Spring 1996

The 1994 Term of the Supreme Court and Freedom of Speech

Martin H. Belsky

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol31/iss3/5
THE 1994 TERM OF THE SUPREME COURT AND FREEDOM OF SPEECH*

Martin H. Belsky†

I. COMMERCIAL SPEECH - VICE VS. LAWYERS

McIntyre v. Ohio Elections Commission,¹ and almost all of the other First Amendment cases this term, could be described as providing broader protections for speech. The prominent exception is Florida Bar v. Went For It, Inc.² Before I discuss this case, I want to put it into context to show not only its significance for the commercial speech doctrine and the law of professional responsibility, but also how individual Justices think.

Starting with the 1976 case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,³ the Supreme Court divided speech into two categories. The most protection is given to political speech, where the intent is to increase participation and understanding of our political process and thus promote the “marketplace of ideas” and the democratic process.⁴ Any restriction on such speech will be subject to strict scrutiny, must be justified by a compelling interest, and must be narrowly tailored.⁵ Lesser protection is given to commercial speech, which promotes commercial or business ends.

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,⁶ the Supreme Court detailed the intermediate

---

* Based on remarks delivered at the Conference, Practitioner's Guide to the October 1994 Supreme Court Term, at The University of Tulsa College of Law, November 17, 1995.

† Dean & Professor of Law, University of Tulsa, College of Law. B.A., Temple University, 1965; J.D., Columbia University School of Law, 1968; Dip. Crim., Cambridge University, 1969.

scrutiny appropriate for commercial speech. First, commercial speech that is misleading or about unlawful activity may be totally barred.\(^7\)

Other commercial speech is reviewed under a three-part standard:

Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."\(^8\)

Over the last several years, the Supreme Court has indicated its pro-business position by expanding dramatically the commercial speech protection, with two exceptions: (1) for vice, and (2) for lawyers. This term, the Court even broadened protection for vice — but narrowed commercial speech protection for lawyers.

In the case of \textit{Rubin v. Coors Brewing Co.},\(^9\) the Court reviewed a Federal Alcohol Administration rule that barred including the alcohol content on a beer label. The regulatory premise was that such labeling would encourage individuals to drink more harmful beer. The administration wanted to preclude people from buying alcoholic beverages based on the amount of alcohol. The justification for this restriction under the Constitution was that all the government was doing was regulating the sale of liquor — a vice — and under a 1986 decision, \textit{Posadas v. Puerto Rico Associates},\(^10\) regulation of commercial speech involving vice did not suffer the same scrutiny as other commercial speech.

The Supreme Court stated that the regulation was unconstitutional. Justice Thomas, writing for the Court, applied the usual commercial speech test — government’s interest must be substantial, must be directly advanced by the regulation at issue, and must be narrowly drawn.\(^11\)

Here, there may have been a substantial interest in curbing alcohol content strength wars, but this interest was not directly advanced by the statutory scheme. The statute allowed disclosure of alcohol content strength wars.\(^7\)

\(^7\) \textit{Id.} at 563.
\(^10\) 478 U.S. 328 (1986) (Court prohibition on casino advertisements in Puerto Rico; gambling was a vice; greater power to ban the underlying activity of gambling includes the lesser power to discourage it by limiting advertisements).
\(^11\) \textit{Rubin}, 115 S. Ct. at 1589.
content in advertisements while barring it on labels and treated wine and spirits differently than beer.\textsuperscript{12}

In footnote 2, Justice Thomas specifically overruled \textit{Posadas} and rejected any per se vice exception. He rejected the government's argument that legislatures have broader latitude to regulate speech promoting socially harmful activity. Thomas indicated that the \textit{Central Hudson} test has to be applied. It might be interesting to speculate how this opinion might affect restrictions on cigarette advertising and labeling.

It is important to compare the \textit{Coors} case to \textit{Florida Bar v. Went For It, Inc.} In that case, the Court said that it was perfectly appropriate to provide government broad leverage to regulate lawyers' commercial speech. Thus, vice speech has more protection than lawyers' speech.

The Florida Bar has always attempted to provide for strict regulation of advertising and solicitation by lawyers. It has consistently spoken out against the almost twenty years of Supreme Court jurisprudence which gave commercial speech protection to lawyers' advertising in the media and by mail.\textsuperscript{13}

Finally, in 1989, the Florida Bar came out with a comprehensive set of proposals to limit advertising. Most of these recommendations were accepted by the Florida Supreme Court and became binding.\textsuperscript{14} Two of these regulations supposedly provided that a lawyer in an accident case could not contact a victim of an accident before 30 days had passed.\textsuperscript{15}

In fact, that is not really what the regulations said. They said a lawyer wishing to represent the accident victim cannot contact the

---

\textsuperscript{12} Id.
\textsuperscript{14} The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990).
\textsuperscript{15} \textbf{FLA. RULES OF PROF. CONDUCT}, Rule 4-7.4(b)(1) provides that:

- A lawyer shall not send, or knowingly permit to be sent, ... a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

\textbf{FLA. RULES OF PROF. CONDUCT}, Rule 4-7.8(a) states that:

- A lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.
person for 30 days, but the lawyer representing the defendant or the insurance company can contact the person within 30 days. To quote the Supreme Court: "Together, these rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business."

A Florida attorney and his company, Went For It, challenged these regulations. Because of what most thought was the clear position of the Supreme Court in prior decisions, both the Federal District Court and the Eleventh Circuit held for the plaintiff and declared the provisions unconstitutional under the commercial speech doctrine. In my opinion, this case has dramatically changed the commercial speech rules applicable to lawyers.

The government regulates lawyers. However, unlike other businesses or professions, lawyers are regulated by the Judiciary — the Supreme Court of each state, usually acting on the advice of one or more bar associations. Until about 1977, the State's power to regulate lawyers' commercial speech was almost total. However, in 1977, in Bates v. State Bar of Arizona, the Supreme Court applied the commercial speech doctrine to a lawyer's advertisement. The Court was sharply divided at that time and remains so today — as indicated by Florida Bar v. Went For It, Inc.

The Court in Bates, in an opinion by Justice Blackmun, indicated that advertisement was protected commercial speech and that as long as it wasn't false or deceptive or misleading to the public, it had to be allowed. The Court rejected all the various arguments raised by the

16. Went For It, 115 S. Ct. at 2374 (emphasis added).
18. 21 F.3d 1038 (11th Cir. 1994).
19. The original named plaintiff Stewart McHenry, the owner of the lawyer referral service, Went For It, was disbarred after the district court decision. Another lawyer replaced him. Went For It, 115 S. Ct. at 2374. See Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992).
20. In some states, like Florida and Oklahoma, there is a "unified bar" — meaning that every individual admitted to practice in those states is automatically a member of the state bar association. That association is asked to and usually does provide assistance to the Court in drafting rules and regulations to govern the practice of law. FLA. RULES OF PROF. CONDUCT, Rule 1-3.1 (1993); Okla. Stat. tit. 5, §14 (1993).
Bar Associations, such as tackiness and unprofessionalism. Advertising by bankers and engineers is not regarded as undignified or unprofessional and neither should advertising by lawyers. The Court specifically rejected the idea that it was inherently misleading to provide any description of quality and that all lawyer services were unique.23

Four Justices — Powell, Stewart, Rehnquist and Burger — each dissented. They argued that all lawyers’ services were unique and that the needs of professionalism were sufficient to allow almost total restriction of advertising.24 The battle was joined.

For nearly 18 years, though with narrow majorities, and with one exception, the Court provided increased freedom for lawyers to advertise. The one exception was allowing a ban on in-person solicitation, in Ohralik v. Ohio State Bar Association.25 Ohralik is a classic example of the old maxim that bad cases make bad law; even the most ardent defenders of commercial free speech could not be outraged by the Court’s decision.

The facts in Ohralik indicate activities that were sleazy beyond belief — behavior right out of a John Grisham novel.26 Ohralik visited two rather young women, one in the hospital and the other in her home. He recorded their conversations and pressed on even after he was told by one of the women that she did not understand what was going on. Later, her mother tried to repudiate the contract for representation, but the lawyer said it was a binding agreement. The young lady eventually discharged the attorney, but had to pay the full contingency fee on threat of a breach of contract suit.27

It was no surprise that the Supreme Court found that Ohralik’s conduct could be barred. It was, at best, overreaching and, at worst, coercion. This is different than the commercial speech in Bates. Ohralik’s behavior involved, said the Court, the real possibility of external pressure, demands for immediate response in times of distress, could encourage speedy and uninformed decision-making, and did not allow for disinterested comparisons in review. It was therefore not

24. Id. at 386-405.
25. 436 U.S. 447 (1978). Decided the same day as Ohralik was In re Primus, 436 U.S. 412 (1978), which applied a political speech strict scrutiny test to solicitation by a representative of a non-profit entity for a political goal (here, the ending of compelled sterilizations).
27. Ohralik, 436 U.S. at 452.
unreasonable, or violative of the Constitution, for a state to respond with what, in effect, was a prophylactic rule.

But except for *Ohralik*, a case which many distinguished as "unique," the Court has been consistent in reiterating and applying broadly the commercial speech doctrine to lawyers' self-promotion. The Court provided that specific limits on wording in advertisements were not appropriate unless shown to be in fact misleading or inherently misleading. Prophylactic rules to limit ads that were considered "undignified" or "emotional" were determined to be invalid as having insubstantial justification. Advertisements, if truthful, could indicate a specialization and be targeted to particular audiences. Even mailings that targeted particular individuals or types of potential customers could not be barred, unless they were false or misleading.

As will be discussed later, there were strong dissents in these cases urging a return to the pre-*Bates* days, but the majority held, and there even seemed to be some strong indications that the majority would expand its broad commercial speech protection to in-person solicitation.

In *Edenfield v. Fane*, the Court addressed a Florida rule which banned certified public accountants from conducting in-person solicitation. The Court held the rule to be unconstitutional under the commercial speech doctrine in an eight-to-one vote with Justice O'Connor dissenting. Specifically, the Court said that the *Ohralik* decision allowing a ban on in-person solicitation was unique:

We reject the [state's] argument and hold that, as applied in this context, the solicitation ban cannot be justified as a prophylactic rule. *Ohralik* does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional in all circumstances. . . *Ohralik*’s holding was narrow and depended upon certain “unique features of in-person solicitation by lawyers” that were present in the circumstances of that case.

---

33. 113 S. Ct. 1792 (1993).
34. *Id.* at 1802. For a discussion of the facts in the *Ohralik* case, see *supra* text accompanying notes 25-27.
Even as late as 1994, the Supreme Court again suggested that broad commercial speech was to be provided to professionals, including lawyers. In *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, Florida barred a lawyer who was a Certified Public Accountant (CPA) and Certified Financial Planner (CFP) from advertising those designations in a Yellow pages ad and on her business card.

Ibanez's activities were not false, deceptive, or misleading, said Justice Ginsburg for the Court. To justify any restriction under the commercial speech doctrine, the Court said, citing cases involving lawyer advertising, the State "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."\(^{36}\) In other words, to justify a restriction, real harm and not speculative harm had to be shown.

Despite these supposedly clear signals that commercial speech by lawyers would continue to be broadly protected, there were some hints, especially in retrospect, that the "winds, they were a'changin." A consistent minority, led by Justice O'Connor rejected *Bates* and its progeny. In fact, in *Shapero v. Kentucky Bar Association*, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia stated point blank that these cases were "built on defective premises and flawed reasoning."\(^{39}\)

Specifically, Justice O'Connor went back to the original dissent in *Bates*. It is not appropriate to allow price advertising on legal services. There are no such things as "routine legal services." Legal services can be differently analyzed and cost can depend upon treating each client separately and individually. A comparison of lawyer services

\(^{35}\) 114 S. Ct. 2084 (1994).

\(^{36}\) Id. at 2089 (quoting *Edenfield*, 113 S. Ct. at 1800).


\(^{38}\) Justice O'Connor had earlier indicated her opposition to applying the commercial free speech doctrine to lawyers, concurring and dissenting in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 673 (1985). Speaking for herself, then Justice Rehnquist and Chief Justice Burger, she stated that "the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant [a prophylactic rule]." Id. Moreover, she attacked the majority for confusing commercialism and professionalism. Merchants promise to provide free samples of their wares but this can't be done when you are dispensing professional advice. There is an enhanced possibility for confusion and deception in marketing professional services — which are not standardized — and the attorneys personal interest in obtaining business may color the advice offered in soliciting a client. Id. at 674. There is also a substantial interest in requiring independent professional judgment and a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring in potential clients. Id. at 678.

\(^{39}\) *Shapero*, 486 U.S. at 480.
and other consumer products is a "defective analogy." Restrictions on lawyers' self-promotion have a specific and "delicate role in preserving the norms of the legal profession." There is an ethical obligation to temper one's selfish pursuit of economic success by adhering to high standards. The goal is public service — which can take a variety of forms. Ethical standards are an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

Justice O'Connor then suggested the broad breadth that should be given to controls by states over its lawyers. First, the determination of standards is "properly left to the states [and is] certainly not a fit subject for constitutional adjudication." Next, "it is worth recalling why lawyers are regulated at all." We are "a trained and specialized body of experts." This can lead some to attempt "to manipulate the system" — through overzealous representation — by abusing the discovery process. But, the more difficult problem is abuse of the client for the lawyer's benefit. . . . It would be unrealistic to demand that clients bargain for their services in the same arms length manner that may be appropriate when buying an automobile or choosing a dry cleaner. . . .

[We are not] a trade or occupation like any other. Given the inevitable anti-competitive effects, [rules and restrictions] should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in light of reason. . . . In my judgment, however, fairly severe constraints on attorney advertising continue to play an important role in preserving a legal profession as a genuine profession. . . . I can only hope that the court will recognize the danger before it is too late to effect a worthwhile cure.

In short, says Justice O'Connor, lawyers are professionals; the real danger is treating lawyers as mere business people and thus failing to recognize the essence of professionalism and its fragile or necessary foundations.

Justice O'Connor was able to gain a majority in Florida Bar v. Went For It, Inc. Her original colleagues in Shapero were joined first by Justice Thomas. This, of course, was no real surprise. Justice

40. Id. at 488.
41. Id. at 488-89.
42. Id. at 486.
43. Id. at 489.
44. Id.
45. Id.
46. Id. at 489-491.
Thomas had indicated in prior cases his almost total congruence with Justice Scalia on constitutional issues. More of a surprise was that Justice Breyer joined to make the five-to-four majority declaring the Florida rules valid.

Make no mistake, Florida Bar v. Went For It, Inc. is a fundamental rejection of the premises of Bates. Justice O'Connor, almost totally disregarding the series of cases from Bates to Shapero, but totally consistent with her own opinions, distinguishes lawyering from other businesses and indicates that lawyers are, in fact, not business persons. States have very broad power to regulate lawyers. Lawyers are different than pharmacists, than eye doctors, than accountants. Maintaining the appropriate image of the profession — professionalism — is a substantial government interest. Moreover, even though the rule precluded even mail notices to accident victims within 30 days, the Florida Bar, said the Court, was justified in promulgating the rule to protect the “privacy and tranquility of personal injury victims and their loved ones.” The Court, of course, disregards the privacy and fairness issues involved in the Florida rule that still allows defense and insurance counsel to contact the victims during the 30 day period.

---

47. See Marcia Coyle, An Emboldened Majority Breaks Ground, NAT'L J., July 31, 1995, at C2 (commenting that Justice Thomas agreed with Justice Scalia ninety percent of the time).

48. In Went For It, 115 S. Ct. at 2376-77, the Court wrote:

We have little trouble crediting the Bar’s interest as substantial. On various occasions we have accepted the proposition that “States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.” Our precedents also leave no room for doubt that “the protection of potential clients’ privacy is a substantial state interest.” In other contexts, we have consistently recognized that “[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” Indeed, we have noted that “a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.”

Id. (citations omitted).

49. Id. at 2376 (holding that the rule was intended to protect the reputation of the legal profession).

50. Id.

51. See Went For It, 115 S. Ct. at 2881-82 (Kennedy, J., dissenting):

I take it to be uncontroversial that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.
How about the second part of the *Central Hudson* test — the need to show that the interests here are "directly advanced by the regulation at issue?" Here the Court looks at a submission by the Florida Bar of a 106 page summary of a two year study of lawyer advertising. Sampling and anecdotal information indicated the public has "negative feelings" and that some advertising tactics are "annoying or irritating" or made recipients angry. No empirical data is required. This is sufficient to show a "direct relation."  

Moving to the third part of the *Central Hudson* test, Justice O'Connor finds a "reasonable fit" between the harm and the rule. Not much is needed to be shown as commercial speech provides much less of a review:

What our decisions [in commercial speech cases] require, ... is a 'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Of course, we do not equate this test with the less rigorous obstacles of rational basis review  

There is, of course, a vigorous dissent by Justice Kennedy, joined by Justices Stevens, Souter and Ginsburg. They are outraged. First, Justice Kennedy indicates that commercial speech by lawyers should get more, and not less, protection:

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. That principle has been understood since *Bates*. ... The Court today undercuts this guarantee in an important class of

---

52. *Id.* at 2377-78. The Court rejected the clear statement in *Shapero* that privacy could not be a real issue when dealing with mail that can be merely thrown away by stating:

[T]he harm targeted by the Florida Bar cannot be eliminated by a brief journey to the trash can. The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former.

53. *Id.* at 2379 (citations omitted).

54. *Id.* at 2380 (internal citations and quotations omitted).

---
cases and unsettles leading First Amendment precedents, at the ex-
pense of those victims most in need of legal assistance. . . .

I take it to be uncontroverted that when an accident results in
death or injury, it is often urgent at once to investigate the occur-
rence, identify witnesses, and preserve evidence. Vital interests in
speech and expression are, therefore, at stake when by law an attor-
ney cannot direct a letter to the victim or the family explaining this
simple fact and offering competent legal assistance.55

There is no substantial justification for this rule, pleads Justice
Kennedy. As to protecting personal privacy and tranquility, the issue
should be overreaching and undue influence. Here we are dealing
with a ban on letters, and a letter, like a printed advertisement, can
readily be put in a drawer to be considered or ignored later. The fact
that some may be offended by receiving such a solicitation is just not
sufficient.56

As to the second interest, protecting the reputation and dignity of
the legal profession — the professionalism argument — mail solicita-
tion, if anything, supports the professionalism of the bar. It "serves
vital purposes" and "promotes the administration of justice" by pro-
viding increased access to legal services.

[T]o the extent the bar seeks to protect lawyers' reputations by
preventing them from engaging in speech some deem offensive, the
State is doing nothing more . . . than manipulating the public's opin-
ion by suppressing speech that informs us how the legal system
works. The disrespect argument thus proceeds from the very as-
sumption it tries to prove, which is to say that solicitations within 30
days serve no legitimate purpose. This, of course, is censorship pure
and simple; and censorship is antithetical to the first principles of
free expression.57

The dissent also indicated that there was no direct advancement
of a legitimate interest here as no real evidence was shown to show a
direct relationship of the rule and the interests involved. This suppos-
edly complete Florida Report is "noteworthy for its incompetence"
and lack of specificity.58 There is also no tailoring, let alone narrow
tailoring here. Simply stated, even assuming all the arguments made
by the Florida Bar are valid:

The Bar's rule creates a flat ban that prohibits far more speech than
necessary to serve the purported state interest. Even assuming that

55. Id. at 2381 (Kennedy, J., dissenting).
56. Id. at 2382-83 (Kennedy, J., dissenting).
57. Id. at 2383 (Kennedy, J., dissenting).
58. Id. at 2384 (Kennedy, J., dissenting).
interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss . . . .

Justice Kennedy makes a frontal attack on the bias he feels is present in the majority opinion. First, it is as likely as not that accident victims will welcome contact — at least by mail — from an attorney.

Second, the majority opinion is an example of "latent protectionism" as it allows other types of solicitation that are more socially acceptable and is economically discriminatory as its disallows that form of solicitation that is most likely to reach the poor or uneducated.

Third, the majority opinion lacks common sense and is patronizing. For example, Justice Kennedy comments:

Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed.

59. Id. (Kennedy, J., dissenting). Justice Kennedy continues:

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. . . . There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner.

Id. at 2384-85.

60. Id. at 2385 (Kennedy, J., dissenting).

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.

Id. at 2385 (Kennedy, J., dissenting).

61. Id. at 2385 (Kennedy, J., dissenting).

The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it conceals the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services . . . .

Id. at 2385 (Kennedy, J., dissenting).

62. Id. (Kennedy, J., dissenting).
I think Justice Kennedy is mostly correct, but not entirely. I think it is appropriate for the bar and the state supreme courts to protect the privacy of accident victims. It might be appropriate to say no contact by any lawyer for thirty days. But the Court did not say that. It only upheld a ban on contact by plaintiffs' attorneys, or potential attorneys. You still have contact from the other side. Secondly, I also believe that regulation against coercion — even by prophylactic rules — is appropriate — but again must be applied to all attorneys on both sides of a potential dispute.

Justice Kennedy's conclusion, however, is clearly correct. "Today's opinion [in Florida Bar v. Went For It, Inc.] is a serious departure not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech." The clear implication from the majority opinion is that the Florida Bar, and other supreme courts and bar associations, if the five Justice majority is maintained, may go back at least partially to the pre-Bates days. These institutions can determine that this ad or action or letter is tacky; this one is not tacky. They can pick and choose. Look here, says Florida, and now the Court — what is the biggest example of tackiness — ambulance chasing. So we allow them to pick ambulance chasing for regulation and set up a 30-day rule for plaintiffs' attorneys. The idea that defense counsel or insurance counsel can contact accident victims is not relevant. That's a choice the bar can make — in its evaluation of what is or is not appropriate.

Of course, who are the people that are going to regulate the lawyers? We lawyers will regulate the legal profession, and which lawyers? The people who are in charge of the Bar Association. And who generally are those people? The people who have the resources to run for office in the Bar association and then give up substantial time to devote to Bar activities. How many of these are in small or solo practice that may depend on advertising and other means of public communication I will leave to the reader to assess.

II. HURLEY V. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON

The next case, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, deal with privacy and freedom of association.
In *Hurley*, a group of individuals — the South Boston Allied War Veterans Council — were the organizers of the annual St. Patrick’s Day parade in Boston. In 1993, they sought and obtained a permit for a parade. They refused a place in the parade to the Irish American Gay, Lesbian and Bisexual Group of Boston [called GLIB] who sought to be included “as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York’s St. Patrick’s Day Parade.” When they were refused permission to participate, they sued, and the Massachusetts courts upheld their claim that the bar was a violation of the state’s public accommodations laws, which barred discrimination against groups in public accommodation on the basis of many classifications, including sexual orientation.

The Supreme Court of the United States reversed — in a unanimous opinion. The War Veterans Council had a constitutional right to free expression — and privacy or autonomy to control their own speech. The First Amendment, said the Court, grants this group of war veterans, the South Boston Allied War Veterans Council, and its individual members through the group, the right to express itself through this parade. This meant that not only could the Council include whatever groups they desired in this parade, but they also could exclude whatever groups they wanted to as well. Being forced by the government to allow the GLIB group into their parade would force the War Veterans Council to say something that they did not want to say.

65. *Id.* at 2341.
68. Justice Souter, writing for the whole Court, used a musical analogy:

> Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

*Id.*
69. *Id.*
The Hurley case is the inverse of the usual free speech case. Here, the government was not, in violation of the First Amendment, barring speech. Rather, it was compelling a group or individual to say certain things — also a violation of the First Amendment. 70

A basic premise of the decision is an assumption that the parade was a type of speech.

Real "parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. . . . Parades are thus a form of expression, not just motion . . . . 71

The Hurley case may be considered troubling if it is considered not just an issue of free speech by a private group, but a reiteration of a trend by the Court to limit what is considered governmental action. Here, South Boston Veterans Council sought and obtained a parade permit from the City of Boston. The Court did not weigh the rights of GLIB to force the government to condition the granting of that parade permit on the basis of the First Amendment rights of GLIB. 72 It accepted the position of the GLIB to not raise the state action issue. 73

The Court, of course, had the independent authority, when a constitutional issue is involved, to go ahead and decide it. 74 It didn’t and

[A] contingent marching behind the organization’s banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade’s organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB’s message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.

Id. at 2348.


71. Hurley, 115 S. Ct. at 2345.

72. The Massachusetts Courts dismissed the public accommodations claim against the city as there was no state action. Id. at 2342, n.1.

73. Id. at 2344.

74. As the Court itself indicated in Hurley, 115 S. Ct. at 2344, constitutional review "carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." Id.
this is consistent with the recent trend to narrow findings of state action. For example, in *Moose Lodge v. Irvis*,\(^7\)\(^5\) the Supreme Court held that when a private club gets a liquor permit from the government, the government can't turn around and say "You can't discriminate!" The club is private and the mere granting of a license by the state to such a club is not state action. Similarly, as indicated this term in *Capitol Square Review & Advisory Board v. Pinette*,\(^7\)\(^6\) when the government allows someone to put up a cross, or a Christmas tree, or a Hanukkah menorah, the government is not therefore endorsing those ideas. There is no establishment of religion by the government.

Remember what was being asked by GLIB in the *Hurley* case. It was willing to accept "concurrent [or, to use an old phrase, separate but equal] exercise of speech rights." GLIB, in essence, was saying, let us demonstrate and have a parade at the same time. We don't have to be identified with your Veteran's Council. We'll even go and hold a sign saying 'we're not part of this group' if that's what you want.

But the Supreme Court barred GLIB from conducting its St. Patrick's Day parade as speech by not finding any public speech rights involved. In my opinion, if you carry this position to its logical extreme — and I think the Court has in many situations — that means the government itself must be the direct violator or actor — not the authorizer, but the actor — for there to be a First Amendment right as against the government. Instead of this case being about a balancing of First Amendment rights, it becomes one of merely focusing on the First Amendment protected rights of the Veteran's Council as against the private and unprotected speech rights of GLIB. Suppose, just suppose, the government gives permits or contracts to private entities to run prisons, schools, or police departments. Will violations of the protections set out in the First, Fourth, Fifth, and Fourteenth Amendments not be reviewable for constitutional infirmity because there was no government involvement in the private activity? That issue — privatization — rather than the right to conduct your own parade may be the real legacy of *Hurley*.

Of course, it may just be that *Hurley* is not that broad. Here the Court was dealing with a group — gays, lesbians, and bisexuals — which the Supreme Court has said in *Bowers v. Hardwick*\(^7\)\(^7\) may be

\(^{75}\) 407 U.S. 163 (1972).
\(^{76}\) 115 S. Ct. 2440 (1995).
\(^{77}\) 478 U.S. 186 (1986).
classified by states as criminals (an issue, of course, beyond the scope of this discussion). If the body or group seeking to participate in the parade was more "traditional" or "mainstream" — composed, for example, of individuals of a particular religion or race or ethnic group — the Court may have been more sympathetic.

On the other hand, if it is that broad, it may even go so far as to allow discrimination by a private group which gets a permit to operate a radio, television, or cable station. The only remedy for such discrimination would be federal statutes and even then such statutes might be held to violate the free speech rights of the broadcasters.