Supreme Court lies between these two extremes, requiring that the government's interest in restricting the speech be substantial, and that the means used to achieve its interest be real and substantially related to the interest. The intermediate level of scrutiny is generally applied to cases involving commercial speech which promotes a commercial transaction. See *supra* notes 65–68 and accompanying text for a discussion of how the Court has interpreted this "intermediate" level of scrutiny in the commercial speech context.

82. *Went For It*, 115 S. Ct. at 2375–76 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)).

83. *Central Hudson*, 447 U.S. at 564–65.

84. *Went For It*, 115 S. Ct. at 2376 (citing Petitioner's Brief at 28, *Went For It* (No. 94-226) (quoting *In re* Anis, 599 A.2d 1265, 1270 (1992))).

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

"well-being, tranquility, and privacy of the home."[86] The Court concluded that the Florida Bar had satisfied its burden of articulating a substantial governmental interest to support its restrictions on targeted, direct-mail solicitation of potential clients by Florida attorneys and lawyer referral services.

2. Second Prong of the Central Hudson *Test*

The *Central Hudson* test requires that the State show that the regulation advances the State's interest "in a direct and material way."[87] The Court explained that in order to satisfy this prong of the test, the State needed to articulate, via some evidence, that the harm which it was purporting to alleviate was real and that the means chosen by the State to eliminate the harm would in fact do so.[88] To support a conclusion that the Florida Bar satisfied this prong of the test, the Court relied heavily on a 106-page summary[89] of a two-year lawyer advertising study which was conducted by the Florida Bar and submitted to the district court.[90] The Court seemed satisfied with the validity of the survey as a factual basis underlying the Bar's rule for the purposes of satisfying the second prong, despite the fact that the Court was never furnished with a copy of the study, the statistical abstract of sample sizes, or the criteria used to select sample group members.[91] The majority defended its reliance on the Bar's proffered study by saying that "our case law [does not] require that empirical data . . . [be] accompanied by a surfeit of background information."[92]

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86. *Went For It*, 115 S. Ct. at 2376 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

87. *Id.* at 2377 (quoting Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

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

89. See *infra* text part III.B.2.a. and accompanying notes for a discussion of the unreliability of the Florida Bar's "Summary of Record."

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

91. *Id.* at 2378.

92. *Id.* The notion that empirical data need not be accompanied by background information to be reliable is unacceptable. Unsubstantiated or unverifiable empirical results are no more valuable than speculative conclusions. In order for empirical data to be useful, it must carry with it some indicia of its reliability and accuracy. See generally *infra* text part III.B.2.a. and accompanying notes for a discussion of the lack of reliable empirical data contained in the Florida Bar's Summary of Record. Justice Kennedy, in his dissenting opinion stated that "[Supreme Court] cases require something more than . . . self-serving and unsupported statements . . . to demonstrate that a regulation directly and materially advances the elimination of a real harm." *Went For It*, 115 S. Ct.

The Court dismissed the Eleventh Circuit's contentions that *Shapero* controlled the outcome of the case and that targeted letters are no more intrusive of a recipient's privacy than a similar letter mailed to the general public.[93] The majority distinguished *Shapero* on three grounds: first, that *Shapero* dealt with the dangers associated with overreaching by targeted letters, not with the protection of victims' privacy interests; second, that the restriction in *Shapero* dealt with a total ban on *any* direct-mailing which solicited clients, regardless of timing, as opposed to a restriction dealing only with solicitation of accident victims within a thirty-day period; and third, that the Kentucky Bar, in *Shapero*, produced no evidence to prove the harm complained of, whereas the Florida Bar offered a 106-page summary of its two-year study of the effects of lawyer advertising in Florida.[94]

The majority also distinguished the rule established in *Bolger v. Youngs Drug Products Corp.*,[95] where the Court held that postal recipients of objectionable material could avoid any effect on their sensitivities by simply looking away from the mailing.[96] The majority held that the harm complained of by the Florida Bar is "as much a function of simple receipt . . . within days of accidents as it is a function of the letters' contents."[97] Therefore, the majority concluded, the harm complained of cannot be eliminated by simply averting one's eyes or by taking the "brief journey to the trash can."[98]

The Court concluded that the Florida Bar had satisfied the second prong of the *Central Hudson* test and had met its burden of showing that the thirty-day restriction directly and materially ad-

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at 2384 (Kennedy, J., dissenting).

93. *Went For It*, 115 S. Ct. at 2378.

94. *Id.* at 2378–79.

95. 463 U.S. 60 (1983).

96. *Went for It*, 115 S. Ct. at 2379 (citing *Bolger*, 463 U.S. at 72).

97. *Went For It*, 115 S. Ct. at 2379. Despite the majority's and the Florida Bar's contention that simply receiving a letter regarding the injury-causing accident within 30 days of the accident, regardless of its actual contents, causes harm to the accident victim, the Florida Bar, in the wake of the recent ValuJet crash in the Everglades, felt compelled to send its own letter to victims' families (via targeted, direct-mail) to explain the Florida Bar's rules regarding direct-mail solicitation. *See Solicitation Investigation Continues*, FLA. B. NEWS, June 15, 1996, at 3 [hereinafter *Solicitation Investigation*]. If the mere receipt of a letter concerning any aspect of legal representation regarding an accident is considered harmful, the Florida Bar should abide by its own rules and refrain from sending its own letters within the waiting period.

98. *Went For It*, 115 S. Ct. at 2379.

vanced the State's interests,[99] in both protecting the privacy of accident victims and in preserving the flagging reputations of attorneys, by producing evidence (the 106-page summary of its own study) showing that the harm complained of was real.[100]

3. Third Prong of the Central Hudson *Test*

The final requirement of the *Central Hudson* test is that the State's chosen means must be narrowly tailored to achieve the desired objective.[101] The Court explained that the State need only find a "reasonable fit" between the ends and the means used to accomplish the ends.[102] The majority noted that "the existence of `numerous and obvious less-burdensome alternatives to the restriction . . . [is] relevant . . . in determining whether the "fit" between ends and means is reasonable.'"[103]

In response to the argument that the thirty-day ban burdened the rights of victims with only minor injuries to receive information, the Court first stated that drawing a line which distinguishes those injuries serious enough to warrant prohibition was too difficult. The Court further stated that since so many other alternative forms of advertising were available, the ban was of little ultimate consequence regarding the argument that the restriction would prevent some victims from learning about their legal options during the time

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99. It is interesting to note that while *Central Hudson* requires a showing that the restriction on commercial speech directly and materially advances the government's interest, the majority spent all of its discussion of the second prong on whether the Florida Bar had successfully brought forth evidence to show that the harm complained of was real. *See Went For It*, 115 S. Ct. at 2377–79.

The majority neglected to discuss how the 30-day ban would directly and materially protect the privacy of accident victims, and more importantly, it neglected to discuss how the 30-day ban would help to preserve the flagging reputation of attorneys in Florida. See *infra* text part IV.A. and accompanying notes for a discussion of how the 30-day ban may have the opposite effect on the reputation of Florida attorneys by forcing them to solicit their clients in mass-media markets where there is a greater risk that the general public will be offended by lawyers' solicitations.

100. *Went For It*, 115 S. Ct. at 2377–79.

101. *Id.* at 2380; *see* Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989); *see also supra* notes 66–68 and accompanying text.

102. *Went For It*, 115 S. Ct. at 2380; *see also supra* notes 66–68 and accompanying text.

103. *Id.* at 2380 (citing Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510 n.13 (1993)).

when opposing parties might be seeking early settlement.[104] The majority noted that the respondents failed to show any example of a case when immediate solicitation or the failure to solicit within thirty days either respectively preserved or caused a forfeiture of any legal rights of an accident victim.[105]

The majority concluded that since "[it did] not see `numerous and obvious less-burdensome alternatives' to Florida's short temporal ban, . . . [the] Bar's rule is reasonably well-tailored to its stated objective of eliminating targeted mailings . . ." that cause accident victims distress and harm the reputation of Florida attorneys.[106] Therefore, the majority held that the Florida Bar satisfied the third prong of the *Central Hudson* test by showing that the regulation is narrowly tailored to reasonably achieve its governmental interest.

B. Critical Analysis and the Dissent: The Right Test, But the Wrong Result

The *Went For It* Court was sharply divided.[107] Justice Kennedy authored the well-reasoned dissenting opinion which agreed with the majority that the proper analysis was the three-pronged *Central Hudson* test.[108] Yet, while the majority applied the right test, Justice Kennedy concluded that the Court came up with the wrong answers. Justice Kennedy focused on the effects the decision will have on the free flow of information desired by some, and needed by others, in order to make informed judgments as to the legal rights and remedies available to injured parties and their relatives.[109] The dissent reasoned that since it is often necessary to investigate the accident or disaster scene, to interview witnesses, and to otherwise preserve the record and evidence as soon after the injury-causing event as possible, vital freedom of expression and speech interests are jeopardized if attorneys cannot direct a letter to a particular victim or relatives of that victim which explains the essence of time and offers

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104. *Id.* at 2380.

105. *Id.* at 2381.

106. *Id.* at 2380 (citing *Discovery Network*, 113 S. Ct. at 1510 n.13). But see *infra* text part IV.C. and accompanying notes for recommended alternatives which are less burdensome than the 30-day ban on solicitation.

107. See *supra* note 7 for a breakdown of the split vote.

108. *Went For It*, 115 S. Ct. at 2382 (Kennedy, J., dissenting).

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

their competent legal assistance.[110] More importantly, the dissent noted that while an attorney willing to represent the injured is precluded from contacting the victim to offer services directly for thirty days, during that thirty-day period, the alleged tortfeasors, "either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement."[111] This scenario creates a "window of opportunity" for the tortfeasor and his representatives to take strategic advantage of the ability to use their superior negotiating skills without interference from a resourceful attorney who would otherwise be ready to go to work against them on behalf of the injured party.

1. Analysis of the First Prong

The first interest which the Florida Bar contends it has in restricting targeted, direct-mail solicitation is "`in protecting the personal privacy and tranquility' of the victim and his or her family."[112] In its analysis, the majority neglected to consider the importance of the decision in *Shapero*.[113] In *Shapero*, the Court distinguished direct-mail solicitation from the in-person solicitation in *Ohralik*,[114] and held that the direct-mail communication does not present the same potential for undue influence or overreaching as the personal solicitation does.[115] A letter sent in the mail "can readily be put in a drawer to be considered later, ignored or discarded."[116] This statement is especially applicable to the case at hand since Rule 4-7.4(b)(2)(a)[117] requires that all targeted, direct-mail communications be clearly marked in red ink, both on the letter and the envelope as an "advertisement."[118] Additionally, Rule 4-7.4(b)(2)(g)[119] requires that the first sentence of any written communication concerning a

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110. *Id.* at 2381 (Kennedy, J., dissenting).

111. *Id.* at 2381–82 (Kennedy, J., dissenting).

112. *Id.* at 2382 (Kennedy, J., dissenting) (quoting Petitioner's Brief at 8, *Went For It* (No. 94-226)).

113. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

114. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *See also supra* note 73 and accompanying text.

115. *See supra* notes 59–64 and accompanying text.

116. *Shapero*, 486 U.S. at 475–76.

117. *Petition to Amend*, 571 So. 2d at 467.

118. See *supra* note 30 and accompanying text for a discussion of the "advertisement" label on letters soliciting potential clients.

119. *Petition to Amend*, 571 So. 2d at 467.

specific matter state: "If you have already retained a lawyer for this matter, please disregard this letter."[120] With these rules already in effect, it is easy for a sensitive victim or family member to identify the solicitation letter in the pile of mail and set it aside until he or she feels compelled to read it. These safeguards, already in effect, go a long way to protect victims and their families who have been targeted by an attorney by warning them about the soliciting nature of the letter before they open it or read it. If a party might be offended by this type of mailing, these safeguards will put him or her on notice so that he or she can discard the potentially offensive letter before any damage to his or her sensitivities or to the reputation of Florida attorneys is done. Additionally, some victims may see the caveats on the outside of the envelope and at the introduction of the letter, warning the recipient about the soliciting nature of the letter contained therein, as respectful of their sensitivities.

The dissent dismissed the majority's contention that the interest which the Florida Bar had in restricting the mailings — that of protecting victims' privacy — centered around preventing the recipients from being offended by the direct-mail solicitation. Citing *Zauderer v. Office of Disciplinary Counsel*,[121] the dissent found that the mere possibility that some members of society might find particular types of advertising offensive is not sufficient justification for suppressing it.[122] The *Went For It* dissent also noted that the Supreme Court has never allowed the government to "`shut off the flow of mailings'" in an effort to protect the citizens who might be offended by receiving a particular mailing.[123] According to *Bolger v. Youngs Drug Products Corp.*, the recipient of objectionable material bears the "acceptable burden" of taking the short trip from mailbox to trash can in order to eliminate the offense which the recipient may take to such a mailing.[124] As previously mentioned, the Florida Bar Rules already in effect which require a clear denomination in red ink that the correspondence is an "advertisement," facilitate the recipient's burden of identifying and eliminating objectionable ma-

120. *Id.*

121. 471 U.S. 626 (1985).

122. *Zauderer*, 471 U.S. at 648.

123. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2383 (1995) (Kennedy, J., dissenting) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983)).

124. *Bolger*, 463 U.S. at 72.

terial from the mailbox.[125]

The second interest which the Florida Bar contends it has in restricting the targeted, direct-mail letters is in protecting the dignity and reputation of attorneys in Florida.[126] In restricting targeted, direct-mail solicitations, the Bar seems to say that all Florida attorneys could be demeaned by the aberrant and questionable behavior of a few.[127] The solicitation of potential clients, however questionable or aberrant it may be, is not necessarily inherently evil, since it informs victims of their rights and remedies at a time when they may not be considering such matters. It follows from this rationale that restricting direct-mail solicitation in order to protect the reputations of Florida attorneys comes at the expense of suppressing informative speech which explains to victims and their families their rights within a legal system they may not fully understand.[128]

2. Analysis of the Second Prong

Assuming arguendo that the Florida Bar's interests were legitimate and substantial for the purposes of the *Central Hudson* analysis, the second prong of the analysis requires that the Bar show that the dangers which it seeks to eliminate do in fact exist and that a restriction on speech will advance those asserted state interests in a direct and material way.[129] The burden of showing that the harm feared actually exists rests with the State.[130]

Unfortunately, the evidence which the Bar proffered to support the existence of a link between targeted, direct-mail solicitations and the sagging reputations of Florida lawyers is tenuous at best.[131] The evidence submitted, a 106-page summary of a study conducted by one of the adverse parties, and referred to as the "Summary of Record,"[132] is not an objective, empirical analysis of the effects that

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125. *See supra* notes 30, 74 and 118 and accompanying text.

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

127. *Id.*

128. *Id.*

129. *Went For It*, 115 S. Ct. 2383–84 (Kennedy, J., dissenting) (citing Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

130. *Id.* at 2384 (Kennedy, J., dissenting).

131. See *infra* text part III.B.2.a. for a discussion of how "fatally flawed" the results of the Florida Bar's Summary of Record are.

132. *See infra* note 138. See generally *infra* Appendix for excerpts from the Florida Bar's Summary of Record.

the written communications, which the Bar seeks to restrict, have on the reputation of Florida attorneys. Justice Kennedy noted that the document contained no actual surveys, that it contained very little information regarding the size of the samples used to develop the report, the selection procedures used, or the methodology used for selection, and also noted that the report contained no qualifying information regarding the results which were included in the Summary of Record.[133] The dissent noted that while the majority opinion described the report as "noteworthy for its breadth and detail," the dissent viewed it as "noteworthy for its incompetence."[134] The dissent further stated that the self-serving and unsupported statements in a suspect report were insufficient to show that the regulation directly and materially advanced the State's interest in eliminating a real harm.[135]

It is important to note that the only evidence presented by the Florida Bar to satisfy the second prong of the *Central Hudson* test was its own Summary of Record report. That report made no mention of, nor did it present any evidence of, a causal link between targeted, direct-mail solicitation and any damage resulting from an invasion of the personal privacy and tranquility of victims and their families. Rather, the report focused solely on the effect which lawyer advertising has on the reputation of attorneys in Florida.[136]

It is crucial to a determination of whether a restriction materially and directly advances the elimination of a real harm, to identify what the harm actually is. The Florida Bar failed to establish in its report that direct-mail solicitation causes harm to either a victim's right to privacy or to the reputation of Florida attorneys, since it was unable to demonstrate to the Court what a typical solicitation letter contains.[137] Without a proper understanding of the contents of

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

134. *Id*.

135. *Id.* Justice Kennedy stated that "[o]ur cases require something more than a few pages of self-serving and unsupported statements by the State . . . [especially] when the State seeks to suppress truthful and nondeceptive speech." *Id.*

136. *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting) (stating that the "essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar").

137. When asked at oral arguments to explain what the typical accident victim would receive in the mail when solicited directly, counsel for the Florida Bar responded "`[t]hat's not in the record . . . and I don't know the answer to that question.'" *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting) (quoting Transcript of Oral Argument at

this type of solicitation, a determination that a claimed harm is real, is at best speculative.

Given the absence of reliable evidence to support the existence of the harm which the State seeks to avoid, in addition to the absence of any evidence to establish that the thirty-day ban would directly or materially eliminate that non-established harm, it was error for the Court to uphold the Florida Bar Rules restricting targeted, direct-mail solicitation as constitutionally valid.

a. The Fatally Flawed Florida Bar Report

The Summary of Record Report[138] which the Florida Bar submitted to the district court was 106 pages long, yet it was grossly inadequate to justify a conclusion that the harm the Florida Bar sought to avoid actually existed. Of the 106 pages contained in the Summary of Record, only twenty-eight[139] touched on targeted, direct-mail solicitation, and of those, less than twenty dealt specifically, or in any detail, with targeted, direct-mail solicitation.[140]

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25).

138. The entire 106-page Summary of Record is on file with the *Stetson Law Review* or may be obtained through the Ethics Department of the Florida Bar in Tallahassee, Florida.

139. Summary of Record, Appendix I (fourteen pages) deals specifically with direct-mail solicitation but contains no empirical survey results which can be used as evidence of the existence of a particular harm caused by direct-mail solicitation. Instead, this appendix contains excerpts from citizen complaints and negative lawyer commentary, as well as three pages of excerpts favoring solicitation. These three pages represent the largest single grouping of comments which disfavor the Florida Bar's position, and interestingly enough, all three are contained in the section dealing directly with targeted, direct-mail solicitation. *See infra* note 140 and accompanying text.

Summary of Record, Appendix J also deals with direct-mail solicitation, however it is fourteen pages of favorable excerpts from Solicitation Review Committee Meetings held across Florida. The excerpts which are included in Appendix J are only those favorable to the Florida Bar's position, and most of the excerpts are comments from attorneys who attended the meetings as opposed to the comments of citizens. As a result, these excerpts are not reliable evidence of whether the reputation of Florida attorneys in the eyes of Florida citizens, is harmed by direct-mail solicitation.

140. See *infra* appendix attached to this Note for a reproduction of the Florida Bar's "Summary of Record, Appendix I — Direct Mail Solicitation." Justice Kennedy, in his dissenting opinion, described this section of the Summary of Record as follows:

> The most generous reading of this document permits identification of 34 pages on which direct-mail solicitation is arguably discussed. Of these only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct-mail . . . , excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic.

The bulk of the Summary of Record used by the Florida Bar consists of excerpts from newspaper articles and editorials including narrative descriptions of editorial cartoons.[141] These excerpts amount to little more than anecdotal "sound bites" designed to present the Florida Bar's position in as favorable a light as possible. Noticeably lacking from the large section of newspaper excerpts are any more than a few strategically placed quotes dealing with the positive aspects of either lawyer advertising or direct-mail solicitation, yet even those so included are subtly slanted to make advertising attorneys look unscrupulous.[142] These one-sided excerpts clearly highlight the unreliability of this non-objective compilation of information prepared by an adverse party to the litigation.

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

141. Some of the excerpts from the Florida Bar's Summary of Record offered as evidence of the harm direct-mail solicitation has on the privacy rights of accident victims and on the reputations of Florida attorneys include:

> "Of the few truly nauseating television commercials, those by lawyers absolutely top my list." *The Tampa Tribune*, May 29, 1989.
>
> Editorial Cartoon — Drawing of two lawyers. One says about another lawyer's ads: "I really envy the spot he's in . . . right after the hemorrhoids ad!"
>
> "When I see tacky commercials for lawyers on the tube, I definitely know which lawyers I would never use." Gary Stein, staff columnist, *Sun-Sentinel*, July 24, 1989.
>
> "These kind of ads make a lot of money for TV stations and newspapers and are a goldmine for low principled attorneys. It is refreshing to see the Florida Bar attempt to clean up their profession." *Gainesville Sun*, July 27, 1989.
>
> "If the story has a moral, it is to beware of lawyers who advertise their wares." James J. Kilpatrick, *St. Petersburg Times*, July 27, 1989 . . . .
>
> "Tactics like [solicitation letters to accident victims] nauseate me." Gary Stein, staff columnist, *Sun-Sentinel*, Oct. 2, 1989.

Summary of Record, Appendix B at 5, 6, 8, 9. The majority of the excerpts contained in the Summary of Record, Appendix B deal with attorney advertising in the mass-media (i.e. television, newspaper, radio, etc.).

142. Among those excerpts which support solicitation yet are still skewed to the Florida Bar's position are:

> Of The Florida Bar's proposed lawyer advertising rules, Tom Lee, a Michigan-based communications consultant for the Citizens Against Censorship group, said: "The issue is, don't we all — even attorneys — have the constitutional right to make ourselves look trashy . . . ?" *St. Petersburg Times*, July 12, 1989. "The Supreme Court said lawyers can advertise. There's no reason to treat our ads differently than those of the lottery or race tracks or banks." David Singer, Florida personal injury lawyer, *ABA Journal*, Sept., 1989.

Summary of Record, Appendix B at 6, 9. Again, these comments, which favor lawyer advertising, are skewed to make advertising attorneys look unscrupulous, and the comments are related only to mass-media advertising, not direct-mail solicitation.

The Summary of Record's largest section is its Appendix C which contains fifteen "surveys," none of which address targeted, direct-mail solicitation, all of which deal with the effects of mass-media advertising by attorneys, most of which are untimely,[143] unqualified,[144] unscientific,[145] and some of which are more properly characterized as anecdotal summaries of personal opinions.[146] These surveys fail to establish through empirical data that the harm the Florida Bar seeks to redress is real or that the regulation directly or materially serves to advance its interests.[147] According to the dissent, the "selective synopses of invalidated studies deal, for the most part, with television advertising and phone book listings, and not direct-mail solicitations."[148] The remaining sections of the Summary of Record contain anecdotal information regarding lawyer marketing companies, electronic media advertising, newspaper advertising, Yellow Page advertising, and enforcement issues.[149]

As a result of the foregoing considerations regarding the lack of concrete empirical evidence submitted by the Florida Bar, the dissent concluded that "[o]ur cases require more than a few pages of

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143. See *Summary of Record*, Appendix C(1) which is a 1983 survey of 126 Iowa (not Florida) residents dealing with the effect of television advertisements on the survey participants' perception of the legal profession. No indication of the selection criteria used to develop the sample, nor of the type of commercials shown to participants is given.

144. See *Summary of Record*, Appendix C(4) which is a report of the results of two phone surveys which were conducted in Florida. No other information regarding the size of the sample used, parameters for selection of "random" participants, or samples of survey questions was presented to qualify the reliability of the results.

145. See *Summary of Record*, Appendix C(15) which is an "informal" survey of 62 Floridians which provided in its entirety:

> Tribble interviewed 62 people in Florida.
>
> 50 had used an attorney. 39 found the attorney through referral, 11 by Yellow Pages, none by television. All 62 said they would not hire a lawyer from television.
>
> 40 said the Bar should regulate advertising. 16 said lawyers should not be allowed to advertise at all.

Summary of Record, Appendix C(15). This informal survey has no scientific basis for analysis whatsoever and as a result is unreliable as evidence of the existence of a proposed harm which the Florida Bar seeks to redress.

146. See *Summary of Record*, Appendix C(6) which contains excerpts from a questionnaire sent to 261 Florida judges. The 19 "sound-bite" excerpts included in this survey once again are all favorable to the Florida Bar's position; noticeably lacking from the results are any comments which favor lawyer solicitation even the slightest bit.

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

148. *Id.*

149. *See Summary of Record*, Appendices D, E, F, G, and H, respectively.

self-serving and unsupported statements . . . to demonstrate that a regulation directly and materially advances the elimination of a real harm."[150] Even if, for the sake of argument, the evidence presented in the Summary of Record was actually reliable as empirical evidence of the potential harm to the reputation of Florida attorneys, the analysis in the summary focuses primarily on the effects of lawyer advertising in the mass-media (i.e. television, newspaper, radio, etc.), and there is very little in the Summary of Record to support the conclusion that targeted, direct-mail solicitation has now, or ever will have, a negative impact on the reputation of Florida attorneys.

3. Analysis of the Third Prong

Assuming arguendo that the Florida Bar Rules survived the first two prongs of the *Central Hudson* analysis, the Rules clearly fall short of satisfying the third requirement, that the means employed to achieve the State's interests in restricting speech are a reasonable fit and are narrowly tailored to eliminate the harm the State seeks to redress. The Bar's restriction amounts to an all out ban for thirty days, regardless of the severity of the injury involved. For instance, accident victims with minor injuries, who suffer little if any emotional pain, would not need the protection so generously offered by the Florida Bar. In fact, the restriction on targeted, direct-mail solicitations may actually hinder the free flow of information which the slightly injured victim, prepared to pursue his legal rights, would need in order to make a sound decision regarding his right to make a claim for compensation.[151] The dissent noted that such a restriction "will fall on those who most need legal representation: . . . the victims too ill-informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties."[152]

There are certainly alternative means for protecting the privacy and tranquility of victims and their families, as well as for preserving the professional reputation of Florida attorneys, without resort-

150. *Went For It*, 115 S. Ct. at 2384 (Kennedy, J. dissenting).
151. *Id.* at 2385 (Kennedy, J., dissenting).
152. *Id.*

ing to blanket censorship.[153] The dissent argued that the blanket restriction on targeted, direct-mail solicitation of potential clients had no justification in presuming that in all or most cases a party would not welcome an attorney's advice; hence, the blanket provision is too broad and oppressive as a means for achieving the interests which the Florida Bar says it has in restricting these communications.[154]

In a vacuum, this type of blanket censorship of commercial speech will certainly achieve the desired goals of preventing any potential invasion of the victims' tranquility and of preventing any potential damage to the reputation of the legal profession; however, when balancing the negative effects of this type of provision against its ability to achieve the desired goal, it becomes a less compelling alternative.

IV. RAMIFICATIONS OF THE DECISION AND RECOMMENDATIONS

The Supreme Court's decision in *Florida Bar v. Went For It, Inc.*, was a dramatic step away from the constitutional protection traditionally afforded commercial speech. The dissent declared that "[t]he Court's opinion reflects a new found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients."[155]

A. Direct-Mail Ban Will Ultimately Harm the Overall Reputation of Attorneys

The long term result of this decision may very well be the polar opposite of what the Supreme Court intended. The Court and the Florida Bar spoke often of the purpose behind the restriction: preserving the reputation of Florida attorneys in the eyes of Florida citizens. As evidence of this potential harm, the Florida Bar cited its own 106-page summary of the citizenry's attitude towards lawyer

153. See *infra* text part IV.C. for a discussion of recommended alternatives for protecting victims' privacy and tranquility and for preserving the professional reputation of attorneys.

154. *Went For It*, 115 S. Ct. at 2385 (Kennedy, J., dissenting).

155. *Id*. at 2386 (Kennedy, J, dissenting).

advertising.[156] Yet, that Summary of Record dealt primarily with the dangers posed by lawyer advertising in the mass-media arena. This Note concedes that the potential for damage to the reputation of attorneys is increased when lawyers are forced to compete against one another for clients in public, mass-media forums.

Unfortunately for the attorneys who make a living representing injured victims, the lack of availability of any kind of targeted, direct communication with the victim will force them to seek out alternative means of advertising to attract clients. This leaves the personal-injury attorney to consider advertising in mass-media forums, such as billboards, radio, television, newspapers, etc. The competitive nature of these media markets forces attorneys trying to win over the injured client to develop a "catchier" advertisement than the competing attorneys already on the air or in print. The general public is thus exposed to a greater number of advertisements for legal services. The more controversial the ads get, the lower the opinion of attorneys drops in the eyes of *all* of the viewers, listeners, and readers, not just in the eyes of the injured victims whom the attorneys are trying to attract. The Florida Bar, by enacting the thirty-day ban on targeted, direct-mail solicitation, is essentially forcing personal-injury attorneys into an advertising medium which its own survey suggests poses the greatest threat to the reputation of attorneys.[157]

In addition, the limit on discreet, targeted, direct-mail solicitation may force personal-injury attorneys to "push the envelope" so to speak in other areas of solicitation in order to get the injured client. For example, following the recent ValuJet crash in the Florida Everglades, two Miami lawyers and three of their employees personally solicited accident victims' families as they boarded a bus headed for a memorial ceremony.[158] These types of blatant abuses may become more common if the subtle methods for soliciting clients (i.e. targeted, direct-mail) are systematically eliminated. As a further con-

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156. See *supra* notes 130–50 and accompanying text for a discussion of the 106-page Summary of Record submitted by the Florida Bar as well as a discussion of its shortcomings.

157. See generally *supra* text part II.B.2.a. for a discussion of how the Florida Bar's own survey focuses mainly on the effects of mass-media forms of advertising on the reputation of attorneys.

158. *See* David Lyons & Andrew Blum, *Were ValuJet Families Solicited?; Two Lawyers Accused*, NAT'L L.J., June 3, 1996, at A4.

sideration, accident victims in Florida may find themselves deluged with solicitations from large out-of-state law firms which may not be subject to Florida Bar Rules limiting direct-mail solicitation.[159] This scenario places Florida attorneys at a disadvantage if they want to represent victims of widely publicized disasters in Florida.

Mass-media advertising poses a much greater threat to the reputation of attorneys than does regulated targeted offers for legal services which individual victims review in the privacy of their own home. In time, the effects of forced, mass-media advertising by attorneys will diminish attorneys' reputations to a much greater degree than would targeted, direct-mail solicitation of those victims to whom the attorneys' message applies. This scenario is akin to cutting off a leg in order to cure a sore ankle. While the pain in the ankle will be relieved upon amputation, the resulting damage to the body as a whole will far outweigh any pain relieving benefit. The same is true with the thirty-day ban on direct-mail solicitation; in the long run, the reputation of attorneys may be damaged even more than it would have been had the *Went For It* Court upheld the attorney's right to contact potential clients through direct-mail solicitation.

B. Direct-Mail Ban Impairs the Free Flow of Needed Information to Victims

A second ramification of the Court's decision relates to the great injustice that the ruling forces upon the disadvantaged, uninformed, and uneducated victims, who are likely to be misled by those acting on behalf of the tortfeasor immediately following an accident.

To accomplish its goal of preserving the reputation of attorneys, the Bar restricted those attorneys, who may be the most qualified to help accident victims, from directly contacting potential clients within the crucial first month following an injury-causing accident or disaster. The first month is the most crucial time for a victim to retain counsel, since the alleged negligent tortfeasor's insurance adjusters and attorneys are not prohibited from soliciting statements from, and presenting unfair settlement offers to, the victim

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159. *See*, *e.g.*, *Solicitation investigation*, *supra* note 97, at 3 (reporting that a ValuJet accident victim's mother was "bombarded with mail . . . from attorneys all over the country").

during the thirty days following an accident.

Parties who have not been informed of their specific potential rights under the law and the remedies available for their particular situation may not be able to receive this valuable decision-making information through traditional and alternative methods of lawyer advertising. Consequently, these victims may enter into unfair settlement agreements with opposing parties' representatives which will affect their rights to bring proper claims for damages at a later date. The Supreme Court, in *Florida Bar v. Went For It, Inc.*, is essentially trying to preserve the reputation of its own colleagues while systematically disadvantaging those victims to which the law and the Constitution of the United States owe a paramount duty.

C. Recommendations

In an effort to preserve the reputation of the legal profession and to protect the sensitivities of recent accident victims and their families, the Florida Bar should adopt several measures in place of the recently approved thirty-day ban on targeted, direct-mail solicitation.

First, the Florida Bar could require that all solicitation letters contain a disclaimer in plain view on the first page of any such letter, explaining that if recipients have any questions about the propriety of a letter received or desire more information, including the soliciting attorney's bar references and disciplinary record, they may telephone a hotline which the Florida Bar should install at its headquarters in Tallahassee. Additionally, the Florida Bar could establish an Attorney Advertising Commission similar to the one used in Kentucky[160] in order to approve all letters before the attorney can mail them out to prospective clients.

If the Florida Bar remains intent on keeping its thirty-day ban on direct-mail solicitation, it should amend the rule to include provisions which would also keep any tortfeasor's defense attorney or insurance representative acting on behalf of the defense attorney from contacting the victim. It stands to reason that *any* contact within thirty days of the injury-causing accident will have the same impact on the victim's privacy and tranquility and should accordingly be subject to the same restrictions as the solicitation by a

160. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

personal-injury attorney seeking to obtain professional employment.

CONCLUSION

The Supreme Court should not let alleged current popular opinion about the reputation of attorneys control what speech should and should not be permitted. The notion, that citizens are free to communicate freely without having to submit to the tastes of the majority (i.e. freedom from censorship), is the cornerstone of the First Amendment, and the lawyer's right to communicate his willingness to represent an injured party's rights in a court of law is no exception to that notion.

As a result of the decision in *Florida Bar v. Went For It, Inc.*, the Supreme Court has opened the door for state legislatures and bar associations to severely limit the rights of attorneys who practice in personal injury to engage in previously protected commercial speech. Consequently, those accident victims with limited knowledge of their legal rights and remedies will be left to fend for themselves and will have to spend a great deal of time and energy, during a time of pain and grief, sorting through the abundance of mass-media advertisements in search of competent legal representation.

Additionally, public perception of attorneys will continue to decline as those lawyers who specialize in personal-injury practice are forced to stop sending discreet letters addressed to victims in need of their services, in order to concentrate on producing elaborate mass-media advertising campaigns to solicit personal-injury clients. These mass-media campaigns will have to be launched against the general population in order to reach the victims who may have been previously contacted personally via targeted direct-mail. As a result of the inevitable inundation of these advertisements in the mass-media, the public's perception of attorneys as accident-chasing, money grubbers will expand exponentially. So, while the Supreme Court sought to preserve the reputations of attorneys in *Florida Bar v. Went For It, Inc.*, the decision of the majority may have the diametrically opposite effect, while simultaneously limiting injured victims' access to valuable commercial information which they may need in order to obtain competent legal representation.