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A New Direction in Attorney Advertising: Florida Bar v. Went for It, Inc.

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NOTE

A NEW DIRECTION IN ATTORNEY ADVERTISING: *FLORIDA BAR V. WENT FOR IT, INC.*

INTRODUCTION

Attorney advertising is an issue that has sparked intense debate among both members of the bar and members of the public. Advertising has been justified as a means of informing the public of their legal rights and the availability of legal services. But advertising is also viewed as "trolling for cases"[1] and as an activity beneath the dignity of such a noble profession.[2] Attempts to restrict advertising produce intense debate. Those in favor of advertising cry censorship at any attempt to restrict it. They attack restrictions as an attempt by the established bar to close ranks and limit the ability of new, unestablished attorneys to develop a clientele.[3] Those opposed to advertising point to the lack of professionalism exhibited by many of the advertisements and the adverse impact they have on the profession's image. They argue that certain types of mass media advertising perpetuate the public's image of attorneys as hired guns, ambulance chasers, and money hungry sharks searching for someone to sue.[4] Direct mail solicitations and demeaning television commercials are the usual targets of such criticism.

Recently, the Supreme Court addressed the issue of direct mail solicitation in *Florida Bar v. Went For It, Inc.*[5] The Court held a thirty-day ban on direct mail solicitation of accident victims constitutional. The decision marks what could be a major turning point in the Court's stance on attorney advertising. For the first time, the Court recognized "upholding the integrity of the legal profession" as a state interest sufficient to justify restrictions on attorney advertising.

1. E. Vernon F. Glenn, *A Pox on our House: Televised Lawyer Advertising Compromises the Profession*, A.B.A. J., Aug. 1993, at 116.

2. Whether the law is still a noble profession is a point of debate in itself. It is this author's position that despite the economic factors at work in the legal marketplace, practice of the law can and should be treated as a profession rather than a trade. *See infra* notes 6-9 and accompanying text.

3. *See, e.g.*, Whitney Thier, Comment, *In a Dignified Manner: The Bar, the Court, and Lawyer Advertising*, 66 TUL. L. REV. 527 (1991).

4. *See, e.g.*, Katherine A. LaRoe, *Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct Mail Solicitation*, 25 St. Mary's L. J. 1513 (1994).

5. 115 S. Ct. 2371 (1995).

Part I of this note focuses on the history of attorney advertising and restrictions against it. Part II examines the majority and dissenting opinions in *Florida Bar v. Went For It, Inc.*, focusing on the recognition of this new state interest. Part III examines the need for restrictions and ways in which this new state interest might be used to justify an increased level of control over attorney advertising by the States. Part IV stresses the need for state bar organizations to implement restrictions to provide some level of dignity and professionalism to attorney advertising and a greater sense of integrity to the profession as a whole.

BACKGROUND

Restrictions on attorney advertising are not of recent vintage. In fact, the restrictions can be traced to the early common law in England. Practice of the law was a profession, as opposed to a trade or occupation, distinguished from other callings by the public service inherent in its practice.[6] "The term [profession] refers to a group of men pursuing a learned art as a common calling in the spirit of a public service. . . ."[7] Pursuing this learned art was the lawyer's primary goal; earning a livelihood was incidental to that.[8] Because income was simply a by-product of the profession, soliciting business in any way was viewed as inappropriate and beneath the dignity of such a noble profession.[9]

The notion of law as a profession carried over to the colonies as did the restrictions on openly soliciting business. The restrictions became a matter of ethics drafted into early codes and canons adopted by newly forming bar associations.[10] These ethical rules remained in place well into the last quarter of this century. Attorney advertisements were treated like any other commercial speech which, until the 1970's, was given no constitutional protection.[11] The state, through its

6. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

7. *Id.*

8. *Id.* Those entering the Inns of Court in England were usually second sons of wealthy landowners whose family wealth allowed them to practice the profession without concern for monetary gain. The lack of concern for monetary gain might also be attributed to the influence of ecclesiastical courts in England in which priests were often also members of the bar. *Id.* at 95-130.

9. At this point the rules against soliciting business were a matter of etiquette. *See* H. DRINKER, LEGAL ETHICS 5, 210-11 (1953).

10. *See* POUND, *supra* note 6, at 175-221 for discussion of Bar Organizations in their formative years.

11. The rule had been established that "while the First Amendment guards against government restriction of speech in most contexts, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.' " Florida Bar v. Went For It, Inc., 115 S. Ct. at 2375 (quoting Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)).

bar association, was free to restrict commercial advertising by attorneys.

That rule remained the law until 1977 when the Supreme Court decided *Bates v. State Bar of Arizona*.[12] In *Bates*, an attorney placed an advertisement in a local paper listing not only his name, address, and areas of practice, but detailing set fees for certain services.[13] The advertisement was a clear violation of local Bar Rules which prohibited any form of commercial advertisement by attorneys.[14] The Court held that although the advertisement was commercial speech, it was entitled to some degree of constitutional protection.[15] The restriction against advertising fees for routine legal services was held to be unconstitutional. The Court held that "advertising by attorneys may not be subjected to blanket suppression"[16] and summarily dismissed claims that advertising would have a detrimental impact on the level of professionalism or public opinion of the profession.[17]

In his dissent, Justice Powell recognized the reasoning behind relaxing the proscription against attorney advertising but expressed his reluctance to provide constitutional protection to commercial speech.[18] Powell also argued that the majority had gone too far in removing the state's ability to supervise activities of the members of the legal profession, and predicted that this decision would have unforetold consequences.[19] Powell argued that the state has an interest in regulating lawyers sufficient to justify restrictions on advertising: "the interest of the State in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been officers of the court."[20]

In a series of subsequent cases, the Court repeatedly upheld the general rule established in *Bates* that lawyer advertising was commercial speech subject to some level of constitutional protection.[21] The

12. 433 U.S. 350 (1977).

13. *Id.*

14. *Id.* at 355.

15. This decision was an extension of the Court's earlier ruling in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1975), that commercial advertisements were entitled to some degree of Constitutional protection.

16. *Bates*, 433 U.S. at 383.

17. *Id.* at 368-69.

18. *Id.* at 398.

19. *Id.* at 389. "[I]t is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar as officers of the court, and the authority of the respective States to oversee the regulations of the profession have been weakened." *Id.*

20. *Id.* at 401.

21. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state interest in preventing undue influence justified rule barring in-person solicitation); In Re R.M.J., 455 U.S. 191 (1982) (attorney's advertisement of services not explicitly listed in Disciplinary Rule outlining permissible advertising protected); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,

Court analyzed attorney advertising cases using the "intermediate scrutiny" test developed for commercial speech cases in the *Central Hudson* case.[22] Under *Central Hudson*, advertising may be prohibited when it is misleading or concerns an unlawful activity.[23] If the activity is lawful and not misleading, the advertisement may still be regulated if the state meets a three-prong test: 1) the state must assert a substantial interest in support of the regulation; 2) the regulation must directly advance the governmental interest asserted; and 3) the regulations must be no more extensive than necessary to serve that interest.[24]

In *Bates* and its progeny, the states proffered various "interests" in support of their restrictions on attorney advertising. These interests included maintaining professionalism among licensed attorneys,[25] avoiding inherently misleading advertising,[26] preventing lawyers from stirring up unnecessary litigation,[27] protecting the privacy of the home,[28] avoiding the high cost to states of determining which ads were deceptive and which were not,[29] ensuring that attorneys maintain dignity in their communications with the public,[30] and avoiding confusion of the general public.[31] The Court found each of these to be insufficient justifications for restrictions. In fact, the state in *Bates* had proffered its interest as protecting the integrity of the legal profession, but the Court felt that "the assertion that advertising will diminish the attorney's reputation in the community is open to question."[32]

Following Justice Powell's reasoning, dissenting opinions were filed in several of the cases that followed *Bates*. In *Zauderer v. Office of Disciplinary Counsel of Ohio*,[33] Justice O'Connor continued to argue for the state's interest in protecting the integrity of the legal profession. "The States understandably require more of attorneys than of others engaged in commerce. Lawyers are *professionals*, and as such

471 U.S. 626 (1985) (advertisements and solicitations of Dalkon Shield victims which contained legal advice was constitutionally protected); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (solicitations sent directly to members of public facing foreclosure held protected from restriction).

22. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980).

23. *Id.* at 566.

24. *Id.*

25. Bates v. State Bar of Arizona, 433 U.S. 350, 368 (1977).

26. *Id.* at 372.

27. *Id.* at 376.

28. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988).

29. Zauderer v. Ohio Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 646 (1985).

30. *Id.* at 648.

31. *Id.*

32. *Bates*, 433 U.S. at 369.

33. 471 U.S. 626 (1985).

they have greater obligations."[34] Justice O'Connor further argued that the State's interest extends to ensuring that lawyers "[c]onsistently exercise independent professional judgment on behalf of their clients."[35] In *Shapero v. Kentucky Bar Association*,[36] Justice O'Connor again argued in dissent that "States should have considerable latitude to ban advertising . . . that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."[37] It was on this foundation that the Court decided *Florida Bar v. Went For It, Inc.*

THE CASE

In late 1990, the Florida Supreme Court adopted amendments to the State's lawyer advertising rules proposed by the Florida Bar. These amendments included a ban on direct mail solicitation of accident victims within thirty days of an accident.[38] Went For It, Inc., a lawyer referral service, filed an action for declaratory and injunctive relief. The service alleged that it routinely sent targeted solicitations to accident victims within thirty days after accidents and wished to continue doing so.[39] The District Court entered summary judgment for the plaintiffs,[40] and the Eleventh Circuit affirmed relying on *Bates* and its progeny.[41]

Justice O'Connor delivered the opinion for the majority. O'Connor wrote that "States have a compelling interest in the practice of professions within their boundaries,"[42] and that the regulation in this case was a valid restriction designed "to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that . . . is universally regarded as deplorable and beneath common decency."[43] In support of its contention, the Florida Bar submitted a 106 page summary of its two-year study of lawyer advertising and solicitation, which the Court found to be more than sufficient.[44]

In dissent, Justice Kennedy argued that the thirty-day ban prohibited attorneys from providing potential clients with vital information

34. *Id.* at 676 (O'Connor, J., dissenting).
35. *Id.* at 678.
36. 486 U.S. 466 (1988).
37. *Id.* at 485 (O'Connor, J., dissenting).
38. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2374 (1995).
39. *Id.*
40. McHenry v. The Florida Bar, 808 F. Supp. 1543 (M.D. Fla. 1992) (McHenry is the owner and operator of Went For It, Inc. and was not a party to the case on appeal).
41. 21 F.3d 1038 (11th Cir. 1994). The Court stated that "[w]e are disturbed that *Bates* and its progeny require the decision we reach today." *Id.* at 1045.
42. *Florida Bar*, 115 S. Ct. at 2376 (citation omitted).
43. *Id.*
44. *Id.* at 2377.

concerning their legal rights.[45] Kennedy also argued that this ban kept plaintiffs' attorneys at bay while insurance adjustors and their attorneys were free to contact the unrepresented person.[46]

ANALYSIS

A New State Interest

The majority opinion in *Florida Bar v. Went For It, Inc.* marks a dramatic turning point in the Supreme Court's analysis of attorney advertising cases.[47] Since the Court's decision in *Bates*, with only one exception, every case which has reached the Court has resulted in an expansion of the advertising activities in which an attorney may engage.[48] The *Florida Bar* case is the first to uphold a restriction on advertising not based on overreaching or undue influence.[49]

This decision provides state bar organizations with a new justification for restricting attorney advertising. With the goal of protecting the integrity of the legal profession, states can now adopt more stringent regulations to control advertising that is distasteful or demeaning. For example, a television commercial airing locally in North Carolina shows an attorney sitting in what appears to be one of those quarter-a-ride spaceships you would find in front of a discount store. The attorney promotes his firm by promising to come to an accident victim wherever they may be. The attorney, in his spaceship, then flies off into space with the firm's "jingle" playing in the background.[50] The commercial never mentions time limits within which to bring suit, rights of the injured to locate an attorney, nor does it warn potential clients against the danger of signing settlement papers. In short, the commercial conveys none of the informational aspects of the law Jus-

45. *Id.* at 2381.

46. *Id.*

47. This turning point was caused not so much by a change of heart among members of the Court but by the recent changes in its composition. "[T]he dissenters - most recently O'Connor, Rehnquist, and Scalia - have remained on the Court, while the strongest advocates of constitutionally protected commercial speech - Brennan, Marshall, and Blackmun - have left the Court." Jonathan K. Van Patten, Essay, *Lawyer Advertising, Professional Ethics, and the Constitution*, 40 S.D. L. Rev. 212, 216 (1995). Justice Thomas, not surprisingly, joined his conservative counterparts in the majority. Of the other recent appointees - Justices Souter, Ginsburg, and Breyer - only Justice Breyer joined the majority. Stephen Gillers, an ethics professor at New York University School of Law noted that "[i]f two of the newer justices were prepared to join the [*Shapero*] dissenters in overruling *Bates*, this case could have been a real Waterloo for attorney advertising. Instead it is a defeat for attorney advertising that is painted on a very small canvas." Richard C. Reuben, *Florida Bar's Ad Restriction Constitutional*, A.B.A. J., Aug. 1995, at 20.

48. *See supra* note 21 for list of post-*Bates* cases. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 477 (1978) is the only exception to that rule.

49. *Ohralik* involved undue influence and overreaching inherent in face-to-face solicitation.

50. Commercial for the law offices of Joynes and Beiber (WRAL television broadcast, Sept. 17, 1995).

tice Kennedy felt inclined to protect.[51] These types of commercials which convey no vital information and place the profession in such disrepute could be controlled by more stringent restrictions justified in the name of protecting the integrity of the legal profession.

The Need for Restrictions

Recognition of the state's interest in protecting the integrity of the legal profession is long overdue. With the string of Supreme Court cases since *Bates*, states have all but lost the ability to control advertising by attorneys. The only restriction the Court had upheld to this point prohibited in-person solicitations.[52] With their hands tied by the Supreme Court, state bar associations had little power to stop a tidal wave of advertising that has had an increasingly adverse impact on the public's perception of the role lawyers play in society.[53] In *Bates,* Justice Blackmun argued that, "with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of the profession and of the legal system."[54] Unfortunately, this has not proven to be the case. Attorney advertising has increasingly fallen to new levels of bad taste. It is ironic that in a decision that dramatically reduced the state's power to regulate attorney advertising, Justice Blackmun argued that, "it will be in [the interest of the honest and straightforward attorney], as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust."[55] Justice Blackmun left it to members of the bar to police their own but took away their "police" powers.

Critics of the majority may ask why there is a need to restrict advertising at all. What actual harm is being done? Commercial advertising, particularly distasteful commercials, adversely affect not only the public's perception of attorneys, but also of the courts and the entire judicial system.[56] We as attorneys hold a unique and powerful position in society. We are the means of access to the courts. The public, in most cases, must seek out the assistance of an attorney whenever they have a wrong that needs to be righted. But with that power comes responsibility. If attorneys are the gateway to the legal system, and the public has no respect for attorneys, then the public will like-

51. *See supra* note 45 and accompanying text.

52. *Ohralik*, 436 U.S. 447 (1978).

53. *See* John Sansing, *The Business of Lawyers is — Lawyers*, S.F. CHRON., Feb. 17, 1991, at Z12; *Legal Crackdown; It's Time to Clean up Predatory Tactics*, DAL. MORN. NEWS, Mar. 24, 1993, at A24.

54. *Bates*, 433 U.S. at 379.

55. *Id.*

56. W. Ward Reynoldson, *The Case Against Lawyer Advertising; Professionalism*, A.B.A. J., Jan. 1989, at 60.

wise have no respect for the legal system. "Solemn forums for the litigation of cases whose lawyer-officers resemble carnival barkers at the doors scarcely can avoid being viewed as carnivals, or at least, places where justice is bought and sold as in any marketplace."[57] As officers of the court, we have a responsibility to uphold the integrity of the entire legal system. The profession itself carries with it a dignity[58] which each of us has a responsibility to uphold.[59] The individual States through their bar associations should have the power to determine which advertisements and solicitations lower the integrity of the profession and restrict them accordingly. The *Florida Bar* decision gives them that power.

In his dissent, Justice Kennedy argues that after an accident it may be urgent to gather evidence, interview witnesses, and perform an adequate investigation.[60] Kennedy argues that the need for this information creates a vital interest in expression that is jeopardized when an attorney can not direct a letter to the victim explaining this fact.[61] This argument ignores the alternative methods of communicating information on the need and availability of legal services (and sounds very similar to a justification for ambulance chasing). Television, radio, and newspaper advertisements as well as the yellow pages are replete with information on legal rights and available representation. The information is there for the taking. It is up to members of the public to make the conscious decision to assert their legal rights and contact an attorney. Attorneys can not do it for them.

Kennedy also argues that while plaintiffs' attorneys are held at bay, insurance adjustors and their attorneys are free to contact the victim, gather evidence, and offer settlement.[62] Again, this argument assumes that the public is unaware of their legal rights and the availability of counsel. For the vast majority, the information sources discussed above are more than sufficient. The public should not be forced to endure invasions of their privacy for the sake of the few ill-informed. If in fact these ill-informed exist, bar associations should undertake an effort to identify and educate them as to their legal rights.

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57. *Id.*

58. By "dignity" I do not mean an arrogance or self-indulgence. I mean a sense of respect for and understanding of the responsibility with which we as attorneys have been vested.

59. "This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours." Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting).

60. *See Florida Bar*, 115 S. Ct. at 2381 (Kennedy, J., dissenting).

61. *Id.*

62. *Id.* at 2381-82.

Kennedy also argues that the thirty-day ban "is censorship, pure and simple."[63] "[U]nder the First Amendment the public, not the State, has the right and power to decide what ideas and information are deserving of their adherence."[64] But this argument is a farce. States regulate a broad spectrum of speech in interpreting the First Amendment.[65] The First Amendment protection is not all-encompassing, especially in the area of commercial speech.[66] If Justice Kennedy truly supports this position, he should oppose any and all restrictions on speech regardless of its form, forum, or content. Kennedy also argues that "[t]he Court's opinion reflects a newfound and illegitimate confidence that it along with the Supreme Court of Florida knows what is best for the Bar and its clients."[67] But the fact is, the Florida Bar Association created the rule, not the Florida Supreme Court or the majority, and it is inherent in the organization and self-governance of attorneys that its representatives (ie, the elected leaders of the bar) do know what is best for its members and the public they represent. The Court's ability, its role, and its "confidence" in interpreting regulations of the organized Bar is neither newfound nor is it illegitimate.

The New Regulation

Justice O'Connor's opinion provides a workable framework within which States might create and enforce restrictions on attorney advertising beyond the "misleading" and "involving unlawful activity" areas. Under the *Central Hudson* test, the government must first assert a substantial state interest in support of its regulation.[68] *Florida Bar* provides that a state has a substantial state interest in protecting the integrity of the legal profession in the eyes of the public.[69] Second, the government must demonstrate that the restriction directly and materially advances that interest.[70] In essence, the state must show that the advertising it seeks to restrict actually has an adverse effect on the public's perception of the legal profession. Empirical data submitted to support such a contention will be key. States do not, however,

63. *Id.* at 2383.
64. *Id.* at 2386.
65. Schenck v. United States, 249 U.S. 47 (1919) (dangerous speech); Miller v. California, 413 U.S. 15 (1973) (obscenity); New York Times v. Sullivan, 376 U.S. 254 (1964) (defamation).
66. "Commercial speech [enjoys] a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Florida Bar*, 115 S. Ct. at 2375 (citations omitted).
67. *Id.* at 2386.
68. *See supra* note 24 and accompanying text.
69. 115 S. Ct. at 2381.
70. *See supra* note 24 and accompanying text.

have to conduct their own statistical surveys to obtain this data. "Indeed, in other First Amendment contexts we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even . . . to justify restrictions based solely on history, consensus, and simple common sense."[71] The third prong of *Central Hudson* requires that the regulation be narrowly drawn.[72] The regulation does not have to be the least restrictive means, but there must be a reasonable fit between the ends and the means chosen.[73] The *Florida Bar* decision makes it clear that in order to pass muster, the restriction must leave open sufficient alternative means by which a member of the public might learn about the availability of legal representation.[74]

CONCLUSION

Advertising as a whole is not an evil which should be eradicated. It serves a vital role in conveying information to members of the public concerning their legal rights and the availability of legal representation. But the need for professional restraint is clear. Intrusive solicitations and demeaning advertisements have pulled the profession into a downward spiral of public disrepute and mistrust. Efforts to restrict advertising are not a manipulation of public opinion[75] but an honest effort to protect the integrity of the entire legal system. The Supreme Court has returned a means of control to states that they have not had in almost twenty years. States must ensure that this opportunity is not lost. State bar organizations should implement restrictions to assure dignity and professionalism in attorney advertising and, in so doing, return a greater sense of integrity to the profession as a whole.

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71. 115 S. Ct. at 2378 (citations omitted).
72. *Id.* at 2376.
73. *See* Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).
74. 115 S. Ct. at 2380.
75. *Id.* at 2383 (Kennedy, J., dissenting).