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Florida Bar v. Went For It, Inc.: The Supreme Court Opens the Door for Heightened Limits on Attorney Advertising

Florida Bar v. Went For It, Inc.[1] involves the constitutionality of Florida Bar rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to accident victims and their families within thirty days following an accident.[2] In March 1992, respondent Went For It, Inc., a lawyer referral service, and its owner, G. Stewart McHenry, filed suit in the United States District Court for the Middle District of Florida against the Florida Bar, seeking declatory and injunctive relief.[3] After referral from the district court, a magistrate judge recommended summary judgment in favor of the Florida Bar.[4] The magistrate judge found that the Florida Bar had substantial interests, based on professionalism concerns, in protecting both the privacy and tranquility of accident victims and their families from undue influence in times of weakness.[5] Relying on a Florida Bar two-year survey (conducted prior to enactment of the rules) which concluded lawyer advertising adversely effects public opinion, the judge held that the rules directly served these interests and were no broader than necessary.[6] Upon de novo review, the district court rejected this recommendation and instead granted summary judgment for respondents, holding that the ban violated constitutional guarantees of free speech by significantly reducing to those in need the availability of truthful, relevant information regarding legal services.[7] Bound by precedent, the Eleventh Circuit Court of Appeals reluctantly affirmed

1. 115 S. Ct. 2371 (1995).
2. *Id.* at 2374.
3. *Id.* In October 1992, McHenry was disbarred for other reasons in Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992). John T. Blakely, another Florida lawyer, was substituted into the suit in his place. *Id.*
4. 115 S. Ct. at 2374.
5. *Id.*
6. *Id.*
7. 21 F.3d 1038, 1041 (1994).

the decision.[8] The Supreme Court granted certiorari and reversed.[9] The Court held that the Florida Bar's substantial interest in protecting injured residents and their families from invasive lawyer conduct was supported by statistical and anecdotal evidence, and was addressed by a regulation sufficiently narrow in scope and duration to meet First Amendment requirements.[10]

First Amendment protection of commercial speech is of recent vintage in this country. The first recognition of limited protection came in the mid-seventies in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[11] In that case, the Court held that pharmacists truthfully advertising prescription drug prices were entitled to limited First Amendment protection because commercial information aids consumers in making informed decisions.[12] A year later, the Court expanded this protection in *Bates v. State Bar of Arizona*[13] to include protection for price advertising by attorneys of certain routine legal services.[14] In doing so, the Court rejected several justifications offered by the State for a complete ban on attorney advertising, including traditional condemnation of attorney solicitation and the adverse effect of such advertising on professionalism.[15] The Court concluded, "the assertion that advertising will diminish the attorney's reputation in the community is open to question."[16] However, the Court was quick to point out that commercial speech protection is limited and that false or potentially deceptive speech is subject to regulation.[17] In addition, the overall protection afforded even truthful, nondeceptive commercial speech is less than that of other forms of constitutionally protected expression.[18] Consequently, there are times when restrictions on truthful commercial speech are justified.[19] One such instance was in *Ohralik v. Ohio State Bar Ass'n*.[20] An attorney personally solicited two car accident victims in an attempt to secure contingency fee contracts

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8. *Id.* at 1045.
9. 115 S. Ct. at 2375, 2381.
10. *Id.*
11. 425 U.S. 748 (1976).
12. *Id.* at 769, 773.
13. 433 U.S. 350 (1977).
14. *Id.* These "routine services" included uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name. *Id.*
15. *Id.* at 367, 371.
16. *Id.* at 369.
17. *Id.* at 384.
18. *Id.* at 381.
19. *Id.* at 383-84.
20. 436 U.S. 477 (1978).

which would allow him to represent them in future lawsuits.[21] The bar association brought disciplinary proceedings against the attorney for violation of rules preventing him from accepting employment resulting from unsolicited advice.[22] Relying on *Bates*, the attorney challenged the constitutionality of the rules.[23] Distinguishing *Bates*, the Court upheld the regulations, finding that the entitlement of in-person solicitation of clients to First Amendment protection was less in degree than the State's interest in prohibition of such conduct.[24] Subsequently, a framework for analyzing this limited protection was established in *Central Hudson Gas Corp. v. Public Service Commission of New York*.[25] The Court in that case promulgated a three-step middle scrutiny test. First, the governmental interest involved must be substantial. Second, the restriction must directly advance the asserted interest. Third, the regulation must be narrowly tailored and no more extensive than necessary.[26] This test was first applied to direct-mail solicitation by attorneys in *Shapero v. Kentucky Bar Ass'n*.[27] The Court distinguished direct-mail advertisements from in-person solicitation, which a state could categorically ban.[28] Consequently the Court struck down a Kentucky Bar ruling that categorically prohibited an attorney's truthful, nondeceptive direct-mail solicitations to "potential clients who had a foreclosure suit filed against them."[29] Initially, the Court recognized that personal letters could present an increased risk of deception and suggested possible less restrictive means of regulation.[30] However, the Court found that the substantial interests in banning in-person solicitation—the strong possibility of lawyer misconduct and the unlikeliness of effective alternative regulations—were not present with direct-mail solicitation.[31] The Court reasoned that protection of individual privacy was not a substantial state interest under these circumstances because direct-mail letters "can readily be put in a drawer to be considered later, ignored, or discarded."[32] Recently, in *Edenfield*

21. *Id.* at 450-51.
22. *Id.* at 453 n.9.
23. *Id.* at 455.
24. *Id.*
25. 447 U.S. 557 (1980).
26. *Id.* at 569-72.
27. 486 U.S. 466 (1988).
28. *Id.* at 472.
29. *Id.* at 466.
30. *Id.* at 475-76.
31. *Id.* at 467.
32. *Id.* at 475-76.

v. Fane,[33] the Supreme Court applied the same *Central Hudson* test to advertising by accountants and found that protection of individual privacy was a substantial state interest.[34] In *Edenfield*, the Florida Board of Accountancy prohibited certified public accountants ("CPAs") from engaging in in-person solicitation.[35] The Court recognized that even truthful solicitations could "be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient."[36] However, the Court rejected the State's contention that *Ohralik* was controlling, finding that *Ohralik* did not stand for the proposition that blanket bans on personal solicitation by all professionals are always constitutional.[37] Instead, the Court held that the dangers presented with in-person solicitation by an attorney, trained in the art of advocacy and persuasion, did not exist with CPAs, who are trained in objectivity and independence.[38] Accordingly, the Court found that the blanket ban was more extensive than necessary and had no direct relation to the asserted interest.[39]

The decision in *Florida Bar* marked a shift in philosophy by the Court, moving to recognition of a threshhold amount of state autonomy in the regulation of attorney conduct.[40] Armed with several factors distinguishing this case from the decision in *Shapero*, the Court found that the thirty-day ban did meet *Central Hudson's* three-tiered analysis test.[41] The Court first looked at the Florida Bar's proffered interest "in protecting the privacy and tranquility of personal injury victims and their loved ones,"[42] which in turn effects the larger concerns of limiting activities that injure the administration of justice.[43] Finding this interest substantial, the Court pointed to *Goldfarb v. Virginia State Bar*,[44] which held that "States have a compelling interest in the practice of professions within their boundaries, and . . . they have broad

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33. 113 S. Ct. 1792 (1993).
34. *Id.* at 1799.
35. *Id.* at 1796.
36. *Id.*
37. *Id.* at 1802.
38. *Id.* at 1802-03.
39. *Id.* at 1802-04.
40. 115 S. Ct. 2371, 2376. This position was most often espoused by Justice O'Connor, who wrote the majority opinion in this case. *Id.* at 2374. She had previously expressed these concerns in *Edenfield*, 113 S. Ct. at 1804, where she was the lone dissenting Justice, and in *Shapero*, arguing that the cases forming precedent in this area were "built on defective premises and flawed reasoning." 486 U.S. at 480.
41. *Florida Bar*, 115 S. Ct. 2371, 2381.
42. *Id.* at 2376.
43. *Id.*
44. 421 U.S. 773 (1975).

power to establish standards for licensing practitioners and regulating the practice of professions."[45] The Court also noted previous occasions in other contexts where they had recognized the importance of protecting the tranquility and privacy of the home.[46] With the first prong satisfied, the Court then looked to whether the regulation advanced this interest in a direct and material way.[47] The Court was careful to recognize that a restriction can only be sustained when it can be shown that the material harms will be directly alleviated by the restriction.[48] To clarify this standard, the Court pointed to *Edenfield*, where the ban on in-person solicitations by CPAs was struck down because the State Board of Accountancy presented no studies or other evidence establishing a link between such conduct and the interests and concerns claimed by the board.[49] The Court found no such lack of evidence in this case, pointing to the summary of the two-year study containing both statistical and anecdotal evidence supporting the Florida Bar's contentions.[50] The study included various general population surveys, newspaper editorials, and excerpts from complaint letters received from direct-mail solicitation recipients.[51] This evidence revealed that those receiving direct-mail solicitations, as well as the public at large, had lower regard for the legal profession and the judicial process as a whole.[52] In light of this evidence, the Court concluded that the second prong of the *Central Hudson* test had been satisfied.[53] The Court also carefully pointed out several other factors distinguishing this case from *Shapero*, including the State's failure in *Shapero* to justify the regulation on grounds of protection of privacy interests.[54] In addition, *Shapero* dealt with a complete ban on all direct-mail solicitations, as opposed to the temporary thirty-day restriction in this case.[55] Finally, the State in *Shapero* presented no evidence showing actual harm caused by the targeted direct-mail solicitations.[56] The Court also took exception to the *Shapero* majority's trivialization of the potential harm as one that could be avoided by simply putting the unsolicited direct-mail letter

45. *Florida Bar*, 115 S. Ct. at 2376 (quoting *Goldfarb*, 421 U.S. at 792).
46. *Id.* at 2377.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 2377-78.
51. *Id.*
52. *Id.*
53. *Id.* at 2378.
54. *Id.*
55. *Id.*
56. *Id.*

away.[57] The Court reasoned that the harm sought to be avoided is just as much "simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents."[58] Accordingly, harm caused by the former concern could not be avoided by simply putting the letter in a drawer for later consideration.[59] Arriving at prong three, the Court prefaced this analysis with a clarification of the applicable standard, characterizing the fit necessary between the ends and means as a reasonably narrow one.[60] In finding the requisite fit in this case, the majority debunked two major contentions of the dissent.[61] First, the Court looked to claims that the regulation was constitutionally over-inclusive, banning mailings even to persons with relatively minor injuries and grief.[62] The Court held that the rule is reasonably well related to its objective because no less burdensome options existed and because lines could not be properly drawn between more and less severe and grievous injuries.[63] Second, the Court considered whether the rule prevented citizens from learning about their legal options at a most crucial time.[64] The Court summarily rejected this idea, concluding that there were available many other ways for injured persons to learn about the availability of legal council during the thirty-day ban.[65] Finding all three prongs of the *Central Hudson* test satisfied, the Court upheld the regulation.[66]

Despite factual differences between this case and *Shapero*, the result of this decision is a clear departure—following along the same line of reasoning seen in *Edenfield*—from what had been an increasing trend by the Court toward more restrictions on the states' authority to regulate advertising by lawyers. The Court was less persuaded than it was in *Bates*, which found the "postulated connection between advertising and the erosion of true professionalism to be severely strained."[67] Perhaps the Court has come to accept the notion that, in the years since the Bates decision, "the development of attorney advertising. . . has not been as favorable as the *Bates* Court anticipated."[68] It is hard to imagine

57. *Id.* at 2379.
58. *Id.*
59. *Id.* at 2380.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 2381.
66. *Id.*
67. *Bates*, 433 U.S. at 368.
68. Petitioner's Brief (1994 WL 614916, at 14), *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2371.

that the Court in *Bates* could have foreseen what has turned out to be a full scale onslaught of attorney advertising through billboards, television and radio spots, newspaper ads, and even untargeted letters to the general population. Indeed, in developing concrete guidelines, "the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds."[69] In the interim, confidence in the legal profession and judicial system has been eroded by repeated invasive conduct by attorneys.[70] As the dissent argues, it appears now that the Court is perhaps retreating from less expansive guarantees of commercial free speech in order to protect the legal profession from public criticism.[71] Yet other states may be quick to follow Florida's lead, as Texas did in *Moore v. Morales*[72] just months after the Court's decision in *Florida Bar*.[73] At least for the moment, it appears that the Court is more willing to embrace Justice O'Connor's long held contention that states should be given more leeway in regulating attorney advertising, recognizing that there are important distinctions between advertisements for commercial products and advertisements for professional services.[74]

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69. *Shapero*, 486 U.S. at 480.
70. *Florida Bar*, 115 S. Ct. at 2381.
71. *Id.* at 2386.
72. 63 F.3d 358 (1995).
73. In that decision, the United States Fifth Circuit Court of Appeals, relying on the decision in *Florida Bar*, upheld a Texas thirty-day ban on attorneys' direct-mail solicitation of accident victims or their families. *Id.*
74. *Shapero*, 486 U.S. at 481.