FIRST AMENDMENT — FREE SPEECH CLAUSE — BAR ASSOCIATION RULES PROHIBITING LAWYERS FROM USING DIRECT MAIL TO SOLICIT POTENTIAL PERSONAL INJURY OR WRONGFUL DEATH CLIENTS WITHIN THIRTY DAYS OF ACCIDENT WITHSTAND FIRST AMENDMENT SCRUTINY — *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

The United States Supreme Court recently held that state bar rules, prohibiting lawyers from sending direct mail solicitations to victims and their relatives within 30 days of an accident or disaster, or accepting referrals in violation of that prohibition, were constitutional. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995). In so holding, the Court reasoned that the solicitation restrictions were justified by Florida's substantial interest in protecting the privacy and tranquility of personal injury victims from intrusive lawyers and in preventing the erosion of public confidence in the legal profession. *Id.* Thus, the Court concluded that the prohibitions withstood intermediate scrutiny as applied to commercial speech. *Id.* at 2381 (citing *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980)). Although constitutionally cognizable, the Court's decision significantly reduces the level of protection afforded commercial speech without clearly identifying the parameters of that protection.

In 1989, the Florida Bar (the "Bar"), responding to a two-year study examining the effects of lawyer advertising, determined that several changes to its advertising rules were necessary. *Id.* at 2374. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar submitted its amended rules to the Supreme Court of Florida for approval. *Id.* Upon the recommendation of the Bar, the Court adopted the proposed amendments with only slight modifications. *Id.* (citing *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar — Advertising Issues*, 571 So.2d 451 (Fla. 1990)).

Two of the amended rules, Rule 4-7.4(b)(1) and Rule 4-7.8(a), were the subject of the controversy in *Florida Bar v. Went For It, Inc.* *Id.* Rule 4-7.4(b)(1) prohibited any written communications with a prospective client concerning professional representation in a personal injury or wrongful death action involving the addressee or a relative of that person if the cause of the injury occurred within thirty days of the communication. *Id.* (citing RULES REGULATING THE FLORIDA BAR Rule 4-7.4(b)(1)(A) (1990)). Rule 4-7.8(a) provided that a lawyer shall not accept referrals from a referral service whose conduct violated the Rules of Professional Conduct. *Id.* (citing RULES REGULATING THE FLORIDA BAR Rule 4-7.8(a)(1) (1990)). Together, these rules created a thirty-day period, during which lawyers were prohibited from either directly or indirectly using the mail to solicit accident victims or their relatives. *Id.*

In March 1992, G. Stewart McHenry, a member of the Florida Bar, and his wholly owned lawyer referral service, Went For It, Inc., filed an action in the United States District Court for the Middle District of Florida seeking declaratory and injunctive relief and challenged the constitutionality of the thirty-day ban on direct mail solicitation. *Id.* McHenry routinely sent targeted solicitations to accident victims and their survivors within thirty days of such accidents or disasters and claimed that Rule 4-7.4(b)(1) and Rule 4-7.8(a) violated the First and Fourteenth Amendments. *Id.* For reasons unrelated to this suit, however, McHenry was disbarred in October 1992, and John T. Blakely, another Florida lawyer, was substituted as the plaintiff. *Id.* (citing *The Florida Bar v. McHenry*, 605 So.2d 459 (Fla. 1992)).

The parties subsequently filed competing summary judgment motions, which were referred to a Magistrate Judge. *Id.* The Magistrate Judge concluded that the Florida Bar had a substantial governmental interest in protecting the privacy and tranquility of accident victims and their relatives, as well as protecting such individuals from undue influence. *Id.* The Magistrate Judge found that the rules directly served the legitimate governmental interests of the Bar and were reasonably necessary to fulfill such interests. *Id.* Hence, the Magistrate Judge recommended that the District Court grant the Florida Bar's motion for summary judgment. *Id.*

Relying on *Bates v. State Bar of Arizona* and subsequent case law, the District Court rejected the Magistrate Judge's recommendation and declared that lawyer advertising was commercial speech protected under the First Amendment. *Id.* (citing *McHenry v. Florida Bar.*, 808 F. Supp. 1543 (M.D. Fla. 1992)). Accordingly, the District Court entered judgment in favor of the plaintiffs. *Id.* (citing *McHenry*, 808 F. Supp. 1543).

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision on similar grounds, noting, however, that it was "disturbed that *Bates* and its progeny require[d this] decision." *Id.* at 2375 (quoting *McHenry v. Florida Bar*, 21 F.3d 1038, 1045 (1994)).

The Supreme Court of the United States granted *certiorari* to decide whether the Florida Bar rules prohibiting direct mail solicitation violated the Free Speech Clause of the First Amendment. *Id.* (citing *The Florida Bar v. McHenry*, 115 S. Ct. 42 (1994)). The Court reversed the circuit court's decision and held that the solicitation restrictions did not violate the plaintiffs' constitutional rights. *Id.* at 2381.

Writing for the majority, Justice O'Connor first noted that constitutionally protecting attorney advertising, and commercial speech in general, is of relatively recent vintage. *Id.* at 2375. The Justice explained that, until the mid-1970's, the Court adhered to the broad rule set out in *Valentine v. Chrestensen*, which held that, while the First Amendment guards against government restriction on speech in most contexts, it imposed no such restraint on purely commercial advertising. *Id.* (citing *Valentine*, 316

U.S. 52, 54 (1942)). The majority explained that beginning with its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court began to afford greater protection to commercial speech and rejected the idea that commercial speech "lack[ed] all protection." *Id.* (quoting *Virginia State Board*, 425 U.S. 748, 762 (1976)). The Court noted that, although the holding in *Virginia State Board* was limited to advertising by pharmacists, it was applied the following year in *Bates v. State Bar of Arizona* to invalidate a state rule prohibiting lawyers from advertising in newspapers and other media for "routine" legal services. *Id.* (citing *Bates*, 433 U.S. 350, 372 (1977)). Thus, Justice O'Connor concluded that the *Bates* decision provided the foundation for the firmly established principle that lawyer advertising is commercial speech protected by the First Amendment. *Id.*

After considering the Court's commercial speech jurisprudence, the majority explained that, while the First Amendment's protection of commercial speech was not absolute, the Court has carefully distinguished commercial speech from categories of speech traditionally considered within the "core" of the First Amendment. *Id.* In this context, the Court reiterated its position that commercial speech enjoys a limited measure of protection and, consequently, is subject to regulation that would otherwise be impermissible if applied to noncommercial expression. *Id.* (citing *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477 (1989)). Hence, the Justice declared that, when determining the constitutionality of restrictions on commercial speech, the Court engages in "intermediate" scrutiny, as that standard was articulated in *Central Hudson Gas & Electric v. Public Service Commission of New York*. *Id.* at 2375-76.

Under *Central Hudson*, the majority noted that the government may freely regulate commercial speech if the speech is either misleading or concerns unlawful activity. *Id.* (citing *Central Hudson*, 447 U.S. at 563-64). The Court further explained that, in the absence of such factors, *Central Hudson* permits the government to regulate commercial speech if there is a substantial interest to support the regulation, the restriction directly and materially advances the interest, and the regulation is narrowly tailored to serve the government's interest. *Id.* (citing *Central Hudson*, 477 U.S. at 564-65). Justice O'Connor concluded that the advertising at issue was not misleading and did not relate to unlawful activity and, therefore, the substantial interest prong of *Central Hudson* was the applicable standard. *Id.*

Applying *Central Hudson*, the Court first considered whether the thirty-day prohibition on direct mail solicitation furthered a substantial government interest. *Id.* The majority began by noting that, unlike rational basis review, the *Central Hudson* test does not allow the Court to substitute the actual underlying governmental interests with other potentially legitimate interests. *Id.* (citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993)).

Accordingly, the Court based its analysis on the Florida Bar's claim that it had a substantial interest in protecting the privacy and tranquility of personal injury victims and their relatives, and in preventing the erosion of public confidence in the legal profession. *Id.* (citations omitted).

Justice O'Connor declared that the Court had "little trouble crediting the Bar's interest as substantial." *Id.* The Justice reasoned that on various occasions the Court accepted the proposition that states have a compelling interest in overseeing the practice of certain professions and may establish appropriate standards and regulations. *Id.* (citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 460 (1978); *Cohen v. Hurley*, 366 U.S. 117, 124 (1961)). Furthermore, the majority noted that the Court has consistently held that the protection of privacy and tranquility in the home is of utmost importance in the preservation of a free and civilized society and, thus, constitutes a substantial state interest. *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988)).

Recognizing the existence of a substantial state interest, the Court shifted its analysis to the second requirement of the *Central Hudson* test. *Id.* at 2377. Justice O'Connor posited that this prong required a showing that the enumerated harms were actual and that the restricting legislation served to materially alleviate those harms. *Id.* (citing *Edenfield*, 113 S. Ct. at 1800). Citing the statistical and anecdotal data contained in the 106-page summary of the Florida Bar's two-year study of lawyer advertising and solicitation, the majority concluded that the record substantiated the state's concerns. *Id.* Particularly, the Court found that the study supported the Bar's contention that the Florida public viewed direct mail solicitations immediately after a personal tragedy as an intrusion of privacy that reflected poorly upon the profession as a whole. *Id.*

The majority next addressed the concerns raised by Justice Kennedy's dissent as they related to the application of the *Central Hudson* test. *Id.* at 2378. The Court noted that the dissent complained that the sample size and selection procedures employed by the Florida Bar's study were inadequate and that no copies of the actual studies were included in the record. *Id.* Responding to these complaints, Justice O'Connor reiterated the majority's belief that the evidence proffered by the Bar was sufficient to meet the standard elaborated in *Edenfield*. *Id.* Moreover, the Justice explicated that in other First Amendment contexts the Court has neither required empirical data to be supported by a surplus of background information, nor has it limited litigants to studies and anecdotes particular to the locale where such restrictions were sought. *Id.* (citations omitted). Accordingly, the Court declared that the ban on direct mail solicitation targeted a concrete, non-speculative harm. *Id.*

Further addressing the concerns raised by the dissent, the majority rejected the dissent's effort to distinguish the Florida Bar's contentions from previous case law. *Id.* The Court declared that the court of appeal's reliance upon *Shapero v. Kentucky Bar Association*, which concluded that a targeted letter does not invade the privacy of the recipient anymore than an identical letter mailed at large, was inappropriate. *Id.* (citing *Shapero*, 486 U.S. 466, 476 (1988)). Justice O'Connor opined that *Shapero* differed in several fundamental respects from the case at bar. *Id.* First, the treatment of privacy in *Shapero* was casual, as the State focused exclusively on the inherent danger of invading personal privacy through direct mail solicitation. *Id.* (citing *Shapero*, 486 U.S. at 475). Secondly, it dealt with a ban on all direct mail solicitation regardless of time frame or recipient. *Id.* (citing *Shapero*, 486 U.S. at 475). Additionally, the Justice posited that in *Shapero* the State assembled no evidence to demonstrate actual harm caused by the targeted mail. *Id.* (citing *Shapero*, 486 U.S. at 475).

Noting these distinguishing factors, Justice O'Connor asserted that the intrusion targeted by the Florida Bar stemmed not from the manner in which the lawyer learned of the accident, but rather from the lawyer's confrontation with the victim or relative to solicit business while the "wounds of the tragedy were still open." *Id.* at 2379. Thus, the Court concluded that a letter mailed at large differs in kind from a targeted solicitation as it does not willingly or knowingly invade the privacy and tranquility of the bereaved or injured, nor does it cause the reputational harm to the profession that was revealed in the Florida Bar study. *Id.*

Similarly, the Court rejected the dissent's use of *Bolger v. Youngs Drug Products Corporation* as it was not dispositive of the issue, despite its superficial resemblance to the case at bar. *Id.* The majority noted that, in *Bolger*, the Court rejected the federal government's paternalistic effort to ban potentially "offensive" and "intrusive" direct mail advertisements for contraceptives on the basis that the recipients could avoid the objectionable mailing by averting their eyes, thereby minimizing the harm by effectuating a "short, though regular journey from mail box to trash can." *Id.* (citing *Bolger*, 463 U.S. 60, 72 (1983)). Justice O'Connor articulated, however, that the harm targeted by the Florida Bar could not be eliminated by simply discarding the unwanted solicitation. *Id.* Explaining that the purpose of the thirty-day restriction on direct mail solicitation was to prevent the erosion of public confidence in the profession, the majority asserted that the Bar was not concerned with the public's "offense" in the abstract, but rather the effect such "offense" ultimately has on the perception of the profession it regulates. *Id.* Thus, the Court concluded that the act of discarding the letter would be meaningless in combating the detrimental impact of such mailings on the profession as the harm is inflicted immediately upon receipt of the solicitation. *Id.*

Shifting its analysis to the third and final prong of the *Central Hudson* test, the majority examined the relationship between the Florida Bar's interests and the means chosen to serve those interests. *Id.* at 2380. The Court began by explaining that, within the context of commercial speech, the Court determines whether there exists a "reasonable fit" between the public policy end and the legislative means chosen to accomplish those ends. *Id.* (citing *Fox*, 492 U.S. at 480). The Justice noted that, in applying this standard, the Court is interested in finding that the means are narrowly tailored to achieve the desired objective. *Id.* (citing *Fox*, 492 U.S. at 480). Setting forth this standard, the Court addressed the respondent's claim that the scope of the restriction was too broad. *Id.*

First, the Court considered the respondent's argument that the prohibition did not discriminate between victims in terms of the severity of their injuries and intensity of their grief. *Id.* Rejecting this position, the majority reasoned that drawing lines based upon a subjective interpretation of "severity" and "intensity of grief" would make it impractical and virtually impossible to distinguish those circumstances in which such mailings would be appropriate. *Id.* Given the prohibition's overall objective of eliminating mailings that are deemed to be a source of distress to Floridians, the Court concluded that it was not overly broad and that it adequately served the state's interest. *Id.*

Justice O'Connor next considered the respondent's argument that the rule may prevent citizens from learning about their legal options and may place them at a disadvantage as opposing council and insurance adjusters clamor for their attention. *Id.* The Court again rejected the respondent's argument, citing the brief period of the restriction and the other available means for injured Floridians to be apprised of their legal rights. *Id.* The majority opined that the Court's previous lawyer advertising cases have afforded great leeway to devise innovative ways of attracting business. *Id.* The Court reasoned that these decisions, coupled with Florida's liberal rules permitting television, radio, and print advertising, provide the public with ample opportunity to receive information during the thirty-day blackout period. *Id.* at 2381. Justice O'Connor concluded by asserting that such alternative channels were sufficient to protect the respondent's free speech rights and that the Court could find no defect in the Florida restrictions. *Id.*

The Court concluded by declaring that, while there are circumstances in which the Constitution fully protects the expressive activity of attorneys, the pure commercial context of advertising will remain subject to a lesser degree of protection. *Id.* In addition, because the states traditionally have been responsible for regulating the standards of conduct of lawyers, the majority opined that it was all the more appropriate to limit its scrutiny of state restrictions to a level commensurate with the "subordinate position" of commercial speech. *Id.* Accordingly, the Court held that the thirty-day

restriction on direct mail solicitation of accident victims and their relatives withstood the intermediate scrutiny of restrictions on commercial speech set forth in *Central Hudson*. *Id.* The Court, therefore, reversed the judgment of the Court of Appeals granting respondent's motion for summary judgment. *Id.*

Dissenting, Justice Kennedy, joined by Justices Stevens, Souter and Ginsburg, asserted that the majority opinion undercut the ability of attorneys to communicate their willingness to assist potential clients through traditionally protected speech and, consequently, upset leading First Amendment precedent at the expense of those most in need of legal assistance. *Id.* (Kennedy, J., dissenting). Preliminarily, the dissent noted that it would be naive to consider the matter at bar simply a matter of commercial speech, for, in many instances, the prohibited communication may be vital to the intended recipient's right to petition the courts for grievances. *Id.* at 2382 (Kennedy, J., dissenting). Justice Kennedy explained that the complex nature of expression was the primary reason why commercial speech has become such an essential part of First Amendment jurisprudence. *Id.* Accordingly, the Justice concluded that, if commercial speech rules were to control this case, it would be imperative that they be applied with exacting care and fidelity to precedent. *Id.*

Justice Kennedy concluded the dissent by focusing on the majority's application of the *Central Hudson* test to the Florida Bar rules. *Id.* The dissent attacked the majority's application of the first prong by asserting that the Bar failed to demonstrate a substantial interest in restricting the speech at issue. *Id.* Justice Kennedy noted that, while the state's interest in protecting the privacy of its citizens has been recognized in the Court's decisions, the general proposition did not follow in the instant matter. *Id.* The Justice opined that the Court's decision in *Shapero* was controlling, as it held that direct mail solicitation was not inherently overreaching nor did it exert undue influence on the recipient. *Id.* (citing *Shapero*, 486 U.S. at 475-76). The dissent explained that the relevant inquiry was not whether potential clients, whose condition made them susceptible to undue influence, existed, but whether the communication presented a means by which lawyers could exploit that susceptibility. *Id.* (citing *Shapero*, 486 U.S. at 474). The Justice rejected the majority's attempt to assert the former by reiterating the language of *Bolger*, which held that, although protective speech may be offensive to some, there continues to be a presumption against suppression where the audience is not "captive." *Id.* at 2383 (Kennedy, J., dissenting) (citing *Bolger*, 463 U.S. at 71). In conclusion, Justice Kennedy declared that, if the majority intended to overrule the Court's prior decisions forbidding restrictions on potentially offensive speech, it should clearly express those intentions. *Id.*

Briefly, the dissent addressed the Bar's second claimed interest in protecting the dignity and reputation of the legal profession. *Id.* Justice Kennedy sharply criticized the majority for invoking censorship upon an entire profession to alleviate the unacceptable behavior of a few. *Id.* The dissent denounced such censorship as antithetical to the fundamental principles of free expression and manipulative of the public's opinion of the legal system. *Id.*

Moving to the second prong of the *Central Hudson* test, Justice Kennedy asserted that, even if the interest were substantial, the regulation failed to directly and materially advance those interests. *Id.* at 2383-84 (Kennedy, J., dissenting). The Justice opined that the Bar did not meet its burden of demonstrating real harms existed, let alone show that the regulation directly and materially advanced those interests. *Id.* at 2384 (Kennedy, J., dissenting). The dissent argued that, despite its presentation of a 106-page summary of its two-year study, the Florida Bar failed to include actual surveys, indications of actual sample sizes and selection procedures, explanations of methodology, or a discussion of excluded results. *Id.* Justice Kennedy noted that a small percentage of the report was actually related to direct mail solicitation and that most of these consisted of self-serving and unsupported statements. *Id.* Consequently, the Justice concluded that the Bar failed to demonstrate that the regulation directly and materially advanced the elimination of the asserted harms. *Id.*

Addressing the third and final prong of the *Central Hudson* test, the dissent concluded that the Bar rule created a flat ban that prohibited far more speech than necessary. *Id.* First, Justice Kennedy posited that the prohibition applied to all accident victims regardless of the injury's "severity." *Id.* The Justice rejected the majority's argument that drawing lines between severe and less serious injuries would be impractical by pointing out that such a delineation would be analogous to the criminal justice system which routinely distinguishes between various degrees of bodily harm. *Id.* at 2384-85 (Kennedy, J., dissenting). Secondly, the dissent asserted that such a prohibition would prevent citizens from learning about their legal options and place them at a disadvantage. *Id.* at 2385 (Kennedy, J., dissenting). In particular, the Justice explained that such a ban would victimize those with less severe injuries and those who lack education, linguistic ability, or familiarity with the legal system because many would not be aware of their legal rights. *Id.* Opposing the majority's justification for the ban on direct mail solicitation, Justice Kennedy concluded by noting that such solicitations alone do not form a contract between the lawyer and the recipient, and serve as a means of informing the potential client of his or her rights and options. *Id.*

Finally, the dissent noted that it was ironic that, for the first time since *Bates*, the Court has retreated from its expansive policy regarding

commercial speech to shield its own profession from criticism. *Id.* at 2386 (Kennedy, J., dissenting). Rejecting the proposition that the Constitution allows states to promote the public image of the legal profession by suppressing information about the business practices of lawyers, Justice Kennedy concluded that the image of the profession cannot be enhanced without improving the substance of the profession's practice and ensuring that "the ethical standards of lawyers are linked to the service and protection of clients." *Id.* (quoting *Ohralik*, 436 U.S. at 461).

Analysis

Went For It, Inc. represents a retreat from a twenty-year-long expansion of First Amendment protection for commercial speech. For many states that have grappled with the issue of direct mail solicitation, this decision frees them from the concern that reasonable regulations might violate the First Amendment and opens the door for the creation of greater restrictions on how, when, and to whom commercial speech may be directed. Nonetheless, while departing from the increasingly expansive First Amendment protection afforded lawyer advertising in the years following *Bates*, *Went For It, Inc.* remains consistent with the underlying premise that commercial speech enjoys only a limited measure of protection. *Id.* at 2375 (citing *Fox*, 492 U.S. at 477).

Applying "intermediate" scrutiny to restrictions on commercial speech, as set forth in *Central Hudson*, the majority recognized that the Florida Bar had compellingly sufficient interests both in protecting the privacy and tranquility of personal injury victims from the intrusive conduct of lawyers and in preventing the erosion of confidence that the profession has experienced as a result of such repeated invasions. *Id.* at 2381. Admittedly, both of these interests have been recognized in numerous contexts as substantial. The Court, however, opens itself to criticism by merely protecting the reputation of lawyers in the name of privacy and the rights of personal injury victims.

Clearly, the state has an interest in protecting victims and their relatives from invasive and offensive conduct, but the force of this interest is immaterial in light of the majority's recognition that the Florida Bar was not concerned with the public's "offense" in the abstract, but rather in the effect that such "offense" has on the perception of the legal profession. *Id.* at 2379. Such language suggests that the Court's true focus was protecting the reputation of lawyers and not injured parties and their relatives. Consequently, as the dissent properly noted, the inquiry focused on whether the communication presented a means by which lawyers could exploit the susceptibility of recently traumatized citizens, not whether there existed potential clients whose condition made them susceptible to undue influence.

Id. at 2382 (Kennedy, J., dissenting) (citing *Shapero*, 486 U.S. at 474). Given the facts of this case, the Court's decision reaches the appropriate resolution, but creates a potentially harmful precedent to the extent that future regulations may fail to address the true harm inflicted by direct mail solicitations at the expense of legitimate commercial speech.

Jonathan M. Remshak