Lawyer Advertising

By
Marcia A. Johnson, Director
Minnesota Office of Lawyers Professional Responsibility

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In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court held that it was unconstitutional for states to ban lawyer advertising.[Ftn 1] At the time, since the Supreme Court had only the year before determined that the First Amendment protected commercial speech, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel,* 425 U.S. 748 (1976), the notion that lawyers were also entitled to First Amendment protection for commercial speech did not seem such a stretch. Nearly 20 years after *Bates*, however, the nature and extent of regulation of lawyer advertising continue to spur heated debate. The flurry of commentary and state action following the Supreme Court's most recent lawyer advertising decision in *Florida Bar v. Went For It, Inc*., 115 S.Ct. 2371, 132 L. Ed. 541 (1995), is ample evidence of the continuing struggle to come to grips with the proper limits of advertising, particularly as it relates to the negative image of lawyers. The decision overturned lower federal court decisions and upheld Florida's 30-day ban on direct-mail solicitation of accident victims by personal injury attorneys.

Like many other controversial legal issues, the notion of regulating or restricting a lawyer's ability to communicate with potential clients engenders disagreement in part because of strong emotional convictions. At one end of the spectrum are those who publicly denounce lawyer advertising as practically the sole cause for the cataclysmic decline in the public image of lawyers. At the opposite end, we find those who applaud such advertising as an essential and consumer-oriented marketing tool to help people to find lawyers for necessary legal services. Somewhere in-between are the silent majority who, largely as a matter of personal taste, abhor commercials they deem tacky or slick, but see the value in a tasteful or dignified ad or firm brochure. With the variety of views concerning advertising amongst the profession, let alone the public, the search for an effective, yet constitutional means to regulate lawyer advertising has continued to pose a challenge for bar leaders, disciplinary counsel, and the courts.

The constitutionality of state regulation of lawyer advertising has been, more or less, in a state of continued flux ever since *Bates*. In *Bates,* the Court opened the door to lawyer advertising in print, but provided little regulatory guidance. Lawyer advertising is regulated by each state's rules governing professional conduct--in Minnesota, the Minnesota Rules of Professional Conduct, Rules 7.1 - 7.5. Regulatory provisions restricting lawyers' ability to communicate about their services have changed on numerous occasions over the years, in part to conform to the Supreme Court's refinement of constitutional standards.[Ftn 2]

In the almost 20 years since *Bates,* the Supreme Court has acted on only a few occasions to uphold restrictions on lawyer advertising. For example, the Court upheld a flat prohibition against in-person solicitation as serving an important state interest, finding that "the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated,

injured or distressed person." *Ohralik v. Ohio State Bar* Association, 436 U.S. 412, 465 (1978).[Ftn 3]

The standard utilized by the Court to weigh the constitutionality of regulations governing commercial speech involves what can be characterized as an "intermediate" level of judicial scrutiny, including a three-part analysis that assumes the speech being regulated is truthful and is not deceptive: the government interest asserted in limiting the speech must be substantial; the regulation must directly advance the government interest asserted; and the regulation must be a "reasonable fit" to achieve the desired objective. *Central Hudson Gas & Electric Corp. v. Public Service Commission of NY,* 447 U.S. 557 (1980).[Ftn 4]

Applying this standard, the Court has struck down regulations prohibiting targeted print advertisements, i.e. to a general audience providing advice or information regarding specific legal problems. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). The Court has indicated that states likely do not have a substantial state interest in protecting lawyer "dignity," stating "[t]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."[Ftn 5]

In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Court struck down a state regulation prohibiting an attorney from sending a targeted communication about a specific legal need directly to a person known to have experienced such a problem, as opposed to sending the communication to the public-at-large, reasoning that the First Amendment would not permit a ban on certain forms of printed speech merely because it was more "efficient." The Court found that targeted, direct-mail solicitation posed much less risk of overreaching than in-person solicitation, and that it was the "mode of communication that makes all the difference." *Id.* at 475. The Court did, however, leave open the door to less restrictive and more precise means of regulation than a total ban.

Went For It, Inc., squarely presented the question as to "less restrictive means." The Court clearly has opened the door, but it remains to be seen how far. In 1987, the Florida Bar had commissioned a two-year survey on lawyer advertising. After the study was concluded, the bar proposed numerous revisions to its state regulations on advertising.[Ftn 6] One was a complete ban on direct-mail solicitation of accident victims. The State Supreme Court rejected the ban and imposed instead a 30-day waiting period. The revised regulation was then struck down both by the federal district court and the 11th Circuit, which relied on the reasoning of the Supreme Court in *Shapero*. The Supreme Court reversed by a narrow margin, upholding the 30-day waiting period, over a biting dissent.

The 5-4 majority decision found that Florida had proved a substantial interest not only in protecting the privacy of accident victims against unsolicited contacts by lawyers, but also in curbing activities that harm the image of the profession. The Court found that Florida had proved that the 30-day waiting period directly and materially advanced its interests based on a summary of results of the study by the Florida Bar. The results, both statistical and anecdotal, reflected that the public viewed direct mail ads immediately after an accident as an intrusion of privacy which reflected poorly on the practicing bar. The 30-day ban was viewed as a regulation well-tailored to meeting its objectives. The Court distinguished Florida's regulation from Kentucky's total ban on targeted direct-mail in *Shapero*, reasoning that Kentucky, in its petition to the court, had not focused on the privacy rights of direct-mail recipients and had produced no empirical evidence.

The four-member dissent was nothing short of scathing in its criticism of the majority decision, finding Florida's regulation "a flat ban that prohibits far more speech than necessary to serve the purported state

interest." The dissent found no significant difference distinguished the privacy interest asserted by the Florida Bar from the state's interest in *Shapero*, noting that restrictions on speech have not been allowed on the grounds that the speech might offend the listener. Even if the state's interest were substantial, the dissent found the study conducted by the state bar did not prove either the harms asserted or that the regulation would directly advance the state's interest. It found the study woefully inadequate: "[t]his document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology and no discussion of excluded results."[Ftn 7] The dissent also commented on the inconsistent logic and potential harm that could result from preventing, plaintiff's personal injury lawyers from contacting accident victims, but not preventing defense counsel or insurance company lawyers who might try to get unsophisticated persons to sign away important rights before retaining their own counsel.

The Supreme Court's decision in *Went For It, Inc.* may signify that it will allow states greater leeway in imposing regulatory restrictions on advertising, but commentators have suggested that it is too early to tell.[Ftn 8] The majority decision does not necessarily do fundamental damage to the commercial speech doctrine, but it does evidence a more restrictive approach, emphasizing the more limited protection that commercial speech doctrine provides under the First Amendment. It seems likely that the Court will have ample opportunity to reconsider the issues raised as many states, including, Minnesota, currently are taking the opportunity to review the regulatory landscape.[Ftn 9]

NOTES

1 *Before the Canons were adopted in 1907, lawyer advertising was not prohibited. Between 1907 and 1977, lawyer advertising was banned.*

2 *For example, ABA Model Rule 7.2 paragraph (d) was adopted in 1983, amended in 1989 and again in 1990; Model Rule 7.3 was promulgated in 1983 following the decision in* Ohralik v. Ohio State Bar Association, *436 U.S. 412, (1978) and* In re R.M.J., *455 U.S. 191 (1982) and amended in 1989 following* Shapero v. Kentucky Bar Association, *486 U.S. 466 (1988).*

3 In Zauderer v. Office of Disciplinary Counsel, *471 U.S. 626 (1985), the Court upheld the state's right to require a disclosure in communications regarding contingency fee cases, that the client would be liable for costs, even if there were no recovery, finding that lay persons could easily be misled by the distinction between "fees" and "costs."*

4 *The third prong of the* Central Hudson *test was modified to the reasonable fit test in* Board of Trustees of State University of New York v. Fox, *492 U.S. 469 (1989)*. Central Hudson *had utilized "least restrictive means" test, which the Court subsequently found too restrictive.*

5 Zauderer v. Office of Disciplinary Counsel, *471 U.S. 626 (1985), at 670.*

6 *Other amendments to the Florida advertising rules have been challenged as unconstitutional and are winding their way through courts.*

7 Florida Bar v. Went For It, Inc., *115 S.Ct. 2371 (1995), at 2378*.

8 *For example, a federal district court in Mississippi recently struck down as unconstitutional advertising regulations promulgated by the Mississippi Supreme Court in June 1994. The regulations required disclosures on all lawyer advertisements and specific disclaimers for statements about expertise, fees and testimonials. The court found that the state had failed to provide sufficient evidence to support the rules as reasonable restrictions.* Schwartz v. Welsh, *94-CV-569BN, (DC, S. Miss., No 3) (6/20/95).*

9 *The MSBA Advertising Committee recently has been meeting to review the advertising rules in Minnesota.*