O'CONNOR'S CANONS: THE PROFESSIONAL RESPONSIBILITY JURISPRUDENCE OF JUSTICE SANDRA DAY O'CONNOR

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Justice Sandra Day O'Connor came to the Supreme Court at a time of tremendous change in the legal profession. With the development of commercial free-speech doctrine, lawyers were permitted to advertise their services. Justice O'Connor vigorously opposed this development because of the potential legal advertising had for damaging the ethical standards of the profession. She believed that lawyers, because of their privileged position in society, had a higher moral duty to society as officers of the court. Moreover, she asserted that ethical standards should be established at the state level and the Court should defer to the states in this regard. Justice O'Connor wrapped her professional ideals around the belief that our majestic law, steeped in traditions of freedom, democracy, and liberty, was to be maintained by lawyers with the highest commitment to professional duty and a willingness to subserve their own financial and personal interests to the needs of the clients. This article will consider the constitutional jurisprudence of Justice Sandra Day O'Connor in the arena of professional responsibility with a focus on how she expressed her ethical canons in light of First Amendment doctrine as applied to commercial free speech. Her views are immensely relevant to current discourse on professionalism.

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INTRODUCTION

Much has been made of Justice O'Connor's role as a "swing" Justice on matters of abortion rights, racial preferences, religion, women's rights, and other matters.[1] Her efforts to change the Court's position on the regulation of attorney conduct are seldom mentioned, especially in the area of legal advertising and solicitation.[2] She

1. Evan Thomas, *Queen of the Center*, NEWSWEEK (July 11, 2005), http://www.newsweek.com/queen-center-121805; *see also* JOAN BISKUPIC, SANDRA DAY O'CONNOR (2005); NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT (1996); ANN CAREY MCFEATTERS, SANDRA DAY O'CONNOR: JUSTICE IN THE BALANCE (2005); Jeffrey Rosen, *The O'Connor Court: America's Most Powerful Jurist*, N.Y. TIMES (June 3, 2001), http://www.nytimes.com/2001/06/03/magazine/03OCONNOR.html?pagewanted=all.

2. MCFEATTERS, *supra* note 1, at 191–92 ("A recurring theme that took on increasing passion for her while on the Supreme Court was the state of the law and the importance of turning out better, more ethical lawyers. In a speech at the dedication of the Alyne Queener Massey Library at Vanderbilt Law School as early in her tenure on the bench as 1982, she said law schools must not only teach students to be competent lawyers but also imbue them with

vigorously rejected the findings of *Bates v. State Bar of Arizona*,[3] which opened the way for lawyer advertising and for what some say was the deprofessionalization of the practice of law.[4] In a line of cases examining various aspects of lawyer free speech in the commercial context, Justice O'Connor consistently dissented.[5] In *Shapero v. Kentucky Bar Association*, Justice O'Connor noted:

> In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers" and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations . . . . In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.[6]

Justice O'Connor had her opportunity to start a cure with the case of *Florida Bar v. Went For It, Inc.*, where the Court upheld the state's targeted-mailings rule that made it unethical to send targeted mail to accident victims for a thirty-day period after the accident.[7] This case reflects her commitment to professionalism and her opposition to the commercialization of the practice of law in a manner that places the lawyer's personal interest ahead of not only the client's interest but also society's interest. It also showcased her more

sense of professional responsibility. Despite the increase in the disciplining of lawyers by state and federal courts, she said, more lawyers need training in 'moral responsibility.'").

3. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

4. *See* William G. Hyland, Jr., *Attorney Advertising and the Decline of the Legal Profession*, 35 J. LEGAL PROF. 339 (2011); Saundra Saperstein & Al Kamen, *Burger Assails Lawyer Advertising: At ABA Meeting, Chief Justice Cites Cases of 'Sheer Shysterism,'* WASH. POST, July 8, 1985, at A1.

5. *See generally* Peel v. Att'y Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).

6. *Shapero*, 486 U.S. at 491.

7. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995).

restrictive use of the commercial free-speech analysis established by *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, discussed below.[8] Many other writings reflect her thinking about professionalism, especially her seminal book, *The Majesty of the Law*.[9] Fundamentally, she considers the practice of law to be grounded in the ideal of public service. For her, this not only means doing pro bono work but also reflects an understanding that as lawyers it is our task to preserve the fundamental values of our constitutional democracy. Lawyers stand to defend justice, equality, and due process for individual citizens, thereby ensuring that our fundamental freedoms are preserved. Hence our ethical duties are shaped by this public, professional commitment to utilizing our status, prestige, and power to honor and defend the law. My intent is to consider this ethical jurisprudence and to examine its foundations.

The first section will examine the biographical background and writings of Justice O'Connor to consider the intellectual personal basis for her perspective on professionalism as related to lawyer advertising and solicitation. I will consider how her background, mentors, and judicial philosophy may have influenced her thinking in this area. The second section of this article will examine the development of First Amendment doctrine as applied to professionals seeking to obtain clients. The major focus is on both how lawyers were seeking new ways to connect to clients and how the Supreme Court was expanding the First Amendment analysis beyond nonpolitical speech. The *Bates* case permitted lawyers to advertise and challenged the more traditional, historical views about the legal profession.

The third section will consider how the free-speech analysis in *Bates* created significant doctrinal challenges. The opinions in *Bates* reflect the difficulty of developing a workable analysis for reviewing state-imposed restrictions on lawyer advertising and business solicitation. This section will examine the advertising and solicitation cases that followed *Bates* and the different lines of reasoning pursued by various Justices of the Supreme Court. From the dialogue among the Justices one will observe three distinct challenges to obtaining analytical clarity on the subject: (1) how a consideration of

8. *See infra* notes 221–226 and accompanying discussion *infra* Part IV.A.

9. *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE (2003) [hereinafter MAJESTY] (discussing Sandra Day O'Connor's views on professionalism).

viewpoints on the First Amendment shapes the discourse; (2) how a recognition that subjective facts can shade any analysis; and (3) how a presentation on varying philosophical perspectives about professionalism and the role of states in regulating attorneys' ethical conduct influences the Justices' perspectives.

The fourth section will briefly review further case developments in the commercial free-speech area. These cases provide the background against which Justice O'Connor sketches her own perspectives on the subject.

The fifth section will review the commercial free-speech cases involving legal ethics decided by the Supreme Court from the time of Justice O'Connor's appointment until the case of *Florida Bar v. Went For It, Inc.* (1981 to 1995).[10] Here, we will see how Justice O'Connor grappled with the ever-widening commercial approach to practicing law. Writing generally in dissenting opinions, Justice O'Connor articulated a more conservative reading of First Amendment doctrine in commercial speech, while expressing a commitment to an aspiration for high professional values. Justice O'Connor's approach also reflected her sense that the regulation of lawyers should be left to the states and the Court should defer to the states' judgment about these matters.

The sixth section will examine Justice O'Connor's majority opinion in *Florida Bar v. Went For It, Inc.* It will highlight the continuing tension in the application of the Court's commercial free-speech doctrines. The analytical debate among the Justices in this case again reflects the doctrinal challenges of creating a sensible approach to reviewing regulations in this area. And finally, I will offer some concluding observations about the struggle for doctrinal clarity in free-speech cases involving lawyer advertising and solicitation. Of particular concern are the ever-evolving methods of reaching out to potential clients in the digital age and the continuation of the discourse on the tension between considering the practice of law as a profession infused with a public purpose or a business like any other, free to market its services in truthful, nondeceptive modalities.

I. JUSTICE O'CONNOR'S CANONS OF PROFESSIONALISM

To understand Justice O'Connor's commitment to professional-

10. *Went For It*, at 635.

ism one needs to follow the tracks she made in this regard. Justice O'Connor herself has written extensively on the topic of professionalism, and examining these works provides an understanding of where she is coming from.[11] Of course, the heart of the professional ideal is a commitment to excellence in all that she does. These are lessons that she learned growing up on the Lazy B Ranch in Arizona:

> The value system we learned was simple and unsophisticated and the product of necessity. What counted was competence and the ability to do whatever was required to maintain the ranch operation in good working order—the livestock, the equipment, the buildings, wells, fences, and vehicles. Verbal skills were less important than the ability to know and understand how things work in the physical world. Personal qualities of honesty, dependability, competence, and good humor were valued most. These qualities were evident in most of the people who lived and worked at the Lazy B through the years.[12]

Others have commented on how her early life on the family ranch in Arizona taught the ethic of hard work and the value of care,

11. *See generally* Sandra Day O'Connor, *Courthouse Dedication: Justice O'Connor Reflects on Arizona's Judiciary*, 43 ARIZ. L. REV. 1 (2001) [hereinafter *Courthouse Dedication*]; Sandra Day O'Connor, *Legal Education and Social Responsibility*, 53 FORDHAM L. REV. 659 (1985) [hereinafter *Legal Education*]; Sandra Day O'Connor, *Meeting the Demand for Pro Bono Services*, 2 B.U. PUB. INT. L.J. 1 (1992) [hereinafter *Meeting the Demand*]; Sandra Day O'Connor, *Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision,* 36 VAND. L. REV. 1 (1983) [hereinafter *Professional Competence*]; Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5 (1998) (demonstrating the many times Justice O'Connor has shown professionalism); Sandra Day O'Connor, *Professionalism*, 78 OR. L. REV. 385 (1999); Sandra Day O'Connor, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library*, 55 OKLA. L. REV. 197 (2002) [hereinafter *Professionalism: Remarks*]; Sandra Day O'Connor, *Remarks of Sandra Day O'Connor, Associate Justice, Supreme Court of the United States*, 27 SETON HALL L. REV. 383 (1996); Sandra Day O'Connor, *Speech: Celli Award Ceremony and Luncheon: ABA Annual Meeting*, 42 ST. LOUIS U. L.J. 715 (1998) [hereinafter *Celli*].

12. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST 315 (2002).

especially important in raising livestock.[13] Early on she demonstrated her intellectual prowess with her academic successes, especially at Stanford Law School.[14] Justice O'Connor graduated without a job placement because of her gender. Nonetheless, she found legal work suitable to her talents first as an assistant district attorney and later when she set up her own law firm.[15] This is just one example of her deep commitment to succeeding in spite of the obstacles.[16]

Justice O'Connor's vision of professionalism is firmly grounded in her love and reverence for the law as an organizing institution of our society. The title of her book, *The Majesty of the Law*, clearly declares her respect for the law.[17] The book's title is derived from the sculptured fresco that adorned the wall above her seat on the Supreme Court bench.[18] In foregrounding the centrality of the law and suggesting why it is majestic, she exclaimed: The law "is an essential safeguard of the liberties and rights of the people. It allows for the defense of human rights and the protection of innocence. It embodies the hope that impartial judges will impart wisdom and fairness when they decide the cases that come before them."[19]

For Justice O'Connor, the law stands as a bulwark on behalf of the people over and against whatever forces might threaten basic freedoms; thus the use of the words "safeguard," "defense," and

13. *See* BISKUPIC, *supra* note 1, at 19 ("Whatever else might be said of the justice's ranch life and school days, they certainly steeled her for other challenges. Said brother Alan, 'Since she was a little girl, she was never afraid of hard work and never afraid of a challenge. She had gone through life, instead of fighting those things or getting worn out, allowing those things to take her places that other people wouldn't go.'").

14. *See* MCFEATTERS, *supra* note 1, at 43–44 (noting that Justice O'Connor graduated *magna cum laude* from Stanford undergraduate and was third in her class at Stanford Law School).

15. *Courthouse Dedication*, *supra* note 11, at 1.

16. *See* MCFEATTERS, *supra* note 1, at 47 ("When I applied to the Arizona Attorney General's Office for work, they didn't have a place for me. I persisted, however, got a temporary job, and quickly rose all the way to the bottom of the totem pole at the Attorney General's Office. As was normal for a beginner, I got the least desirable assignments. But that was all right, because I managed to take away from these rather humble professional beginnings some valuable lessons. I learned, for example, the habit of always doing the best I could with every task, no matter how unimportant it might seem at the time. Such present habits can breed future success.").

17. *See* O'CONNOR, MAJESTY, *supra* note 9, at xvii ("My hope is that the historical themes in this book, and the reflections expressed here, will help the reader better understand our own system, and also why and how the Rule of Law offers the world its best hope for the future.").

18. *Id.* at xvi.

19. *Id.*

"protection."[20] No doubt she would agree with the admonition the Harvard president gives the graduates of Harvard Law School at commencement when conferring the law degree with the statement, "You are ready to aid in the shaping of and application of those wise restraints that make men free."[21] Hence, she frames her professional identity in a manner that serves the preservation of the law in order to protect the people and our society.[22]

Her book provides the reasoning behind this "majesty of the law framework."[23] In explicating the historical context of our systems of government and in describing how our founding documents came to be, she highlights the principles of individual liberty within a democratic, representative government constructed with a central government operating in tandem with state governments.[24] From her seat on the bench, Justice O'Connor posits the role of the Court as "striking precisely the right balance among the competing ideals of law, freedom, and justice."[25] The Court is called upon to consider a broad range of issues involving basic rights under the Constitution, the interpretation of legislative and regulatory enactments (both state and federal), criminal and civil rights, and issues involving "Federalism and separation of powers."[26]

The theme of federalism runs throughout her description of the development of our system, and she especially emphasizes the role played by the states and the need to recognize a correlative power to make law for the citizens of the states.[27] In her book she reviews how important it was for the Framers to preserve the role of state

20. *Id.* at 242–43.

21. Rebecca Liao, *Those Wise Restraints that Make Men Free: Legal Reform with Chinese Characteristics*, ALEPH MAG (May 2, 2011), http://thealephmag.com/2011/05/02/those-wise-restraints-that-make-men-free/; *see also* O'CONNOR, MAJESTY, *supra* note 9, at 258.

22. O'Connor, *Courthouse Dedication*, *supra* note 11, at 7 (noting the importance of what occurs inside the courthouse at the dedication of a new federal courthouse in Phoenix).

23. *See generally* SANDRA DAY O'CONNOR, OUT OF ORDER: STORIES FROM THE HISTORY OF THE SUPREME COURT (2013) (continuing to reflect this notion of majesty in her latest book).

24. O'CONNOR, MAJESTY, *supra* note 9, at 13.

25. *Id.* at 15.

26. *Id.* at 13 ("These issues concern the balance of power between the states and the federal government—a balance struck by the constitutional limits on state and the federal power, the rules concerning preemption of state law by federal law, the doctrine of separation of powers, and the Eleventh Amendment, which addresses the states' immunity from lawsuits brought in federal court.").

27. *Id.* at 56.

governments.[28] For Justice O'Connor, this remains a challenge for us today in "preserving the role that independent state governments must play in ensuring the success of that system of government in the new century and beyond."[29] Perhaps, this explains in part her reluctance to overrule state efforts to regulate lawyers' conduct.[30] The state is obligated to protect the public from lawyers who may overreach or use undue influence to promote their own economic interests.[31] On the positive side, the state also has the task of articulating the ideals of professionalism. While the First Amendment has a place in tempering the state's regulatory authority, the Court must generally defer to the state's judgment in establishing ethical standards when presented with a clear explication of the importance of the state's interests.[32] This is not inconsistent with her general judicial philosophy of deferring to the legislative prerogatives of the states.[33]

In upholding the majesty of the law, the Court is also called upon to respond in a deliberative manner to significant changes in society that call for a re-examination of prior applications of the Constitution, such as school desegregation.[34] This is particularly reflected in her chapter on the Bill of Rights,[35] where she considers how important the Amendments to the Constitution are in preserving our fundamental liberties "against encroachment by the states as well as by the federal government."[36] For example, in discussing the First Amendment, she details how, in setting up the Free Speech Clause,

28. *Id.* ("For the Anti-Federalist, the autonomy of the states and the rights of the individual were part and parcel of the same programs of democratic freedom. They saw in the state legislatures democracy close to the source, the expression of the people themselves. One of the important lessons of 1788 is that the independence of the states helps to protect one of our most cherished liberties: the right to govern ourselves.").

29. *Id.* at 57.

30. *See* discussion *infra* Part V.A.

31. See *infra* text accompanying notes 325–328.

32. *See infra* note 84 (noting a state has an independent ability to define its own standards of professionalism).

33. O'CONNOR, MAJESTY, *supra* note 9, at 56–57.

34. *See id.* at 14–15 ("[W]hen our agenda does change, the change most frequently is a delayed response to changes in the nation's agenda. When Congress, the executive branch, or a state lights a new fire by passing significant new legislation or taking bold new action, we are inevitably summoned to attend to the blaze. Some litigants will ask us to fan the flames, others will demand their extinguishment, and still others will request only that the fire not be allowed to spread. Justice moves slowly (especially in a federal system where multiple courts may be entitled to review the issue before we do), so the Court usually arrives on the scene some years late. But once there, we must usually linger for a while.").

35. *See id.* at 58–64.

36. *Id.* at 59.

"the primary concern was to protect political speech: specifically, criticism of the government."[37] Moreover, the constitutional protection for free speech has expanded into areas of expression not actually conceived of by the Framers.[38] Ironically, while she notes the *Virginia Pharmacy* case,[39] she does not mention *Bates* or its progeny and the mighty changes in the profession impacting the First Amendment analysis of which she had an essential role.[40] Nonetheless, Justice O'Connor places the most emphasis on the original concept of free speech and expression in the context of speaking out about the government, or other forms of political speech.[41] It is this element of our fundamental freedoms that makes our democracy the envy of the world.[42]

A key to this review of her book, again, is the idea of the law's magnificence. Studying the history of the Constitution, and especially the Bill of Rights, reveals the central place these documents have in our society.[43] Justice O'Connor states, "It is part of our American contribution to the notion of justice and freedom."[44] Thus, there are basic civil and human rights that are protected from government overreach and are not at the whim of majority rule.[45] To

37. *Id.* at 61.

38. *See id.* ("One case, for instance questioned whether the First Amendment prohibits a high school principal from keeping stories about pregnancy and birth control out of the school paper. Another asked whether pharmacies must be permitted to advertise their prices for over-the-counter drugs. We have even had to decide whether New Hampshire residents who disagree with the state motto, "Live Free or Die," can use tape to cover that part of their license plate.").

39. O'CONNOR, MAJESTY, *supra* note 9 at 61.

40. *Id.* at 228.

41. *Id.* at 250–54 (noting that an independent judiciary is key to a successful democracy). Justice O'Connor further articulated her thoughts on the First Amendment:

> The second principle I want to emphasize is the importance of a free press. A judiciary that stands apart from other branches of government is able to perform its function without fear of sanction. Likewise, a responsive press free from government control is able to perform its function of comment and criticism. Only an independent and vigorous and responsible press permits democratic institutions to correct themselves through the powerful forces of informed debate and public opinion.

Id.

42. *Id.* at 257–58.

43. *Id.* at 58–64.

44. *Id.* at 64.

45. *Id.* at 59, 258.

make these rights more than empty promises in old documents, there must be a mechanism that ordinary citizens can use to defend their rights.[46] Justice O'Connor exclaimed, "In our system—and our experience has proved its efficacy—it is the citizens themselves, through the courts, who enforce their rights."[47] So any person can have a day in court against the government or anyone else who infringes on that person's basic rights.[48]

However, there must be lawyers available to assist citizens in protecting their rights. This is central to her ideals about professionalism because it falls to lawyers to uphold the values of freedom, justice, and liberty in courts of law.[49] In Justice O'Connor's words, "Lawyers possess the key to justice under a Rule of Law—the key that opens the courtroom door."[50] Hence, lawyers, because of their unique position, have a moral obligation to protect and honor the law for the good of society.[51] She emphatically expressed this concept:

> Although we must continue to train law students to "think like lawyers" by teaching legal theory and methods, we must not forget that questions of professional responsibility cannot be resolved with the same framework of analysis. After all, we as lawyers and judges hold in our possession the keys to justice under a rule of law. We hold these keys in trust for those seeking to obtain justice within our legal system. Lawyers who are sensitive to their role in society will surely view their responsibility to the public as transcending the purely technical skills of their profession.[52]

46. *Id.* at 258–59.

47. *Id.* at 259.

48. *Id.* ("They take their claims to the courts, and the courts decide whether the actions of the executive branch have encroached upon some protected rights. The courts then have the power to halt the official conduct that violates those rights, and to order relief for past injury. Ready access to independent courts allows any citizen to press his or her claim.").

49. O'Connor, *Professional Competence, supra* note 11, at 7.

50. O'CONNOR, MAJESTY, *supra* note 9, at 229.

51. *Id.* at 230.

52. *See also* O'CONNOR, MAJESTY, *supra* note 9, at 229. *See generally* O'Connor, *Legal Education*, supra note 11.

As evident from this philosophical framework, she believes fervently that lawyers have a moral and social responsibility to be faithful to the moral values expressed in the law.[53] The lawyer should not only practice law in the technical sense of applying the law correctly but also always consider the moral implications of their work on behalf of the client. She states that, "A great lawyer is always mindful of the moral and social aspects of the attorney's power and position as an officer of the court."[54]

It is not readily obvious what she means by moral and social responsibility, but this must be tied back to her idea about law's majesty, specifically, the establishment of a system that upholds the rule of law and protects the liberty interest of citizens. Our democracy is not static, it continues to evolve and must do so in a manner that harkens back to our original ideals of freedom, human rights, and nonoppression by the government in its regulatory powers.[55] Justice O'Connor notes that the Supreme Court has consistently tackled many of the social issues of the day that implicate our fundamental freedoms, including, "the right to speak freely and advocate for change, the right to worship as we please, and the privilege of political participation."[56] Moreover, great progress was made in eliminating racial segregation and including all of our citizens in the arc of liberty.[57] All of this is in response to the notion that the law in action should reflect the law as written in our organic documents, and that takes a continuing inquiry into the meaning of our rights and the institutions that are called to defend them.[58] None of this is even possible without first recognizing that we must constantly ask, or inquire, about the nature of our democracy.[59] Such

53. O'CONNOR, MAJESTY, *supra* note 9, at 226.

54. *Id.* at 226.

55. *Id.* at 266 ("But as the twentieth century progressed, evolving notions of individual liberty, and efforts to balance that liberty with governmental power and the commands of citizenship, became the heart of judicial decision making.").

56. *Id.*

57. *Id.* at 268.

58. *Id.* at 268–69 ("Certainly, much work lies ahead to erase the severe damage and distress caused by racial discrimination, and many questions remain unanswered about the ultimate sweep of individual-rights decisions. But I believe that the hallmark of social change in the last century was the Supreme Court's increasing protection of the individual and its efforts to extend the benefits of American citizenship to every segment of society. So too, in this new century, we will continue to ensure that individuals participate as equals in this country.").

59. *Id.* at 269.

inquiry into the nature of our democracy is the grounding of her stated moral imperative.[60]

It is clear that Justice O'Connor believes lawyers, starting in law school, must be trained in moral inquiry.[61] While she does not prescribe a single course of moral inquiry, she does note that the current drama lawyers inflict on each other while seeking to win at all costs has led to severe dissatisfaction with the practice of law.[62] She decries the warrior mentality of many lawyers who seek to destroy their opponents without concern for solving the dispute that brings the client to the lawyer in the first place.[63]

One should also note that she came of age professionally at a time of great debate in Arizona about the meaning of legal practice and the traditions of the profession. In the 1961 case of *State Bar of Arizona v. Arizona Land Title and Trust Co.*,[64] the State Bar of Arizona sought a declaratory judgment that certain realtors and title insurance companies were engaging in the unauthorized practice of law in the course of handling of real-estate transactions.[65] These

60. *Id.* at 276 ("A nation's success or failure in achieving democracy is judged in part by how well it responds to those at the bottom and the margins of the social order. Those of us in positions of influence and power can never be complacent and comfortable with the status quo. However sturdy our foundation, however strong our legal and political institutions, we must acknowledge that our societies are not perfect.").

61. O'Connor, *Legal Education*, *supra* note 11, at 660 ("To be sure, the first obligation of a law school is to teach students the substantive law and how to analyze and incorporate sufficient practical training to equip the graduate with the essential skills required for the practice of law. But law schools must do even more than that. They need to instill a consciousness of the moral and social responsibilities to the lawyer's clients, to the courts in which the lawyer appears, to the attorneys and clients on the other side of an issue, and to others who are affected by the lawyer's conduct.").

62. O'CONNOR, MAJESTY, *supra* note 9, at 226. In commenting on the increase in incivility she notes:

> It has been said that a nation's laws are an expression of its people's highest ideals. Regrettably, the conduct of lawyers in the United States has sometimes been an expression of the lowest. Increasingly, lawyers complain of a growing incivility in the profession, and of a professional environment in which hostility, selfishness, and a win-at-all costs mentality are prevalent.

Id.

63. *Id.* at 226–28.

64. State Bar of Ariz. v. Ariz. Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961).

65. *Id.* at 4. The case focused on a broad category of actors in the real-estate field including all Arizona corporations engaged in the land-title insurance business, and in many instances also acting in other fiduciary or representative capacities, such as executor, administrator, trustee, broker, receiver, underwriter, depository and agent, general or escrow.

entities and individuals who were in the business of conveying real-estate drafted a variety of documents and implicitly gave their customers advice that in reality was not unlike advice that lawyers would generally give in similar situations.[66] Moreover, in what we might now call multidisciplinary practice, the actions of these entities and individuals were aided by what were in essence in-house lawyers.[67]

In finding against the real-estate brokers and title companies, the case was built around an examination of the nature of the legal profession.[68] After giving a sweeping historical account of the legal profession and citing the work of the former Harvard Law School Dean Roscoe Pound, the court declared that the practice of law was one of the traditional learned professions dedicated to service and not to earning money.[69] The Arizona Supreme Court distinguished lawyers from other providers who were not part of traditional professions through their absence of motivation by business ideals, declaring:

> From this historical trend it is inevitable to conclude that as the body of the law has grown, the

Id.

66. *Id.*

67. *Id.* In describing the substance of the work done with the aid of lawyers, the court found:

> The essence of the complaint against the title companies is that they, acting by and through attorneys and other persons employed by them, in connection with the conduct of their businesses and transactions have been and are regularly and continuously preparing, drafting and formulating documents affecting title to real property for their numerous clients, patrons, and customers, and giving legal advice regarding such transactions and instruments so drafted, constituting the unauthorized practice of law.

Id.

68. *Id.* at 5–8.

69. *Id.* at 6 (citing POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 6, 10 (1953)) The court found Roscoe Pound's thoughts on the ideal of a profession instructive:

> Historically there are three ideas involved in a profession: organization, learning, i.e., pursuit of a learned art, *and a spirit of public service*. These are essential. A further idea, that of gaining a livelihood, is involved in all callings. It is the main if not only purpose of in the purely money making callings. *In a profession it is incidental.*

Id.

> community has needed and continues to require *the services of men learned in the law*. It follows that when legal tasks are performed by men who are neither professionally trained nor motivated, the best interest of the public cannot be served.[70]

Moreover, lawyers are bound by high professional ideals embodied in the *Canons of Professional Ethics*, which are not enforceable against those who are merely running a business for profit.[71] It is the specially trained lawyer who can assist a layperson with the complexities of real-property transactions.[72] The public can have faith in the abilities of a licensed lawyer because he or she has been "approved by the courts, and subject to their discipline when he fails to live up to the ethics of the profession."[73]

The title companies and those who work within them are unqualified to handle legal matters, and "they are not normally governed by the code of ethics to which lawyers are subject; their principal motivation is the business of the title company, not of the customer."[74] Furthermore, the fact that title companies and brokers have historically been engaged in this activity is immaterial to the court's duty to regulate the practice of law and to protect the public from potential harms.[75] The court then issued a declaratory judgment outlining what aspects of real-estate conveyancing constitute the

70. *Id.* at 8. One must note the gendered construction of the comment. The practice of law was so much a "man's world," which in part explains Justice O'Connor's difficult entry into it.

71. *Id.* at 9 (citing CANONS OF PROFESSIONAL ETHICS Canon 15 (AM. BAR ASS'N 1908). The court emphasized that while the lawyer is subject to a code of ethics, the entities involved here are not so focused on the ideal of putting the customer and client first. The court wrote that:

> Many of the Canons of Professional Ethics which attorneys must observe most scrupuously [sic] are diametrically opposed to the code by which businessmen must live if they are to survive. Perhaps the most important applicable Canon states that: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied."

Id.

72. *Id.* at 8.

73. *Id.*

74. *Id.* at 10.

75. *Id.* at 13.

practice of law and thus can only be done by lawyers and what practices do not constitute the practice of law and can be done by title companies and real-estate brokers.[76]

This case was grounded in the theory that lawyers are traditional professionals who are committed to the ideal of service and the values of the profession's ethical codes.[77] Additionally, lawyers have specialized training that prepares them to offer legal counsel to the public.[78] While it is true that lawyers also make a living by offering their legal services, the history of the profession has demonstrated that it is responsible for "the administration of justice through a spirit of public service."[79] This was also essentially the finding of the Arizona Supreme Court in the *Bates* case: "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"[80]

Such important issues are not easily settled, especially when the competing parties have interests that are vital to their way of doing business. The realtors and title-insurance companies successfully mounted a ballot initiative to amend the Arizona constitution so that they would be able to continue their historical practice of preparing all aspects of real-estate transactions.[81] Against vigorous opposition from the Arizona Bar, the amendment was passed with strong public support on November 6, 1962, just a year after the Arizona Supreme Court had decided differently.[82]

At the heart of the matter was the issue of whether attorneys were motivated by a concern for the public's welfare or by their own self-centered economic interests in protecting their ability to earn fees, the ideal of public service notwithstanding. Furthermore, there was the recognition that perhaps persons seeking to sell or buy real-estate did not always need a lawyer. Additionally, if the concern was how to protect the public, then the realtors had a code of ethics as well that placed upon them the ideal of fiduciary responsibility to the

76. *Id.* at 14–15.

77. *Id.* at 8.

78. *Id.*

79. *Id.*

80. *In re* Bates, 555 P.2d 640, 643 (Ariz. 1976), *aff'd in part, rev'd in part sub nom.* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

81. Merton E. Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A. J. 139, 141 (1963).

82. *Id.*

persons they served. The business of practicing law was on the cusp of fundamental change and the public was becoming aware that some services and products necessary for addressing some legal needs could be done without a lawyer.

At the time of these decisions, Justice O'Connor was a sitting Arizona judge on the Arizona Court of Appeals. Justice O'Connor would later also note the business aspect of the practice of law, but distinguished lawyers from other professionals because of their commitment to public service.[83] Her sentiments certainly reflect those expressed by the Arizona Supreme Court in the real-estate conveyancing case. The people of Arizona had a different opinion about who could provide such services. For Arizona, the United States Supreme Court effectively settled the debate on the commercial aspect of professionalism with respect to lawyer advertising in *Bates*.[84] This tension is reflected in her jurisprudence on these issues, as we shall see below. First, we will attempt to acquire a deeper understanding of her point of view on these issues.

Justice O'Connor's canons of professionalism are animated by the ideal of public service. Ironically, Justice O'Connor herself returned to the thinking expressed by the Arizona Supreme Court in the realtors' case in describing the nature of professionalism by also citing to Roscoe Pound's definition of professionalism grounded in the ideal of public service.[85] By experience alone, her legal and

83. O'Connor, *Professionalism*, *supra* note 11, at 200 ("Certainly, life as a lawyer is a bit more complex today than it was a century ago. The ever-increasing pressure of the marketplace—the need to bill hours, to market to clients, and to attend to the bottom line—have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession.").

84. In the final analysis, however, it is the title companies and real-estate brokers who won the debate. They were able to successfully amend the Arizona Constitution to allow them to engage in the same practices that brought about the Bar complaint in the first place. *See* Marks, *supra* note 81; Hon. Charles C. Bernstein, *The Arizona Realtors and the 1962 Arizona Constitutional Amendment*, 29 UNAUTHORIZED PRAC. NEWS 129, 169 (1963); Robert E. Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment*, 37 S. CAL. L. REV. 1 (1964).

85. O'Connor, *Professionalism: Remarks*, *supra* note 11, at 198. Observing the dissatisfaction lawyers have with their professional lives and the public dislike of the legal profession, Justice O'Connor states:

> I believe that a decline in professionalism is partly responsible for this state of affairs. Dean Roscoe Pound said that a profession is "a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood." On graduation from law school, aspiring attorneys

political career was dedicated to serving the public as a private lawyer, public lawyer, legislator, and judge. She recognized that attorneys are imbued with great power by virtue of their training and status within the legal system.[86] This is the point she made strongly in *Shapero v. Kentucky Bar Association* when she called for innovative methods for inculcating professional values.[87] This is also the message she regularly made when speaking at law schools before an audience of law students, lawyers, and legal educators.[88]

Her ideal of public service embodies two perspectives. First, she believes that as officers of the court, lawyers stand in a unique position to uphold the rule of law and to offer the means by which ordinary citizens can gain access to the courts to protect their rights. This larger role for lawyers extends beyond the practical need to make a living, which is certainly a necessity, but it also suggests that lawyers are commissioned to work for the good of society. Second, the ideal of public service includes providing pro bono services to those who cannot afford to hire a lawyer. In many ways, her own private practice reflected this ideal because she took clients who walked in off of the street and she took criminal cases that were assigned from the court.[89] All lawyers should do their part to make services available to the poor.[90] She even suggests that this duty has global reach.[91] At the end of the day, lawyers will receive a great deal of professional and personal satisfaction in engaging in pro bono work.[92]

In sum, Justice O'Connor's canons of professionalism begin with her own personal commitment to excellence. She has had a remarkable career as a talented, skillful lawyer, dedicated to performing her best on behalf of the people she serves. As such, the

> do not simply gain the means of a comfortable livelihood. They also assumed the obligations of professionalism; obligations in their dealings with other attorneys; obligations toward legal institutions; and obligations to the public.

Id.

86. *Id.* at 229.

87. *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 490 (1988).

88. *See* O'Conner, *Legal Education*, *supra* note 11, at 660; O'Connor, *Professional Competence*, *supra* note 11, at 7; O'Connor, *Professionalism*, *supra* note 11, at 385; O'Connor, *Professionalism: Remarks*, *supra* note 11, at 200.

89. O'Connor, *Courthouse Dedication*, *supra* note 11, at 2.

90. O'Connor, *Meeting*, *supra* note 11, at 6.

91. O'Connor, *Ceeli*, *supra* note 11, at 717.

92. *Id.* at 720.

framework for her professional canon is structured by the ideal of lawyers serving the public. This is a moral objective because, as officers of the court, lawyers have been granted enormous power in the systems that actualize our laws. Moreover, lawyers must always understand that the law through which they practice is majestic for the following reasons: First, the existence of a functioning society depends on our moral commitment to the rule of law.[93] Second, the fundamental principles of freedom, democracy, and justice are at the core of our law.[94] Finally, these principles must be understood in the context of a constitutional democracy that is situated in a governmental framework of federal and state regulatory jurisdictions.[95] The federal and state governments each have a proper role and sphere of influence.[96] However, it is the People who have the final say through representative government.[97] And it is the People who have civil rights that cannot be readily usurped by government.[98]

To insure the protection of constitutionally recognized liberty interests, citizens must be able to defend their rights in courts of law. If we are to remain free, it is morally imperative that justice be made available to all citizens. Lawyers are the ones who hold the keys to justice. One pauses to note that, while holding up the Bill of Rights as the foundation of these liberty interests, Justice O'Connor privileges the First Amendment because it grants the awesome ability to speak out against and for the government without fear of repercussion.[99] This bedrock belief shapes her thinking on commercial free speech by lawyers.

II. PROFESSIONALISM AND LEGAL ADVERTISING AND SOLICITATION IN THE WINDS OF CHANGE

To understand the analytical perspective of Justice O'Connor on legal advertising is to see the tension between tradition and change in law and society.[100] The constitutional protection of legal advertising

93. O'CONNOR, MAJESTY, *supra* note 9, at 73.
94. *Id.* at 64.
95. *Id.*
96. *Id.*
97. *Id.* at 245.
98. *Id.* at 35.
99. *Id.* at 61, 255.
100. *Id.* at 269–70.

emerged at a critical intersection of change in the way lawyers practiced, in the expansion of the constitutional critique of the First Amendment, and in the monumental changes in society. The civil rights movements of the sixties and early seventies were fueled in part by lawyers advocating for social justice through the courts.[101] At the same time, law schools expanded the pool of potential students to include more minorities, women, and individuals from nontraditional backgrounds.[102] Traditional, large law firms grew in size as new fields of practice were developed and mass-tort litigation became a lucrative area of practice. Concurrently, the organized bar sought to fulfill the obligation to make legal services more generally available and wrestled with whether pro bono legal services should be made mandatory.[103] Moreover, lawyers were instrumental in bringing impact litigation calculated to effect broad social changes.[104]

During this period, the Supreme Court considered many landmark cases involving the reach of the First Amendment. Professor Owen M. Fiss, in his book *The Irony of Free Speech*,[105] noted the cases of *New York Times v. Sullivan*, *Brandenberg v. Ohio*, and *New York Times v. United States*, as examples of the Court creating modern First Amendment jurisprudence.[106] At the heart of these and other First Amendment cases, is the tension between the government's regulatory role in promoting legitimate state interests, such as preserving order and the fundamental value of expression,

101. *Id.* at 132–38 (paying tribute to Justice Thurgood Marshall, the primary legal architect of the civil rights movement); *see also* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983) (describing how Charles Hamilton Houston prepared a cadre of civil rights lawyers who developed a strategy to secure equal rights under the Constitution for all Americans); James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559 (2009).

102. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 234 (1983).

103. *See generally* A.B.A. Special Committee on Public Interest Practice, *Implementing the Lawyer's Public Interest Obligation*, 63 A.B.A. J. 585, 678 (1977).

104. *E.g.*, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part*, *rev'd in part*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part*, *rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (establishing important rights for people with mental illnesses, especially those confined to state mental-health institutions); *see also* Michael L. Perlin, *"Abandoned Love": The Impact of* Wyatt v. Stickney *on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 121 (2011) (noting the significance of *Stickney*).

105. OWEN M. FISS, THE IRONY OF FREE SPEECH (1996). *See generally* N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Brandenberg v. Ohio, 395 U.S. 444 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

106. FISS, *supra* note 105, at 6.

especially political expression designed to promote civil rights or challenge governmental policies.[107] The protests against the Vietnam War, for example, brought First Amendment cases to the Supreme Court and pushed the traditional analysis of constitutional protections to areas never contemplated by constitutional scholars.[108] Professor Fiss suggests that the doctrinal advancement of First Amendment jurisprudence recognized not only the constitutional limits on states regulating speech, but also a role for states to allow for the expression of ideas with which many in society would disagree, such as hate speech and pornography.[109]

The 1960s were a period of profound social, political, and cultural change. The civil rights movement propelled the country out of the Jim Crow era[110] and towards a society where access to full participation in all fundamental rights would not be predetermined by race.[111] Other groups of citizens also organized to achieve full social, political, and economic equality.[112] From a political perspective, a plethora of legislation was enacted to guarantee basic rights such as voting, employment, and housing. Many of these laws were the result of citizens standing up, speaking out, and calling on their government to act for the good of all in society.[113] Culturally, the society opened up to new musical genres (rhythm-and-blues, rock-and-roll, and soul) more sexual freedom to experiment with nontraditional relationships, and the mobility to go anywhere in the country and the world.[114]

107. *Id.* at 6–7.

108. *E.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that students have some First Amendment rights even while attending a public school and could thereby express their opposition to the Vietnam War by wearing black armbands to school). *See generally Sullivan*, 376 U.S at 254 (dealing with whether a state must award damages to a public official for a defamatory falsehood relating to his official conduct).

109. FISS, *supra* note 105, at 18–19.

110. *See* HOWELL RAINES, MY SOUL IS RESTED: THE STORY OF THE CIVIL RIGHTS MOVEMENT IN THE DEEP SOUTH (1977).

111. *See* E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA (1993) (chronicling the admission of Vivian Malone and James Hood into the university in spite of Governor George Wallace standing in the door defying a federal order to allow the admission).

112. *See* FISS, *supra* note 105, at 9–10 (noting the development of civil rights laws fostered a wider conception of rights).

113. *E.g.*, FRED GRAY, BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM—THE LIFE AND WORKS OF FRED GRAY (1995) (describing the career of the lawyer who represented Dr. Martin Luther King, Jr. and Rosa Parks, and provided legal counsel to the Montgomery Bus Boycott, the desegregation of Alabama schools, and the 1965 Selma to Montgomery march for voting rights).

114. *See* JAMES C. HALL, MERCY, MERCY ME: AFRICAN-AMERICAN CULTURE AND

More can be said about this period of rapid social change, but suffice it to say that the following discussion shows the developing First Amendment doctrines that would mirror the changes in traditional orthodoxy, both legally and socially, when Justice O'Connor expounded upon her canons of professionalism.

A. Connecting the First Amendment to Professionalism in NAACP v. Button

While it may be said that *Bates v. State Bar of Arizona* opened up the legal advertising floodgates, it is *NAACP v. Button*[115] that foreshadowed the constitutional conundrum of how to accommodate the ideals of professionalism with the ever-increasing need for the legal profession to make legal services broadly available and financially sustainable. This case arose out of the many legal battles that followed the Supreme Court's decision in *Brown v. Board of Education*,[116] which declared that segregation by race in public schools was unconstitutional. [117] After *Brown* was decided, many states engaged in what was called massive resistance to integration of public schools.[118] To counter this resistance, the NAACP,[119] the NAACP Legal Defense Fund, Inc. (Defense Fund),[120] and the Virginia State Conference of NAACP Branches[121] pursued a vigorous litigation campaign to effectuate the mandate in *Brown*.[122] In Virginia, the NAACP's Virginia State Conference hired staff lawyers to bring such suits and would call in Defense Fund's lawyers for assistance.[123] The NAACP members and staff lawyers held informational meetings describing the right to an equal education and would encourage individuals to sign up to bring cases against local

THE AMERICAN SIXTIES (2001).

115. NAACP v. Button, 371 U.S. 415 (1963).

116. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

117. *See* RICHARD KLUGER, SIMPLE JUSTICE (1976) (discussing the history of *Brown v. Board*).

118. *See* OLIVER HILL, THE BIG BANG—*BROWN V. BOARD OF EDUCATION* AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR. 168 (Jonathan K. Stubbs ed., 2000); *see also* Walter Murphy, *The Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371 (1959) (discussing the efforts of southern states to defeat the ruling of *Brown*).

119. *See Button*, 371 U.S. at 419.

120. *Id.* at n.5.

121. *Id.* at 419.

122. *See* HILL, *supra* note 118, at 178–82.

123. *Button*, 371 U.S. at 420–21.

school boards that had refused to integrate the schools.[124]

The NAACP, led by attorneys Oliver Hill,[125] Spottswood Robinson,[126] Robert Carter,[127] and Thurgood Marshall,[128] sought injunctions declaring that these statutes violated the First Amendment and the Fourteenth Amendment's Equal Protection Clause.[129] Justice Brennan, writing for the Court, found that the activities of the petitioners were of the kind demanding the full protection of the First Amendment.[130] Moreover, the lawyers were engaging in an important form of political expression designed to "achiev[e] the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country."[131] Further, the lawyers not only were properly representing the desires of individual clients but also were expressing the objectives of the organizations involved.[132] Accordingly, a provision of the law that could sanction these lawyers for pursuing the constitutional rights of their clients implicated the right of free expression.[133] Justice Brennan vigorously defended these First

124. *Id.* at 421–22.

125. Oliver Hill became a leading attorney in Virginia and the Virginia State Bar named the annual Pro Bono Award after Mr. Hill. *See* Hill, *supra* note 118.

126. Spottswood Robinson became a federal district court judge. *Biographical Directory of Federal Judges: Robinson, Spottswood William III*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=2031&cid=999&ctype=na&instate=na (last visited Oct. 16, 2015).

127. Robert Carter became a federal district court judge. *Biographical Directory of Federal Judges: Carter, Robert Lee*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=392&cid=999&ctype=na&instate=na (last visited Oct. 16, 2015).

128. Thurgood Marshall became United States Solicitor General and then a United States Supreme Court Justice. *Biographical Directory of Federal Judges: Marshall, Thurgood*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=1489&cid=999&ctype=na&instate=na (last visited Oct. 16, 2015).

129. *See Button*, 371 U.S. at 444.

130. *Id.* at 429–30 (noting the importance of being able to bring such an action against the government). The Court stated:

> We meet at the outset the contention that "solicitation" is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against government intrusion.

Id. at 429.

131. *Id.*

132. *Id.* at 430.

133. *Id.* at 432–33 (discussing the Court's concern about whether the statute was too

Amendment freedoms by declaring, "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[134]

Contrastingly, Justice Harlan, in a dissent joined by Justices Clark and Stewart, found that the Court was impermissibly interfering with the "the domain of state regulatory power over the legal profession."[135] While recognizing the importance of the First and Fourteenth Amendments' rights,[136] Justice Harlan focused on the actual conduct of the NAACP lawyers and the state's strong interest in maintaining regulatory supervision of the profession.[137] Noting that there must be a balance struck between these competing interests, he observed that the constitutional rights at stake were not absolute.[138] He articulated the following test: "So here, the question is whether the particular regulation of conduct concerning litigation has a reasonable relation to the furtherance of a proper state interest, and whether that interest outweighs any foreseeable harm to the furtherance of protected freedoms."[139] For Justice Harlan, the regulations were reasonably related to the State's concern about the profession,[140] which he found were not intended to discriminate against the NAACP or to chill the exercise of First Amendment rights.[141]

NAACP v. Button provides the example of how lawyers were expanding the ways in which they represented clients. First, in this instance, they were finding clients to represent by which the constitutional law of the land could be actualized. This was only novel in that the reach of these efforts to fight school segregation were vast. As the Court noted, "The sheer mass of such (and related) litigation is an indication of the intensity of the struggle."[142] The

vague or overbroad so that a lawyer could not determine whether he or she was in danger of ethical sanction).

134. *Id.* at 433.

135. *Id.* at 448 (Harlan, J., dissenting).

136. *Id.* at 452–53.

137. *Id.* at 451–53.

138. *Id.* at 453–54.

139. *Id.* at 455.

140. *Id.*

141. *Id.* at 455, 469–70.

142. *Id.* at 435 n.16 (majority opinion) (listing twenty-seven named cases with multiple opinions issues in ten different Virginia municipalities where segregation was being challenged.); *see also id.* at 436 ("We cannot close our eyes to the fact the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically

instant case follows in a longer tradition of impact litigation pursuing fundamental civil rights, such as *Plessy v. Ferguson*,[143] *Carter v. Texas*,[144] *United States v. Shipp*,[145] *Guinn v. United States*,[146] and *Buchanan v. Warley*.[147] Second, the First Amendment rights of lawyers were recognized and vigorously protected by the Supreme Court. The tension between advocacy and the First Amendment is brought into focus by the need for and the method of obtaining clients seeking to vindicate political rights. Finally, this case wrestles with how to shape the professional framework by which states can regulate the practice of law. Against this backdrop, the Supreme Court sets the stage for Justice O'Connor's later development of her professionalism jurisprudence.

B. Commercial Free Speech Meets Professionalism in Bates v. State Bar of Arizona

The *Bates v. State Bar of Arizona* case was an extension of the development of commercial free-speech jurisprudence as presented in *Virginia Pharmacy v. Virginia Consumer Council*.[148] *Virginia Pharmacy* permitted pharmacists to advertise the prices of their products, especially those products that had become standardized and were fungible with similar drug products sold by other pharmacists.[149] As First Amendment theories have developed for political speech, commercial speech is protectable on the ground that the speaker has the right to impart information to the public and society has a right to receive such information so that informed decisions can be made

dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought.").

143. Plessy v. Ferguson, 163 U.S. 537 (1896); *see also* John Minor Wisdom, Plessy v. Ferguson—*100 Years Later*, 53 WASH. & LEE L. REV. 9 (1996).

144. Carter v. Texas, 177 U.S. 442 (1900) (challenging exclusions of blacks on grand juries); *see also* Rogers v. Alabama, 192 U.S. 226 (1904).

145. United States v. Shipp, 203 U.S. 563 (1906) (challenging a habeas corpus petition against a local official who refused to protect a black prisoner from lynching); *see also* MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM (1999).

146. Guinn v. United States, 238 U.S. 347 (1915) (challenging the exclusion of black voters by way of the grandfather clause in voting legislation in Maryland and Oklahoma).

147. Buchanan v. Warley, 245 U.S. 60 (1917) (challenging Louisiana's discriminatory real-property ordinance).

148. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

149. *See id.* at 773–74 (Burger, J., concurring).

about the purchase and use of pharmaceutical services.[150] In addition to the marketplace of political ideas, the First Amendment also protects the marketplace of commercial ideas and information.[151] The legitimate concern over professionalism was outweighed by the First Amendment rights of the individuals to receive commercial information about the availability of the lowest prices for the goods and service they seek in the marketplace.[152]

Professionalism was also at the heart of the *Bates* case.[153] Fundamentally, the tradition in the profession was that it was undignified for lawyers to advertise.[154] Before the adoption of the American Bar Association's *Disciplinary Rules*, the American Bar Association's *Canons of Professional Ethics* governed the manner in which lawyers could present themselves to the public.[155] The new *Disciplinary Rules* reflected the sentiment in the old *Canons of Professional Ethics* with an updated list of dos and don'ts.[156] Attorneys Bates and O'Steen recognized that times were changing, and their experience, especially with legal services,[157] convinced them that low- and moderate-income individuals had limited access to legal services due to costs and lack of information about how to obtain the services of a lawyer. The attorneys concluded that if they set up their practice in a way that provided specific, routine services at set prices, they could make legal services available to a wider range of the public and still be able to earn a respectable living.[158] To achieve this, the attorneys needed to generate a sufficient volume of business and be efficient in serving clients in order to have a

150. *Id.* at 770.

151. *Id.* at 764 ("Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial,' may be of general public interest."); *see also id.* at 761.

152. *Id.* at 770.

153. Bates v. State Bar of Ariz., 433 U.S. 350, 365–68 (1977) (noting that professionalism was a main concern of the state). The Court observed that "[t]he key to professionalism . . . is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth." *Id.* at 368.

154. *Id.*

155. *See* CANONS OF PROFESSIONAL ETHICS Canon 27 (AM. BAR ASS'N 1908) (setting out a specific list of dos and don'ts).

156. *See Bates*, 433 U.S. at 355 n.5.

157. *Id.* at 354.

158. *Id.* (opening their practice in March 1974 with intentions to provide legal services at modest fees to "persons of moderate income who did not qualify for government legal aid").

sustainable practice.[159] They reasoned that volume could best be achieved by advertising their practice, which they called a "Legal Clinic."[160] The lawyers also ran newspaper advertisements listing the prices for certain legal services.[161] Consequently, the State Bar of Arizona sanctioned the lawyers for violating Disciplinary Rule 2-101(B), which stated:

> A lawyer shall not publicize himself, or his partner, or associates or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.[162]

After a hearing, a local grievance committee originally gave the two lawyers a six-month suspension.[163] On review, the Arizona State Bar's Board of Governors recommended a one-week suspension.[164] The two lawyers appealed to the Supreme Court of Arizona on the grounds that the disciplinary rule violated the federal antitrust provisions under the Sherman Act and was an impermissible restriction of their right to free speech under the First Amendment of the United States Constitution.[165] The Supreme Court of Arizona found that the Sherman Act did not apply to the states as held by the United States Supreme Court in *Parker v. Brown*.[166] The Arizona Supreme Court also relied heavily on *Goldfarb v. Virginia State Bar* in its antitrust analysis.[167] The Arizona Supreme Court found that the minimum price setting by a local bar association, which the United

159. *Id.*

160. *Id.*

161. *Id.* at 354 n.4 (noting the advertisements accompanied by subsequent news stories increased business).

162. *Id.* at 355.

163. *In re* Bates, 555 P.2d 640, 648 (Ariz. 1976) (Hays, J., dissenting), *aff'd in part, rev'd in part sub nom.* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

164. *Id.* at 641 (majority opinion).

165. *Id.* at 642–43.

166. *Id.* at 643 (citing Parker v. Brown, 317 U.S. 341, 352 (1943)).

167. *Id.* (citing Goldfarb v. Va. State Bar, 421 U.S. 773 (1975)).

States Supreme Court found to be anticompetitive in the *Goldfarb* case, was distinguishable from the minimum-fee schedule set by attorneys Bates and O'Steen.[168] The State had complete authority to regulate the profession, including whether lawyers could advertise.[169]

On the First Amendment claim, the Supreme Court of Arizona in *In re Bates* acknowledged such speech had some protection under the First Amendment, but believed that legal advertising could still be restricted as a method of regulating the profession.[170] The court noted a larger societal concern, stating, "[t]he legal profession, like the medical profession, has always prohibited advertising since it is a form of solicitation deemed contrary to the best interest of society."[171]

On appeal of the antitrust and First Amendment issues, the United States Supreme Court first upheld the state court's finding on the claim that the Sherman Act did not apply to the states in this instance.[172] The Court focused on the regulatory role of the state supreme court over the legal profession and found no need to consider whether there was an impermissible, anticompetitive impact on the lawyers who wished to advertise.[173] However, it should be noted that the Court, in its discussion of the First Amendment, considered the issue of competition in the legal field as related to the impact of fee comparisons, the rising cost of practice due to advertising, and whether advertising caused barriers to entry for young lawyers who had difficulty competing with firms with advertising budgets.[174] The

168. *Id.* at 643 (focusing on the regulatory role the state court has over attorneys who are officers of the court).

169. *See id.* at 643 (finding that Disciplinary Rule 2–101(B) was not inconsistent with the holding of *Goldfarb* and noting that the special regulatory function the State has over the profession).

170. *See id.* at 644.

171. *Id.*

172. Bates v. State Bar of Ariz, 433 U.S. 350, 363 (1977).

173. *Id.* at 361–62 (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975). The Court considered the differences between *Goldfarb* and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), on the question of state action for antitrust purposes, and found that the state bar was acting as a state actor:

> In contrast, the regulation of the activities of the bar is at the core of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"

Id.

174. *Id.* at 377–78. When considering whether increased costs for advertising would

Court found that advertising might even lower the costs of legal services because potential clients could search for the lowest price.[175] Hence the economic aspects of the practice of law are always present in advertising cases even if they are not in the foreground.

In addressing the First Amendment issue, the Court applied the commercial-speech doctrine established in *Virginia Pharmacy*, extending it to the state's regulation of the legal profession.[176] Justice Blackmun reviewed the justifications presented by the State and found none of them sufficiently persuasive to overcome the free-speech claim of the attorneys.[177] None of the advertisements were misleading, false, or deceptive; made comparisons about the quality of services offered by other practitioners; or were illegal.[178] The opinion noted that in-person solicitation may give cause for regulatory concern and that there may by "reasonable restrictions on the time, place, and manner of advertising."[179] The Court succinctly stated its narrow holding as follows:

> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of the appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the free flow of such information may not be restrained, and we therefore hold that the present application of the disciplinary rule against appellants to be violative of the First Amendment.[180]

The notion of encouraging the free flow of information and ideas was most salient during this period. Expressions of all forms could only be restricted by the state for compelling reasons. With a

have any impact on the amount lawyers charge in fees, the Court recognized, as a factual matter, that the State's concern about creating entry barriers cut both ways.

175. *Id.* at 377.

176. *Id.* at 365. While reviewing the opinion of *Virginia Pharmacy*, the Court pointed out its consideration of commercial speech as a negative influence on the professionalism for pharmacists, and noted that that opinion reserved for another day how the analysis would apply to other professions. The Court used this occasion to apply those First Amendment principles to lawyers.

177. *Id.* at 379.

178. *Id.* at 383–84.

179. *Id.* at 384.

180. *Id.*

populace animated by social protest and the opening up of social and economic opportunities for all, any governmental restrictions on free speech were suspect. The problem was finding valid limits for free expression by legal professionals. Nonetheless, after *Bates* was decided, the organized bar was slow to respond to the new jurisprudential regime and the jurisprudence on professionalism would evolve in a piecemeal fashion.[181]

III. *BATES* PROVIDES ANSWERS AND MANY MORE QUESTIONS

The case reflects the challenges in applying the commercial free-speech doctrine. This is the challenge with which Justice O'Connor wrestles in balancing her ideas about professionalism and the First Amendment's commercial-speech doctrine. The indeterminate nature of First Amendment doctrine, varying perceptions of case facts, and divergent philosophical priorities, especially those linked to professionalism, all conspire to offer and effect divergent paths for resolving these claims. To begin with, the application of seemingly fluid First Amendment principles can lead to conflicting results. The opinion recognizes that some questions over the extent of commercial free-speech cannot be simply answered without considering the context of the speech.[182] For example, the Court would seem to permit the tight regulation of in-person speech or direct solicitation of clients.[183] However, there is no guidance on how a state might effectively issue ethical rules that pass First Amendment constitutional muster.[184] How does one achieve a balance between

181. *See* Gerald S. Reamey, *Life in the Early Days of Lawyer Advertising: Personal Reflections of a* Bates *Baby*, 37 ST. MARY'S L.J. 887 (2006). The author describes becoming a lawyer in Texas the year that *Bates* was decided and notes that no lawyers in his area were advertising. He reports that the Texas Bar's response to the decision was one of reluctant acceptance.

182. *Bates*, 433 U.S. at 384. The Court found that legal advertising cannot be suppressed but that it is still subject to regulation and several aspects of it will be subject to further scrutiny. The Court concluded:

> As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. Advertising concerning transactions that are themselves illegal obviously may be suppressed. And the special problems of advertising on the electronic broadcast media will warrant special consideration.

Id. (citations omitted).

183. *Id.*

184. *Id.* at 404–05 (Rehnquist, J., dissenting) (noting that the Court had virtually obliterated the distinctions between protected speech and unprotected speech). Justice

the state's efforts to promote professionalism and the economic practicalities of law practice? As we shall see below, this is the main problem with which the Court grappled in the advertising and solicitation cases that it reviewed over the next three decades.[185]

Additionally, different Justices apply different reasoning to each case depending on how expansive they believe the *Bates* case permits the reading of free-speech doctrine.[186] Chief Justice Burger, concurring in part and dissenting in part in *Bates*, was apprehensive about the Court's extension of the *Virginia Pharmacy* case to the legal advertising of so-called routine services.[187] Chief Justice Burger's main disagreement with the case was that the ban on legal advertising was designed to protect the public "from the unscrupulous or the incompetent practitioner anxious to prey on the uninformed."[188] Justice Powell's separate opinion, concurring in part and dissenting in part and joined by Justice Stewart, focused on "the vastly increased potential for deception and the enhanced difficulty of effective regulation in the public interest."[189] Justice Powell concluded that, "[u]ntil today, in the long history of the legal profession, it was not thought that this risk of public deception was required by the marginal

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Rehnquist concluded:

> I think my Brother Powell persuasively demonstrates in his opinion that the Court's opinion offers very little guidance as to the extent or nature of permissible state regulation of professions such as law and medicine. . . . Once the exception of commercial speech from the protection of the First Amendment which was established in *Valentine v. Christensen* was abandoned, the shift to case-by-case adjudication of First Amendment claims of advertisers was a predictable consequence.

Id. (citation omitted).

185. *Id.* at 402–03 (Powell, J., concurring in part, dissenting in part) (anticipating the challenge of regulating in this area given the changing nature of the legal profession). Justice Powell explained that "[t]he problem has not been resolved with complete satisfaction despite diligent and thoughtful efforts by the organized bar and others over a period of many years, and there is no reason to believe that today's best answers will be responsive to future needs." *Id.*

186. *See id.*

187. *Id.* at 386 (Burger, C.J., concurring in part, dissenting in part) (expressing his reservations about extending the *Virginia Pharmacy* case). Chief Justice Burger wrote that "[s]ome Members of the Court apparently believe that the present case is controlled by our holding one year ago in [*Virginia Pharmacy*]. However, I had thought that we made most explicit that our holding there rested on the fact that the advertisement of standardized, prepackaged, name-brand drugs was at issue." *Id.* (citation omitted).

188. *Id.* at 388.

189. *Id.* at 391.

First Amendment interests asserted by the Court."[190] Justice Rehnquist, in another separate opinion, dissenting in part and joining in part, also expressed reservations about extending First Amendment doctrine as far as the Court insisted:

> I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and service. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.[191]

For the Court to move towards the constitutional protection of the First Amendment, it will by necessity have to cut the state-created regulatory system loose from the traditional professional moorings dating back to beginnings of the American bar.[192] Professionalism had to drift in an ever-rising tide of a fast-paced economic revolution where marketing became the dominant feature of promoting a legal practice.[193]

Also, the Justices tended to disagree about the meaning of the facts presented to support or oppose a claim of First Amendment interference and thus the factual support for the asserted state's interests in regulating speech. For example, in *Bates*, how is one to determine a routine service that would always be provided at the same listed fee, especially when that fee is said to be reasonable?[194] As to

190. *Id.* at 404.

191. *Id.*

192. *See* JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 197–200 (rev. ed. 1924) (1916); *see also*, Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1 (2005).

193. O'CONNOR, MAJESTY, *supra* note 9, at 230 (recognizing an essential part of law practice is marketing). O'Connor wrote: "Certainly, life as a lawyer is a bit more complex today than it was a century ago. The ever-increasing pressure of the legal marketplace—the need to bill hours, to market to clients, and to attend to the bottom line—have made fulfilling the responsibility of community service difficult."

194. *Bates,* 433 U.S. at 392 (Powell, J., concurring in part and dissenting in part) (noting, as a factual matter, there is hardly a clear method for determining routine legal services especially when one considers the unique nature of each case). Justice Powell wrote:

reasonableness of a fee, even if one applies the *Bates* rules on reasonable fees, can we be assured of finding that value?[195] Justice Powell warned, "Whether a fee is 'very reasonable' is a matter of opinion, and not a matter of verifiable fact as the Court suggests."[196]

Consequently, when reading the advertisement, how does one determine whether it is misleading or deceptive?[197] Nothing in the advertisement suggests that even with a so-called simple divorce, a host of sub-issues, such as custody, support, property, and other matters unique to each individual client could arise.[198] Moreover, as Justice Powell points out, the idea of a routine, uncontested divorce ignores the larger role of the attorney in handling these matters:

> More important from the viewpoint of the client is the diagnostic and advisory function: the pursuit of relevant inquiries of which the client would otherwise be unaware, and advice with respect to alternative arrangements that might prevent irreparable dissolution of the marriage or otherwise resolve the client's problem.[199]

The Justices appear to have differing views on this issue. The *Bates* majority emphasized the need of the listener to obtain more information about the availability and price of some basic legal services.[200] The majority concluded that the State is being paternalistic, and found that information, even if incomplete, is better

"Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the routine and the unique." *Id.*

195. *Id.* at 395.

196. *Id.*

197. *Id.* at 394. Justice Powell's reading of the advertisement leads to a different conclusion about its clarity:

> The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product. As a result, the type of advertisement before us inescapably will mislead many who respond to it in the end, it will promote distrust of lawyers and disrespect for our own system of justice.

Id.

198. *Id.* at 392–93.

199. *Id.* at 393.

200. *Id.* at 364 (majority opinion).

than a client ignorant about his or her rights.[201] The dissenting opinions focused on the State's interest in protecting the public from being deceived or mislead by confusing advertisements.[202] Furthermore, the pecuniary interest of attorneys in offering legal services in this fashion may lead some attorneys to short shrift the client because the lawyer would not be able to fully advise and diagnose the extent of the problem presented.[203] In any event, the varying opinions address the issues from differing factual assessments of the nature of legal practice and ideas about professionalism.

To further stretch the analytical exercise of determining the facts, how does one read the various reports that are submitted by the contending sides?[204] Some are given more weight than others, which shades the analytical conclusions each Justice makes. For example, on the question of whether legal advertising would present enforcement and disciplinary problems, Justice Blackmun does not see this as any different from any other disciplinary matter.[205] However, Justices Powell and Burger each reference an American Bar Association (ABA) study suggesting that enforcement of unethical advertising would be burdensome.[206] Justice Blackmun's majority opinion did

201. *Id.* at 374–75 ("Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public.").

202. *Id.* at 392–95 (Powell, J., concurring in part and dissenting in part) (discussing routine services and what could be called reasonable fees); *see also id.* at 394 n.7 (expressing concern about defining a legal clinic). Justice Powell wrote:

> Use of the term "clinic" to describe a law firm of any size is unusual, and possibly ambiguous in view of its generally understood meaning in the medical profession. Appellants defend its use as justified by their plan to provide standardized legal services at low prices through the employment of automatic equipment and paralegals.

Id. Contra id. at 381–82 (majority opinion) (the majority found that the idea of a clinic was something that the public would have little difficulty understanding).

203. *Id.* at 393 n.5 (Powell, J., concurring in part and dissenting in part).

204. *Id.* at 370 n.22 (majority opinion).

205. *Id.* at 379.

206. *Id.* at 396 (Powell, J., concurring in part and dissenting in part). Citing the ABA study, Justice Powell stated: "In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proved to be extremely difficult." *Id.* Chief Justice Burger raised similar concerns about the same ABA study and stated: "To impose new regulatory burdens called for by the Court's decision on the presently deficient machinery of the bar and courts is unrealistic; it is almost predictable that it will create problems of unmanageable proportions."

not mention the ABA study.[207] At the heart of what Attorneys Bates and O'Steen were attempting to do was to make legal services available to those who could not afford them. Justice Blackmun cited studies that suggested people do not seek counsel because they believe it is unaffordable or they do not know how to.[208] Justice Powell saw advertising as diluting professionalism at a time when the ABA and the Federal Legal Services Corporation were striving to make legal services available to those who could not afford them.[209] While not naming specific studies, he noted that in making legal service available, "Study and experimentation continue."[210] Accordingly, one's position on an issue is buttressed by which report or study is used to back up that position.

And finally, the constitutional doctrines and the factual presentments are tinged by the philosophical priorities that are brought to the analysis.[211] Clearly, the varying opinions disagree on how much deference to give to the state in its regulatory decision-making process. Since we do not regulate attorneys on a federal basis, the question becomes: how much latitude can be afforded to the states while still protecting free-speech principles?[212] Some Justices would give greater deference to the states in regulating an attorney disciplinary system.

Philosophical priorities are also evident in how the Justices consider the idea of professionalism. This includes the nature of professionalism and whether it precludes an acknowledgement that lawyers not only serve the public but also earn a living and pay the cost of operating an office.[213] Traditionally, the bar has viewed

Id. at 387. *See generally* AM. BAR ASS'N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENF'T PROBLEMS, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970), http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf.

207. *Id.* at 379 (majority opinion).

208. *Id.* at 370–71.

209. *Id.* at 397–98 (Powell, J., concurring in part and dissenting in part).

210. *Id.* at 399.

211. *See* Katherine R. Kruse, *Fidelity to Law and the Moral Pluralism Premise*, 90 TEX. L. REV. 657, 664–65 (2012) (taking issue with W. Bradley Wendel's premise in his book, LAWYERS AND FIDELITY TO THE LAW (2010)). The article takes issue with the premise that a lawyer's conduct can be directed by identifying "the normative judgments woven into the fabric of legal standards and procedures." *Id.* at 664. Kruse determines that certain controversies have no clear answer because society has not fully agreed on what our norms should be in interpreting the law. *Id.* at 665.

212. *See generally* NAACP v. Button, 371 U.S. 415 (1963).

213. *Bates*, 433 U.S. at 368 (majority opinion).

advertising as undignified for an honored profession and has been philosophically opposed to being viewed as participants in "[t]he hustle of the marketplace."[214] In fact, the Court looks at the historical nature of the tradition and notes that, "It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics."[215] Hence there is no philosophical reason for considering the advertising ban as preserving an ethical tradition.[216] Moreover, if the question were to focus on the issue of the need to inform the public that legal services are available, there is a disagreement on who should bear that task. The dissent asserts that the bar should take on the job of informing the public about how the legal system works and where legal help can be found.[217] The majority would prefer a perspective that lawyers are fully capable of truthfully advertising about the availability of legal services.[218] In the final analysis, it is the majority opinion that recognizes that lawyers can be trusted to fulfill their ethical obligations and maintain the historical level of professionalism:

> We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interests, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.[219]

Ideas about the First Amendment, fact interpretation and application, and philosophical differences on professionalism and the state's role in regulating attorneys frame the challenges when discussing legal advertising and solicitation. As implied above, these

214. *Id.*

215. *Id.* at 371.

216. *Id.* at 405 (Rehnquist, J., dissenting) (Justices Powell and Rehnquist disagree on whether any form of legal advertising could be constitutionally protected). Justice Rehnquist stated he was "unwilling to take even one step down the 'slippery slope.'").

217. *Id.* at 388 (Burger, C.J., concurring in part and dissenting in part).

218. *Id.* at 376–77 (majority opinion).

219. *Id.* at 379.

three themes resonate in the dissenting opinions of Chief Justice Burger and Justices Powell and Rehnquist, and are evident in Justice O'Connor's opinions as discussed below. As Justice Powell suggested, this case left many questions unresolved and reset in motion the continuing debate about the business side of practicing law.[220] Once the advertising door was opened, the limits would be determined by how the votes were cast in the Supreme Court.

IV. ADDITIONAL FRAMEWORKS FOR ASSESSING LEGAL ADVERTISING AND SOLICITATION BEFORE JUSTICE O'CONNOR'S TENURE

When Justice O'Connor came to the Court she wrestled with the issue of professionalism in the context of legal advertising and professionalism in the context of evolving commercial free-speech doctrine. The cases discussed in this section frame the debate on attorney speech in print and in-person solicitation by setting the conceptual issues implicit in the First Amendment's guarantee of free speech in light of government efforts to regulate nonpolitical speech. *Virginia Pharmacy*, *Bates*, and other cases establish the principle of commercial free speech, but leave to the cases discussed in this section the task of articulating a workable analytical basis for assessing the proper balance between free speech and government regulation. All of this doctrinal evolution in commercial free speech will fill out the analytical background that Justice O'Connor would draw upon in her thinking about professionalism and free speech.

A. The First Amendment Measuring Stick of Central Hudson

The Court would eventually try to nail down a standard for the application of commercial free-speech doctrine in the *Central Hudson Gas and Electric Corp. v. Public Service Commission of New*

220. *Id.* at 402–03 (Powell, J., concurring in part and dissenting in part). Discussing the heart of the problem of regulating the business side of practice and the challenges facing a self-regulating profession, Justice Powell stated:

> The problem of bringing clients and lawyers together on a mutually fair basis, consistent with the public interest, is as old as the profession itself. It is one of considerable complexity, especially in view of the constantly evolving nature of the need for legal services. The problem has not been resolved with complete satisfaction despite diligent and thoughtful efforts by the organized bar and others over a period of many years, and there is no reason to believe that today's best answers will be responsive to future needs.

Id. at 402.

York.[221] In brief, this case involved the issue of whether a utility could send promotional and informational materials to its customers encouraging them to use more electricity at a time when the Public Service Commission was trying to get the public to conserve electricity. The nation was experiencing an energy crisis due to an embargo of oil by Arab oil-producing countries.[222] The Court, in an opinion by Justice Powell, held that the Commission could not restrict the utility's efforts to promote electricity consumption through advertising that was truthful and not unlawful.[223] Further, in order for the state to so restrict the commercial speech of the utility, the state had to meet the following three-part analysis: there must be a finding of a substantial state interest, the interest is advanced by the restriction, and it is narrowly drawn.[224]

While Justice Powell calls this a four-part test,[225] it is generally viewed as a threshold inquiry or set of questions about deception and legality of the speech (which has no constitutional protection), followed by a three-part analysis weighing the state's interest against the right of the speaker to say and the listener to hear information useful for informed economic decision making.[226] This approach was certainly evident in Justice O'Connor's majority opinion in *Florida Bar v. Went For It, Inc.*, a case that is discussed below.[227]

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221. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

222. *Id.* at 583 (Rehnquist, J., dissenting).

223. *Id.* at 563–64 (majority opinion). Justice Powell expressed the threshold inquiry as follows:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than inform it, or commercial speech related to illegal activity.

Id. (citations omitted).

224. *Id.* at 564.

225. *Id.* at 565.

226. *Id.* at 566.

227. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995). Justice O'Connor synthesized the *Central Hudson* test (as it had evolved) as follows:

> Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated of the government satisfies a test consisting of three related prongs: First, the government must assert a substantial

Justice Rehnquist, in an extensive dissenting opinion in *Central Hudson*, found that the Court's opinion offered too much First Amendment protection and did not give adequate deference to the state as it attempted to articulate a substantial government interest.[228] He had previously expressed this philosophical tension in *Bates*.[229] In *Central Hudson* he wrote an extensive dissenting opinion criticizing the Court's rush to continue to elevate commercial speech to the level of political speech.[230] Justice Rehnquist reasoned that the type of restriction at issue was well within the power of the state, and that the judiciary had no role in substituting its own opinion.[231] He also found the Court's definition of commercial speech confusing and of little guidance to states attempting to draft regulations designed to protect the public for harms potentially caused by the speech.[232] Nevertheless, *Central Hudson* continues to be the measuring stick for analyzing commercial-speech cases in spite of the discordant opinions of the Justices.[233]

B. The Solicitation Standard of Ohralik *and* Primus

Before Justice O'Connor was appointed, the Court heard the case of *Ohralik v. Ohio State Bar Association* in 1978.[234] In that case, the Court considered whether an attorney could solicit legal business by going directly to a potential client to persuade that person to retain the attorney's services.[235] Here, the attorney, Albert Ohralik, sought to represent two women who were injured in an automobile accident.[236]

> 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."

Id. (citations omitted).

228. *Central Hudson*, 447 U.S. at 584–85.

229. Justice Rehnquist would find it difficult to apply the *Central Hudson* test in an expansive manner considering his view in *Bates v. State Bar of Arizona*, 433 U.S. 350, 404 (1977).

230. *Central Hudson*, 447 U.S. at 598.

231. *Id.* at 589.

232. *Id.* at 594–95.

233. *See generally* STEVEN G. BRODY & BRUCE E.H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE ch. 3, at 26–30 (Practising Law Inst., 2d ed. 2004).

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

235. *Id.* at 449.

236. *Id.* (noting that Ohralik learned of the case by chance). The Court stated, "On February 13, 1974, while picking up his mail at the Montville Post Office, appellant learned

He first sought the women out in the hospital where they were recovering from their injuries and later visited their homes to obtain their signatures on a retainer agreement.[237] To make matters worse, Ohralik secretly recorded his discussions with the women to prove that they retained him.[238] When the women decided not to use Ohralik's legal services he attempted to use the recording to demonstrate that the women had entered into a binding contract with him.[239] The women filed ethics complaints against Ohralik, alleging improper solicitation in violation of the code of professional responsibility, and he was eventually sanctioned by the Ohio State Bar.[240] In his appeal to the Supreme Court of Ohio, Ohralik claimed that he had a First Amendment right to speak to potential clients.[241] That court held that this speech was not constitutionally protected, and so he appealed to the United States Supreme Court. [242]

The United States Supreme Court held that, while this form of speech was of a commercial nature, the State had a substantial interest in proscribing this form of conduct, an issue left open in the *Bates* case.[243] Justice Powell, writing for the Court, stated, "In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and

from the postmaster's brother about an automobile accident that had taken place on February 2 in which Carol McClintock, a young woman with whom appellant was causally acquainted, had been injured." *Id.*

237. *Id.* at 467 (noting the intrusiveness and pressure that Ohralik placed on the two women). The Court stated, "He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests." *Id.*

238. *Id.* at 450–51.

239. *Id.* at 467.

240. *Id.* at 452–54; *see also* Ohio State Bar Ass'n v. Ohralik, 357 N.E.2d 1097 (Ohio 1976), *aff'd*, 436 U.S. 447 (1978).

241. *Ohralik*, 357 N.E.2d at 1098.

242. *Id.*

243. *Ohralik*, 436 U.S. at 462 (noting the substantial interests the State has in protecting the public from unscrupulous lawyers). The Court stated:

> We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate interest and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

Id. (citation omitted).

enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed."[244] In this case, the attorney attempted to push these women into an attorney–client relationship at a vulnerable time while they were recovering from their injuries.[245] In addition, he did not have a prior relationship with them, and the women and the attorney were not close family.[246] As a result, the disciplinary rule served an important state interest in protecting the public from such intrusive and overbearing attempts to pursue a pecuniary objective.[247]

When the Court decided the *Ohralik* case, it also decided *In re Primus*, a case involving a lawyer for the American Civil Liberties Union who was pursuing a class-action suit involving women on welfare claiming to be involuntarily sterilized by the State.[248] Edna Smith Primus, the attorney in that case, sent a solicitation letter with a follow-up to women who may have been sterilized.[249] Relying on its earlier case of *NAACP v. Button*, the Court, in an opinion by Justice Powell, reasoned that this particular form of speech involved the vindication of possible civil rights claims and was thus distinguishable from commercial speech.[250] Further, the State's concern about commercialization's negative impact on the legal profession is not justified where a nonprofit organization offers its services for free in a case where political rights are at issue.[251]

In a dissent, Justice Rehnquist saw this as a contest between good and bad.[252] An attorney is good if the attorney, like Edna Primus, acts with First Amendment protection to solicit potential

244. *Id.* at 464.

245. *Id.* at 453 (citing the Ohio Code of Professional Responsibility provisions DR 2-103(A) and DR 2-104(A), which prohibit in-person solicitation to persons who are not in a close relationship with the attorney).

246. *Id.*

247. *Id.* at 468.

248. *In re* Primus, 436 U.S. 412, 414–18 (1978).

249. *Id.* at 417. The letter dated August 30, 1973, in part, said: "You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation." *Id.* at 416 n.6.

250. *Id.* at 431 ("Appellant's letter of August 30, 1973, to Mrs. Williams thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.").

251. *Id.* at 436–37.

252. *Id.* at 440 (Rehnquist, J., dissenting).

clients to pursue the vindication of political rights.[253] An attorney is bad and subject to discipline if the attorney, like Albert Ohralik, acts with little First Amendment speech protection by directly soliciting clients for purely pecuniary purposes.[254] Justice Rehnquist did not see how the Court justified the distinction between the two situations where lawyers are actively soliciting clients.[255] Justice Rehnquist emphasized the proper role of the State in enforcing ethical standards deemed necessary to protect the public from the dangers of lawyers overbearing the will of vulnerable potential clients.[256] In essence, this was a factual matter for the state to determine.[257] Rehnquist's position is shaped, in part, by his philosophical perspective that the Court is not in the position to make this decision for states even when political rights are at stake.[258]

These two cases represent an affirmation of *Bates* and the basic structure of free-speech analysis applied to attorney advertising and solicitation. Attorneys may speak to the public to convey information about their availability to provide legal services. In this regard, there is a continuum of protectable speech. At one end is speech that is directed toward protecting the constitutional rights of citizens. There, free speech is most protected from state infringement. At the other end is speech that is permissible commercial speech. There, the attorney must not overreach in a manner that diminishes the listener's will to avoid the speech if the potential client is in a vulnerable situation, as in *Ohralik*. Moreover, the cases suggest that states have an important interest in protecting the public, and hence, states have an important role to play in regulating the commercial speech conduct of attorneys. Courts have yet to decide the states' roles in ensuring a high level of professionalism within the practice of law. This is the challenge that Justice O'Connor later addressed when she became a member of the Supreme Court.

V. THE O'CONNOR ERA AND THE CAMPAIGN FOR PROFESSIONALISM

Justice O'Connor was sworn in as an Associate Justice of the United States Supreme Court on September 25, 1981. At that time,

253. *Id.*
254. *Id.*
255. *Id.* at 443–44.
256. *Id.* at 445.
257. *Id.* at 446.
258. *Id.* at 445–46.

she was a judge on the Arizona Appellate Court from 1979; prior to that she was a judge on the Maricopa County Superior Court beginning in 1974. Due to her familiarity with Arizona law, Justice O'Connor was aware of the efforts by attorneys Bates and O'Steen to break new ground in the way they practiced law, especially since the Supreme Court of Arizona issued its opinion in that case in 1976.[259] In Justice O'Connor's first year on the bench, the Court took up the first lawyer-advertising case to consider the application of *Bates*, thus intensifying the Court's efforts to grapple with the tensions between professionalism and the First Amendment.

A. O'Connor Dissents From the March Away From Traditional Professionalism

In November of Justice O'Connor's first term, the Court heard the case of *In re R.M.J.*[260] That case involved the application of Disciplinary Rule 2-101 that limited the amount, the content, and the form of information a lawyer could use in an advertisement.[261] For example, the most restrictive aspect of Disciplinary Rule 2-101 placed limits on the way a lawyer was allowed to describe the areas of practice in which the lawyer engaged.[262] The rule also limited how a lawyer may represent a specialty in a specific area of law.[263] The attorney in *In re R.M.J.* listed the following as areas of practice: "'personal injury' and 'real-estate' instead of 'tort law' and 'property law'—and that included several areas of law without analogue in the list of areas prepared by the Advisory Committee—e.g., 'contract,' 'zoning & land use,' 'communication,' [and] 'pension & profit sharing plans.'"[264] Moreover, the attorney did not include a disclaimer that any of the "areas of practice [do] not indicate any

259. *In re* Bates, 555 P.2d 640, 640 (Ariz. 1976), *aff'd in part, rev'd in part sub nom.* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

260. *In re* R.M.J., 455 U.S. 191 (1982).

261. *Id.* at 193–94 (noting that the Supreme Court of Missouri instituted Disciplinary Rule 2-101, permitting lawyer advertising, after the United States Supreme Court's decision in *Bates v. State Bar of Arizona*).

262. *Id.* at 194–95.

263. *Id.* at 195 ("Alternatively, he may use one or more of a list of 23 areas of practice, including, for example, 'Tort Law,' 'Family Law,' and 'Probate and Trust Law.' He may not list both a general term and specific subheadings, nor may he deviate from the precise wording stated in the Rule. He may not indicate that his practice is 'limited' to the listed areas and he must include a particular disclaimer of certification of expertise following any listing of specific areas of practice.").

264. *Id.* at 197.

certification of expertise therein."[265]

Justice Powell, writing the opinion of the Court, applied the reasoning of the *Bates* and *Central Hudson* decisions[266] and found that the advertisements were not misleading, the State had no substantial interests that justified restricting free speech in this manner, and there were no findings that the practices at issue were difficult to enforce.[267] In fact, Justice Powell observed that the manner in which the lawyer identified his areas of practice was more informative than the narrow list provided by the State.[268] Nevertheless, Justice Powell's opinion recognized that states, when they articulate a substantial interest, still have the authority to regulate lawyer speech as long as "the interference with speech [is] in proportion to the interest served."[269] This is the standard for commercial free-speech analysis that was articulated in *Central Hudson*.[270]

The next major case involving regulating the commercial speech of lawyers was *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[271] Among other issues,[272] this 1985 case involved an attorney who sought to generate clients by advertising that he was willing to represent women injured by an intrauterine

265. *Id.* at 195.

266. *Id.* at 203.

267. *Id.* at 206 (addressing the issue of mailing announcement cards to potential clients and the fact that there were less restrictive methods for vindicating the state's interest). Justice Powell wrote:

> Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings.

Id.

268. *Id.* at 205.

269. *Id.* at 203.

270. *Id.*

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

272. *Id.* at 631 (noting the attorney was also alleged to have violated Ohio Code of Professional Responsibility DR 2-101(A) because he deceptively ran an advertisement to represent criminal defendants charging what appeared to be a contingent fee based on the outcome, which is strictly prohibited).

birth-control device called the Dalkon Shield.[273] The advertisement contained a drawing of the device, described the terrible consequences of using the device, and averred that persons who were harmed could still bring a cause of action against the manufacturer.[274] The disciplinary case against the attorney alleged that he had violated several disciplinary rules, including placing an ad that was not dignified by providing an illustration of the device, not disclosing the fact that in a contingent-fee case the client may have to pay expenses and costs, and giving unsolicited legal advice to unrepresented persons with the intent of obtaining employment.[275] Because the advertisement was not misleading or deceptive, the Court held that the advertisement was protected by the First Amendment and potential litigants had a right to receive such information.[276] However, the Court noted that states could require attorneys to disclose to potential clients how contingent-fee arrangements work.[277]

In a separate opinion, concurring in part and dissenting in part, Justice O'Connor first expressed her dissatisfaction with how the line of case law developing out of *Bates* and *Central Hudson* have been applied to regulating professional conduct.[278] The heart of the matter

273. *Id.* at 630.

274. *Id.* at 631 ("The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement.").

275. *Id.* at 632–33.

276. *Id.* at 646–47 (holding that the state's prophylactic rule on all such advertising that truthfully identifies the rights of potential litigants was too broad and did not demonstrate a sufficient state interest). The Court stated:

> Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising. An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

Id.

277. *Id.* at 650–53.

278. *Id.* at 676 (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that the case law on professional conduct was drifting toward ordinary commercial regulation). Justice O'Connor stated:

> In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference that the majority's analysis would permit. In its prior decisions, the Court was better able to perceive both the importance of state regulation of

for Justice O'Connor was the idea that an attorney could give unsolicited legal advice via an advertisement, and then obtain legal employment by recommending himself for the job.[279] Justice O'Connor wrote, "In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule."[280] First, from a factual analysis, this method of obtaining employment is not unlike the in-person solicitation the Court condemned in the *Ohralik* case. Justice O'Connor characterized the advertisement as "bait."[281] In this circumstance, a potential client wondering if she has a claim will visit the attorney's office where, because the attorney will have a personal financial interest, "the same risk of undue influence, fraud, and overreaching that were noted in *Ohralik* are present."[282]

Second, in applying the commercial free-speech analysis, Justice O'Connor would utilize a much narrower focus when it came to regulating the advertisement of professional services. Justice O'Connor stated, "In my view, state regulation of professional advice in advertisement is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit."[283] Stating the core of her canon, Justice O'Connor said, "Lawyers are professionals, and as such, they have a greater obligation."[284]

Finally, Justice O'Connor reached this conclusion regarding unsolicited legal advice based on her philosophical belief that lawyers owe a high duty to society to not accept employment after giving unsolicited legal advice.[285] Furthermore, since states have a

> professional conduct, and the distinction between professional services and standardized consumer products.

Id.

279. *Id.* at 673–74.

280. *Id.* at 673.

281. *Id.* at 678.

282. *Id.*

283. *Id.* at 676.

284. *Id.*

285. *Id.* at 677. Noting the ethical understanding of a lawyer's professionalism, Justice O'Connor stated:

> The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain. While some assert that we have left the era of professionalism in the practice of law, substantial state interests underlie

substantial interest in protecting the public from undue influence and overreaching by self-interested lawyers, Justice O'Connor would defer to the states to make this regulatory call even if the information conveyed in the advertisement is truthful.[286] In addition, because states have a substantial interest in lawyers acting with the highest professional conduct, Justice O'Connor would also defer to the states to determine the standard of this professional conduct.[287]

Justice O'Connor next gave a detailed analysis of the Court's commercial free-speech doctrine as applied to legal advertising and solicitation in *Shapero v. Kentucky Bar Association*, which was decided by the Supreme Court in 1988.[288] That case involved a lawyer who sought legal work by sending letters to potential clients with home mortgages in foreclosure.[289] The lawyer had sought prior approval from the Kentucky Attorneys Advertising Commission, an organization created by the Kentucky State Bar Association to regulate attorney advertising.[290] The majority opinion by Justice Brennan applied the now-standard commercial free-speech analysis and found that this form of advertising was protected by the First Amendment.[291] As Justice Brennan stated, "Lawyer advertising is in the category of constitutionally protected commercial speech."[292] This reasoning was due to the minimal potential harm to clients,[293]

> many of the provisions of the state codes of ethics, and justify more stringent standards that apply to the public at large.

Id. (citation omitted).

286. *Id.*

287. *Id.* at 678 (contemplating the state's interest in establishing a higher standard of professional conduct that reflects the idea of self-sacrifice). Justice O'Connor stated:

> The State also has a substantial interest in requiring that lawyers consistently exercise independent professional judgment on behalf of their clients. Given the exigencies of the marketplace, a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office, rather than that advice which it is most in the interest of potential clients to hear.

Id.

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

289. *Id.* at 469.

290. *Id.* at 469 n.1.

291. *Id.* at 479–80.

292. *Id.* at 472.

293. *Id.* at 475. Noting the lack of a substantial government interest, Justice Brennan stated:

and the fact that the State had much less restrictive methods for insuring that the lawyers' targeted mailing was not misleading.[294] One alternative to a direct ban suggested by the court was for the envelope to "[bear] a label identifying it as an advertisement."[295]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, wrote a strong dissent in opposition to the ever-expanding world of legal advertising and solicitation. Justice O'Connor gave the following criticism of the Court's use of *Zauderer* as the basis for deciding the present case: "As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined."[296]

In presenting this critique, Justice O'Connor first reminded her colleagues that she dissented in *Zauderer* because she prefers to defer to the states in these matters.[297] More significantly, the factual comparison of advertising for professional services to advertising for consumer products was illusory for two reasons. First, Justice O'Connor reasoned that a typical potential client would have difficulty evaluating the quality of legal services offered by the brief "free sample" offered in the advertisement.[298] Second, the legal advice offered in that advertisement is tainted by the lawyer's purpose of obtaining legal business when "an attorney has an obligation to provide clients with complete and disinterested advice."[299]

Justice O'Connor then offered a fuller critique of the Court's doctrine on commercial speech.[300] She firmly believed that under the

> Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation. Neither mode of written communication involves "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."

Id. (citation omitted) (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 642 (1985)).

294. *Id.* at 476–77.

295. *Id.* at 477. *See* MODEL CODE OF PROF'L RESPONSIBILITY r. 7.3(c) (AM. BAR ASS'N 2013).

296. *Shapero*, 486 U.S. at 480 (O'Connor, J., dissenting).

297. *Id.* at 481.

298. *Id.*

299. *Id.*

300. *Id.* at 484 (noting the commercial free-speech doctrine has been expanded too broadly). Justice O'Connor stated, "The latest developments, in *Zauderer* and now today,

First Amendment the commercial-speech doctrine should not have the same level of protection from government interference as noncommercial speech.[301] The balancing analysis presented in *Central Hudson* provides a process for courts to review whether a governmental regulation impermissibly impacted commercial speech.[302] For Justice O'Connor, the Court has not used sufficient "discernment," especially when evaluating the nature of the government interest.[303] She noted:

> Decisions subsequent to *Virginia Pharmacy* and *Bates*, moreover, support the use of restraint in applying this doctrine to attorney advertising. We have never held, for example, that commercial speech has the same constitutional status as speech on matters of public policy, and the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review.[304]

Applying *Zauderer* to the instant case, Justice O'Connor would have reached a different result than the majority by focusing on potentially harmful effects of targeted, direct-mail advertising. First, receiving a personally addressed letter from an attorney may lead the recipient to conclude that it comes with the "authority of the law itself."[305] The formal nature of the letter likely encourages people to respond to the inquiry. Second, the "letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient."[306] This attempt to create a personal rapport may lend itself to improper influence and overreaching on the lawyer's part by creating a false sense of trust in the lawyer.[307] Third,

confirm that the Court should apply its commercial speech doctrine with more discernment than it has shown . . . . Decisions subsequent to *Virginia Pharmacy* and *Bates*, moreover, support the use of restraint in applying this doctrine to attorney advertising." *Id.*

301. *Id.* at 483–84.

302. *Id.* at 485.

303. *Id.* at 484.

304. *Id.*

305. *Id.* at 481–82.

306. *Id.* at 482.

307. *Id.* at 481–82 ("For people whose formal contacts with the legal system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and their officers,

because the public holds lawyers in high esteem, the recipient may not realize that the lawyer is writing a letter that "contain[s] advice that is unduly tailored to serve the pecuniary interests of the lawyer."[308] Instead of focusing purely on the needs of the potential client, the material may be slanted towards the attorney's desire to obtain work.[309] These three points are enough for Justice O'Connor to determine that states have a substantial interest in preventing such harm to the public by unscrupulous lawyers under the reasoning of *Zauderer*.[310]

For Justice O'Connor, based on the facts presented by the government, more weight should be given to the government's substantial interest "in promoting the high ethical standards that are necessary in the legal profession."[311] This is particularly true when considering the great need to protect the public from unscrupulous lawyers who use slick advertising techniques.[312] In *Shapero*, Justice O'Connor believed targeted, direct mailings and fee quotations for so-called routine legal service were potentially misleading.[313] Moreover, because lawyers have a personal, economic interest in the results of the advertising, Justice O'Connor was concerned about "the corrosive effects that such advertising can have on appropriate professional standards."[314] The economic self-interest of the advertising lawyer distorts the lawyer's judgment in a way that lifts the lawyer's interest in financial reward above that of the client's interest in having a counsel committed to being unselfishly loyal to that client.[315] Justice O'Connor was not persuaded by contrary claims that the restrictions on legal advertising inhibit economic efficiency by denying lawyers the ability to transmit price information for consumers to make an informed decision.[316]

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may therefore find it much more difficult to ignore and apparently 'personalized' letter form an attorney than to ignore a general advertisement.").

308. *Id.* at 482.

309. *Id.*

310. *Id.* at 482–83 (noting direct-mail advertising and in-person solicitation call for regulation despite their differences).

311. *Id.* at 485.

312. *See id.* at 486.

313. *Id.* at 485–86.

314. *Id.* at 486.

315. *Id.* at 489–90.

316. *Id.* at 488 (noting economic analysis can work against the desire for maintaining core professional values). Justice O'Connor stated:

In concluding her dissent, Justice O'Connor turns more deeply to the essence of her stance on professionalism. From a philosophical point of view, Justice O'Connor again strongly asserted her disagreement with *Bates*, which held that commercial speech in the form of legal advertising is protected by the First Amendment because legal services are not in the same class as consumer products.[317] Conflating legal services with consumer goods and services was a Court-dictated policy decision that Justice O'Connor believed "was not derived from the First Amendment, and it should not have been used to displace a different and no less reasonable policy decision of the State whose regulation was at issue."[318] Hence, Justice O'Connor would defer to states in their proper role of regulating the conduct of lawyers and would apply the principles of *Central Hudson* to uphold states' interest in doing so.[319]

States have a special responsibility to articulate professional values because as Justice O'Connor posits:

> Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they

> Assuming, *arguendo*, that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favor of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.

Id.

317. *Id.* at 487.

318. *Id.*

319. *Id.*

inevitably wield in a political system like ours.[320]

For Justice O'Connor, the idea that the legal profession has special privileges is derived from several realities. First, to become a member of the profession, lawyers must be equipped with extensive training and knowledge about how the legal system functions.[321] Second, because of their education, lawyers have a unique legal skill set that places them in a position of power with the ability to achieve legal objectives that clients cannot adequately obtain on their own.[322] Third, with that power comes a recognition that lawyers are committed to the ideal of "public service," broadly defined.[323] Justice O'Connor draws this proposition from the work of Roscoe Pound, observing, "This training is one element of what we mean when we refer to the law as a 'learned profession.'"[324] This ideal also tracks back to the earlier discussion on *State Bar of Arizona v. Arizona Land Title and Trust Co.*

Justice O'Connor believes that lawyers are public servants committed to upholding the system of justice even when that requires the sacrifice of one's own interests.[325] Accordingly, to achieve the traditional ideal of public service, regulation of the legal profession is important because "membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced by ethical legal fiat or through the discipline of the market."[326] Due to the legal profession's immense power, an attorney should place the client's interest above the personal interest of the attorney, but some attorneys will not always do so. As a result, regulations, such as those that restrict advertising and solicitation, are needed to guard against economic self-interest edging out the ideals of the profession.[327] That task, developing appropriate models for obtaining those ideals, can certainly be left, in part, to the states.[328] Moreover, it requires a

320. *Id.* at 489.

321. *Id.*

322. *Id.* at 490.

323. *Id.* at 489.

324. *Id.*

325. *Id.* at 489.

326. *Id.* at 488–89.

327. *Id.* at 490.

328. *Id.* at 490–91 (recognizing restrictions on advertising and solicitation are but part of the process of establishing appropriate ethical conduct, but nonetheless a necessary part to

comprehensive effort to promote professional ideals from law schools and bar associations by developing an air of expectation for aspiring to the highest ideals.[329]

As more cases involving lawyers' rights to free speech came before the Court, Justice O'Connor continued to be in the minority, waiting for the Court to see the error of its ways in the *Bates* case.[330] In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, the Court considered whether an attorney could hold himself out as a certified, civil-trial specialist having attained that designation from the National Board of Trial Advocacy.[331] Decided in 1990, the case focused on whether the State could prohibit a lawyer from listing on his letterhead that he was certified as a specialist by an organization not sponsored or recognized by the State.[332] The Court

combat the forces of economic expediency). Justice O'Connor stated:

> Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

Id.

329. *Id.* at 490 (noting a broad approach is necessary to keep economic expediency from overtaking the professional ideal of public service). Justice O'Connor stated, "Tradition and experience have suggested a number of formal and informal mechanisms, none of which may serve to reduce competition (in the narrow economic sense) among members of the profession."

330. *Id.* at 487.

331. Peel v. Att'y Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) (plurality opinion).

332. *Id.* at 97 (noting under the disciplinary rules, an attorney could list the areas of practice as permitted by *In re R.M.J.*, 455 U.S. 191 (1982), but could not hold himself out as a specialist in an area of law). The Court stated:

> In 1987, the Administrator of the Attorney Registration and Disciplinary Commission of Illinois . . . filed a complaint alleging that petitioner, by use of this letterhead, was publicly holding himself out as a certified legal specialist in violation of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility. That Rule provides: "A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.'"

Id.

stated that the letterhead was not misleading and the public would not believe that the certification was state sponsored.[333] In a plurality opinion by Justice Stevens,[334] the Court held that since the certification designation was neither actually nor inherently misleading, the disciplinary rule violated the attorney's First Amendment rights.[335] Justice Stevens also dismissed the argument that it was potentially misleading because the State had not established a sufficient substantial interest justifying a prophylactic rule.[336]

Justice O'Connor's dissenting opinion was joined by Chief Justice Rehnquist and Justice Scalia.[337] Justice O'Connor asserted that the commercial free-speech doctrine was applied by courts far too broadly.[338] Reading the facts of the case, Justice O'Connor believed that while the designation as a certified civil-trial specialist was truthful, the designation was nonetheless misleading, and the State was well within its authority to protect the public from being misinformed by listing that designation.[339] This is especially so

333. *Id.* at 103–04.

334. *Id.* at 93, 111. (Justices Brennan, Blackmun, and Kennedy joined the opinion, and Justice Marshall, joined by Justice Brennan, filed an opinion concurring in the judgment).

335. *Id.* at 110–11.

336. *Id.* at 108.

337. *Id.* at 119.

338. *Id.* at 126 (O'Connor, J., dissenting) (disagreeing that inserting disclaimers about what the certification means would cure the misleading nature of placing this information on the letterhead). Justice O'Connor stated:

> Although having information about certification may be helpful for consumers, the Constitution does not require States to go to these extremes to protect their citizens from deception. In my view, the Court would do well to permit the States broad latitude to experiment in this area so as to allow such forms of disclosure as best serve each State's legitimate goal of assisting its citizens in obtaining the most reliable information about legal services.

Id.

339. *Id.* at 121 (noting that nineteen other states had bans on listing specialty certifications) Justice O'Connor asserted:

> Charged with the duty of monitoring the legal profession within the State, the Supreme Court of Illinois is in a far better position that is this Court to determine which statements are misleading or likely to mislead. Although we are the final arbiters on the issue whether a statement is misleading as a matter of constitutional law, we should be more deferential to the State's experience with such statements.

Id.

because the "certification is tantamount to a claim of quality and superiority."[340] Accordingly, Justice O'Connor would defer to states in making a decision about regulating the profession in this matter.[341] Finally, as stated at the beginning of Justice O'Connor's opinion, the ultimate problem with this case was the impact on developing standards of professionalism, which is reflected in the following passage:

> Nothing in our prior cases in this area mandates that we strike down the state regulation at issue here, which is designed to ensure a reliable and ethical profession. Failure to accord States considerable latitude in this area embroils this Court in the micromanagement of the State's inherent authority to police the ethical standards of the profession within its borders.[342]

B. O'Connor takes on Commercial Free Speech as Crystallized in Edenfield v. Fane

Justice O'Connor also found herself in the minority in *Edenfield v. Fane*.[343] This commercial free-speech case involved the regulation of accountants who sought business through in-person solicitation of potential clients.[344] This was a different branch of the same First Amendment tree that sprouted from *Virginia Pharmacy* and *Bates*.[345] At first glance, *Edenfield* resembled the dangers of in-person solicitation prohibited in *Ohralik*.[346] The Court held that the Florida

340. *Id.* at 123.

341. *Id.* at 121.

342. *Id.* at 119.

343. Edenfield v. Fane, 507 U.S. 761 (1993).

344. *Id.* at 763–64.

345. *Id.* at 770.

346. *Id.* at 768 (applying the *Central Hudson* test the Court held that the Florida Board of Accountancy asserted interest in imposing a ban on C.P.A.'s in-person, direct solicitation) The Court summarized the stated substantial interest as follows:

> To justify its ban on personal solicitation by CPA's the [Florida Board of Accountancy] proffers two interests. First, the Board asserts an interest in protecting consumers form fraud and overreaching by CPA's. Second, the Board claims that its ban is necessary to maintain both the fact and appearance of CPA independence in auditing a business and attesting to its financial statements.

ban on accountant in-person solicitation was not in the same category as the overreaching and undue influence problems that animated the challenge in *Ohralik*.[347] Moreover, under *Central Hudson*, the Court noted the following:

> [The State] has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way. It presents no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromise that the Board claims to fear.[348]

For the Court, the business context was different because there was no urgent need for the accountant's services, and the business person would generally have the experience to make an informed choice in deciding which accountant to retain.[349] Under the *Central Hudson* three-part test the Court stated, "[T]hough we conclude that the Board's asserted interests are substantial, the Board has failed to demonstrate that its solicitation ban advances those interests."[350]

In *Edenfield*, Justice O'Connor solidified her jurisprudential perspective on professionalism in the commercial free-speech context. She began her solo dissenting opinion by again declaring that *Bates* and its progeny were wrongly decided.[351] Justice O'Connor believed these prior cases were grounded on a narrow consideration of the

Id.

347. *Id.* at 774.

348. *Id.* at 771.

349. *Id.* at 775–76 (noting the experience of the prospective client and the circumstances in which the solicitation is made makes a distinctive difference in considering whether a restriction of speech is constitutionally permitted). In distinguishing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), Justice Kennedy, writing for the Court, stated:

> While the clients in *Ohralik* were approached at a moment of high stress and vulnerability, the clients Fane wishes to solicit meet him in their own offices at a time of their choosing. If they are unreceptive to his initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern.

Id.

350. *Id.* at 767.

351. *Id.* at 778 (O'Connor, J., dissenting) ("I continue to believe that this Court took a wrong turn with *Bates v. State Bar of Arizona*, and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech.").

harmful and deceptive nature of professional advertising.[352] Justice O'Connor would rather situate the First Amendment analysis in a larger vision of professionalism, stating, "In my view, the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large."[353] To determine whether professional advertising is harmful and deceptive, Justice O'Connor preferred an analysis that first considers the State's interest in preserving and upholding the fundamental ideals of the profession, be it legal or accounting. In the legal context, this means that the lawyer's self-interest in retaining clients must not diminish the lawyer's commitment to serving the public.[354]

For Justice O'Connor, the commercial-speech analysis of *Central Hudson* must proceed from the context of professionalism, deferring to the State's ability to decide how to best protect society from harm done by professionals and promote professional values. Therefore, O'Connor's application of the three-part *Central Hudson* analysis does not preference the protection of speech in the commercial context.[355] In the first part of this *Central Hudson* analysis Justice O'Connor parted from the majority's view that in-person solicitation by accountants is significantly different than in-person solicitation by lawyers as prohibited by *Ohralik*.[356] It was not unreasonable that Florida "could have envisioned circumstances analogous to those in *Ohralik*, where there is a substantial risk that the CPA will use his professional expertise to mislead or coerce a naive potential client."[357]

352. *Id.*

353. *Id.*

354. *Id.* ("In particular, the States may prohibit certain forms of competition usual in the business world on the grounds that pure profit seeking degrades the public-spirited culture of the profession and that a particular profit-seeking practice is inadequately justified in terms of consumer welfare or other social benefits. Commercialization has an indirect, yet profound effect on professional culture, as lawyers know all too well.").

355. *Id.*; *see also* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 483 (1988) (O'Connor, J., dissenting).

356. *Edenfield*, 507 U.S. at 779 (O'Connor, J., dissenting) ("But even if I agreed that the States may target only professional speech that directly harms the listener, I still would dissent in this case. [*Ohralik*] held that an attorney could be sanctioned for the in-person solicitation of two particularly vulnerable potential clients, because of the inherent risk under such circumstances that the attorney's speech would be directly harmful, and because a simple prohibition on fraud or overreaching would be difficult to enforce in the context of in-person solicitation. The result reached by the majority today cannot be squared with *Ohralik*.").

357. *Id.* at 780.

In the second prong of the *Central Husdon* analysis regarding the question of whether the regulation advances a state interest, Justice O'Connor believed that the Court did not do an adequate factual analysis of the reason for the rule.[358] The majority opinion based its findings on the mere suggestion that the rule, as applied to *Edenfield v. Fane* in the business context, violated the First Amendment.[359] However, the Court found that the antisolicitation rule was designed to promote ethical standards for accountants and did not generally violate the First Amendment analysis.[360]

Finally, applying the third part of the *Central Hudson* analysis, Justice O'Connor concluded that given the interests in promoting professionalism and protecting against solicitation-type harms, the restriction was reasonably proportional to the State's asserted interest in protecting business persons, especially those with small businesses.[361] Hence, Justice O'Connor would defer to Florida's choice on how to protect society and promote professionalism, especially since the rule itself seems to meet the dictates of *Central Hudson*.[362] While not on board with the Court's majority, this summation was the hook that Justice O'Connor used to "restrain [this] logic within reasonable bounds" as she said in *Shapero*, which will be discussed in Section VI.[363]

C. O'Connor's Professionalism Ideal Reflected in Criminal Matters

There are three cases involving the role of lawyers in criminal matters worth discussing. The first case reflects the critical protective role the lawyer plays in our system of justice. The other two are arguably under the umbrella of free speech because one concerns speaking publicly about a client's case and the other concerns a lawyer's ability to speak untruthfully on behalf of a client. All three of these cases suggest that attorneys, while providing legal services to clients, also have a larger duty to society, and thus are not solely in

358. *Id.*

359. *Id.* at 780. In reviewing the departure of the majority, Justice O'Connor states, "I am surprised that the majority has taken this approach without explaining or even articulating the underlying assumption: that a commercial speaker can claim First Amendment protection for particular instances of commercial speech, even where the prohibitory law satisfies *Central Hudson*." *Id. See also id.* at 770–71 (majority opinion) (discussing the majority's approach).

360. *Id.* at 767, 771 (majority opinion).

361. *Id.* at 781 (O'Connor, J., dissenting).

362. *Id.*

363. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 480 (1988) (O'Connor, J., dissenting).

service to those who pay the fee.

The first case, in which Justice O'Connor wrote the majority opinion, is *Strickland v. Washington*.[364] This case set the standard for determining the constitutional requirement of effective assistance of counsel in a criminal matter. A defendant convicted of murder appealed his death penalty sentence on the grounds of ineffective assistance of counsel, claiming that his lawyer failed to properly present evidence that would have militated against the death penalty.[365] In evaluating that claim, Justice O'Connor laid out a two-part test requiring that "[f]irst, the defendant must show that counsel's performance was deficient. . . . [And second], the defendant must show that the deficient performance prejudiced the defense."[366] The case is important because it demonstrates the crucial role counsel plays in the justice system, especially when a person's life and liberty are at stake. As to that role of effective assistance of counsel, Justice O'Connor proclaimed, "In giving meaning to the requirement, however, we must take its purpose to ensure a fair trial as the guide."[367] Justice O'Connor's goal was to ensure "fundamental fairness"[368] in the system of law.[369] In other words, the law must fully protect the rights of the individuals who are called to defend themselves in court, and the lawyer's performance in that role must be worthy of the rights guaranteed by the Sixth Amendment.[370]

The challenge of speaking for the client presents ethical and practical issues for the attorney. First, consider the case of a lawyer sanctioned for speaking on his client's behalf in *Gentile v. State Bar of Nevada*.[371] This is a noncommercial First Amendment case involving the proper method for an attorney to make a public statement about a client undergoing a criminal prosecution.[372] During their careers, attorneys are likely to have to defend a client in the court of public opinion as well as in the court of law. Correspondingly, prosecutors will also hold press conferences to explain an ongoing criminal proceeding. The challenge for both sets

364. Strickland v. Washington, 466 U.S. 668 (1984).
365. *Id.* at 675.
366. *Id.* at 687.
367. *Id.* at 686.
368. *Id.* at 696.
369. *Id.*
370. *Id.* at 688.
371. Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).
372. *Id.* at 1048–49.

of attorneys will be to present sufficient, truthful information about the matter without unduly prejudicing the criminal defendant's right to a fair trial. The difficulty comes in drafting a disciplinary rule with precise parameters that permit free speech but inhibit overzealous dialogue. The ABA has established the test for forbidding speech that has a material likelihood of causing substantial material prejudice in obtaining a fair trial.[373]

In *Gentile*, the attorney carefully attempted to stay within the framework of the disciplinary rule, but was nonetheless sanctioned by the Nevada State Bar.[374] The Supreme Court, in a divided set of opinions favoring the appealing lawyer, noted that the rule itself was too vague as to what was permitted and what was proscribed.[375] Justice O'Connor filed a concurring opinion agreeing with the judgment of the court because the contested rule was too vague.[376]

For the purpose of further expounding on Justice O'Connor's professionalism perspective, it is significant to highlight her thinking about the public-service role of the lawyer. Justice O'Connor noted that "[l]awyers are officers of the court and as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech."[377] Justice O'Connor's framework for analyzing free-speech issues is accordingly grounded in the notion that lawyers, as professionals, have duties that reflect their critical role in the justice system and in preserving the rule of law. Hence, it is proper for state bars to place constraints on the First Amendment rights of lawyers.[378]

Finally, consider the dilemma of the attorney who is asked to speak untruthfully on behalf of a client or support the client's desire to do so. In *Nix v. Whiteside*, a criminal defendant in a murder trial sought to testify in his own defense by purposely creating a false defense to the charge.[379] Upon informing his lawyer of his plan, the lawyer strongly advised against the plan and informed the defendant that if he lied on the stand, the lawyer would have to disclose the lie

373. *See* JOHN S. DZIENKOWSKI & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 876–78 (2012–2013 ed.).

374. *Gentile*, 501 U.S. at 1050.

375. *Id.* at 1048.

376. *Id.* at 1082 (O'Connor, J., concurring).

377. *Id.* at 1081–82.

378. *Id.*

379. Nix v. Whiteside, 475 U.S. 157 (1985).

to the judge.[380] The defendant was convicted of second-degree murder and appealed his conviction on the grounds that he was denied his right to testify in his own defense and he had ineffective assistance of counsel.[381]

The United States Supreme Court found that the defendant's constitutional rights had not been violated. First, the defendant did not have the right to testify falsely on his own behalf.[382] Second, using the standard set out in *Strickland v. Washington*,[383] the lawyer acted within the reasonable range of appropriate conduct for handling the proposed perjury, and did not prejudice the defendant's right to a fair trial.[384]

Chief Justice Warren Burger wrote for the majority in *Nix*, and was joined by Justices O'Connor, Brennan, Blackmum and Stevens, who each authored concurring opinions.[385] While they all agreed with the result, the prevailing question among the concurring opinions was whether the Chief Justice's opinion overstated the doctrinal basis of the ruling by detailing the appropriate ethical standards and methods of reconciling the attorney's various ethical duties in this circumstance.[386] Justice Brennan suggested that while the Court's extensive historical discussion and review of the ethical rules was informative, the Court surpassed its authority by attempting to shape ethical rules for states.[387] Justice Blackmun found that the issue was too complicated to provide a definitive answer for the appropriate response to client-proposed perjury, given the eccentricities of each case and taking into account a lawyer's duty of confidentiality,

380. *Id.* at 161.

381. *Id.* at 162.

382. *Id.* at 173.

383. Strickland v. Washington, 466 U.S. 668 (1984).

384. *Nix*, 475 U.S. at 175.

385. *Id.* at 177–91 (Blackmun, J., concurring) (Justices Marshall, Stevens, and Brennan joined Justice Blackmun's concurring opinion).

386. *Id.* at 169–71 (majority opinion).

387. *Id.* at 176–77 (Brennan, J., concurring) (suggesting that the Court's sentiment regarding the ethical duties of lawyers was mere dictum). Justice Brennan stated:

> Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law.

Id. at 177.

loyalty, and candor to the tribunal.[388] Justice Blackmun strongly urged the court to defer to the individual states to establish the appropriate ethical responsibilities of lawyers.[389] Justice Stevens's opinion mirrored this assessment and suggested that the underlying question of a lawyer's proper ethical response to intended client perjury had not been settled by the majority.[390]

The diversity of opinions found in *Nix* demonstrate the challenges the Justices have in reviewing matters of professionalism. The Justices' varying and often-competing philosophical perspectives on professionalism and how much deference to give to the states in setting ethical limits are the core challenges in structuring a commercial free-speech doctrine in cases involving regulation advertising and solicitation.

VI. JUSTICE O'CONNOR'S PROFESSIONAL PERSPECTIVE TRIUMPHS (BARELY) IN *FLORIDA BAR V. WENT FOR IT, INC.*

Motivated by a desire to "preserv[e] the legal profession as a genuine profession," Justice O'Connor hoped the Court would effect a cure to the misapplication of First Amendment principles promulgated in *Bates* and the line of cases that followed.[391] However, in *Florida Bar v. Went For It, Inc.*, Justice O'Connor applied the facts to the prior case law enunciated in *Bates* and *Central Hudson*, thereby validating the Florida regulatory system as being within the previously established parameters of commercial free-speech doctrine.[392] In essence, Justice O'Connor took her dissent in *Edenfield* and applied the reasoning to this case. The arrival of Justices Clarence Thomas (1991) and Stephen Breyer (1994) to the bench, replacing Justices Thurgood Marshall and Harry Blackmun, aided O'Connor's viewpoint as both Justices, along with Justice Antonin Scalia and Chief Justice William Rehnquist, joined her

388. *Id.* at 188–89 (Blackmun, J., concurring).

389. *Id.* at 189 ("I therefore am troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings. The States, of course, do have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal. But the American Bar Association's implicit suggestion in its brief *amicus curiae* that the Court find that the Association's Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience.").

390. *Id.* at 190–91 (Stevens, J., concurring).

391. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 491 (1988) (O'Connor, J., dissenting).

392. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

majority opinion.

Justice O'Connor applied the three-part test articulated in *Central Hudson*. First, she considered the stated harm that the regulation was designed to redress and found the targeted and direct solicitation of victims and their families after a tragic disaster was a serious breach of their privacy at a uniquely vulnerable time of unspeakable grief.[393] While the conduct of the lawyers is certainly condemnable, the State was attempting to protect the public from this specific harm.[394] Moreover, such solicitation harmed the reputation of the legal profession in the public's eyes.[395] From this position, the State had a compelling interest in enacting the regulation.

Second, the regulation advanced this interest in protecting the grieving public by shielding potential clients for a short reasonable time, protecting their privacy in a time of grief.[396] Further, the regulation helped improve the poor image of lawyers in Florida by "forestall[ing] the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered."[397]

Third, the regulation met the Court's requirement of a reasonable fit between the ends and the means chosen by the State to effectuate those ends because it was narrowly drawn to allow direct-mail solicitation after 30 days, thereby affording lawyers the opportunity to convey otherwise protected communications to potential clients.[398] The regulation did not prohibit lawyers from using other media, such as television and radio advertising, to announce their availability for providing legal services.[399] While those affected by disasters may face myriad legal issues, the solicitation ban did not disadvantage

393. *Id.* at 629–30 (noting *Shapero*'s treatment of privacy was too casual and failed to consider "the special dangers of overreaching inhering in targeted solicitations"); *see id.* at 630 (alteration in original) (citation omitted) ("The Bar has argued, and the record reflects, that a principal purpose of the ban is 'protecting the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma.'"(quoting Brief for Petitioner at 8, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 630 (1995) (no. 94-226))).

394. *Id.* at 630.

395. *Id.* at 625.

396. *Id.* at 633.

397. *Id.* at 631.

398. *Id.* at 632–33 ("The Bar's rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.").

399. *Id.* at 633–34.

persons coping with the immediate aftermath of a disaster by preventing them from obtaining legal aid.[400]

In his dissent, Justice Kennedy applied the three-prong *Central Hudson* test and reached a much different conclusion.[401] Justice Kennedy argued that the State had not articulated a significant governmental interest under the first prong, especially in light of the *Shapero* holding, which permitted targeted mailings.[402] The mode of communication, a mailing, did not present the same danger as the in-person client solicitation that was prohibited in *Ohralik*.[403] Justice Kennedy argued that the mere possibly of the mailed advertisement offending a potential client was not a sufficient reason to place a ban on this expression of information.[404] Finally, Justice Kennedy asserted that while the State's interest in protecting the profession's reputation is legitimate, allowing lawyers to disseminate information to potential clients on how the legal system may help them could be beneficial to the public.[405] He noted:

> The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to 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 opinion by suppressing speech that informs us how the legal system works.[406]

As to the second prong of the analysis, Justice Kennedy believed that there was no substantial government interest to advance and little

400. *Id.* at 634 ("Floridians have little difficulty finding a lawyer when they need one.").

401. *Id.* at 635–36 (Kennedy, J., dissenting).

402. *Id.* at 637 (citations omitted) ("The problem the Court confronts, and cannot overcome, is our recent decision in [*Shapero*]. In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct, in-person solicitations and direct-mail solicitations. *Shapero*, like this case, involved a direct-mail solicitation, and there the State recited its fears of 'overreaching and undue influence.' We found, however, no such dangers presented by direct-mail advertising.").

403. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978) (holding a lawyer's direct, in-person solicitation of personal-injury business may be prohibited by the State).

404. *Went For It*, 515 U.S. at 638 (Kennedy, J., dissenting).

405. *Id.* at 639–40.

406. *Id.*

credible evidence that actual harm was occurring.[407] Therefore, under the third prong, Justice Kennedy concluded, "the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit."[408] The regulation was overbroad, covering potential clients who might wish to learn of the availability of a lawyer's services.[409] In that situation, a client may be delayed in receiving information necessary to protecting important legal rights.[410] The bottom line for Justice Kennedy was that direct-mail solicitation works, and clients should be given every avenue to receive information. He concluded that "[t]he use of modern communication methods in a timely way is essential if clients who make up this vast demand are to be advised and informed of all of their choices and rights in selecting an attorney."[411]

As these two approaches suggest, this case carries with it the same tensions and issues involved in the *Bates* case discussed in Section III. Justice O'Connor's opinion and the dissenting opinion of Justice Kennedy illustrate the differing viewpoints on the First Amendment, the factual supports for regulations, and the philosophical differences about the role of the Court in reviewing state regulation of professionalism, specifically attorney conduct in advertising and solicitation. These tensions were woven into the analysis that each Justice used when considering Florida's targeted-mailing rules.

Justice O'Connor's First Amendment analysis was premised on the belief that commercial free speech, while important, is not in the same classification as political speech.[412] She noted that "[s]uch First Amendment protection, of course, is not absolute. [The Court has] always been careful to distinguish commercial speech from speech at the First Amendment's core."[413] This view is consistent with her writings on the First Amendment in *The Majesty of the Law*,

407. *Id.* at 641 ("Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and non-deceptive speech.").

408. *Id.* at 641.

409. *Id.* at 643–44.

410. *Id.* at 643.

411. *Id.* at 644.

412. *Id.* at 623 (majority opinion) ("Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core.").

413. *Id.*

discussed earlier. Justice O'Connor emphasized that the Court should follow *Central Hudson* by utilizing regulations under mid-level scrutiny, a standard of review that is generally used for fundamental rights such as political free speech and expression.[414]

In his dissent, Justice Kennedy did not support Justice O'Connor's proposed cure to *Bates*. He vehemently disagreed with any retreat from established First Amendment principles.[415] One could read Justice Kennedy's dissent to argue that free speech of any kind should be given the highest level of protection:

> It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures.[416]

For Justice Kennedy, this reasoning is based on the point of view that clients have a right to receive this type of information because it is vital to protecting their legal rights.[417] Furthermore, Justice Kennedy viewed the regulation as government censorship, a proposition that the majority of the Court's prior First Amendment cases do not countenance.[418]

Justices O'Connor and Kennedy also read the facts differently and emphasized different studies on which they based their opinion. Justice O'Connor found the Bar's extensive study sufficient to establish the factual basis of the government's substantial interest in

414. *Id.* at 623–24.

415. *Id.* at 635 (Kennedy, J., dissenting) (citation omitted) ("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 cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance.").

416. *Id.* at 636.

417. *Id.* at 643.

418. *Id.* at 645 ("The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence.").

regulating direct-mail solicitation.[419] Justice O'Connor incorporated into her discussion other precedents that seemingly weaken the State's position. First, she distinguished *Edenfield*, which rejected a Florida restriction on accountants' direct targeted mailings, by suggesting that in that instance the State failed to articulate a cognizable harm.[420] Here the harm to the public was adequately demonstrated. Then Justice O'Connor distinguished *Shapero* as a case that did not provide sufficient evidentiary basis for demonstrating the harm that the State had an interest in preventing.[421] In *Florida Bar v. Went For It, Inc.*, there was significant, unrefuted evidence not only to validate a finding of harm but also to undergird the regulatory scheme that was designed to eliminate the harm.[422] By using this strategic approach, she followed precedent and attempted to "effect a worthwhile cure" to *Bates*.

Justice Kennedy used the same constitutional jurisprudence, applying the commercial free-speech test of *Central Hudson* as Justice O'Connor.[423] For Justice Kennedy, there was little evidence that direct-mail advertising was a harm from which the public needed protection in a manner that suppressed free speech.[424] He found that the documents were inadequate because they were not descriptive enough, were incompetently prepared, and were statistically suspect.[425] Moreover, the State had not demonstrated that unsolicited, direct mailings to potential clients "would be unwelcome or unnecessary when the survivors or the victim must at once begin

419. *Id.* at 626 (majority opinion) ("The Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession.").

420. *Id.*

421. *Id.* at 629.

422. *Id.* at 628.

423. *Id.* at 636 (Kennedy, J., dissenting).

424. *Id.* at 641 (disagreeing with the majority's rationale of protecting the public). Justice Kennedy stated:

> It is telling that the essential thrust of all the material adduced to justify the state's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim.

Id.

425. *Id.* at 640–41.

assessing their legal and financial position in a rational manner."[426]

Finally, Justice O'Connor and Justice Kennedy each concluded their opinions with a philosophical statement about the Court's role in setting standards of professionalism. Justice O'Connor re-emphasized her belief that while commercial speech has constitutional protection, it does not rise to the same level as a traditional free-speech analysis. This is especially true regarding attorneys "because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States."[427] Direct-mail solicitation at a vulnerable time is unprofessional conduct and promotes "the erosion of confidence that such repeated invasions have engendered."[428] Justice O'Connor had the vision that a learned profession should always uphold its unique public obligations to the extent practicable, as the discussion in Section I suggests.

Justice Kennedy placed the emphasis on the First Amendment rights of both the lawyer to disseminate information and the client to receive that information.[429] Moreover, Justice Kennedy did not agree with the proposition that the Court could shape the discourse on professionalism because "it amounts to mere sermonizing."[430] Protecting and promoting the dignity of the profession was not a judicial role, at least as far as constitutional doctrine was concerned.[431]

In the end, *Florida Bar v. Went For It, Inc.* raises more questions than answers, just like where the Court began in *Bates*. Under the First Amendment's commercial free-speech doctrine, how much protection should be provided to attorneys who wish to inform the public of their availability and willingness to provide legal services for a fee? When measuring and evaluating any harm caused by lawyers when they advertise or solicit clients, how should the Court weigh any factual evidence to determine the extent of the

426. *Id.* at 642.

427. *Id.* at 635 (majority opinion).

428. *Id.*

429. *Id.* at 636 (Kennedy, J., dissenting).

430. *Id.* at 645.

431. *Id.* (noting the State cannot improve the profession's image "by suppressing information about the profession's business aspects"). Justice Kennedy stated, "If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less." *Id.*

government's legitimate interest? From a philosophical perspective, what is the role, if any, that the Court should play in setting professional standards that the states claim to be in their exclusive domains? And finally, is this a task for which the Court should defer to the states?

CONCLUDING OBSERVATIONS

Just as society was rapidly changing when Justice O'Connor entered the legal profession, our world seems to be changing even faster. The past thirty years have witnessed the dawning of the computer age and the subsequent evolution of the Internet, which instantly places information at the public's fingertips. Technology has advanced so quickly that people are developing new devices and computer applications almost daily. Lawyers use websites and a variety of social media to market their law practices.[432] Consequently, the concept of advertising and solicitation are thus placed under the general rubric of marketing, a necessary skill if a lawyer wishes to attract potential clients.[433]

With new methods and means of marketing legal services, there is a need to continually update how the ethics rules are applied to these means of advertising and soliciting clients. Author Helen Gunnarsson covers many of the current concerns in a two-part Special Report for the *ABA/BNA Lawyers Manual on Professional Conduct* which surveys many of the Internet mediums for marketing legal services.[434] In the first report, Gunnarsson explores how state bars and

432. *See generally* Stephanie Francis Ward, *Fifty Simple Ways You Can Market Your Practice*, A.B.A. J., July 2013 (general suggestions for marketing a legal practice with specific tips on social-media marketing).

433. NELSON P. MILLER ET AL., ENTREPRENEURIAL PRACTICE: ENTERPRISE SKILLS FOR SERVING EMERGING CLIENT POPULATIONS 25–26 (2012) ("Marketing is certainly a legitimate concern of lawyers and law firms, even though appropriately colored by the profession's special commitment to law and justice through client service. Lawyers constantly think and talk about marketing, and adopt marketing practices, even while they also keep their figurative eye on the professional ball. Marketing is an important and legitimate concern simply because it addresses how lawyers create and deliver law products and services for specific client segments. Marketing principles can therefor legitimately guide lawyer practice. Marketing activities are legitimate means of increasing the positive professional influences and reach of a lawyer's services.").

434. Helen W. Gunnarsson, Special Report, *Ethics Standards on Lawyer Advertising Apply to Content on Firms' Websites*, 30 Law. Manual Prof. Conduct 112 (2014) [hereinafter Gunnarsson, *Ethics Standards on Firms' Websites*]; Helen W. Gunnarsson, Special Report, *When Lawyers Use Others' Websites for Marketing, Ethics Rules Follow Them*, 30 Law. Manual Prof. Conduct 151 (2014) [hereinafter, Gunnarsson, *Ethics Rules Follow*].

the ABA have attempted to craft rules that cover the multitude of issues surrounding the content of advertising on law firm websites, including hyperlinks to and from other websites.[435] In the second report, Gunnarsson tackles a wide variety of advertising and solicitation issues including lawyer-rating websites, Groupon offers, listing specializations, targeted electronic messages, forms of direct-contact chat rooms, live legal-answer sessions, and e-mail solicitation.[436]

Both reports demonstrate a variety of approaches in terms of ethical regulations, but all seem to follow the general framework developed during Justice O'Connor's time on the Court. Gunnarsson notes that website advertising must not be false, deceptive, or misleading, and must "include qualifying statements or disclaimers to avoid unjustified expectations by potential clients; cautionary statements may be drafted to effectively limit or disclaim lawyer's obligations to website visitors."[437] Some marketing methods create unique challenges, such as participating on a website like Groupon or other sites that offer coupon deals that potential clients can purchase in advance.[438] For example, when the lawyer receives the payments from the coupon-service provider, should they be placed in the lawyer's trust account, are they refundable, and does the fee charged by the coupon website amount to sharing fees with a nonlawyer? Sending text messages, while arguably done in real time, is not unlike direct-mail solicitation that must be designated as "Advertising Materials" according to some ethics opinions.[439] Gunnarsson's extensive review of current ethics opinions and law-review articles demonstrates that the basic framework of analysis under the ethics rules continues to be adapted to the new mediums of advertising and solicitation, although with varying outcomes.

From a First Amendment-doctrinal perspective, the analysis of *Bates* and its progeny, including *Central Hudson* and *Went For It*, continues to be applied to the various mediums of marketing. For example, the Florida State Bar has made several efforts to draft rules

435. Gunnarsson, *Ethics Standards on Firms' Websites*, *supra* note 434.

436. Gunnarsson, *Ethics Rules Follow*, *supra* note 434.

437. Gunnarsson, *Ethics Standards on Firms' Websites*, *supra* note 434 (citing ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (discussing advertising on lawyer websites).

438. Gunnarsson, *Ethics Rules Follow*, *supra* note 434.

439. *Id.*

for advertising that would pass constitutional muster.[440] Of the many provisions and guidelines developed to regulate advertising, one provision spoke to listing past results as being "deceptive and inherently misleading."[441] The rule was challenged on First Amendment grounds by attorney Robert Rubenstein and his law firm Rubenstein Law, P.A., who had developed a television advertising campaign.[442] After obtaining prior approval from the Florida Bar's Regulation Department, Rubenstein was notified that his advertisement was not in compliance with the ethics rules. However, he continued to run the ads and the Bar began disciplinary proceedings against him. He challenged the rule on First Amendment grounds and sought summary judgment in the United States District Court for the Southern District of Florida.[443]

United States District Court Judge Beth Bloom found that this was a commercial free-speech case and met the procedural requirements for summary judgment.[444] She reviewed the Supreme Court cases with which Justice O'Connor wrestled and concluded that the proper analysis to apply would be the three-part test of *Central Hudson* as applied in *Went For It*.[445] Judge Bloom found that there were substantial government interests at stake, including "[protecting] the public from misleading or deceptive attorney advertising; [promoting] advertising that is positively informative to potential clients; and [preventing] attorney advertising that contributes to disrespect for the legal system and thereby degrades the administration of justice."[446] On the second prong of the *Central*

440. *See In re* Amendments to the Rules Regulating the Fla. Bar—Subchapter 4-7, Lawyer Advert. Rules, 108 So. 3d 609 (Fla. 2013) [hereinafter Amendments to Subchapter 4-7]; *see also In re* Amendments to the Rules Regulating the Fla. Bar—Advert., 971 So. 2d 763 (Fla. 2007); Fla. Bar v. Pape, 918 So. 2d 240 (Fla. 2005) (reviewing whether a lawyer could use advertising that characterized the lawyer as a "pit bull" and determining the advertisement violated advertising rules).

441. Amendments to Subchapter 4-7, *supra* note 440, at 618–19.

442. Rubenstein v. Fla. Bar, 72 F. Supp. 3d 1298, 1304 (S.D. Fla. 2014) (alteration in original) ("Plaintiffs' advertisements include, for example, a television segment animated with a cartoon car accident, a courthouse and dollar signs drawn on a dry-erase board; using an attorney voice over; and depicting the words "COLLECTED OVER $50 MILLION FOR THEIR CLIENTS IN JUST THE LAST YEAR! Gross proceeds. Results in individual cases are based on the unique facts of each case.").

443. *Id.* at 1301.

444. *Id.* at 1308.

445. *Id.* at 1310–12; *see also* Harrell v. Fla. Bar, 608 F.3d 1241 (11th Cir. 2010) (applying the test used for commercial speech to Florida attorney-advertising case).

446. Rubenstein, 72 F. Supp. 3d at 1314–15.

Hudson test, Judge Bloom found no evidence "that the restrictions [the State had] imposed on the use of past results in attorney advertisement support the interests its Rules were designed to promote."[447] Finally, the ethics rules failed the third prong of *Central Hudson* by not being narrowly tailored to achieve the intended results.[448] The court found the rules to be "unconstitutional in violation of the First Amendment to the United States Constitution."[449] Judge Bloom followed the script Justice O'Connor wrote in *Went For It*, and perhaps came to a conclusion that was more in line with the dissent in that case.

The continuing challenge of *Bates* and the dilemma of professionalism in light of the right to advertise one's services as a lawyer is the long-standing tension between the morals of the marketplace and the morals of the profession. Konefshy and Sullivan explore this in their article by considering the fear in the profession about the current state of legal education and how the practice of law has suffered contractions and restructuring in how the profession delivers legal services since the Great Recession of 2009.[450] At the base is the question of what it means to be a lawyer. The economics of the marketplace only partially determine the answer because lawyers by necessity must utilize contemporary means of marketing their legal services.

There are many ways to consider the historical significance of the *Bates* case notwithstanding the harsh criticism by Justice O'Connor. Although attorneys Bates and O'Steen are products of the rapid social, cultural, economic and technological changes in society, they are also cognizant of the emerging constitutional doctrines that permit wider expressions of ideas, politically and economically.

Justice O'Connor reminds us that being a lawyer in our society comes with special duties and responsibilities. The core of her belief, as articulated in *The Majesty of the Law*, is that lawyers have a unique calling to protect the rule of law and to offer access to those whose legal rights are in jeopardy.[451] In an era of crass commercialism, as evidenced by some lawyers' advertisements on

447. *Id.* at 1304, 1315.

448. *Id.* at 1317–18.

449. *Id.* at 1322 (emphasis in original).

450. *See* Alfred S. Konefsky & Barry Sullivan, *In This Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 BUFF. L. REV. 659 (2014).

451. *See* O'CONNOR, MAJESTY, *supra* note 9.

late-night television, she calls lawyers back to the ideal of service. Ultimately, being a true professional in the tradition of lawyers past should have vibrant currency to all who are privileged to practice law in all of its majesty.