Monopolizing Misfortune: A Story of Stratification in the Personal Injury Bar

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ABSTRACT

The legal profession has long viewed personal injury law as the profession's most ethically dubious field. In particular, the profession has expressed concern about personal injury attorneys' perceived tendencies to solicit clients in objectionable ways. This Article explores the profession's attempt to solve this perceived problem through state regulation of personal injury attorneys' advertising tactics. Specifically, it examines the development and imposition of these regulations in Florida and Kentucky, two of the first states to implement these rules in the late 1980s and 1990s. In attempting to solve one ethical problem, the profession created another, by giving control of the regulations' creation to attorneys who often had a vested interest in which personal injury attorneys would succeed.

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INTRODUCTION

The history of personal injury law is defined by discriminatory and elitist hiring practices. At the beginning of the nineteenth century, an increasing number of immigrants and first-generation Americans entered the field. At the same time, the newly formed American Bar Association was concerned with excluding Blacks, women, Jews, and other minority groups from practicing law. Rejected from firm employment, those with means opened their own personal injury law practices. [1]

The personal injury bar sought to distance itself from the "ambulance chaser" trope by focusing on professionalization, cooperation, and education. It went as far as instituting its own code of ethics, claiming to be more stringent than that of the ABA's. In effect, these rules preserved the industry's elitist structure by punishing the solicitation tactics of newly admitted lawyers while also enshrining "old guard" behavior as the industry standard.

My work explores the development of regulations in personal injury law through archival research on how particular states restricted the boundaries of

1. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 257 (1998).

permissible regulation. It shows how these efforts prompted the Supreme Court to change its understanding of what is and is not considered permissible regulation of attorney commercial speech. As the Court's thinking evolved, states continued to clamp down on solicitation, making it harder for certain lawyers to find clients and making it possible for powerful personal injury attorneys to shape the regulations in their favor.

This article builds on attorney commercial speech scholarship, as well as regulation of the legal profession. But it takes an important new direction by exploring how the profession's overall concern with public perception has influenced its regulation of personal injury attorneys. In particular, I focus on the profession's attempt to preserve its reputation at the consumer's expense. Some articles argue that the Court's decision to allow attorney advertising was a net positive.[2] Others look at how attorney advertising has impacted the public's perception of the profession, generally arguing that the profession blames attorney advertising for its poor public image.[3] None of these articles, however, analyze the effects of advertising reforms and state regulations aimed at controlling attorney behavior.

My archival research into the profession's exclusionary principles and concern with its public image, both during the Progressive Era and into the twentieth century, demonstrates a spirit of anti-competition and overall suppression of personal injury legal services. I demonstrate this effect through two case studies in Kentucky and Florida. These states were chosen for their tag-team approach in regulating attorney advertising and solicitation, as well as their restrictive disciplinary rules, which eventually became models for the rest of the country. Historical documents, including legislative testimony, bar journals, and internal communications, reveal that elites in the personal injury bar were mainly concerned about losing business, rather than helping facilitate access to the court system.

This Article proceeds in five substantive parts. Part I gives a brief history of the personal injury bar, its concern with image and approach to advertising and solicitation. It also highlights Supreme Court precedent from 1977 to 1989, demonstrating the Court's increasing comfort with attorney advertising. Part II highlights Florida's reaction to the beginning of attorney advertising. Part III discusses the bifurcation of the personal injury bar and how certain segments opposed advertising at the expense of other personal injury attorneys. Part IV then outlines the 1995 Supreme Court case *Florida Bar v. Went For It* and

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2. *See generally* Tiffany S. Meyer & Robert E. Smith, *Attorney Advertising: Bates and a Beginning*, 20 ARIZ. L. REV. 427 (1978); Gerry Singsen, *Competition in Legal Services*, 2 GEO. J. LEGAL ETHICS 21 (1988); Terry Calvani, James Langenfeld & Gordon Shuford, *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761 (1988).

3. *See generally* William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325 (1996); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405 (1999); Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437 (2006).

discusses how it drastically changed the Court's doctrine, restricting permissible attorney speech under the First Amendment. Part V will focus on Kentucky's regulatory approach, which both mirrored and intensified Florida's regulations.

I. THE LEGAL PROFESSION, ATTORNEY ADVERTISING, AND THE SUPREME COURT

Part I gives an overview of the history of the profession, starting in the Progressive Era and continuing through the 1970s, as well as the legal profession's views on personal injury attorneys and their use of advertising. Ultimately, it demonstrates how disagreements within the profession—even between personal injury lawyers themselves—laid the groundwork for eventual regulation to suppress the non-elite personal injury attorneys.

A. EARLY HISTORY OF DISCRIMINATION IN THE PROFESSION

The legal profession has historically seen itself as "a great professional fraternity."[4] Membership in the profession was restricted to a select few, systemically discriminating against those of a lower socioeconomic status or foreign birth. Lawyers, along with other groups, began to recognize the value of organizing for self-interest, as well as the public interest. By 1878, several state and city bar associations had been established.[5] These new associations restricted membership "primarily [to] well-to-do business lawyers who were attempting to prevent minority groups from entering the profession."[6] Well-established lawyers had once controlled actual admission to the profession, but by the 1870s, they were losing some of that power and looked to restrict membership in bar associations to distance themselves from marginalized groups trying to enter the profession."[7]

The lawyers attempting to exclude these groups were among those to form the American Bar Association in 1878, with invitations sent only to a "selective group of lawyers."[8] These men were concerned with the changes in the demographics of the profession. By the end of the nineteenth century, most state bars admitted women into the practice, although not in numbers of any consequence.[9] Black, Jewish, and immigrant lawyers saw the same fate.[10] Many of those admitted started their own firms after rejection from established organizations.[11] Their lack of

4. John H. Wigmore, *A Course on "The Profession of the Bar"*, 7 AM. L. SCH. REV. 273, 273 (1931).

5. John Austin Matzko, *The Best Men of the Bar: The Founding of the American Bar Association*, ESSAYS IN HIST. 7, 9–10 (1977).

6. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 278 (1973).

7. For instance, racist and sexist accounts of the time included sentiments that new lawyers were "slovenly in dress, uncouth in manners and habits, ignorant even of the English language," and, as a result, were "vulgarizing the profession." Matzko, *supra* note 5, at 11 (internal citation omitted).

8. *Id*. at 19.

9. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 32 (2002).

10. *Id*. at 32-33.

11. FRIEDMAN, *supra* note 9, at 41; RICHARD L. ABEL, AMERICAN LAWYERS 86 (1989). Between 1900 and 1910, they made up 26 percent of the newly admitted lawyers in New York City, and eventually 80 percent

WASP characteristics forced them to find their own entry into the profession, as large, corporate firms refused to hire them. Without extensive contacts or retainers from big corporations, these lawyers were forced to rely on "one-shot" clients - those who had never used an attorney before and may never again.

Both the American Association of Law Schools (AALS) and the ABA heavily suggested that additional barriers be put into place to prevent diversification of the profession. Within a few years, all law schools required their students to have a college education before matriculation. Additionally, the ABA and the AALS jointly lobbied for school accreditation requirements as a prerequisite for bar admission. While the ABA and AALS claimed they were concerned with the quality of legal education, their real motivation was in keeping the profession exclusive, made up of male WASPS.[12] For instance, in 1914, Secretary of the American Judicature Society Herbert Harley said there were "too many lawyers by far," in part because standards for bar admission were too lax.[13] Feeling threatened by the changing demographics of the profession, white, male lawyers noted that the bar admission process "served to deprofessionalize the practice of law, and directly threatened the social and economic standing of lawyers."[14]

The discriminatory hiring practices of established law firms forced those shut out to open their own practices.[15] These small offices often represented individuals with a wide range of needs, with many of these attorneys negotiating contracts and representing employees against their corporate employer. While far from a distinct segment of the bar at this time, this era ushered in the concept of personal injury attorneys. Given that these lawyers centered their work around representing individuals, they would do things like locate their offices across from factories, which often saw employee injuries, so they could run over when they heard there had been an accident. They were known for employing police officers, telephone operators, and hospital staff to help convince accident victims to retain their firm.[16] They used contingency fees, agreeing to take part of the recovery rather than charging a fee up front, often the only way a workingman—who had been hit by a streetcar or injured by an exploding bottle—could afford a lawyer.[17] And they started to advertise.

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between 1930 and 1934. For example, the ABA admitted three Black lawyers in 1912 without knowing their race. Horrified, and amidst stringent debate, the three were allowed to remain, but the ABA required any future applicant to reveal his race.

12. *See* FRIEDMAN, *supra* note 9, at 34–35, 38; Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 558 (2018); Herb D. Vest, *Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America*, 50 J. OF LEGAL EDUC. 494, 496–497 (2000).

13. *See* HERBERT HARLEY, *Organization of the Bar*, 52 ANNALS AM. ACAD. OF POL. AND SOC. SCI. 77, 78–80 (1914).

14. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 558 (2018).

15. *See, e.g.*, ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS (1946); Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803 (2008).

16. Karsten, *supra* note 1, at 232 n. 3.

17. FRIEDMAN, *supra* note 9, at 41.

The ABA's growing concern over its image resulted in the institution of a code of ethics, first adopted in 1908. The preamble to the code, confirming the profession's lofty expectations of itself, claimed that the "future of the Republic .... depends on our maintenance of Justice pure and unsullied."[18] Most of the provisions were fairly straightforward: lawyers were to avoid conflicts of interest, keep their clients' secrets, and not overcharge.[19] But the code nevertheless functioned to benefit its drafters, as well as the overall profession's reputation.[20] Rules that forbade advertising—including "circulars," "furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged," using "indirection through touters of any kind," or any type of behavior that would "defy the traditions and lower the tone of our high ceiling"—were meant to constrain the ability of the "one-shot" personal injury lawyers from gaining a foothold.[21] Traditionally, the profession believed that a lawyer's "most worthy and effective advertisement" was his "reputation for professional capacity and fidelity to trust."[22] State bars were not obligated to adopt any of the canons, although most states did, including the ones prohibiting advertising. In the case of client solicitation, every state adopted the ABA's recommendations.

Contemporaneous articles of general circulation often criticized the legal profession and called for increased regulation, taking particular issue with attorney solicitation. A 1928 article in *Atlantic Monthly* condemned "the ambulance chaser and the vast radiation of the accident contingent-fee litigation."[23] An editorial in the *New York Sun* warned, "The condition is on a border approaching chaos and it is imperative that there be a remedy applied before the judiciary becomes a mockery through the hordes of attorneys stirring up litigation."[24] *The New York Times* called for "thunders against our local tribe of ambulance chasers."[25] But attorneys' similar behavior continued into the 1960s, despite the profession's regulations. Jerome Carlin's study of solo practitioners in Chicago during that decade revealed kickbacks to doctors who referred clients.[26] Disciplinary cases from the 1970s underscored the prevalence of various kinds of unethical conduct. Accusations included fraud, bribery, perjury, and fabricating evidence, highlighting the serious challenges the legal community faced in maintaining both its image and public trust.[27]

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18. CANONS OF PRO. ETHICS pmbl. (1908).
19. *Id.*
20. FRIEDMAN, *supra* note 9, at 40.
21. *Id.*
22. *Id.*
23. George W. Alger, *Cleaning the Courts*, 141 ATL. MONTHLY 403, 405 (1928).
24. *Disbarment is Not Punishment*, N.Y. SUN, June 21, 1928.
25. *Ambulance Chasers Chased*, N.Y. TIMES, Nov. 18, 1927.
26. JEROME E. CARLIN, LAWYERS ON THEIR OWN: THE SOLO PRACTITIONER IN AN URBAN SETTING (1962).
27. *Id.* at 80–91; *Lawyers Chase Crash* Victims, CHI. DAILY NEWS, May 21, 1950; *Boyle to Ask Help in Probe of Court Jam*, CHI. TRIBUNE, Apr. 20, 1967; *see, e.g.*, *In re* Perrello, 394 N.E.2d 127 (Ind. 1979); Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 321 (1986).

These advertising and solicitation rules largely remained in place until the 1970s. When the ABA released its updated version of ethics regulations in 1969, it suggested that an attorney would be allowed to disseminate information over television or radio in the geographic area in which he practiced and information about himself and his practice, provided it was presented in a "dignified manner."[28] But the ABA only permitted a lawyer to broadcast their name, their place and date of birth, the schools they attended, their professional memberships, names of clients they had represented (with the clients' consent), and their fees for an initial consultation.[29] Using any kind of sensational tactic as in other kinds of advertising was still off limits.

Solicitation in particular stoked fears among the elites of the profession due to its potential effects. One of the oldest criticisms against solicitation was its perceived ability to "stir[. . .] up litigation," an action that was a crime in fourteenth-century England.[30] In medieval times, the fear was that powerful litigants could corrupt the courts. In the early twentieth century, however, there was more concern that those who solicited business could influence the system.[31] Historically, lawyers did not compete against each other, save for attorneys on opposite sides of a case. Barristers did not practice law for pecuniary gain, leaving no need to vie for clients,[32] and because lawyers worked to define themselves as members of a respected profession—rather than mere tradespeople or businessmen—the concept of competition was largely absent in the legal sphere.[33]

There were several other reasons to curtail litigation. One concern was the potential for injustice if an innocent party lost. Additionally, the court system was intended to serve only those who felt injured or aggrieved enough to bring a case on their own initiative, rather than after being prompted by an attorney. There was also the possibility that solicitation could lead to fraudulent claims or cases brought on fabricated evidence.[34] That said, another often unspoken factor was the likelihood that solicitation of claims would result in suits against large corporations or governmental entities—groups that were often represented by the more established professionals of the legal profession. Actions that were bad for their clients were also bad for the attorneys.[35]

Yet the 1970s brought new challenges to the ability of a profession to proscribe its members' activities. In 1975, Public Citizen and its co-founder Alan Morrison brought a case in Virginia to challenge the minimum fee schedule imposed by a county bar association, successfully arguing that it constituted price-fixing.[36] The next year would bring a successful challenge to the Virginia Board of Pharmacy's

28. MODEL CODE OF PRO. RESPONSIBILITY DR 2-101(B) (AM. BAR ASS'N 1969) [hereinafter MODEL CODE].
29. MODEL CODE DR 2-101(B).
30. *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 675 (1958).
31. *Id.*
32. Max J. Luther III, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A. J. 554, 554 (1958).
33. *Id.*
34. *See A Critical Analysis of Rules Against Solicitation by Lawyers*, *supra* note 30, at 675–79.
35. *See* James F. Brennan, *The Solicitation of Professional Employment – The Bugaboo "Ambulance Chasing,"* 36 COM. L.J. 232 (1931).
36. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

rule forbidding pharmacists advertising prescription drugs, establishing some measure of protection for commercial speech under the First Amendment.[37] With new precedent, a challenge to the ban on attorney advertising and solicitation was close behind.

B. BATES V. STATE BAR OF ARIZONA

The complete ban on attorney advertising would finally fall in 1977, in *Bates v. State Bar of Arizona*, after John R. Bates and Van O'Steen started their own law office in Phoenix, Arizona.[38] They planned to provide legal services to clients of moderate incomes who did not otherwise qualify for governmental aid.[39] In order to implement an accessible pricing structure, they needed a large volume of cases.[40] Despite the Arizona Bar's prohibition on lawyer advertising, Bates and O'Steen began to advertise their services in the local newspaper.[41] This action was in direct violation of the advertising rules; the rules extremely circumscribed the amount of information the rules were allowed to contain. A lawyer could only include the most basic facts about his services, whereas Bates and O'Steen's advertisement highlighted "legal services at very reasonable fees."[42] They were disciplined by the Bar and eventually sought review by the Supreme Court of Arizona. Their unsuccessful challenge there led them to the Supreme Court of the United States.[43]

Ultimately, the Court found that attorneys had a right to advertise prices of certain routine services.[44] The Court did not reach the issues of in-person solicitation, or the right of an attorney to advertise the quality of their legal services, leaving the issue for another day.[45] This narrow ruling initially gave states flexibility in imposing regulations, although a lack of clarity as to what the Court would allow, leading to several challenges. The Supreme Court, building on the precedent of *Bates*, held that truthful, non-deceptive advertising related to lawful activity was entitled to First Amendment protection. [46] While this principle of regulation did not extend to in-person solicitation, which was considered "inconsistent with the profession's ideal of the attorney-client relationship,"[47] it did hold for both targeted advertisements[48] and solicitations sent directly to potential clients.[49]

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37. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
38. Bates v. State Bar of Ariz., 433 U.S. 350, 354 (1977).
39. *Id.*
40. *Id.*
41. *Id.*
42. MODEL CODE Canon 2, EC 2-8; *Bates*, 433 U.S. 350 at 385.
43. *Bates*, 433 U.S. at 355–58.
44. *Id.* at 378–79.
45. *Id.* at 383–84.
46. *In re* R.M.J., 455 U.S. 191, 206–07 (1982). *See Bates*, 433 U.S. at 383–84.
47. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454 (1978).
48. Zauderer v. Off. of Disciplinary Council of Sup. Ct. of Ohio, 471 U.S. 626, 642 (1985).
49. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 479 (1988).

C. SHAPERO V. KENTUCKY BAR ASSOCIATION: THE PATH TO WENT FOR IT

The Court further cemented an attorney's ability to directly contact clients in need of specific services in 1988. Richard Shapero, a personal injury lawyer in Kentucky,[50] wanted to send letters offering free consultations to people who he knew had foreclosure actions filed against them.[51] As part of the procedure in Kentucky, he submitted the advertisement to the Kentucky Bar in 1985 for preapproval before sending the letter to offer his services.[52] While reviewers found nothing wrong with the advertisement, they refused to approve it based on a Kentucky Supreme Court rule that forbid delivering written advertisements that were: a) triggered by a certain event, and b) targeted to a specific person.[53]

The Kentucky Supreme Court agreed that it needed to amend the rule, so it adopted the ABA's Model Rule 7.3 in its place. The new rule forbade attorneys from contacting potential clients if the lawyer had reason to know the person was in need of legal services, if a the lawyer and client did not have a preexisting relationship, and if the lawyer was motivated by financial gain.[54] In addition to in-person contact, solicitations included contacting a person by telephone, telegraph, letter, or other writing.[55]

The Supreme Court of the United States granted cert to determine whether such a rule was consistent with the First Amendment.[56] In *Shapero v. Kentucky Bar Association*, the Court began by noting that prior attorney advertising cases did not distinguish between the different types of written advertisements; if the advertisement was neither false nor deceptive, then a state could not prohibit the advertisement.[57] But in its brief, Kentucky attempted to distinguish between *advertising* and *solicitation*. It conceded that targeted direct-mail advertising, or sending letters to a broad group of people who may or may not need legal services, was constitutionally protected. But it argued that targeted direct-mail solicitation, sending letters to people whom attorneys knew for a fact were involved in some kind of legal matter, was not.[58]

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50. *Id.* at 469. A "gutsy guy," he enjoyed the business of law much more than the actual practice. He was one of the first attorneys in Kentucky to market himself under a slogan, claiming "I Know the Experts." He was also one of the first in Kentucky to advertise on television. These actions earned criticism from his colleagues, and the TV ads in particular "made traditional lawyers cringe." But that was fine with him. His clients, regular people in need of help, were able to relate to his ads, leading to a steady stream of clients. He usually took personal injury cases and medical malpractice claims but had decided to branch out to recruit clients facing foreclosure suits. *See Farewell to Legal Advertising Trailblazer Richard D. Shapero*, LOUISVILLE DIVORCE, January 1, 2007, https://www.louisvilledivorce.com/2007/01/01/farewell-to-legal-advertising-trailblazer-richard-d-shapero/[perma.cc/H6AG-LVC7]; *Richard D. Shapero*, MARTINDALE, https://www.martindale.com/attorney/richard-d-shapero-581936/ [https://archive.ph/iyvBq].

51. *Shapero*, 486 U.S. at 469.

52. *Id.*

53. *Id.* at 469–70.

54. *Id.* at 470–71.

55. *Id.*

56. *Id.* at 471.

57. *Id.* at 473.

58. *Id.* at 473–74.

The Court was not persuaded. It pointed out that "[i]n assessing the potential for overreaching and undue influence, the mode of communication makes all the difference."[59] Written communications lack "'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.'"[60] A printed contact can also be thrown away or ignored. "A letter, like a printed advertisement (but unlike a lawyer) can readily be put in a drawer to be considered later, ignored, or discarded."[61] The Court conceded that a personalized letter to a specific recipient could increase the risk of deception, cause the recipient to expect too much of the lawyer's familiarity with the case, or overestimate the legal problem.[62] Still, the isolated potential for abuse did not justify a complete ban on that type of speech since there were many less restrictive ways for the state to regulate problematic solicitations.[63]

After *Shapero*, at least twenty-four states modeled their mail solicitation rules after Model Rule 7.3.[64] Many others, however, did not know how to reconcile their existing rules prohibiting direct targeted mail solicitation with the Court's precedent.

The right to advertise under the First Amendment divided the profession, with many attorneys against the idea altogether. The plaintiffs' bar was no exception. Younger attorneys, often trying to break into the market and establish name recognition, welcomed the new freedom, although suspected that established attorneys, who already had a client base, were merely fearful that advertising could cut into their caseload.[65] Several others also pointed out that the new rules could help with making justice more accessible. Insurance adjusters historically advised injured victims that contacting a lawyer was unnecessary—that doing so would be costly and slow down a settlement check. If personal injury attorneys advertised, the argument was, then perhaps they could inform victims of their rights. The older, established members of the Association of Trial Lawyers of America (ATLA)—the leading plaintiffs' attorney organization—feared that "tasteless" advertising would only reignite the "ambulance chaser" trope.[66]

The ATLA had worked hard to elevate the reputation of the personal injury bar, but that did not mean that this was a unified front. Rather, the plaintiffs' bar began to see stratification within its ranks, just as the larger profession already

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59. *Id.* at 475.

60. *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 n.2 (1978) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

61. *Id.* at 475–76.

62. *Id.* at 476.

63. *Id.*

64. David O. Stewart & Scott Nelson, *Hawking Legal Services*, 74 A.B.A. J. 44, 44 (1988).

65. RICHARD S. JACOBSON & JEFFREY R. WHITE, DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE: A FIFTY-YEAR HISTORY OF THE CHALLENGES AND ACCOMPLISHMENTS OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA 246 (2004).

66. *Id.*

had. At one end were those who controlled the ATLA and its state counterparts, obtained high value cases via internal referral networks, and lobbied for more favorable laws to that end. On the other side were those who handled more routine cases, like car accidents and slip and falls, and were largely prohibited from participating in professional associations. In effect, these lawyers were excluded from the elites' "cohesive community" and the protections they enjoyed.[67]

II. FLORIDA'S REACTION

Part II outlines Florida's actions following *Bates*. While the state was against all forms of attorney advertising, Florida took particular issue with personal injury advertising, finding it the most offensive and damaging to the profession's reputation. The Florida Bar embarked on a comprehensive campaign to gather evidence in support of its proposed reforms to restrict advertising, particularly by personal injury attorneys, including soliciting comments from attorneys and commissioning various studies to use as evidence. The attorneys in support of additional regulations included those who were mainly concerned with their own profits, ultimately leading to restrictions that fell disproportionately on newer, younger personal injury attorneys who did not have an established client base.

A. ATTORNEYS TEST THE LIMITS

Even though *Bates* told states they could not prohibit advertising, there were many states that still had a strong desire to regulate as much as they could—with Florida leading the effort. Almost immediately following *Bates*, the Florida Bar passed new regulations to restrict attorney advertising to newspapers or papers of general circulation. It also limited the amount of information an attorney could include in an advertisement, allowing only one's name, hours, and pricing.[68] Television advertisements were specifically excluded, even after the ABA recommended their usage.[69] Perhaps due to these restrictions, the Florida Bar reported in 1978 that advertising use among Florida attorneys was "little."[70]

It would not take long for these restrictions to fall. By 1980, the Florida Supreme Court dictated that attorney advertising was to be permitted in all forms of media.[71] With those limitations removed, attorneys began advertising at a rapid pace, with a fifty percent increase in advertising spending between 1979 and 1980.[72]

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67. Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 NYLS L. REV. 243, 250 (2006).

68. *Bar Adopts Advertising Guidelines*, THE FLA. BAR NEWS, July 20, 1977, at 1.

69. *ABA House of Delegates Approves Television Advertising by Lawyers*, THE FLA. BAR NEWS, Sept. 15, 1978, at 4.

70. *Extent of Lawyer Advertising Reported*, THE FLA. BAR NEWS, Oct. 15, 1978, at 1.

71. *Court Amends Code to Permit Lawyers to Advertise in All Media*, THE FLA. BAR NEWS, Aug. 15, 1979, at 1; The Fla. Bar Amend. to Fla. Bar Code of Pro. Resp., 380 So. 2d 435, 437 (Fla. 1980).

72. *Florida Lawyers Spend Million-Plus on Ads*, FLA. BAR NEWS, Oct. 15, 1980, at 6.

Some Florida attorneys began to push the limits, branching out into direct solicitation, usually through the mail. The line between advertising and solicitation was indeed somewhat fuzzy; even Black's Law Dictionary defines solicitation as "an attempt or effort to gain business," with an example of "the attorney's solicitations took the form of radio and television ads."[73] But governing members of the profession saw a strict demarcation between advertising and solicitation, just as the Kentucky Bar had in *Shapero*. The bar saw advertising as the publication of an attorney's skills or services to a general audience, usually through a means of general distribution, such as newspapers, telephone books, billboards, radio, or television. Whereas solicitation involved targeted, direct communication with a potential client.

The Florida Bar feared that attorneys would contact clients directly. The United States Supreme Court had already ruled that states could ban in-person solicitation of a potential client, but this still left many avenues open for reaching potential clients, including the mail.[74] Indeed, once attorneys realized this loophole, many exploited direct mail as a way to not only set themselves apart, but also establish a personal connection with someone who may need legal services.[75]

Besides advertising in traditional forms of media, lawyers sent letters or fliers to prospective clients they knew were facing some type of legal issue, information often obtained by scrutinizing court dockets, police reports, or news stories highlighting an accident or mass disaster. The Florida Bar argued this conduct was more objectionable and worse than advertising, including signaling the possible "death knell of law as a profession." [76] Because the communication was private, it was easier for a solicitation to contain false or misleading information. Even if the attorney's solicitation was truthful, the Bar still feared that this conduct would "create the impression that lawyers are money-hungry ghouls."[77]

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73. *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

75. Horror stories of attorneys reaching out to people directly got picked up by local Florida papers, with sensationalized stories meant to catch people's attention and paint the bar in the least favorable light. one article began with the sentence: "Kenneth Addison was barely a year old when he received his first letter from a lawyer." Mary Dolan, *Lawyers' Soliciting Tactics Draw Scorn at Bar Hearing*, TAMPA BAY TIMES, Oct. 7, 1987. Kenneth Addison's father was an attorney who felt that attorneys who used these tactics were like "sharks in the water," a sentiment he conveyed to a Florida Bar committee specifically studying lawyer solicitation. This was also apparently far from the only incident of this kind. In its eventual petition to the Florida Supreme Court to change the advertising rules, the Bar included many additional letters from Florida personal injury firms sending letters to accident victims, including parents of children. *See, e.g.*, Letter from Richard Mullholland and Associates to Parents of Ronald L. Cole, III (Nov. 9, 1989) (State Archives of Florida, Series 49, Box 93, File 74,987, Wallet 1); Letter from Victims Legal Clinic to Anita Eichenbaum (June 26, 1989) (State Archives of Florida, Series 49, Box 93, File 74,987, Wallet 1).

76. Judson H. Orrick, *Court Rules 5-1 Against Lawyer Direct-Mail Advertising*, FLA. BAR NEWS, Nov. 15, 1981, at 1.

77. *Id.*

Both Florida and Kentucky harbored deep concerns about the potential for solicitation to overwhelm its recipients. Bar opinion polls have consistently shown attorneys' chief concern to be their poor public image, with solicitation being a major contributing factor to that problem.[78] In fact, the Florida Bar was so concerned with how the public perceived the profession that it undertook an extensive public relations campaign in the late 1980s, funded by members' dues, to combat lawyers' low regard.[79] The leadership of both the Kentucky and Florida Bars strongly disapproved of advertising.[80] But they were laser-focused on controlling solicitation and passing rules that could deter, or at least make it harder, for attorneys to contact clients directly. In some ways, this seems incongruous. Advertising is the more open and obvious action, the one that could potentially tarnish lawyers' reputations. Even so, the private nature of solicitation was what worried the bars the most. As the Florida Supreme Court stated in its overhaul of the state's advertising rules in 1986, "[t]here is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services."[81]

The history of the legal profession also likely influenced regulations on advertising and solicitation. As mentioned in Part I, both were outlawed under the ABA's Canon of Professional Ethics in 1908, although solicitation had really been the driving force behind the ban, including the fear of ambulance chasers and other potentially offensive recruitment tactics used in the early days of the personal injury bar. The historical context helps partly explain why state bars acted the way they did when it came to attorney discipline. Once the Supreme Court ruled that advertising had to be permitted in some form, states immediately feared that solicitation would follow closely behind, potentially bringing the legal profession back into the headlines and disrepute for exploiting individuals' tragedies in the immediate aftermath. As attorneys began to test the boundaries of solicitation under *Bates*, state bars, particularly in Florida and Kentucky, were prepared to increase disciplinary measures and regulations to prevent abuse.

State bars across the country were used to regulating and disciplining attorneys for conduct related to solicitation. Discipline for advertising, on the other hand, was new territory. There were far fewer decisions disciplining attorneys for advertising, and these instances did not increase in number until after *Bates*. It

78. Rhode, *supra* note 27, at 326.

79. Larry Keller, *Bar to Try to Boost Image of Lawyers*, S. FLA. SUN-SENTINEL, May 23, 1989; *Florida Bar Wants to Improve Image*, FLA.-TIMES UNION, May 24, 1989.

80. *See, e.g.*, Henry D. Stratton, *The President's Page*, 40 KY. BENCH & B. 25, 35-36 (1976); Russell Troutman, *It Pays to Advertise?*, 51 FLA. B.J. 487, 487-89 (1977); Murray L. Schwartz, *The Changing Profile of the Legal Profession*, 54 FLA. B.J. 78, 81 (1980); Remarks of Chief Justice John S. Palmore at Dedication of Kentucky Bar Center Headquarters, Frankfort, Ky. (Sept. 21, 1980); Remarks by John S. Palmore, Chief Justice Sup, Ct. of Ky., Before the Senate Commerce Committee, (July 15, 1981); Leslie G. Whitmer, *One More Word*, 45 KY. BENCH & B. 8, 19 (1981).

81. The Fla. Bar re Rules Regulating the Fla. Bar, 494 So. 2d 977, 1073 (1986).

made sense for state bars to focus on what they already knew how to regulate effectively.

B. COMPILING EVIDENCE

In 1987, the Florida Bar began a study on lawyer advertising and its impact on the public's opinion of lawyers. The Bar had received several complaints regarding attorney advertising and what was referred to as "'zip code ambulance chasing.'"[82] The horror stories surrounding direct mail solicitation made the front page of *The Florida Bar News* on August 15, 1987, with Darwin Stiles, a Jacksonville pharmacist, discussing a letter he had received from an attorney after the attorney had found out that Stiles was under investigation by a state regulatory board. Stiles said he "tore it up and threw it away. I was angry." Another pharmacist who received the same solicitation felt the same. "I resented it like hell. To me it's another way of chasing ambulances."[83] A few weeks later, the same publication discussed the anger surrounding lawyers soliciting business from victims and their families after a school bus crash that killed five children and the bus driver. In response, the Bar took out advertisements in Florida newspapers requesting readers to report solicitation that they felt "'overstepped the bounds of ethical propriety.'"[84] Even though the Bar president and the chair of the investigative committee acknowledged that lawyer advertising was protected under the First Amendment, they also felt that the issue was far from settled and that "[t]he Court. . .might have to take another look at it."[85]

In the midst of the Florida Bar's concern over direct mail solicitation, the Court indeed did take another look at attorney solicitation when it heard *Shapero,* and the Florida Bar saw a partner in the Kentucky Bar to root out what it saw as the indignities of advertising and solicitation.[86] Even though Mr. Shapero was ultimately interested in foreclosure solicitation rather than personal injury, the Florida Bar filed an amicus brief supporting the Kentucky Bar using the "record of abuses" by personal injury attorneys it had compiled through its research on solicitation.[87] Both the Florida and Kentucky Bars were dealt a blow when Mr. Shapero was successful in his quest for direct advertising, but Florida did not plan to let that be the last word.[88]

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82. Joe Bizarro, *Views Clash on Mail Ads*, FLA. BAR NEWS, Oct. 15, 1987, at 1; Fla. Bar v. Went for It, Inc., 515 U.S. 618, 620 (1995).

83. Joe Bizarro, *Letters Spark Anger in Some Who Get Them*, FLA. BAR NEWS, Aug. 15, 1987, at 1.

84. Judson H. Orrick, *Bar Fights Solicitation*, FLA. BAR NEWS, Oct. 1, 1987, at 3.

85. Judson H. Orrick, *Officials Hope to Prevent Any Horror Stories*, FLA. BAR NEWS, Aug. 15, 1987, at 1, 3.

86. Shapero v. Ky Bar Ass'n, 486 U.S. 466, 466 (1988).

87. *See id.* at 468. The Academy of Florida Trial Lawyers, of which the president of the Florida Bar was a member, also filed a brief in support. *Id.*; *See generally A Guide to the Records of University President Ray F. Ferrero, Jr.,* NOVA SE. UNIV., OFF. OF THE PRESIDENT (Dec. 2014) https://nsuworks.nova.edu/nsudigital_findingaids/5/[perma.cc/2Q75-DQJ9]; Judson H. Orrick, *Bar May Enter Kentucky Battle*, FLA. BAR NEWS, December 1, 1987, at 1.

88. *Shapero*, 486 U.S. at 476.

Determined to find some way to regulate personal injury attorneys even in light of *Shapero,* the Florida Bar continued its pursuit of evidence gathering. After requesting comments from both the public and members of the Bar,[89] as well as holding hearings throughout the state, the Bar concluded that its rules regulating direct mail solicitation had to be changed if the profession were to save face in light of the Supreme Court's expansion of lawyer advertising rights. Responses from both plaintiffs' attorneys and defense attorneys expressed concern about attorney solicitations. Most attorneys who came forward were concerned with targeted advertising's impact on the profession, particularly in cases involving targeted solicitation of those who had suffered tragedies, with Committee member Edwin Mulock noting that some had even received letters while in intensive care, calling such actions "'the grossest problem we have now.'"[90]

A minority of commenters argued that the tactics of a few attorneys should not be enough to target the entire system.[91] Tampa attorney Barry Caskey noted that "[p]eople like Bill Wagner [a prominent Florida wrongful death attorney]" were "concerned" about the new rules, suggesting that "maybe [he was] afraid one of these lawyers [using mail solicitation was] going to pluck one of those million-dollar babies [lawsuits]." Suggesting that it was "[natural]" for "people who think they have the best shot at [such lawsuits to] want to limit their competition."[92]

Even with a vocal minority against the potential regulations, the Bar concluded that attorney advertising and solicitation could mislead the public and negatively impact the administration of justice.[93] The results of the study showed that the public was specifically repulsed by television commercials and direct mail solicitation targeting accident victims, which led the Bar to conclude its rules should, at a minimum, be amended to tightly regulate the solicitation of clients by personal injury attorneys.[94] As a result, in 1990, the Bar filed a request with the Florida Supreme Court to amend the rules governing attorney advertising.

While the Florida Bar wanted to overhaul its entire code related to advertising, its main focus was reforming the ability of attorneys to solicit clients after an accident, especially through targeted mail campaigns. The Bar attempted a total ban on such solicitation, but the Florida Supreme Court rejected its efforts because of *Bates* precedent.[95] While the Bar did acknowledge that targeted

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89. *See Commission on Advertising and Solicitation Invites Comments on Proposals*, FLA. BAR NEWS, July 1, 1989, at 4; *Lawyer Discipline Amendments Going to Court*, FLA. BAR NEWS, July 15, 1989, at 6-8; Advertising Comment Period Extended, FLA. BAR NEWS, Nov. 15, 1989, at 2. *See generally Proposed Ad Restrictions*, FLA. BAR NEWS, July 15, 1989, at 3; *Proposed Advertising Rule Amendments as Applied by Board of Governors with Conforming Amendments*, FLA. BAR NEWS, October 1, 1989, at 6-11.

90. Bizarro, *supra* note 82, at 4.

91. *See id*. at 1, 4.

92. *Id*. at 4.

93. *See* Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d 451, 463 (Fla. 1990).

94. *See id*. at 454, 459; Fla. Bar v. Went for It, Inc., 515 U.S. 618, 620 (1995); Bizarro, *supra* note 82, at 1.

95. *See* Brief of the Florida Bar, Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar –

written communications "generally present less potential for abuse or over-reaching than in-person solicitation and are therefore not prohibited for most types of legal matters," it argued that a thirty-day restriction on personal injury solicitation was "reasonably required by the sensitized state of the potential clients, who may be either injured or grieving the loss of a family member, and the abuses which experience has shown exist in this type of solicitation."[96] There was no mention or acknowledgment of the sensitive nature of solicitation in other areas of the law, such as probate or criminal law, as those practice areas were not in the Bar's crosshairs.[97]

In response to the Bar's request, the Florida Supreme Court heard from various groups, with some in favor of the changes and some opposed.[98] There were numerous letters from personal injury attorneys who said they would be harmed by an advertising ban. Some were from lawyers looking to build a book of business, working in firms with only a few lawyers or even by themselves.[99] They used advertising and solicitation to find clients, as they did not have well-known names or connections. And they were often quite successful in doing so. In fact, one of the lawyers who submitted his objection as a young attorney now owns "one of the largest personal injury firms in the Sunshine State."[100]

There were also many parties in favor of the reforms. The proposed change was publicly supported by the Academy of Florida Trial Lawyers and the Dade County Trial Lawyers Association, prominent local plaintiffs' organizations and counterparts of the national ATLA. Both claimed that the new rules were necessary to prevent deception and eliminate "serious damage" to the judicial system.[101]

In 1990, the Florida Supreme Court narrowly decided 4-3 to allow the Bar to make its changes.[102] Despite the Supreme Court's holding in *Shapero* just two years before, the proposed thirty-day ban was found to pass constitutional and precedential muster. While the court held that direct mail advertising and solicitation could not be banned completely, it did feel that the mailings could be constitutionally restricted by implementing the thirty-day ban.[103] With only a thirty-day waiting period, the court felt that the new advertising rules were overall "tailored

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Advertising Issues, 571 So. 2d 451 (Fla. 1990) (No. 74987), State Archives of Florida, Series 49, Box 93, File 74,987, Wallet 1.

96. *Petition to Amend the Rules Regulating the Fla. Bar*, 571 So. 2d. at 486.

97. *Id.* at 455.

98. *Id.* at 452.

99. *See* Letter from David W. Singer, Att'y L. Offs. David W. Singer, to Raymond Ehrlich, C.J. Fla. (Apr. 19, 1990); Letter from Lars A. Lundeen to Fla. Sup. Ct. (Dec. 12, 1989).

100. David W. Singer, *A Message from David W. Singer*, DAVID W. SINGER & ASSOCS., https://www.1800askfree.com [https://perma.cc/BSQ6-TDMA] (last visited Dec. 3, 2024).

101. *Petition to Amend the Rules Regulating the Fla. Bar*, 571 So. 2d. at 455.

102. *See id.* at 460.

103. *See id.* at 459.

to serve the public interest and do not constitute a burden on protected commercial speech."[104]

III. THE RIGHT KIND OF PERSONAL INJURY ATTORNEY

The following section highlights the stratification within the personal injury bar between plaintiffs' attorneys' organizations strongly in favor of stricter regulations and those who wanted or needed to advertise in order to generate business. Supporters of stronger regulations claimed they were necessary to protect the image of the profession. These attorneys tended to be well-known and established, with high name recognition and little need to advertise. Those against advertising restrictions argued that new regulations would create barriers to entry for upstarts, especially when it came to building a reliable client base. The section demonstrates how some members of the personal injury bar were able to shape the rules in their favor, while also limiting competition.

A. PERCEPTION AND IMAGE

It is apparent that Florida intended its thirty-day ban to, at minimum, hamstring personal injury attorneys' ability to do business. The problems reported by the Commission on Advertising and Solicitation centered on the activities of personal injury attorneys, with little regard for the actions of those in other areas of law.[105] The information submitted as evidence to the Florida Supreme Court in support of the rule changes was framed with the personal injury attorneys in mind.[106] While the Florida Bar's main arguments for the ban were the protection of privacy and of possibly judgment-impaired accident victims, it was also largely concerned with perception of the profession. The Bar's journal published numerous articles about attorneys wringing their hands over how members of the public saw the legal profession in general, largely due to increased advertising and solicitation activity.[107] Since the public's focus was on personal injury attorneys, that seemed to be an easy place to project their fears. Bar leadership was concerned

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104. *Id.*

105. *See id.* at 455, 459.

106. *See generally* Orrick, *supra* note 84; *Lawyer Faces Felony Charges for Hospital Solicitations*, FLA. BAR NEWS, Oct. 15, 1987, at 1; Joe Bizarro, *Limited Ban on Solicitation Urged by Bar*, FLA. BAR NEWS, Feb. 1, 1988, at 1, 3; *Trial Lawyers Board Backs Standard of Conduct*, FLA. BAR NEWS, Feb. 15, 1988, at 22; David B. Higgenbottom, Letter, Embarrassed by Commercials, FLA. BAR NEWS, Nov. 1, 1988, at 2; Robert H. Kennedy, Letter, Public Ignorance, FLA. BAR NEWS, Oct. 1, 1989, at 2.

107. *See generally* Ray Ferrero, Jr., President's View, *Direct Mail Solicitation-Abusing a Right*, FLA. BAR NEWS, Aug. 15, 1987; Stephen F. Bolton, Letter, *Deplores Mail Solicitation*, FLA. BAR NEWS, Sept. 15, 1987, at 2; Judson Orrick, *Direct-Mail Solicitation Okay, Court Says*, FLA. BAR NEWS, July 1, 1988, at 1, 3; Joe Bizarro, *Panel Developing Lawyer Ad Screening Procedure*, FLA. BAR NEWS, Oct. 1, 1988, at 5; Howard T. Sutter, Letter, *Ads Disgusting*, FLA. BAR NEWS, Jan. 15, 1989, at 2; Joe Bizarro, *Ad Restriction Coming from Bar Panel*, FLA. BAR NEWS, June 15, 1989, at 3; Joe Bizarro, *Lawyer Ad Proposals Stir Controversy*, FLA. BAR NEWS, July 1, 1989, at 1, 3; Ben Hill III, *Should Ad Limit Proposals be Approved?*, FLA. BAR NEWS, July 15, 1989, at 1, 3; Morris C. Proenza, Letter, *Abolish Advertising*, FLA. BAR NEWS, July 15, 1989, at 2; Douglas D. Batchelor, Letter, *Lawyers and the Press*, FLA. BAR NEWS, Aug. 1, 1989, at 2.

that not only would personal injury attorneys prey on unsuspecting, vulnerable victims, they would disgrace the entire profession in doing so.

B. THE ESTABLISHMENT

The AFTL had a relatively unremarkable history. It was founded at the end of World War II by a group of attorneys who represented accident victims, eventually associating itself with the ATLA. But it remained small into the 1960s, counting fewer than fifty members at the turn of the decade. By the 1970s, it had grown enough to hire an executive director, and by the 1980s, it was part of the mainstream, with members contributing to Florida Bar publications on a regular basis.[108] It positioned itself as an organization that was meant to represent the interests of the average injured person in the court system and continued to expand as the idea of personal injury claims began to grow in the 1960s and 1970s. Much like its national counterpart, advertising was not a main focus of the AFTL.[109] Instead, it focused on topics that would help personal injury attorneys represent their clients in a more zealous manner, including damages, wrongful death claims, auto accidents, and insurance issues.[110] Personal injury attorneys who were members of the organization conducted their business in a calm and controlled manner and were not necessarily focused on how to market their practice or come up with a splashy billboard or slogan. They were able to exist as members of the bar without the rest of the profession taking issue with their tactics or practices.

Its members also tended to be the more established personal injury attorneys. For example, Anthony Cunningham was a "nationally prominent trial lawyer" who was in practice for 45 years.[111] He had been named to the Best Lawyers in America every year since the award began in 1983, as well as a preeminent lawyer in the United States by Martindale-Hubbell.[112] His firm, of which he was a founding partner, had existed since 1967, and was founded by Bill Wagner, one of the best-known personal injury attorneys in the state.[113] F. Gregory Barnhart

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108. *See Vision, Mission, and History*, FLA. JUST. ASS'N, https://www.myfja.org/vision-mission-history/ [https://perma.cc/TE7V-2UL5] (last visited Dec. 3, 2024).

109. *See Compare Code Must Be Amended Before Florida Lawyers Can Advertise*, FLA. BAR NEWS, July 10, 1977, at 1 (explaining the implications of *Bates v. State Bar of Arizona* on its front page, in the first issue after the decision was announced), *with* J. ACAD. FLA. TRIAL L., July 1977, J. ACAD. FLA. TRIAL L., Aug. 1977, J. ACAD. FLA. TRIAL L., Oct. 1997, J. ACAD. FLA. TRIAL L., Nov. 1977, and J. ACAD. FLA. TRIAL L., Dec. 1977 (providing no coverage or discussion of *Bates* or attorney advertising in general).

110. *See* S. Victor Tipton, *Cases and Commentaries*, J. ACAD. FLA. TRIAL L., July 1977, at 1 (discussing punitive damages); S. Victor Tipton, *Cases and Commentaries*, J. ACAD. FLA. TRIAL L., Aug. 1980, at 1 (discussing insurance and bad faith); S. Victor Tipton, *Cases and Commentaries*, J. ACAD. FLA. TRIAL L., May 1988, at 6 (discussing wrongful death claims and interspousal immunity); S. Victor Tipton, *Cases and Commentaries*, J. ACAD. FLA. TRIAL L., Apr. 1989, at 9 (discussing collisions with stopped and parked vehicles).

111. *Anthony Cunningham Obituary*, TAMPA BAY TIMES (Jan. 22, 2009), https://www.legacy.com/us/obituaries/tampabaytimes/name/anthony-cunningham-obituary?id=10868528 [https://archive.ph/V2y3N].

112. *Id.*

113. *See About Us*, WAGNER MCLAUGHLIN & WHITTEMORE, https://www.wagnerlaw.com/our-team/ [https://perma.cc/6WW5-6L66].

received his undergraduate degree with honors from Vassar College and his law degree from Cornell Law School.[114] He taught at Cornell's law school and was appointed by several Florida governors to sit on numerous judicial nominating commissions, among other accolades.[115] Richard Slawson received both his undergraduate and law degrees from the University of Notre Dame, obtained the highest possible rating from Martindale-Hubbell, had been named to the Best Lawyers in America for five straight years before he began his term as president, and was appointed by the Florida governor to serve on the Judicial Nomination Commission for the Fifteenth Judicial Circuit from 1987 to 1991.[116] Either of the remaining two could be deemed the most prominent and powerful: Roy Dalton, a current federal judge for the Middle District of Florida,[117] or Mel Martinez, former Secretary for Housing and Urban Development, former chairman of the Republican National Committee, and United States Senator from Florida from 2005 to 2009.[118]

These men would not have given the need for solicitation a second thought, because people, including potential customers, knew who they were. They did not need to recruit accident victims to be their clients, because clients would find them on their own, either by word of mouth or formal recommendation.[119] Many members of the AFTL conducted their practice in the same way. In fact, of the AFTL officers and directors from 1988 who are still practicing, two members still do not run a website.[120]

Furthermore, the members of the AFTL were neither the personal injury attorneys of the Progressive Era who had located across the street from factories nor the ones of the late twentieth century who had caused the Bar to create the thirty-day ban on solicitations. Of the fifty-one officers and directors of the 1988 AFTL, one became an assistant attorney general in the state of Florida,[121] six became

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114. *F. Gregory Barnhart*, SEARCYLAW.COM, https://www.searcylaw.com/attorneys/f-gregory-barnhart/ [https://perma.cc/DZ87-TC8G] (last visited Dec. 3, 2024).

115. *Id.*

116. Laura Simon, *Trial Lawyers' Academy Names a New President: Palm Beach Edition*, S. FLA. SUN-SENTINEL, Nov. 3, 1995; *Richard Slawson*, LINKEDIN, https://www.linkedin.com/in/richard-slawson-156b1056 [https://archive.ph/xz1UU] (last visited Nov. 20, 2024); *Richard Slawson, Esq.*, FLORIDA'S CHILDREN FIRST, http://www.floridaschildrenfirst.org/richard-slawson/ [https://perma.cc/6EG7-HXAY] (last visited Dec. 3, 2024).

117. *Roy Dalton, Jr.*, U.S. DIST. CT. MIDDLE DIST. FLA., https://www.flmd.uscourts.gov/judges/roy-dalton-jr [https://perma.cc/74YK-EYUZ] (last visited Dec. 3, 2024).

118. *Martinez, Melquiades R. (Mel)*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/People/Detail/15032401306 [https://perma.cc/3ZD9-4NFB] (last visited Dec. 3, 2024).

119. *See* WAGNER MCLAUGHLIN & WHITTEMORE, *supra* note 113.

120. *See* J. ACAD. FLA. TRIAL L., May 1988 (providing the masthead for the Journal of the Academy of Florida Trial Lawyers in 1988; of the individuals listed under "Officers" and "Board of Directors," two of those still in practice do not run websites other than Facebook or LinkedIn profiles).

121. *Brian Duffy Brings Four Decades of Experience to Spicer Rudstrom PLLC*, INT'L ASS'N OF DEF. COUNS., (Oct. 29, 2015 at 6:37 PM), https://www.iadclaw.org/brian-duffy-brings-four-decades-of-experience-to-spicer-rudstrom-pllc/. *See Brian Duffy Will Be Missed*, MCCONNAUGHHAY, COONROD, WEAVER, & STERN P.A., (Nov. 24, 2015), https://www.mcconnaughhay.com/news/brian-duffy-will-be-missed/ [https://perma.cc/S8ZV-VVWJ].

judges,[122] and one became president of an Iowa community college.[123]

With members of such pedigrees, it is no surprise that the AFTL, as well as the Dade County Trial Lawyers Association, filed responses with the Florida Supreme Court in favor of the thirty-day restriction on advertising. The court heavily relied on those submissions.[124] Most of the members of these organizations were established, well-known, and attracted their clients through what were considered an acceptable, old-fashioned means: the Yellow Pages, business cards, referrals, and, in the words of the ABA's Canon of Professional Ethics from 1908, having "a well-merited reputation for professional capacity and fidelity to trust . . . the outcome of character and conduct."[125] They wanted to not only protect the profession's reputation from those who were advertising in other ways, but also to protect the business they had established on reputation and name recognition.

The ban affected those who needed to advertise and solicit to find clients: those who had not gone to law schools like Cornell or Notre Dame, those who were young and just entering the profession, and those who were not originally from the state and were trying to build a client base without knowing many people who could give referrals. The Florida Supreme Court heard from many attorneys who were against the proposed rules, but their objections were relegated to footnotes.[126]

Like AFTL members, many of these "up-and-coming" attorneys did not advertise, at least not in the traditional sense.[127] But unlike AFTL attorneys, they were not

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122. *See* J. ACAD. FLA. TRIAL L., *supra* note 119 (providing the masthead for the Journal of the Academy of Florida Trial Lawyers in 1988); Milestones*, Recognition & Involvement*, KAREN GIEVERS, ATTY. AT L., https://karengievers.com [https://perma.cc/PZ44-XKHQ] (served on the bench from 2010 until 2019 and served as secretary of the AFTL from 1987-1988) (last visited Dec. 3, 2024); *Ronald C. Dresnick*, KLUGER, KAPLAN, SILVERMAN, KATZEN & LEVINE, P.L, https://www.klugerkaplan.com/attorneys/ronald-c-dresnick/ [https://perma.cc/P9WD-UFYH] (served on the bench in the 11th judicial circuit of Florida and was on the board of directors of the AFTL in 1987-1988) (last visited Dec. 3, 2024); *Former Judges of the Fifth District Court of Appeal*, FLA. FIFTH DIST. CT. OF APPEAL, https://www.5dca.org/Judges/Former-Judges [https://archive.ph/6JNd8] (Jacqueline R. Griffin served on the bench from 1990 to 2014 and was an associate editor for the AFTL in 1987-1988) (last visited Dec. 3, 2024); Thomas Hoadley, *Judicial Profile-Moses Baker, Jr.,* PALM BEACH BAR ASS'N, Dec. 1994, https://www.palmbeachbar.org/wp-content/uploads/2020/02/Baker-Moses.pdf [https://archive.ph/Nap87] (served on the 15th judicial circuit of Florida in the juvenile division and was on the board of directors of the AFTL in 1987-1988) (last visited Dec. 3, 2024); *Tom Mihok*, MEDIATEFIRST, INC., https://mediatefirstinc.com/team/tom-mihok [https://perma.cc/WH28-QFZZ] (served as both an Assistant U.S. Attorney and as a judge in the 9th circuit of Florida from 1995-2014, was an associate editor for AFTL in 1987-1988) (last visited Dec. 3, 2024).

123. *Rob Denson Becomes DMACC's Longest-Serving President*, DES MOINES AREA CMTY. COLL. (Dec. 5, 2023), https://www.dmacc.edu/news/2023/20231205-1.html [https://perma.cc/L58Q-MWRQ] (is currently the president of Des Moines Area Community College in Des Moines, Iowa); *see* J. ACAD. FLA. TRIAL L., *supra* note 119 (listing Robert J. Denson as a member of the 1988 Board of Directors of the Journal of the Academy of Florida Trial Lawyers).

124. Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d 451, 455 (Fla. 1990).

125. A.B.A Comm. on the Code of Pro. Ethics, *Final Report: Code of Professional Ethics*, at 582 (1908).

126. *Petition to Amend the Rules Regulating the Fla. Bar*, 571 So. 2d. at 456.

127. Of the ten who are still active, only four have websites advertising their practice.

well-known, and they lacked substantial advertising budgets. Mining police reports and sending targeted letters to potential clients was much more cost-effective than buying a billboard or filming a television commercial. These tactics were also more likely to reach the right person than ads in the Yellow Pages or a classified in the newspaper. Being able to directly solicit a client who was likely to hire them was important for their business model, and any alteration of that model could cause some of them to lose money, or, potentially, their entire business.[128]

IV. THE SUPREME COURT'S RESPONSE

This part details the Supreme Court's role reversing its prior precedent by restricting personal injury advertising, creating an anti-competitive environment with barriers to entry for those who were just beginning their law career or who had not established name recognition and needed to advertise in order to find clients. In doing so, the Supreme Court not only sided with the ABA's concerns of preserving image and not offending the public, but also with the upper echelon of personal injury attorneys who claimed the same concerns. In the process, the Court helped established personal injury attorneys pick winners and losers in the market, allowing those already entrenched in the profession to keep a firm hold on their client base.

A. LOWER COURTS WEIGH IN

In March 1992, G. Stewart McHenry[129] filed suit in the Middle District of Florida to challenge the new restrictions the Florida Bar had implemented just over a year earlier.[130] McHenry had started a personal injury referral service called Went For It, Inc.[131] The business model involved sending letters to individuals who had been involved in accidents, advising them of their right to sue and of McHenry's ability to represent them in court.[132] These letters would usually be sent shortly after the accident had occurred, which, until 1990, had taken place without any objection from the Florida Bar.

McHenry claimed that he would routinely contact accident victims before thirty days had elapsed and that reaching out in that time was important for finding clients.[133] Moreover, he argued that his conduct was protected by the First

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128. Letter from Lars A. Lundeen to Fla. Sup. Ct., *supra* note 99; Comments in Opposition to Petition, Wilson Jerry Foster, Petition to Amend the Rules Regulating the Fla. Bar—Advertising Issues, 571 So. 2d at 455 (Fla. 1990) (No. 74987) (on file with author); Comments of Frank Mallory Shooster, P.A., in Opposition to the Petition, Petition to Amend the Rules Regulating the Fla. Bar—Advertising Issues, 571 So. 2d at 455 (Fla. 1990) (No. 74987) (on file with author).

129. The original name of the case was *McHenry v. The Florida Bar*; the representative parties had to be altered because McHenry was disbarred for propositioning himself to his clients during the case's rise to the Supreme Court.

130. McHenry v. Fla. Bar, 808 F.Supp 1543, 1544 (M.D. Fla. 1992).

131. CORPORATION ANNUAL REPORT, WENT FOR IT, INC. (1995).

132. Petitioner's Brief on the Merits at *5, Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995) (No. 94-226) 1994 WL 614916, at *5.

133. *Id*. at *4–5.

Amendment.[134] He was successful at both the district and circuit level, with both courts unpersuaded by the idea that the Bar was trying to protect the possible recipients, especially since letters could be sent to the same people under the same circumstances if they were sent for other reasons; the recipients for a probate letter and a wrongful death letter could be exactly the same, but only the wrongful death letter would be prohibited. Both courts agreed that, while the content and the timing of the letters may indeed be objectionable and offensive, "'[t]he State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.'"[135]

The Florida Bar chose to appeal to the Supreme Court, hoping to challenge the expansion of attorney speech rights that the Court had allowed over the previous fifteen years. But it did not seem that it would be successful; this case involved essentially the same conduct that the Court had approved in a case in *Shapero*.[136] The ATLA was on board, with former ATLA president and prominent Miami personal injury attorney Larry Stewart collaborating with the Florida Bar to draft the thirty-day restriction. It then filed an amicus brief in support of the Florida Bar when McHenry's case reached the Supreme Court. It argued that it was not just the image of the legal profession that was at stake, but the potential to prejudice potential jurors against personal injury plaintiffs. While Justice Kennedy brushed off the idea, ATLA presented the results of several studies that showed how attorney advertising has caused many people to view trial lawyers as less credible and more likely to pursue frivolous lawsuits. Survey respondents also looked down on plaintiffs who retained a lawyer who advertised.[137]

The results of ATLA's studies did seem to reflect the cultural moment. By the mid-1990s, with Newt Gingrich and other congressional Republicans' anti-lawyer rhetoric, as well as lawyer advertising in cases like McHenry's, lawyer jokes had become part of popular culture. Lawyers became fodder on talk shows, websites, and even current, topical shows like *Saturday Night Live*, *The Simpsons*, and, eventually, *South Park* and *Family Guy*. No one passed up the opportunity to make a lawyer joke. In fact, in *Went For It*, oral argument was interrupted by bursts of laughter from the gallery as the justices traded jokes about the image of the Bar.[138] Lawyers were becoming a punch line, and this became one of Justice Sandra Day O'Connor's main concerns.

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134. *See* Appellee's Answer Brief at 5-6, McHenry v. Fla. Bar, 21 F.3d 1038 (No. 93-2069), 1993 WL 13127078, at *5–6.

135. McHenry v. Fla. Bar, 808 F.Supp. 1543, 1546 (M.D. Fla. 1992) (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 473 (1916)).

136. *Shapero*, 486 U.S. at 466.

137. JACOBSON & WHITE, *supra* note 65, at 255–56.

138. Transcript of Oral Argument at *25, *32, *33, Florida Bar v. McHenry, 515 U.S. 618 (1995) No. 94-226.

B. COMMERCIAL SPEECH AND COMPETITION

Justice O'Connor, described as a "longtime critic of lawyer advertising," made her disapproval of attorney advertising and solicitation—as well as the declining standards of professionalism in the Bar overall—well-known.[139] She was outspoken about advertising in the professions in general, and even spoke out on the matter when it was not at the crux of the issue.[140] Since arriving on the Court in 1981, she had heard four other attorney advertising cases, with arguments in one coming roughly six weeks after her confirmation.[141] While she went along with the unanimous decision in the first., she wrote separately in the other three. In all three of those cases, the attorneys involved were personal injury attorneys: one practiced personal injury and product liability law,[142] another's firm handled injury cases,[143] and one was a well-known personal injury attorney—despite his case involving advertising for foreclosure representation.[144]

In each of those three cases, she thought the Court overstepped its bounds and should have allowed the states to regulate the profession within their borders. The "ordinary consumer" often did not know how to evaluate the veracity of claims brought by attorneys, consequently leading to an "easily intimidated or overpowered" clientele, she argued.[145] With each case, she was able to persuade more members of the Court.

By the time it heard *Went For It*, the Court's makeup had also changed dramatically. In addition to swapping Anthony Kennedy for Lewis Powell, David Souter for William Brennan, and Ruth Bader Ginsburg for Byron White, Antonin Scalia replaced Warren Burger in 1986; Clarence Thomas replaced Thurgood Marshall in 1991; and Stephen Breyer replaced Harry Blackmun in 1994. The turnover

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139. Scripps Howard News Service, *Court Tells Ambulance Chasers to Keep Away*, EVANSVILLE COURIER, June 22, 1995.

140. Edenfield v. Fane, 507 U.S. 761, 778-81 (1993) (O'Connor, J., dissenting); Sandra Day O'Connor, *Professionalism*, 78 OR. L. REV. 385 (1999); Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L. Q. 5 (1998); *see* Ibanez v. Fla. Dept. of Bus. and Pro. Regul., Bd. of Acct., 512 U.S. 136, 149-153 (1994) (O'Connor, J., concurring in part and dissenting in part); *see* Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 398 (1987).

141. *In re* R.M.J., 455 U.S. 191 (1982); Zauderer v. Off. Of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626 (1985); *Shapero*, 486 U.S. at 466; Peel v. Att'y Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990).

142. Brief of Appellant at *3, Zauderer v. Off. of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (No. 83-2166),1984 WL 565570 at *3.

143. *Peel*, 496 U.S. at 91. Peel, although now disbarred and a convicted felon, worked for the Lakin Law Firm, which was known as a personal injury law firm while in operation. The firm is defunct, in part, due to both Peel and the firm's founder, Tom Lakin, serving time in prison. *See* Joe Harris, *Lawyer Tom Lakin Headed for Fed Plea Deal*, COURTHOUSE NEWS SERVICE (Feb. 29, 2008) https://www.courthousenews.com/lawyer-tom-lakin-headed-for-fed-plea-deal/ [https://archive.ph/BpPSn].

144. *Shapero*, 486 U.S. at 466; *Richard D. Shapero and Associates*, MARTINDALE, https://www.martindale.com/organization/richard-d-shapero-associates-2890326/louisville-kentucky-4687680-f/ [https://archive.ph/JBVkL] (last visited Dec. 3, 2024).

145. *Peel*, 496 U.S. at 126 (1990) (O'Connor, J., dissenting); *Zauderer*, 471 U.S. at 674 (1985) (O'Connor, J., concurring in part and dissenting in part).

worked to O'Connor's advantage. In her first dissent, she was joined only by Powell and Burger; in the next, both Powell and Burger had left the Court, but she was able to persuade Rehnquist and Scalia; and in the last, she was able to persuade White to join the three of them. The recent additions of Scalia, Thomas, and Breyer, in addition to O'Connor and Rehnquist, would make up the majority in *Went For It*. A bit of an odd coalition—but one that O'Connor had been able to build that frowned on attorney advertising and solicitation, both as a threat to the public as consumers and as a stain on the profession.

In the Court's opinion in *Went For It*, O'Connor, writing for the majority, drastically cut back on what would be considered permissible attorney speech, saying that, while attorney speech was indeed given a "measure" of First Amendment protection, that amount of protection was, "of course, [was] not absolute," since it fell under the category of commercial speech.[146] Under the Court's intermediate scrutiny standard for commercial speech, the regulation would be upheld if the government could show: 1) a substantial interest in favor of the regulation; 2) that the restriction directly and materially advanced that interest; and 3) that the regulation was narrowly drawn.[147]

The Court found Florida's evidence persuasive. The Bar submitted a 106-page summary of a two-year study of advertising and solicitation by attorneys. The Court found the study supported the Bar's contentions that the public in Florida viewed direct-mail solicitation "in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession."[148] Among other answers, the Court highlighted that the survey's respondents thought that contacting accident victims would be an invasion of privacy; "annoying or irritating"; "designed to take advantage of gullible or unstable people"; and that being contacted by an attorney after an accident lowered their perception of both the legal profession and the judicial process.[149] The Court also relied on testimonials the Bar had submitted from those who had been directly solicited by an attorney, including one who found it "despicable and inexcusable" that a lawyer contacted his mother three days after his father's funeral, and another who felt it "beyond comprehension" that his nephew's family had received a letter the day of the nephew's funeral.[150]

Notably, the majority decision deviated from precedent. The Court felt that even though some of the language from past cases may have been applicable, those cases differed in "several fundamental respects."[151] The *Went For It* court felt that the evidence it had received in favor of regulation was much stronger than what states had presented previously. Unlike the interests cited in past

146. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).
147. *Id.*
148. *Id.* at 626.
149. *Id.* at 627.
150. *Id.* at 627–28.
151. *Went For It, Inc.*, 515 U.S. at 629–31.

attempts by states to regulate attorney advertising, the Court found that the Bar's interest in Florida was clearly substantial. This directly ignored the principle from a 1988 case that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded."[152] In a span of seven years, direct mail solicitation had evolved to become so offensive and intrusive that it warranted regulation, at least in the eyes of the Court. The Court found the Florida Bar's actions *more* acceptable than its past cases, because Florida deliberately limited the scope of its solicitation ban. Analyzing the issue as a content-based restriction was therefore not necessary, O'Connor ruled.[153]

Countering respondents' arguments, the Court found that there were no less burdensome alternatives for protecting a victim's privacy short of a complete ban on contact within the first thirty days, and that there were "many other ways for injured Floridians to learn about the availability of legal representation during that time."[154] The fact that the Bar only targeted personal injury advertising by immediate or direct solicitation worked in its favor, because the Court considered the fact as evidence of a narrowly tailored regulation.[155] Further, the Court decided that the Bar's regulation was designed not to protect citizens from offense but to avoid the "demonstrable detrimental effects that such 'offense' has on the profession it regulates," a legitimate state interest.[156] Because the Bar argued it was not as concerned with the contents of the solicitation letters as it was the timing of the receipt of the letters, the Court was able to sidestep its prior statements that the letter could be easily ignored.[157] Despite respondents' arguments, the Court found the Bar's study to be the deciding factor, calling it "unrebutted" by respondents in the case below, and held: "The palliative devised by the Bar to address these [the potential] harms is narrow both in scope and duration. The Constitution, in our view, requires nothing more."[158]

Justice Kennedy wrote the dissent, and was joined by Justices Souter, Ginsberg, and Stevens. He provided a sharp critique of the majority's casual treatment of precedent related to the First Amendment: "If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care and fidelity to our precedents." He pointed out that, despite the Court's desire to defer to the states regarding the regulation of licensed professions, "[t]he problem the Court confronts, and cannot overcome, is our recent decision in *Shapero* [the case from 1988]."[159]

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152. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 475–76 (1988).
153. *See Went For It, Inc*., 515 U.S. at 630–31.
154. *Id*. at 633.
155. *Id*. at 624.
156. *Id*. at 631.
157. *See id*.
158. *Id*. at 635.
159. *Id*. at 636-37 (Kennedy, J., dissenting).

The Court historically chose a "hands-off" approach in cases involving competition, letting the market decide who should prevail.[160] In the 1970s and 1980s, the Court intensified that tendency. By the 1980s, courts were generally finding in favor of competition among members of learned professions on matters that would allow for more price competition and more information to be provided to consumers.[161] This included pharmacists,[162] engineers,[163] and doctors,[164] in addition to lawyers. *Went For It* was decided in direct contrast to that principle, instead allowing states to restrict communications that could provide potential clients with necessary information on how to decide between several attorneys.

This is part of the reason the decision in *Went For It* was so surprising; it was the Court's first decision on attorney advertising that allowed a state to restrict anything other than in-person solicitation, a complete reversal of the gradual expansion of attorney speech rights. But if we consider the history of the legal profession's attitude toward personal injury attorneys, as well as its stratification, the actions make sense because the established elites of the profession have historically had a dislike of personal injury attorneys. As more attorneys took advantage of advertising, oftentimes in offensive ways, many elites in the profession, including prestigious personal injury attorneys, grew increasingly uncomfortable with the effect on the profession's reputation.[165] It was impossible to ban attorney advertising entirely; the Court had made that clear in *Bates*. Rather than overrule *Bates*, the Court, along with the governing members of the Florida Bar and powerful personal injury organizations, simply decided that it would allow stringent rules to govern personal injury advertising and solicitation, forcing those who had become potential embarrassments to find business in a more traditional, respectable way.

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160. *See* Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951); *see also* N. Securities Co. v. United States, 193 U.S. 197, 328-32 (1904); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 383, 385 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Se. Underwriters Ass'n, 322 U.S. 533, 553 (1944); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Container Corp. of Am., 393 U.S. 333 (1969); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); City of Lafayette, La. v. La. Power & Light Co., 435 U.S. 389, 398 (1978); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978).

161. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 748-49 (1976) (pharmacists); Nat'l. Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 679-80 (1978) (engineers); Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 332-33 (1982) (doctors).

162. Va. State Bd. of Pharmacy, 425 U.S. at 748.

163. Nat'l. Soc'y of Pro. Eng'rs, 435 U.S. at 679.

164. Am. Med. Ass'n v. F.T.C., 638 F.2d 443, 445-46, 453 (2d. Cir. 1980); Maricopa Cnty. Med. Soc'y, 457 U.S. 332.

165. *See* R. William Ide III, *Rebuilding the Public's Trust*, 79 A.B.A. J. 8 (1993); James Podgers, *Image Problem: Burned by a Fall in Public Favor, the Organized Bar Turns Up the Heat on Lawyer Advertising*, 80 A.B.A. J. 66, 67 (1994); Mark Hansen, *Lawyers' Internet Ad Angers Users*, 80 A.B.A. J. 26, 26-27 (1994); James Podgers, *Commercial Appeal*, 79 A.B.A. J. 109 (1993); E. Vernon F. Glenn, *A Pox on Our House*, 79 A. B.A. J. 116 (1993); Letter from D. Lawrence Wobbock, President of the Or. Trial Laws. Ass'n, to the A.B.A. J. (Oct. 1993), *in Letters*, 29 A.B.A. J. 10, 12-13.

Despite the free market and anti-regulation implications, *Went For It* is still a relatively understudied case. Most commentary has been in the form of notes or comments in law reviews, often too short to delve into the history of the thirty-day restriction. Perhaps this is because it was not particularly revolutionary in its holding; it did not forbid advertising or solicitation; it just made it possible for states to regulate them. Plus, the only attorneys affected by the regulation would be personal injury attorneys, not enough of the profession to cause much of a backlash, and also not a part of the profession extensively studied. In pieces that examine the case, *Went For It* is described in the following ways: 1) personal injury attorneys' conduct was offensive to the majority of attorneys and could harm its reputation among the public, justifying Florida's desire to minimize its appearance; and 2) allowing targeted advertising and solicitation by personal injury attorneys could abuse potential clients in a time of grief and vulnerability, perhaps causing them to make a decision that they would not have otherwise. Many of these works criticize the decision, but they do so on free speech, access to justice, and stare decisis grounds—ignoring the anti-competitive nature of advertising restrictions.[166]

In the justices' concern about potential disrespect for their profession, the Court, inadvertently or not, put its finger on the scale. There was nothing about the Florida rule that was patently anti-competitive. But by allowing the thirty-day ban to stay in place, the Court gave Florida a chance to strongly favor established personal injury attorneys over the ability of newer personal injury attorneys to enter the market. *Went For It* was indeed an issue of propriety for the Court. Neither the Florida Bar nor the Court had forgotten personal injury attorneys' long history. Not only did the Bar and the Court want to protect "vulnerable" clients, but the Bar also needed protection from the lawyers who had used runners at accident scenes and inspired embarrassing lawyer jokes. If we are to take the Court's opinion at face value, its intent was indeed to protect both lawyers in

166. *See* Jodi Vanderwater, Note, *Florida Bar v. Went For it, Inc.: Restricting Attorney Advertising to Preserve the Image of the Legal Profession*, 27 LOY. U. CHI. L.J. 765 (1996) (agreeing that the Court ruled correctly); Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 ARK. L. REV. 703, 727 (1996) (recognizing that limiting attorney contact for the first thirty days could keep clients "in the dark"); Daniel L. Zelenko, Note, *Do You Need a Lawyer? You May Have to Wait 30 Days: The Supreme Court Went Too Far in Florida Bar v. Went For It*, 45 AM. U. L. REV. 1215, 1238-1239 (1996) (recognizing the difficulty injured parties may have in finding an attorney without solicitation); Matthew E. Saunders, Comment, *Florida Bar v. Went For It, Inc.: A Thirty-Day Bugaboo?*, 31 NEW ENG. L. REV. 1215, 1254, 1256, 1264-65 (1997) (recognizing both speech implications and the Court's overruling of its own precedent); John Phillips, Note, *Six Years After Florida Bar v. Went For It, Inc.: The Continual Erosion of First Amendment Rights*, 14 GEO. J. LEGAL ETHICS 197 (2000); Israel Dahan, Comment, *Attorney Direct-Mail Solicitation Revisited in Florida Bar v. Went For It, Inc.: A Step Too Far*, 4 J.L. & POL'Y 611, 615-617 (1996) (recognizing both the access to justice problems and the disadvantage it poses for lawyers); Marc David Lawlor, Note, *Ivory Tower Paternalism and Lawyer Advertising: The Case of Florida Bar v. Went For It*, 40 ST. LOUIS U. L.J. 895 (1996) (recognizing the speech issue as well as the possible price reduction that could occur if solicitation were allowed).

general and the unwitting accident victims. The result, however, fostered a spirit of anti-competition.

V. KENTUCKY'S TURN

This part explains how Kentucky took advantage of the Supreme Court's actions in *Went For It*, pushing the regulations of personal injury attorneys to the next step. In doing so, well-known personal injury attorneys once again advocated for the protective measures, eventually resulting in a criminal penalty for those who attempted to contact a client too soon after an accident.

A. OFFENSIVE TACTICS

Ironically enough, the leader against personal injury solicitation in Kentucky wasn't a lawyer. Rather, Larry Clark was a journeyman electrical worker, a wireman, to be more specific, and a proud member of IBEW Local 369 in Louisville, Kentucky.[167] He was also a longtime state legislator. While he served on numerous committees during his time in the Kentucky House of Representatives, the judiciary committee was never one of them. By 1996, he had already served over ten years in Kentucky's General Assembly, representing District 46, and even ran unopposed in 1994.[168] He had also recently been appointed Speaker Pro Tem, with enough political capital to take an important leadership position and to push a bill through when he wanted to. And he had suddenly taken interest in a topic that concerned the many members of the General Assembly who were members of the Kentucky Bar.

Clark didn't much care about picking winners and losers in the personal injury market, and he was only somewhat concerned about the reputation of the legal profession. Rather, as would be repeated several times throughout the debate of House Bill 177, Clark was involved in a car accident, albeit a minor one, on March 29, 1995, right in front of his house in Louisville.[169] According to Clark, "within days" of this accident, he received "no less than fifteen letters of solicitation from Jefferson County attorneys" trying to retain him as a client when he had no desire to bring a suit.[170] The solicitations he received were meant to be eye-catching, "in bright multi-colored envelopes," and, according to Clark, were "unprofessional and demeaning to the legal profession," because they made all

167. *Meet Larry Clark*, REP. LARRY CLARK, https://keeplarryclark.com/meet-larry/[https://perma.cc/FZX8-YJLQ] (last visited Dec. 3, 2024).

168. *1994 Primary and General Election Results*, COMMONWEALTH OF KY. STATE BD. OF ELECTIONS, https://elect.ky.gov/SiteCollectionDocuments/Election%20Results/1990-1999/1994/94gen_staterep.txt [https://perma.cc/9L89-APUH] (last visited Nov. 28, 2024).

169. Memorandum in Support of Motion for Summary Judgment by Intervenor Defendant A. B. Chandler III, Chambers v. Stengel, 1998 U.S. Dist. LEXIS 22359 (W.D. Ky. Sep. 14, 1998) (No. 3:97-CV-448(R)); Response by Intervenor Defendant A. B. Chandler III to Motion for Summary Judgment, Affidavit of Lawrence D. Clark ¶ 3, Dec. 28, 1997, Chambers v. Stengel, 1998 U.S. Dist. LEXIS 22359 (W.D. Ky. Sep. 14, 1998) (No. 3:97-CV-448(R)).

170. Response by Intervenor Defendant A. B. Chandler III to Motion for Summary Judgment, at ¶ 5

members of the profession look like "ambulance chasers" and contributed to the public's low opinion of attorneys in general.[171] Clark claimed these solicitations were "vexatious" and "invaded [his] privacy."[172] Clark's interest in regulating attorney solicitation came solely as a private citizen who took offense to letters in his mailbox.

Clark introduced a bill on the first day of the 1996 legislative session —less than a year after the Supreme Court decided *Went For It*—that largely mimicked Florida's thirty-day rule. House Bill 177 differed from Florida's in several ways. The Florida Bar created its rule after it had received complaints over several years and conducted as an extensive study prompted by those complaints. In Kentucky, Clark introduced the bill with little to no public comment.[173] Additionally, and perhaps most obvious, House Bill 177 was not meant to be a rule created by the Kentucky Supreme Court. Rather, it would be a law established by elected officials; officials who, in the state of Kentucky, had been expressly prohibited by the Kentucky Constitution from regulating the practice of law.[174] Finally, this law had a much more severe penalty than that of Florida. Florida's penalty was administered by the Florida Supreme Court and called for a lawyer to forfeit fees or void an agreement done in violation of the advertising rules.[175] Under House Bill 177, attorneys in violation of the thirty-day ban would be charged with a crime, punishable by up to a year in jail, as well as potential discipline by the Kentucky Bar.[176]

B. KENTUCKY PLAINTIFFS' ATTORNEYS POWERFUL INTERESTS

Despite Clark's overall lack of experience with the legal profession, there were many attorneys in Kentucky who shared his interests in regulating the conduct of

171. *Id.*

172. *Id.*

173. For example, *see* DVD: An Act Relating to the Solicitation of Legal Clients: Hearing on H.B. 177 Before the H. Comm. On Judiciary, 1996 Leg., 2nd Sess. (Ky. 1996) (on file with author) (testimony of Rep. Larry Clark and testimony of Joe White(Feb. 7, 1996)); DVD: An Act Relating to the Solicitation of Legal Clients: Hearing on H.B. 177 Before the S. Comm. On Judiciary, 1996 Leg., 2nd Sess. (Ky. 1996) (on file with author) (testimony of Rep. Larry Clark and testimony of Doug Myers (March 12, 1996)).

174. In 1975, Kentucky amended its constitution per the will of voters to revise the structure of the state court system. As part of this overhaul, the constitution made it clear that "The Supreme Court shall, by rule, govern admission to the Bar and the discipline of members of the Bar." KY. CONST. § 116. This did not deter the legislature from attempting to continue to regulate members of the bar through things like requiring admission fees be remitted to the state treasury. However, in 1980, the Supreme Court of Kentucky held that those acts of the legislature were void "because they purport to erect powers and limitations that no longer fall within the legislative province." *Ex parte* Auditor of Public Accounts, 609 S.W.2d 682, 684 (Ky. 1980).

175. *See* Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d 451, 455 (Fla. 1990).

176. DVD: An Act Relating to the Solicitation of Legal Clients: Hearing on H.B. 177 Before the H. Comm. On Judiciary, *supra* note 171.

the personal injury bar, but for different reasons. Many of them were upper- echelon personal injury attorneys. Roughly a month after the introduction, Clark appeared in front of the House Judiciary Committee to formally speak in favor of the bill. He brought an attorney with him, Joe White, who practiced in Louisville and was a member of the Kentucky Academy of Trial Lawyers (KATA), a state-level counterpart of ATLA.[177] KATA was a full supporter of the bill and wanted to show its backing, and White stated he was "pleased" to be there to speak in favor of HB 177.[178] He testified that the "majority of lawyers" were opposed to the solicitation practices that Clark had described, and that KATA specifically had a provision in its code of conduct that mirrored HB 177.[179] He felt that not only would it be "beneficial to the public at large," he also thought it was a bill that would help attorneys.[180]

It was very clear from the questions raised that Clark had a sympathetic audience. Some members worried if the bill was compliant with the current precedent of the Supreme Court, but, as one of the members noted, HB 177 was directly "patterned after the Florida act."[181] There were no objections to the idea that this bill targeted personal injury attorneys disproportionately or what it would mean for a personal injury attorney's ability to maintain a practice. Apart from two absent committee members, and one abstention, every member voted for HB 177.[182]

The Committee had several members who were also attorneys, and of those, there were a number who were connected to personal injury law. In fact, out of 19 members, 13 were attorneys, with six of them having some connection to personal injury law, and one of them being a member of the Kentucky Justice Association (formerly KATA) today.[183] As the attorneys were also members of

177. The Kentucky Academy of Trial Lawyers is now known as the Kentucky Justice Association (KJA). *History of KJA/KATA*, KY. JUST. ASS'N, https://www.kentuckyjusticeassociation.org/?pg=HistoryKJA [https://perma.cc/7VBM-2G8P] (last visited Nov. 16, 2024).

178. DVD: An Act Relating to the Solicitation of Legal Clients: Hearing on H.B. 177 Before the H. Comm. on Judiciary, *supra* note 171. Mr. White would become president of the organization in 2000. *Past Presidents*, KY. JUST. ASS'N, https://www.kentuckyjusticeassociation.org/?pg=PastPresidents [https://perma.cc/WF73-LTGF] (last visited Nov. 16, 2024).

179. This does in fact appear to be true, although the provision had not been in effect for not even eighteen months when White testified. A copy of the Code of Conduct, adopted in September 1994, states that "No KATA member shall personally, or through a representative, contact any party, or an aggrieved survivor in an attempt to solicit a potential client when there has been no request for such contact from the injured party, an aggrieved survivor, or a relative of either." KENTUCKY ACADEM SY OF TRIAL ATTORNEYS, KATA CODE OF CONDUCT (1994) (on file with author).

180. DVD: An Act Relating to the Solicitation of Legal Clients: Hearing on H.B. 177 Before the H. Comm. on Judiciary, *supra* note 171.

181. There was discussion, however, of forbidding solicitation of those going through a divorce or those who may need estate planning after a recent death. *Id.*

182. REPORT OF THE H. COMM. ON JUDICIARY, 1996 Leg., Reg. Sess. (Ky. 1996) (on file with author).

183. Bob Heleringer is a current member of the Kentucky Justice Association. *Heleringer, Robert L.*, KY. JUST. ASS'N, https://www.kentuckyjusticeassociation.org/?pg=FindaLawyer&dirAction=memberDetails&dirMemberid=488013 [https://perma.cc/ZH96-427B] (last visited Nov. 16, 2024). Mike Bowling, the chair of

the General Assembly, they would not have needed to solicit business; their names would have been well-known enough in their district and throughout the state. Allowing personal injury attorneys to directly solicit business through the mail could directly threaten their client base that capitalized on name recognition alone.

KATA (now the Kentucky Justice Association), like AFTL and the national counterpart ATLA, had, and continues to have, an interest in who would be the face of the personal injury bar. Its mission statement specifically says that it is "committed to improving the quality of legal representation for Kentucky families."[184] It currently boasts sponsors such as Lawyers Mutual of Kentucky, a well-known Kentucky legal malpractice carrier; FindLaw, which is part of Thomson Reuters; a court reporting firm; and several vocational consultants.[185] KATA has also counted among its members a personal injury attorney who would later be appointed as administrative law judge,[186] a member of the Kentucky College of Law Hall of Fame,[187] a clerk to a Kentucky Supreme Court justice,[188] an eventual state circuit court judge,[189] and a fellow of the American Bar Foundation.[190] In

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the committee, is deceased, but his son has taken over his father's firm and is a member of KJA. *See Bowling, Blake Shoffner*, KY. JUST. ASS'N, https://www.kentuckyjusticeassociation.org/?pg=FindaLawyer&dirAction=SearchResults&fs_match=s&m_lastname=bowling&seed=707494 [https://perma.cc/RBP7-4KLV] (last visited Nov. 16, 2024). Thomas Kerr, Jim Lovell, and Herbie Deskins appear to have all possibly done personal injury work. *Attorney Profile*, THOMAS R. KERR, https://www.thomaskerr.com/attorney-profile/[https://perma.cc/YP5P-3XL4] (last visited Nov. 16, 2024); *James M Lovell Law Office*, REAL YELLOW PAGES, https://www.yellowpages.com/paris-ky/mip/james-m-lovell-law-office-435681 [https://perma.cc/9NDS-ZLGT] (last visited Nov. 16, 2024); *Herbert Deskins Jr Atty*, REAL YELLOW PAGES, https://www.yellowpages.com/pikeville-ky/mip/herbert-deskins-jr-atty-460673442 [https://perma.cc/8TKK-28M2] (last visited Nov. 16,2024). While Jon Ackerson, an eventual co-sponsor of the bill, has apparently retired from the practice of law, his son, Brent T. Ackerson (who practiced with his father) now runs their office Ackerson Law Offices as a prominent personal injury firm. See *Brent T. Ackerson, P.S.C.*, ACKERSON LAW OFFICERS, https://www.kyfirm.com/brent-t-ackerson.html [https://perma.cc/5NGM-ETMM] (last visited Nov. 16, 2024).

184. *History of KJA/KATA*, *supra* note 176.

185. *Friends of KJA*, KY. JUST. ASS'N, https://www.kentuckyjusticeassociation.org/?pg=FriendsofKJA [https://perma.cc/TY9Z-PLN2] (last visited Nov. 16, 2024).

186. Jeanie Owen Miller, president-elect in the year 2000, owned her own personal injury firm before being appointed by the governor to serve as an administrative law judge for the Department of Workers' Claims in 2013. S. Resol. 247, 2014 Leg., Reg. Sess. (Ky. 2014).

187. Joe Savage, a former governor-at-large of the association, runs his own personal injury firm in Lexington. *Joe Savage*, JOE C. SAVAGE LAW FIRM, https://joesavagelaw.com/attorney/joe-savage/[https://perma.cc/UT78-E3QA] (last visited Nov. 16, 2024).

188. *Carl Bensinger*, JEFFERSON CNTY. CLERK ELECTION CTR., http://elections.jeffersoncountyclerk.org/team_members/carl/ [https://perma.cc/LK8N-HHSX] (last visited Nov. 16, 2024).

189. *Charles L. Cunningham Jr*, KY. BAR ASS'N, https://www.kybar.org/members/?id=32257296 [https://perma.cc/NE7H-YA53] (last visited Nov. 25, 2024).

190. *David Bryce Barber*, BARBER LAW, https://www.davidbarberlaw.com/attorney/david-b-barber/ [https://perma.cc/7D3E-G544] (last visited Jan. 28, 2025).

other words, KATA members, like those of AFTL and ATLA, were among the upper echelon of the profession. They were well-known and conducted themselves in a dignified manner. They also had every reason to make it difficult for the non-respectable personal injury attorneys, those who were not members of the organization, to find business. Forbidding contact inside of thirty days would hurt those who needed to advertise and solicit clients, not members of KATA.

The passage of HB 177 demonstrates some of the wide-reaching ramifications of *Went For It*. By ruling as it did, the Supreme Court set up a carte blanche for powerful legislators on their respective states' judiciary committees, many of whom were lawyers, to pass increasingly strict laws regulating the activities of personal injury attorneys. With *Went For It* as supporting precedent, there was no need to pretend that propriety was the reason behind the regulations, even though those voting in favor kept that as their official line. Those who had an interest in personal injury law had the perfect opportunity for protectionism handed to them. Despite the Supreme Court's general policy of letting the market decide who would succeed and who would fail, its decision in *Went For It* gave interested legislators the ability to pass laws, patterned after the Florida law, that would pick winners in the personal injury market.

VI. CONCLUSION

The rise of personal injury bar in the legal profession arose out of many lawyers being shut out of corporate firms because of their races, ethnicities, and gender. They turned to advertising and solicitation to find clients and start their own business and exist in a profession that historically prevented their membership. Restrictions on lawyer advertising and solicitation, dating back to the 1800s, stemmed from concerns about the conduct of personal injury attorneys and the profession's desire to limit their influence and entry into the legal profession. Diverse lawyers' rejection from the existing firms and the grander legal society prompted entering lawyers to compete in new, innovative ways. Florida and Kentucky, two very different states in terms of population, income, and demographics, have been inextricably linked in the regulation of attorney advertising and solicitation since the 1980s. When one would try to enact a law that restricted advertising, the other would show its support with an amicus brief. When one was unsuccessful in its pursuit, the other state would take a turn at devising a new restriction. And when Florida was finally successful in adding a new restriction, Kentucky built on its model.[191] The upper echelon of personal injury attorneys

191. Florida has since modeled a law after Kentucky but took it one step further by making it a third-degree felony for a lawyer to solicit business from someone within sixty days after a motor vehicle accident, either through in-person solicitation or by telephone. FLA. STAT. §817.234 (8)(c).

was very much a part of this success. Both the national level ATLA and its state-levelcounterparts AFTL and KATA were vocal in their support of advertising restrictions that would limit those personal injury attorneys who did advertise, both under the guise of protecting the public and the profession's reputation. But they were also able to protect their established practices in the meantime, making it that much more difficult for newer personal injury attorneys to break into the business.