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Steven H. Hobbs

WORKING PAPER

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O'Connor's Canons: The Professional Responsibility Jurisprudence of Justice Sandra Day O'Connor

Steven H. Hobbs[*]

Abstract

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 sub serve 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.

Introduction

I. Justice O'Connor's Canons of Professionalism

II. The Professionalism and Legal Advertising in the Winds of Change

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

B. Commercial Free Speech Meets Professionalism in Bates & O'Steen v.

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[*] Tom Bevill Chairholder of Law, University of Alabama School of Law. Thanks to Professor Carol Andrews for her thought read of an earlier draft and Paul Horwitz for his insights on the First Amendment cases. I am grateful for the research assistance of Librarian Penny Gibson.

State Bar of Arizona

III. Bates Provides Answers and Many More Questions

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Concluding Observations

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] Seldom has there been mention of her efforts to change the Court's position on the regulation of

[1] "Queen of the Center," Evan Thomas and Stuart Taylor Jr., Newsweek, July 11, 2005, at 24. See also, Sandra Day O'Connor: Justice in the Balance, by Ann Carey McFeatters (2005); Sandra Day O'Connor, by Joan Biskupic (2005); Justice Sandra Day O'Connor: Strategist on the Supreme Court (1996); and Jeffrey Rosen, "The O'Connor Court: America's Most powerful Jurist," The New York Times, June 3, 2001, at .

attorney conduct, especially in the area of legal advertising and solicitation.[2] She vigorously rejected the findings of *Bates & O'Steen v. State Bar of Arizona*,[3] which opened the way for lawyer advertising and for what some say was the de-professionalization 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

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[2] In the major biographies none specifically focused on her professionalism jurisprudence. Supra., note 1, McFeatters does note Justice O'Connor's concern for the profession, observing:

> 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 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."

Mcfeatters, supra., note 1, at 191 – 192.

[3] 433 U.S. 350 (1977)

[4] See, Saundra Saperstein and Al Kamen, "Burger Assails Lawyer Advertising: At ABA Meeting, Chief Justice Cites Cases of 'Sheer Shysterism'", The Washington Post, 7-8-1985, at A1; William G. Hyland, Jr., Attorney Advertising and the Decline of the Legal Profession, 35 J. of the Legal Prof. 339 (2011).

[5] See *Shapiro v. Kenctucky Bar Association* 486 U.S, 466 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); and *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990).

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 ethics rule which made it unethical to send targeted mail to accident victims for a 30 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 interests, but also society as a whole. It also showcased her more restrictive use of commercial free speech analysis as established by *Central Hudson Gas & Electric Corporation 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 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

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[6] *Shapiro*, supra., note 4, at 491.
[7] *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).
[8] See text accompanying notes to , infra.
[9] Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice (2003).

O'Connor to consider the intellectual personal basis for her professionalism perspective as related to lawyer advertising and solicitation. I will consider how her background, her mentors, and her judicial philosophy may have possibly 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 how both lawyers were seeking new ways to connect to clients and how the Supreme Court was expanding the First Amendment analysis to beyond non-political speech. The *Bates* case not only permitted lawyers to advertise, it 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 solicitation for business. 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 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 attorney 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 decided by the Supreme Court from the time of Justice O'Connor's appointment until the case of *Florida Bar v. Went For It* (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, the section considers how she 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*. 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 is 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 a profession infused with a public purpose or a

[10] See cases cited above, supra., note .

business like any other, free to market it services in truthful, non-deceptive modalities.

I. Justice O'Connor's Canons of Professionalism

To understand Justice O'Connor's commitment to professionalism one need follow the tracks she made in this regard to understand where she is coming from.[11] Of course, the heart of the professional ideal is a commitment to excellence in all that she does; 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

[11] Justice O'Connor has written and spoken many times on the topic of professionalism. See, O'Connor, Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library, 2002, 55 Okla. L. Rev. 197 (2002); O'Connor, "Professionalism", 78 Oregon L. Rev. 385 (1999); O'Connor, Fifth Annual Sandra Day O'Connor Medal of Honor, Seton Hall University School of Law, November 26, 1996: Remarks of Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, 27 Seton Hall L. Rev. 383 (1997); O'Connor, Legal Education and Social Responsibility, 53 Fordham L. Rev. 659 (1984 – 1985); O'Connor, Speech: Celli Award Ceremony and Luncheon: ABA Annual Meeting, 42 St. Louis U. L. J. 715 (1998); O'Connor, Courthouse Dedication: Justice O'Connor Reflects on Arizona's Judiciary 43 Ariz. L. Rev. 1 (2001); O'Connor, Meeting the Demand For Pro Bono Services, 2 B. U. Pub. Int. L. J. 1 (1992); O'Connor Professional competence and Social Responsibility: Fulfilling the Vanderbilt Vision, 36 Vanderbilt L. Rev. 1 (1983); and O'Connor, Professionalism, 76 Wash. U. L. Q. 5 (1998).

people who lived and worked at the Lazy B through the years.[12]

Others have commented on how her early live on the family ranch in Arizona taught the ethic of hard work and the value of care, especially important in raising livestock.[13] Early on she demonstrated her intellectual prowess with her academic successes, especially at Stanford Law School.[14] When she graduated without securing a legal job because of her gender, she nonetheless found legal work suitable to her talents, first, as an assistant district attorney and later setting up her own law firm.[15] For me this represented a deep commitment to succeeding in her chosen profession in spite of the obstacles.[16]

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*

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[12] Sandra Day O'Connor and H. Alan Day, Lazy B: Growing up on a Cattle Ranch in the American Southwest, at 315 (2002).

[13] Joan Biskupic notes:

> 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."

Biskupic, supra., note , at 19

[14] She graduated magna cum laude from Stanford undergraduate and was third in her class at Stanford Law School. McFeatters, supra. note , at 43 – 44.

[15] O'Connor, Courthouse Dedication, supra. note , 1.

[16] Justice O'Connor has described her efforts to establish her career as a lawyer and how that endeavor required a commitment to excellence:

> 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.

O'Connor, supra. note ,Seton Hall L. Rev. at 385.

Company, et. al.[17], the State Bar of Arizona sought a declaratory judgment against certain realtors and title insurance companies claiming that in handling real estate transactions they were engaging in the unauthorized practice of law.[18] These entities and individuals who were in the business of real estate conveyancing were drafting a variety of documents and implicitly giving their customers advice that in actual reality was not unlike advice that lawyers would generally give in similar situations.[19] Moreover, in what we might now call multi-disciplinary practice, the actions of these entities and individuals were aided by what were in essence, in-house lawyers.[20]

In finding against the real estate brokers and title companies, the case was built around an examination of the nature of the legal profession.[21] After giving a sweeping historical account of the legal profession and citing the work of 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.[22] For the Arizona Court, this absence of

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[17] 90 Ariz. 76 (1961)

[18] 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.

[19] Id. at 80.

[20] 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.

[21] Id. at 82 – 87.

[22] The Arizona Supreme court found Dean Roscoe Pound's emphasis on the ideal of a profession instructive:

being motivated by business ideals separated lawyers from other providers of services who are not traditional professions, declaring:

> From this historical trend it is inevitable to conclude that as the body of the law has grown, the 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.[23]

Moreover, lawyers were committed to high professional ideals embodied in the Canons of Professional Ethics which were not enforceable against those who are merely running a business for profit.[24] The title companies and those who work within them are not only unqualified to handle legal matters, "…they are not normally governed by the code of ethics to which lawyers are subject; their principal motivation is the business of the

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> 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. at 83, citing Pound, The Lawyer from Antiquity to Modern Times 6, 10 (1953). (Emphasis in text.)

[23] Id. at 86. 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.

[24] The Court emphasizes 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/client first:

> Many of the Canons of Professional Ethics which attorneys must observe most scrupulously[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.' Excerpt from Canon 15, Canons of Professional Ethics.

Id. at 88.

title company, not of the customer."[25]

This was not a new debate, but was emblematic of an age old discourse on whether the practice of law is a business or a profession; an issue considered by Julius Henry Cohen in his 1916 book, *Law: - Business or Profession*,[26] articulating the outlines of the debate.[27] Cohen was considering the challenge of non-lawyers soliciting business that required trained, ethical lawyers, the perils of legal advertising and solicitation, and the need for high ethical standards for the profession.[28] Cohen also pondered whether the practice of law is a business or a profession, concluding that law is indeed a highly regarded profession.[29] Justice O'Connor also noted the business aspect of the practice of law but would distinguish lawyers from other professionals because of our commitment to public service.[30] This was 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.'"[31] At the time of that decision, Justice O'Connor was a sitting Arizona judge on the Appellate Court of Arizona. For Arizona,

[25] Id. at 88.
[26] Julius Henry Cohen, The Law: Business or Profession (1916).
[27] See Symposium: The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century, XL Fordham Urban Law Journal (2012).
[28] Insert cites.
[29] Find a cite.
[30] Justice O'Connor observed:
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.
O'Connor, supra., note . Oklahoma L. R. at 200.
[31] In the Matter of Members of the State Bar of Arizona, John R. Bates and Van O'Steen, 555 P.2d 640 (1976), at 643.

the United States Supreme Court effectively settled the debate on the commercial aspect of professionalism in *Bates* discussed below.[32]

Notwithstanding the tenor of the times, 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 how she comes from this place of respect for the Law.[33] The book's title is derived from the sculptured fresco that adorned the wall above her seat on the Supreme Court bench.[34] In foregrounding the centrality of the Law and suggesting why it is majestic, she exclaimed:

> It 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

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[32] 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, Merton E. Marks, The Lawyers and the Realtors: Arizona's Experience, 49 A.B.A. J. 139 (1963); Ho. Charles C. Bernstein, The Arizona Realtors and the 1962 Arizona constitutional Amendment, 29 Unauthorized Prac. News 169, (1963 – 1964); and Robert E. Riggs, Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment, 37 S. Cal. L. Rev. 1 (1963 – 1964).

[33] Justice O'Connor's task in her book is to provide a case for her jurisprudence to be grounded in the law:

> 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.

O'Connor, The Majesty of the Law, supra., note , at xvii.

[34] O'Connor, The Majesty of the Law, supra., note , at xvi.

cases that come before them.[35]

For Justice O'Connor, the law stands as a bulwark in behalf of the people over and against whatever forces might threaten basic freedoms, thus the use of the words "safeguard", "defense', and "protection".[36] No doubt she would agree with the admonition given the graduates of the Harvard Law School at commencement when the Harvard President confers the law decree with the statement, "You are ready to aid in the shaping of and application of those wise restraints that make men free."[37] 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.[38]

Her book provides the reasoning behind this "majesty of the law framework."[39] 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.[40] From her seat on the bench, Justice O'Connor posits the role of the Court in a democratic, representative government as

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[35] Id.

[36] Id. at 242 - 243.

[37] www.asklib.law.harvard.edu/a.phpo?qid=37313. Last visited, 5-30-2013. See also, O'Connor, Majesty of the Law, supra., note , at 258.

[38] In a speech at the dedication of a new federal courthouse in Phoenix, named in her honor, Justice O'Connor noted the importance of what occurs inside the courthouse:

> Millions of people will enter these buildings in the years ahead, some as lawyers on behalf of clients, some as litigants or witnesses, some as jurors, some as new citizens of this country, some as merely visitors. Winston Churchill once said, "We shape our buildings and afterwards our buildings shape us." My hope is that all those who enter will leave secure in the knowledge that justice is open, illuminated, and makes room for everyone, and that in this place facts are determined correctly, legal issues resolved fairly and wisely, and equal justice under law is rendered to all.

O'Connor, The Arizona Judiciary, supra, note , at 7.

[39] Justice O'Connor's latest book also reflects this notion of majesty, **cite.**

[40] Id. at 13.

"…striking the right balance among the competing ideals of law, freedom, and justice." [41] 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."[42]

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.[43] In her book she reviews how important it was for the framers to preserve the role of state governments.[44] 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."[45] Perhaps, this explains in part her reluctance to overrule state efforts to regulate lawyer conduct.[46] The state is obligated to protect the public from lawyers who may overreach or use undue influence

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[41] Id. at 15, 266, and 272.

[42] Id. at 13. Justice O'Connor identifies these issues as follows:

> 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.

Id., at 13.

[43] Id. at 56.

[44] In discussing the ratification of the constitution, she emphasizes the importance of state sovereignty:

> 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.

Id. at 56.

[45] Id., at 57.

[46] See discussion below, infra.,…

to promote their own economic interests.[47] 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.[48] This is not inconsistent with her general judicial philosophy to defer to the legislative prerogatives of the states.[49]

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.[50] This is particularly reflected in her chapter on the Bill of Rights[51], 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."[52] For example, in discussing the First Amendment, she details how setting up the Free Speech Clause, "…the primary concern was to protect political speech: specifically, criticism of the

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47 See discussion below, infra. Note …

48 See generally, infra., note at

49 Majesty, supra., note , at 56 – 57.

50 Justice O'Connor notes:

> …when 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.

Id., at 15.

51 Id., at 56 – 64.

52 Id., at 59.

government."[53] Moreover, the constitutional protection for free speech has expanded into areas of expression not actually conceived of by the framers.[54] Ironically, while she notes the *Virginia Pharmacy* case,[55] 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.[56] Nonetheless, Justice O'Connor places the most emphasis on the original concept of the free speech and expression in the context of speaking out about the government, or more to the point, political speech.[57] It is this element of our fundamental freedoms that makes our democracy the envy of the world.[58]

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 central place these documents have in our society.[59] Justice O'Connor states, "It is part of our

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[53] Id., at 61.

[54] Justice O'Connor identifies such controversies as the following:

> 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.

Id., at 61.

[55] Id.

[56] Id. at 228.

[57] Justice O'Connor wrote about what it takes to have a successful democracy, noting that an independent judiciary was key. Id. 250 - 254. She further articulated her thoughts on the First Amendment:

> The second principle I want to emphasize is the *importance of a free press* (emphasis in original). 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. at 254.

[58] Id. at 257 – 258.

[59] Id. at 58 -64.

American contribution to the notion of justice and freedom."[60] Thus, there are basic civil and human rights that are protected from government overreach and are not at the whim of majority rule.[61] To make these rights more than empty promises in old documents, there must be a mechanism which ordinary citizens can use to defend their rights.[62] Justice O'Connor exclaimed, "In our system – and our experience has proved its efficacy – it the citizens themselves, through the courts, who enforce their rights."[63] So any person can have their day in court against the government or anyone else who may infringe their basic rights.[64]

But 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 on freedom, justice and liberty in courts of law.[65] In Justice O'Connor's words, "Lawyers possess the key to justice under a Rule of Law – the key that opens the courtroom door."[66] Hence, lawyers because of their unique position have a moral obligation to protect and honor the law for the good of society.[67] She emphatically expressed this concept:

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[60] Id., at 64.
[61] Id. at 59, 258.
[62] Id. at 258 - 259.
[63] Id. at 259.
[64]

> 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.

Id. at 259.
[65] O'Connor, Vanderbilt L. Rev. supra., note . at 7
[66] O'Connor, Majesty. Supra., note , at 229.
[67] Id. at 230.

> 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.[68]

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.[69] Not only should one practice law in the technical sense of applying the law correctly, but also the lawyer should always consider the moral implications of what is done in behalf of clients. 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."[70]

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 non-oppression by the

[68] O'Connor, Fordham L. Rev. supra., note , at 662. See also, O'Connor, Majesty of the Law, supra. note at 229.
[69] O'Connor, Majesty of the Law, supra., note , at 226.
[70] Id.

government in its regulatory powers.[71] 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."[72] Moreover, great progress was made in eliminating racial segregation and including all of our citizens in the arc of liberty.[73] 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 suppose to defend them.[74] None of this is even possible unless without recognizing that we must constantly ask, or inquire, about the nature of our democracy.[75] One could assert that such inquiry into the nature of our democracy is the grounding of her stated moral imperative.[76]

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[71] Justice O'Connor observed:

> 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.

Id. at 266.

[72] Id.

[73] Id. at 268.

[74]

> 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.

Id. at 268 – 269.

[75] Id. at 269.

[76] Justice O'Connor observed:

> A nation's success of 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.

Id. at 276.

It is clear that for Justice O'Connor, that, lawyers, starting in law school, must be trained in moral inquiry.[77] While she does not prescribe a single course of moral inquiry, she does note the current drama that lawyers inflict on each other in the course of seeking to win at all cost and has led to severe dissatisfaction with the practice of law.[78] 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.[79]

Justice O'Connor's canons of professionalism are animated by the ideal of public service. Ironically, Justice O'Connor herself returns to the thinking expressed by the Arizona Court in the realtors case in describing the nature of professionalism, by also citing to the writing of Dean Roscoe Pound's definition of professionalism grounded in the ideal of public service.[80] By experience alone, her legal and political career was

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> 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.
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> 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.

O'Connor, supra., note , Fordham L. R. at 660

[78] 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.

[79] Id. at 226 – 228.

[80] In observing the dissatisfaction lawyers have with their professional lives and the public dislike of the legal profession, she states:

> I believe that the 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 do not simply gain the means of a comfortable livelihood.

dedicated to serving the public as private lawyer, public lawyer, legislator and judge. She recognized that attorneys, by virtue of their training and status within the legal system, are imbued with great power.[81] This is the point she strongly made in *Shapero* when she called for innovative methods for inculcating professional values.[82] This is also the message she regularly made when speaking at law schools with an audience of law students, lawyers and legal educators.[83]

Her ideal of public service carries two perspectives. First, she believes that lawyers as officers of the court 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, 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 because she took business that walked in off of the street and she took criminal cases that were assigned from the court.[84] All lawyers should do their part in make services available to the poor.[85] She even suggests that this duty has global reach

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> They also assumed the obligations of professionalism: obligations to their clients, obligations in their dealings with other attorneys, obligations toward legal institutions, and obligations to the public.

Id. at 226.

[81] Id. at 229.

[82] See Shapero, supra, note , at 490.

[83] See O'Connor, supra., note , 36 Vand. L. Rev. 7; 53 Fordham L. Rev. 660; 78 Or. L. Rev. 385; and 55 Okla. L. Rev. 200.

[84] O'Connor, Ariz. L. R., supra., note , at 2.

[85] O'Connor, B.U. Pub. Int. L. J., supra., note , at 6.

as well.[86] At the end of the day, lawyers will receive a great deal of professional and personal satisfaction in engaging in pro bono work.[87]

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 framework for her professional canon is structured by the ideal of lawyers being in service to 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. First, because the notion that our society functions because of our moral commitment to the Rule of Law.[88] Second, because at the core of the law are our fundamental principles of freedom, democracy and justice. 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. The federal and state governments each have a proper role and sphere of influence.[89] However, it is the people who have the final say through representative government.[90] And it is the people who have civil rights which cannot be readily usurped by government.[91]

To insure the constitutionally recognized liberty interests, citizens must be able to

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[86] O'Connor, Saint Louis L. J., supra., note , at 717.
[87] Id.
[88] Majesty of the Law, supra., note , at 73.
[89] Id. at 64.
[90] Id . at 245.
[91] Id. at 35

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. And 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, she privileges the First Amendment because it grants the awesome ability to speak out against and for the government without fear of repercussion.[92] This bedrock belief will shape 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.[93] The constitutional protection of legal advertising 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 in part fueled by lawyers advocating for social justice through the courts.[94] At the same time, law schools expanded the pool of potential

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[92] Id. at 61, 255.
[93] Id. at 269 – 270.
[94] Justice O'Connor paid tribute to her fellow justice, Thurgood Marshall, the primary legal architect of the civil rights movement, Id. at 132 - 138. See, G. McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (1983), for a description of the how Charles Hamilton Houston prepared a cadre of civil rights lawyers

students to include more minorities, women and individuals from non-traditional backgrounds.[95] 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.[96] Moreover, lawyers were instrumental in bringing impact litigation calculated to effect broad social changes.[97]

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,[98] noted the cases of *New York Times v. Sullivan (1964)*, *Brandenberg v. Ohio (1969)*, and *New York Times v. United States* (Pentagon Papers case, 1971) as examples of the Court creating modern First Amendment jurisprudence.[99] At the heart the heart of these and other First Amendment cases, is the tension between the government's

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who developed a strategy to secure equal rights under the Constitution for all Americans. See also, James E. Moliterno, The Lawyer as Catalyst of Social Change, 77 Fordham L. R. 1559 (2009).

[95] R. Stevens, Law School: Legal Education in America from the 1850's to the 1980's (1983).

[96] See generally, A.B.A. Special Committee on Public Interest Practice, Implementing the Lawyer's Public Interest Obligation, June 1977.

[97] One example is the case of *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, rev's in part*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev. in part sub nom.* Wyatt v. Aderholt, 503 F. 2nd 1305 (5th Cir. 1974), which established important rights for person with mental illness, especially those confined to state mental health institutions. The significance of this case was noted by Professor Michael L. Perlin:

> *Wyatt v. Stickney* is the most important case litigated in the history of domestic mental disability law. It spawned copycat litigation in multiple federal district courts and state superior courts; it led directly to the creation of Patients' Bills of Rights in most states; and it inspired the creation of the Developmental Disabilities Assistance and Bill of Rights, the Mental Health systems Act Bill of Rights, and the federally-funded Protection and Advocacy System.

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 & Psychology Rev. 210, 210 (2011).

[98] Owen, M. Fiss, The Irony of Free Speech (1996). See, New York Times v. Sullivan, 376 U.S. 254 (1964); Brandenberg v. Ohio, 395 U.S. 444 (1969); and New York Times v. United States, 403 U.S. 713 (1971).

[99] Id. at 6.

regulatory role in promoting legitimate state interest, such as preserving order, and the fundamental value of expression, especial political expression designed to promote civil rights or challenge governmental policies.[100] The protests against the Vietnam War, for example, brought First Amendment cases to the Supreme Court pushing the traditional analysis of constitutional protections to areas never contemplated by constitutional scholars.[101] Professor Fiss suggests that the doctrinal advancement of First Amendment jurisprudence not only recognized 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.[102]

The sixties were a period of profound social, political and cultural change. The Civil Rights Movement propelled the country out of the Jim Crow Era[103] and towards a society where access to full participation in all fundamental rights would not be pre-determined by race.[104] Other groups of citizens also organized to achieve full social, political and economic equality.[105] From a political perspective, a plethora of legislation

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[100] Id. at 6 – 7.

[101] See, for example, *Tinker v. Des Moines Independent Community School District*, 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 Viet Nam War by wearing black armbands to school. See also *Times v. Sullivan,* 376 U.S 254 (1964).

[102] Id. at 18 – 19.

[103] See, Howell Raines, My Soul is Rested: The Story of the Civil Rights Movement in the Deep South (1977)

[104] One example of the fundamental change was the integration of state universities, such as the University of Alabama in 1963, a story told in E. Culpepper Clark, The Schoolhouse door: Segregation's Last Stand at the University of Alabama (1993) which chronicles the admission of Vivian Malone and James Hood into the University in of spite of Governor George Wallace standing in the door defying a federal order to allow the admission.

[105] Professor Owen Fiss noted the development of civil rights laws fostered a wider conception of rights:

> As a result of these developments, more and more spheres of human activity -- voting, education, housing, employment, transportation – have come to be covered by antidiscrimination law, so that today there is virtually no public activity of any significance that is beyond its reach. Moreover, the protection of

was enacted to guarantee basic rights such as voting, employment and housing. Many of these laws were the result of citizens standing up and speaking out and calling on their government to act for the good of all in society.[106] Culturally, the society opened up to new musical genres (Rock n' and roll, soul, R & B, rock) more sexual freedom to experiment with non-traditional relationships, and the mobility to go anywhere in the country and the world.[107] More can be said about this period of rapid social change, but suffice 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 expounds upon her canons of professionalism.

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

While *Bates* is the case that can be said to open up the legal advertising floodgates, it is the case of *NAACP v. Button*[108] 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*[109] which declared that public schools segregated by race were

> the law has been extended to a wide array of disadvantaged groups – racial, religious and ethnic minorities, women, the disabled. Soon it is likely to be extended to groups defined by their sexual orientation. Over the last forty or fifty years, civil rights have become essential to the American legal order.

Fiss, note , supra., at 10.

[106] See for example, Fred Gray, Bus Ride To Justice: Changing the System by the System – the Life and Works of Fred Gray (1995) which describes the lawyer who represented Dr. Martin Luther King, Jr. and Rosa Parks and provided legal counsel the Montgomery Bus Boycott, the desegregation of Alabama schools and the 1965 Selma to Montgomery March for voting rights.

[107] See, James C. Hall, Mercy, Mercy Me: African-American Culture and the American Sixties (2001).

[108] *NAACP v. Button*, 371 U.S. 415 (1963).

[109] *Brown v. Bd. of Educ*., 347 U.S. 483 (1954).

unconstitutional. [110] After *Brown* was decided, many states engaged in what was called massive resistance to integration of public schools.[111] To counter this resistance, the NAACP,[112] and the NAACP Legal Defense Fund, Inc. (Defense Fund),[113] and the Virginia State Conference of NAACP Branches[114] pursued a vigorous litigation campaign to effectuate the mandate in *Brown*.[115] In Virginia, the NAACP's Virginia State Conference hired staff lawyers to bring such suits and would call in Defense Fund lawyers for assistance.[116] 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 school boards that had refused to integrate the schools.[117]

The NAACP, led by attorneys Oliver Hill,[118] Spotswood Robinson,[119] Robert

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[110] For a thorough discussion of the history of this case, see, Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975).

[111] See, Oliver Hill, The Big Bang – Brown v. board of Education and Beyond: The Autobiography of Oliver W. Hill, Sr. (ed. by Jonathan K. Stubbs) (2000). Hill, who was one of the principle attorneys in Brown and the chief counsel in bringing enforcement action in Virginia reflected:

> In Virginia, the segregationists announced their so-called campaign of "massive resistance." Two years later, a majority of southern states issued their famous "Southern Manifesto" calling upon all southern to resist any effort to desegregate public schools by "any and all lawful means." (As if one could lawfully violate someone else's constitutional rights.)

Id. at 168.
See also,Walter Murphy, "The Counterattacks: The Anti-NAACP Laws", 12 Western Political Q. 371 (Jun. 1959), for an in-depth discussion of the efforts of southern states to defeat the ruling of Brown. The Court cited this article in NAACP v. Button, supra, note , at 430, ft. 12.

[112] See, NAACP v. Button, supra., note , at 419.

[113] Id., at 421, footnote 5.

[114] Id., at 419.

[115] See Hill, supra., note , at 168 – 182.

[116] *NAACP v. Button*, supra., note , at 420.

[117] Id. 421 – 422.

[118] 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 .

[119] Spotswood Robinson became a federal District Court judge.

Carter[120] and Thurgood Marshall,[121] sought injunctions declaring that these statutes violated the First Amendment and the Fourteenth Amendment's Equal Protection Clause.[122] 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.[123] Moreover, the lawyers were engaging is an important form of political expression designed to "…achieve the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country."[124] Further, the lawyers were properly representing not only the desires of individual clients but were also expressing the objectives of the organizations involved.[125] Accordingly, a provision of the law which could sanction these lawyers for pursuing the constitutional rights of their clients implicated the right of free expression.[126] Justice Brennan vigorously defended these First 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

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[120] Robert Carter, became a Federal District Court judge.

[121] Thurgood Marshall became United States Solicitor General and then Unites States Supreme Court Justice.

[122] See Hill, supra., note , at .

[123] Justice Brennan noted the importance of being able to bring such an action against the government:

> 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.

NAACP v. Button, supra., note , at 429.

[124] Id.

[125] Id., at 430.

[126] Here the Court was concerned about whether the statute was too vague or was overbroad so that a lawyer could not determine whether he or she was in danger of ethical sanction. Id., at 432 – 433.

sanctions."[127]

Contrastingly, Justice Harlan, in a dissent joined by Justices Clark and Steward, found that the Court was impermissibly interfering with the "… the domain of state regulatory power over the legal profession."[128] While recognizing the importance of First and Fourteenth Amendments rights,[129] Justice Harlan focused on the actual conduct of the NAACP lawyers and the state's strong interest in maintaining regulatory supervision of the profession.[130] Noting that there must be a balance struck between these competing interests, he observed that the constitutional rights at state were not absolute.[131] 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.[132]

For Justice Harlan, the regulations were reasonably related to the State's concern about the profession,[133] which he found were not intended to discriminate against the NAACP or to chill the exercise of First Amendment rights.[134]

NAACP v. Button provides the example of how lawyers were expanding the ways

127 Id., at 433.
128 Id. at 448
129 Id. at 452 – 453.
130 Id. 451.
131 Id. at 453 – 454.
132 Id. at 455.
133 Id. at 455.
134 Id. at 469 – 470.

in which they represented clients. 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." [135] The instant case follows in a longer tradition of impact litigation pursuing fundamental civil rights, such as *Plessy v. Ferguson*,[136] *Carter v. Texas*,[137] *United States v. Shipp*,[138] *Guinn v. United States*,[139] *Buchanan v. Warley*.[140] Second, the First Amendment rights of lawyers are 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. And 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.

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[135] Id. at 435, footnote 16, where the Court lists 27 named cases with multiple opinions issues in ten different Virginia municipalities where segregation was being challenged. The Court further noted:

> We cannot close our eyes to the fact the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought.

Id.

[136] 163 U.S. 537 (1896). For an insightful discussion on this case see, John Minor Wisdom, *Plessy v. Ferguson* – 100 Years Later, 53 Wash. & Lee L. Rev. 9 (1996).

[137] 177 U.S. 442 (1900), challenging exclusions of blacks on grand juries. See also, Rogers v. Alabama, 192 U.S. 226 (1904).

[138] U.S. challenged a habeas corpus petition in against a local official who refused to protect a black prisoner from lynching. See. Mark Curriden & Leroy Phillips, Jr., Contempt of Court: The Turn-of-the –Century Lynching that launched a hundred years of federalism (1999).

[139] 238 U.S. 347 (1915), challenging the exclusion of black voters by way of the grandfather clause in voting legislation in Maryland and Oklahoma.

[140] 245 U.S. 347 (1917),challenging Louisiana's restrictive covenant laws.

B. **Commercial Free Speech Meets Professionalism in *Bates and O'Steen v. State Bar of Arizona***

The *Bates and O'Steen v. State Bar of Arizona* case[141] was an extension of the development of commercial free speech jurisprudence as presented in *Virginia Pharmacy v. Virginia Consumer Council*.[142] *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.[143] 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 about the purchase and use of pharmaceutical services.[144] In addition to the marketplace of political ideas, the First Amendment also protects the marketplace of commercial ideas and information.[145]

The Commonwealth of Virginia was concerned that such commercial advertising would undermine the professional standards that the Virginia Pharmacy Board was attempting to uphold.[146] Advertising, it was argued, would have a negative effect on pharmacy services because competing pharmacists would be forced to cut prices to meet

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[141] Supra., note .
[142] 425 U.S. 748 (1976).
[143] See Chief Justice Burger's concurring opinion, Id. at 773 -774.
[144] Id. at 770.
[145] The Court notes, "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." Id. at 764. See also, Id. at 761.
[146] Id. at 767 – 768.

competition and thus reduce services in order to maintain slim profit margins.[147] 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.[148]

Professionalism was also at the heart of the *Bates and O'Steen* case.[149] Fundamentally, the tradition in the profession was that it was undignified for lawyers to advertise.[150] Before the adoption of the ABA Disciplinary Rules, the ABA Canons of Ethics were specific about the manner lawyers could present themselves to the public.[151] The new Disciplinary Rules reflected the sentiment in the old Canons of Ethics with an updated list of do's and don'ts.[152] Attorneys Bates and O'Steen recognized that times were changing and their experience, especially with Legal Services[153], convinced them that low and moderate income individuals had limited access to legal services due to costs

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[147] Id.
[148] Id. at 770.
[149] The Court noted that professionalism was a main concern of the state and observed:

> Appellee places particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, 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.

[150] Id at 368.
[151] The ABA Canons of Ethics sets out a specific lists of do's and don'ts:

> It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

ABA Canon 27.
[152] See Bates and O'Steen, supra. note __, at 355, footnote 5.
[153] Id. at 354.

and lack of information about how to obtain the services of a lawyer. They concluded that if they set up their practice in a way which 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.[154] To achieve this, they would need to generate a sufficient volume of business and be efficient in serving clients in order to have a sustainable practice.[155] They reasoned that volume could best be achieved by advertising their practice, which they called a "Legal Clinic".[156] They ran newspaper advertisements listing the prices for certain legal services.[157] Consequently, they were sanctioned by the State Bar of Arizona for violating disciplinary Rule 2-101(B) which stated:

> (B) 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.[158]

The two lawyers were originally given a six month suspension after a hearing by a local grievance committee. The Board of Governors of the Arizona State Bar reviewed

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[154] The two attorneys opened their practice in March 1974 with the following intentions:

> Their aim was to provide legal services at modest fees to persons of moderate income who did not qualify for government legal aid. In order to achieve this end, they would accept only routine matters, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name, for which costs could be kept down by extensive use of paralegals, automatic typewriting equipment, and standardized forms and office procedures. More complicated cases, such as contested divorces would not be accepted.

Id. at 354.

[155] Id.

[156] Id.

[157] Apparently the advertisements brought in significant legal business. Id. at footnote 4.

[158] Id. at 355.

the case and recommended a one week suspension. The two lawyers appealed to the Supreme Court of Arizona on the grounds that the disciplinary rule violated the federal anti-trust 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.[159] 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*.[160] The Arizona Supreme Court also relied heavily on *Goldfarb v. Virginia State Bar* in its anti-trust analysis.[161] The Arizona Supreme Court found that the minimum price setting by a local bar association in the *Goldfarb* case, which the United States Supreme Court found to be anti-competitive, was distinguishable for the minimum fee schedule set by the Attorneys Bates and O'Steen.[162] The State had complete authority to regulate the profession, including whether lawyers could advertize.[163]

On the First Amendment claim, the Supreme Court of Arizoina in *Bates*

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[159] 555 P.2nd 640, 113 Ariz. 394 (1976)

[160] Id. at 643, citing Parker v. Brown, 317 U.S. 341, 352 (1943).

[161] Id. at 643 - 644, citing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[162] The Arizona Supreme Court focusing on the regulatory role the state court has over attorneys who are officers of the court, said:

> We do not believe that the holding of Goldfarb, supra, applies to the facts of this case. Goldfarb, supra, was concerned with a minimum fee schedule. Attempts at minimum fees or price floors are traditionally the target of anti-trust laws, state and federal, as they tend to artificially raise the prices of goods and services without a corresponding increase in the value of services. The control of advertising by the Supreme Court of members of the Bar is far different than price fixing by a local bar association. We do not believe that Disciplinary Rule 2-101(B) conflicts with Goldfarb, supra.

555 P.2nd 640, at 642.

[163] The Arizona Supreme Court found that Disciplinary Rule 2 – 101(B) was not inconsistent with the holding of the Goldfarb case. Id. at 643. The Court further noted the special regulatory function the State has over the profession:

> The State Bar of Arizona is an integrated bar, integrated by the court rule, Rule 27, 17A A.R.S. Attorneys are officers of the Supreme Court and subject to the regulation of that court, and legislative branch of government, state or federal, may not interfere with the court in the reasonable and constitutional regulation of the practice of law. (citing Golbfarb).

Id. at 643.

acknowledged such speech had some protection under the First Amendment, but believed that legal advertising could still be restricted as a method to regulate the profession.[164] The court noted a larger societal concern, stating, "The 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."[165]

On appeal to the United States Supreme Court on these two issues, the 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.[166] 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, anti-competitive impact on the lawyers who wished to advertize.[167] 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.[168] The Court found that advertising might even lower the

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[164] Id. at 645.
[165] Id. at 643.
[166] Bates & O'Steen, supra. note , at 363.
[167] The Court in Bates & O'Steen considered the differences between Goldfarb, 421 U.S. 773 and Cantor v. Detroit Edison Co., 428 U.S. 579(1976) on the question of state action for anti-trust 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 court.'

Bates and O'Steen, supra. at 361 -362, citing Goldfarb, 421 U.S., at 792.
[168] Id. at 377 – 378. After considering whether increased costs for advertising would 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:

costs of legal services because potential clients could search for the lowest price.[169] 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 the *Virginia Pharmacy* case, as described above, extending it to the state's regulation of the legal profession.[170] 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.[171] None of the advertisements were misleading, false or deceptive, made comparisons about the quality of services offered by other practitioners, nor were any of the ads illegal.[172] The opinion noted that in-person solicitation may give cause for regulatory concern and that there may by "reasonable

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> In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetrate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.

Id. at 378.

[169] The Court observed:

> Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising. It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.

Id. at 377

[170] The Court reviewed the opinion of Virginia Pharmacy, pointing 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. Id. at 365. The Court used this occasion to apply those First Amendment principles to lawyers:

> Like the Virginia statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance. Because of the possibility, however, that the difference among professions might bring different constitutional considerations into play, we specifically reserved judgment as to other professions.

Id. at 365.

[171] Bates. Id. at 379.

[172] Id. at 383 – 384.

restrictions on time, place, and manner of advertising."[173] 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.[174]

The notion of 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 populace animated by social protest and the seemingly opening up of social and economic opportunities for all, any government restrictions on free speech was 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 new jurisprudential regime and the jurisprudence on professionalism would evolve in a piecemeal fashion.[175]

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[173] Id. at 384.
[174] Id.
[175] See, Gerald s. Reamey, Forward: Life in the Early Days of Lawyer Advertising: Personal Reflections of a *Bates* Baby, 37 St. Mary's Law J. 887 (2006). Professor Reamey describes becoming a lawyer in Texas the year that bates was decided. Noting that no lawyers in his area were advertising, he reports on the Texas Bar's response to the decision:

> Responding to *Bates*, the Texas State Bar Board of Directors adopted an official statement in a special meeting held in September 1977:

III. Bates Provides Answers and Many More Questions

The case reflects the challenges in applying commercial free speech doctrine. This is the challenge with which Justice O'Connor will wrestle in balancing her ideas about professionalism and the First Amendment 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.[176] For example, the Court would seem to permit the tight regulation of in-person speech, or

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> All present disciplinary rules remain in effect, except insofar limited newspaper advertising is allowed by the *Bates* decision. Any attorney violating such existing rules is subject to disciplinary action by the appropriate grievance committee. Attorneys who desire to advertise should study the opinion carefully, since all advertising which exceeds the narrow bounds of the *Bates* holding continues to be prohibited.
>
> The board also noted in its official statement that, "advertising by individual lawyers, as distinguished from institutional advertising by bar associations, lawyer referral services, and group legal service plans, is *something that should be discouraged* in the public interest. This cautionary statement clearly was neither an endorsement of lawyer advertising, nor a point that was lost on new lawyers who were just being initiated into the legal culture. (emphasis in original)

Id. at 889 – 890.

[176] The Court recognized in finding that legal advertising cannot be suppressed, it is still subject to regulation and several aspects of advertizing will be subject to further scrutiny. The Court concluded:

> In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both free and cleanly.
>
> As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. [Citations omitted.] Advertising concerning transactions that are themselves illegal obviously may be suppressed. [Citations omitted.] And the special problems of advertising on the electronic broadcast media will warrant special consideration. [Citations omitted .]

Id. at 384.

direct solicitation of clients.[177] However, there is no guidance on how a state might effectively issue ethical rules that pass First Amendment constitutional muster.[178] How does one achieve a balance between the state's efforts to promote professionalism and the economic practicalities of law practice? This is the main problem with which the Court grappled in the advertising and solicitation cases reviewed over the next three decades as we shall see below.[179]

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.[180] 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.[181] Chief Justice Burger's main disagreement with the case was

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[177] Id. at 384.

[178] Justice Rehnquist, noting that the Court had virtually obliterated the distinctions between protected speech and unprotected speech, 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 predictable consequence.

Id. at 404 – 405.

[179] Justice Powell foresaw the challenge of regulating in this area given the changing nature of the legal profession:

> 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 – 403.

[180] See Justice Powell's dissenting opinion, at Id. 402 – 403.

[181] Chief Justice Burger expressed his reservations about extending the Virginia Pharmacy case:

> Some Members of the Court apparently believe that the present case is controlled by our holding one year ago in Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748 (1976). 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. Citation omitted. In that context, the prohibition on price advertising, which had served a useful function in the days of individually

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."[182] 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."[183] Justice Powell concluded that, "Until today, in the long history of the legal profession, it was not thought that this risk of public deception was required by the marginal First Amendment interests asserted by the Court."[184] 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."[185]

For the Court to move towards the constitutional protection of the First Amendment, it

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> compounded medicines, was no longer tied to the conditions which had given it birth. The same cannot be said with respect to legal services which, by necessity, must vary from case to case. Indeed, I find it difficult, if not impossible, to identify categories of legal problems or services which are fungible in nature.

Id. at 386.

[182] Id. at 388.
[183] Id. at 391.
[184] Id. at 404.
[185] Id. at 404.

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.[186] [see Cohen]. 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.[187]

Secondly, the justices tend 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?[188] As to reasonableness of a fee, even if one applies the Bar's rules on reasonable fees, can we be assured of finding that value?[189] Justice Powell warned:

Whether a fee is 'very reasonable' is a matter of opinion, and not a matter of

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[186] See Cohen, at .

[187] An essential part of law practice is marketing , a reality that Justice O'Connor certainly recognized:

> 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.

O'Connor, Majesty of the Law, supra., note , at 230.

See also, Marketing Your Practice in the Digital Age, 35:3 Family Advocate (winter 2013)(issue devoted to marketing) and Stephanie Francis Ward, 50 Simple Ways You Can Market Your Practice, 99:7 ABA Journal 34 (July 2013).

[188] For Justice Powell, 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:

> 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. In most situations it is impossible both for the client and the lawyer to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine. Neither quantitative nor qualitative measurement of the service actually needed is likely to be feasible in advance.

Bates, supra. at 392

[189] Id. at 395.

> verifiable fact as the Court suggests. One unfortunate result of today's decision is that lawyers may feel free to use a wide variety of adjectives such as 'fair,' 'moderate,' 'low-cost,' or 'lowest in town' to describe the bargain they offer to the public.[190]

Consequently, when reading the advertisement, how does one determine whether it is misleading or deceptive?[191] 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 matter unique to each individual client could arise.[192] 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.[193]

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

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[190] Id. at 395.

[191] 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. at 394.

[192] Id. at 392 – 393.

[193] Id. at 393.

price of some basic legal services.[194] The majority concluded that the state is being paternalistic and finds that information, even if incomplete is better than client ignorance about his or her rights.[195] The dissenting opinions focused on the state's interest in protecting the public from being deceived or mislead by confusing advertisements.[196] Furthermore, the pecuniary interest of attorneys in offering legal services in this fashion may lead some attorneys to short shrift client because the lawyer would not be able to fully advise and diagnose the extent of the problem presented.[197] 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?[198] Some are given more weight than others which shades the analytical conclusions each justice makes. For

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[194] Id. at 364.

[195]

> 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 rest on an underestimation of the public.

Id. at 374 – 375.

[196] There were concerns about what it meant to have routine services and what could be called reasonable fees. Id 392 - 395. Also, concerned was expressed about what exactly is a legal clinic:

> 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. at 394, footnote 7.

The majority on the other hand found that the idea of a clinic was something that the public would have little difficulty understanding:

> We suspect that the public would readily understand the term 'legal clinic' if, indeed, it focused on the term at all to refer to an operation like that of appellants' that is geared to provide standardized and multiple services. In fact, in his deposition the president of the State Bar of Arizona observed that there was a committee of the bar 'exploring ways in which the legal clinic concept can be properly developed.

Id. at 381 – 382.

[197] Id at 394, footnote 5.

[198] Id. at 371, footnote 22.

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.[199] However, Justices Powell and Burger each reference an American Bar Association(ABA) study suggesting that enforcement of unethical advertising would be burdensome.[200] Justice Blackmun's majority opinion did not mention the ABA study.[201] At the heart of what Attorneys Bates and O'Steen were attempting to do was make legal services available to those who could not afford them. Justice Blackmun cited studies which suggested people do not seek counsel because they believe it is unaffordable and they do not know how.[202] Justice Powell saw advertising as diluting professionalism at a time when the ABA and the Federal Legal Services Corporation are striving to make legal services available to those who could not afford them.[203] While not naming specific studies, he noted that in making legal service available, "Study and experimentation continue.[204] Accordingly, one's position on an issue is buttressed by which report or study is used to back up that position.

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[199] Id. at 379.

[200] 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. See generally ABA Special Committee on Evaluation of Disciplinary Enforcement Problems and Recommendations in Disciplinary Enforcement (1970).

Id. at 396.

Justice Burger raised similar concerns citing the same ABA Study:

> 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.

Id. at 387.

[201] Id. at 379.

[202] Id. at 370 -371.

[203] Id. at 397 – 398.

[204] Id at 399.

And finally, the constitutional doctrines and the factual presentments are tinged by the philosophical priorities that are brought to the analysis. Cite Kraus article. 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 should be afforded to the state and still protect the free speech principles?[205] 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. What is the nature of professionalism and does it preclude an acknowledgement that lawyers are in practice to not only serve the public but also to earn a living and pay the cost of operating an office.[206] Traditionally, the Bar has viewed advertising as undignified for an honored profession and has been philosophically opposed to being viewed as participants in "[t]he hustle of the marketplace."[207] 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."[208] Hence there is no philosophical reason for considering the advertising ban as preserving an ethical tradition.[209] 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

[205] See NAACP v. Button, supra., note .
[206] Id. at 368.
[207] Id.
[208] Id. at 371.
[209] Justices Powell and Rehnquist disagree because….

informing the public about how the legal system works and where help can be found to handle legal problems.[210] The majority would prefer a perspective that lawyers are fully capable of truthfully advertising about the availability of legal services.[211] In the final analysis, it is the majority opinion which 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.[212]

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 three themes resonate in the dissenting opinions of Chief Justice Burger and Justice Powell, and Rehnquist and are evident in Justice O'Connor's opinions as discussed below. As Justice Powell suggested, this case left unresolved many questions

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[210] Id. a 388.
[211] Id. at 376 – 377.
[212] Id. at 379.

and re-set in motion the continuing debate about the business side of practicing law.[213] Once the advertising door was opened, the limits would be determined by how the votes are cast in the Supreme Court.

IV. **Additional Frameworks for Assessing Legal Advertising and Solicitation Before Justice O'Connor's Tenure**

When Justice O'Connor comes to the Court, she will wrestle 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 guaranteeing free speech in light of government efforts to regulate non-political speech. *Virginia Pharmacy*, *Bates*, and other cases establish the principle of commercial free speech, but leaves to the cases discussed in this section to articulate a workable analytic 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.

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[213] Justice Powell went to the heart of the problem of regulating the business side of practice and the challenges facing a self-regulating profession:

> 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.

Bates, at 402 – 403.

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 & Electric Corporation v. Public Service Commission of New York*.[214] In brief, that 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.[215] 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.[216] 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:

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two

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[214] 447 U.S. 557 (1980).

[215] Id. at 583.

[216] Justice Powell expressed the threshold inquiry as follows:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. [citation omitted] 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, [citations omitted] or commercial speech related to illegal activity.

Id. at 563-4.

criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest involved could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[217]

While Justice Powell calls this a four-part test,[218] 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.[219] This approach was certainly evident in Justice O'Connor's majority opinion in *Florida Bar v. Went For* it discussed below.[220]

Again, the threshold questions on deception and legality and the three part test can be applied in different ways depending on how expansive or narrow one wishes to read the First Amendment. *Central Hudson*, with separate concurrences by Justices Brennan, Blackmun and Stevens, amplifies the difficulty in obtaining consensus on the parameters of commercial speech. Justice Brennan in his concurrence thought that the

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[217] Id. at 564.
[218] Id. at 565.
[219] Id at 566.
[220] Justice O'Connor synthesized the *Central Hudson* (as it had evolved) test as follows:
Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. [citation omitted]. 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 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.'"
Florida Bar v. Went For It, supra. note , at 623 – 624.

ban on advertising by the Public Service Commission may cover more than just commercial speech but include potentially political speech protected by the First Amendment.[221] Accordingly, he endorsed the reasoning articulated in the concurring opinions of Justices Blackmun and Stevens.[222] Justice Blackmun found that even though the advertisements by the utility had some aspects of commercial speech, the information presented on energy conservation contained actual ideas to which the state was opposed. He stated: "…it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice."[223] Justice Blackmun was adamant that commercial speech was like other protected First Amendment speech when the state sought to influence the public's conduct by suppressing ideas.[224] Justice Stevens, in a concurring opinion joined by Justice Brennan, also found the ban to be one that prohibited the expression of ideas (the consumption of electricity) to which the state was opposed, since the state sought to encourage energy conservation.[225] Justice Stevens was also troubled by the Court's attempt to define commercial speech so broadly that it would encircle

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[221] Id. at 572 – 573.

[222] CH Id.

[223] CH Id. at 575.

[224] Justice Blackmun reviewed prior First Amendment precedent and concluded the Central Hudson majority opinion did not go far enough in articulating the core values of the First Amendment:

> It appears that the Court would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes. In my view, our cases do not support this type of suppression.

Id. at 579.

[225] Justice Stevens noted:

> It prohibits all advocacy of the immediate or future use of electricity. It curtails expression by the informed and interested groups of their point of view on questions relating to the production and consumption of electricity- questions frequently discussed and debated by our political leaders.

Id. at 580 – 581.

otherwise protected free speech as this case demonstrates in his opinion.[226]

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.[227] He had previously expressed this philosophical tension in Bates:

> 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 services. 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.[228]

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.[229] He reasoned that the type of restriction at issue was well within the power of the state and that the

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[226] Justice Stevens did not buy the state's rational about energy conservation being dampened by the promotional material presented by the appellants and found that if the state's interest was important enough it should have issued direct regulation on energy usage:

> The justification for the regulation is nothing more that the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communications may persuade some citizens to consume more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech.

Id. at 592.

[227] Id. at 584 – 585.

[228] Id. at 404. Justice Rehnquist would find it difficult to apply Central Hudson in an expansive manner considering his view in Bates.

[229] Central Hudson, at 598.

judiciary had no role in substituting its own opinion.[230] 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.[231] Nevertheless, *Central Hudson* continues to be the measuring stick for analyzing commercial speech cases in spite of the discordant opinions of the justices.[232]

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*[233] in 1978. In that case the Court considered whether an attorney who solicited legal business by going directly to a potential client to persuade that person to retain the attorney's services.[234] Here the attorney sought to represent two women who were injured in an automobile accident.[235] He first sought them out in the hospital where they were recovering from their injuries and later visited their homes to obtain their signatures on a retainer agreement.[236] To make matters worse, he secretly

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[230] Id. at 589.
[231] Id. at 594 – 595.
[232] See generally, Advertising and Commercial Speech: A First Amendment Guide, 2nd ed., Brody and Johnson, at 3-26 -3-30 (2005).
[233] 436 U. S. 447 (1978)
[234] Id. at 449 – 450.
[235] Ohralik learned of the case by chance:

> On February 13, 1974,, while picking up his mail at the Montville Post Office, appellant learned 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. a 449.
[236] The Court noted the intrusiveness and pressure that Ohralik placed on the tow women:

carried a tape recorder to be able to prove that they did indeed retain him.[237] When the women decided not to utilize his legal service he attempted to use the recording to demonstrate that the women had entered into a binding contract with him.[238] They filed ethics complaints against him alleging improper solicitation in violation of the code of Professional Responsibility and he was eventually sanctioned by the Ohio State Bar.[239] In his appeal to the Supreme Court of Ohio, he claimed that he had a First Amendment right to speak to potential clients.[240] That court held that this speech was not constitutionally protected[241] and he appealed to the United States Supreme Court.

The United States Supreme Court found 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.[242] Justice Powell, writing for the Court, found, "In such a situation, which is inherently conducive to overreaching and other

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> 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. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used information he had obtained from the McClintocks, and the fact of his agreement with Carol, to induce Wanda to say "O.K." in response to his solicitation.

Id. at 467.

[237] Id. at 450, 451.

[238] Id. at 467.

[239] Id. at 452 – 454. See also Ohio State Bar Ass'n v. Ohralik, 357 N. E. 2d 1097 (1976).

[240] Id. at 1098.

[241] Id at 1099.

[242] Ohralik, supra, note --, at 456 -457. The Court noted the substantial interests the state has in protecting the public from unscrupulous lawyers:

> We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate interests and indeed "compelling" interests in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." Brief for Appellant 25. We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

Id. at 462.

forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed."[243] As was the case here, the lawyer attempted to push these women into a client-lawyer relationship at a most vulnerable time (while they were recovering from their injuries) and since he did not have a prior relationship with them and they were not close family,[244] the disciplinary rule served an important state interest in protecting the public from such intrusive and overbearing attempts to pursue a pecuniary objective.[245]

When the Court decided the *Ohralik* case, it also decided the case of *In re Primus*,[246] a case involving a lawyer for the American Civil Liberties Union, which was pursuing a class action suit involving women on welfare who were arguably sterilized involuntarily.[247] Edna Smith Primus, the attorney in that case, had sent a solicitation letter with a follow-up to women who may have been sterilized by the state.[248] Relying on its earlier case of *N.A.A.C.P 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.[249] Further, in this

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243 Orhalik, supra. note __, at 464.

244 Id. at 453, citing the Ohio Code of Professional Responsibility DR 2-103A and DR 2-104(A) which prohibits in-person solicitation to persons who are not in close relationship with the attorney. Id. at 453, footnotes 9 and 10.

245 Id. at 468.

246 436 U.S. 412 (1978).

247 Id. at 414 - 418

248 The letter dated August 30, 1973, in part, said:

> You will probable 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 417, footnote 6.

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> 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

situation where political rights are being vindicated, the fact that there was a possibility of obtaining attorneys' fees did not elevate the state's concern about commercialization's negative impact on the profession.[250]

In a dissent, Justice Rehnquist saw this as a contest between good guys and bad guys.[251] An attorney is a good guy, like Edna Primus, with First Amendment Protection to solicit potential clients if pursuing the vindication of political rights.[252] One is a bad guy who is subject to discipline and possessed of little first Amendment speech protection if directly soliciting clients for purely pecuniary purposes, as Ohralik did.[253] Justice Rehnquist could not see how the Court could justify the distinction between the two situations where lawyers are actively soliciting clients.[254] He would not stretch the First and Fourteenth Amendment in this manner absent a more principled method of distinguishing similar conduct, finding, "I believe that both South Carolina and Ohio acted within the limits prescribed by those Amendments, and I would therefore affirm the judgments in each case."[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 potential clients who are in a vulnerable position.[256] In essence, this was a factual matter that the state could well determine for itself. And

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> vehicle for effective political expression and association, as well as a means of communicating useful information to the public.

Id. at 431.

[250] Id. a 436 – 437.
[251] Id. at 440.
[252] Id.
[253] Id.
[254] Id. at 443 – 444.
[255] Id. at 440 – 441.
[256] Id. at 445.

finally, this position is shaped in part by his philosophical perspective that the Court is not in the position to make this call for the state even when political rights are at stake.[257]

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 would be considered permissible commercial speech. At this end of the spectrum, the attorney must not overreach in a manner that diminishes the listener's will to avoid the speech or the potential client is in a vulnerable situation, as in *Ohralik*. Moreover, the cases suggest that there is an important state interest in protecting the public, and hence, it still has an important role to play in regulating the commercial speech conduct of attorneys. What is still yet to be decided is the role the state could or should play in ensuring a high level of professionalism within the practice of law. This is the challenge that Justice O'Connor will address when she becomes 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. She had been a judge on the Arizona Appellate Court from 1979, prior to which she was a judge on the Maricopa County Superior Court

[257] Id. at 445 – 446.

beginning in 1974. Obviously, she was certain to have been 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. In her 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 her first term, the Court heard the case of *In re RMJ*.[258] That case involved the application of Disciplinary Rule 2-101[259] that limited the amount, the content and the form of information a lawyer could use in an advertisement.[260] For example, the most restrictive aspect placed limits on the way a lawyer could describe the areas of practice in which the lawyer engaged.[261] There were also limits on how a lawyer could identify him or herself as specializing in a specific area of law.[262] The attorney in

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[258] 455 U.S. 192 (1982)

[259] Disciplinary Rule 2-101 was instituted by the Supreme Court of Missouri after the United States Supreme Court's decision in Bates v. State Bar of Arizona to permit lawyer advertising. As Justice Powell noted:

> As with many of the States, until the decision in Bates, Missouri placed an absolute prohibition on advertising by lawyers. After the court's invalidation of us such a prohibition in Bates, the Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri revised that court's Rule 4 regulating lawyer advertising. The Committee sought to "strike a midpoint between prohibition and unlimited advertising," and the revised regulation of advertising, adopted with slight modification by the State Supreme Court, represented a compromise. Lawyer advertising is permitted, but it is restricted to certain categories of information, and in some instances, to certain language.

Id. at 193

[260] Id. at, 193 – 194.

[261] Id. at, 194 – 195.

[262]

In re RMJ, listed 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 & law use.' 'communication,' 'pension & profit sharing plans'."[263] Moreover, the attorney did not include a disclaimer indicating that any of the "… areas of practice does not indicate any certification of expertise therein."[264]

Justice Powell, writing the opinion of the Court,[265] applied the reasoning of the *Bates* and the *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 were more informative than the narrow list provided by

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> 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 tha 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.

Id. at 195

[263] Id. at 197.

[264] Id. at 195.

[265] There were no other opinions, concurring or dissenting, authored in this case.

[266] Id. at 203.

[267] 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 found:

> Mailings and handbill 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. at 206.

the state.[268] Nevertheless, Justice Powell's opinion recognized that the state, when it articulates a substantial interest, still has the authority to regulate lawyer speech as long as "…the interference with speech must be in proportion to the interest served."[269] Of course, this is the standard 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 who may have been injured by using an intrauterine 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 used it and 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

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[268] Id. at 205.
[269] Id. at 203.
[270] Id., at footnote 15.
[271] Supra., note .
[272] The attorney was also found to have violated Ohio disciplinary Rule 2-1-1(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. Id. at 631.
[273] Id. at 630.
[274]

> The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits in behalf of 106 of the women who contacted him as a result of the advertisement.

Id. at 631.

persons with the intent of obtaining employment.[275] Because the advertisement was not misleading or deceptive (the threshold question), the Court found that the advertisement was protected by the First Amendment and potential litigants had a right to receive such information.[276] Although the Court did find that the State could require more disclosure about how contingency fee arrangements actually worked.[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 for her 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] She said, "In my view, the use of unsolicited legal advice to entice clients poses

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[275] Id. at 632 – 633.

[276] The Justice White held that the state's prophylactic rule on all such advertising which truthfully identifies the rights of potential litigants was too broad and did not demonstrate a sufficient state interest:

> The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising—indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut out from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising. 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 advice regarding the legal rights of potential clients.

Id. at 646 – 647.

[277] Id. at 650 – 653.

[278] Justice O'Connor saw the case law on professional conduct drifting toward ordinary commercial regulation noting:

> In my view, state 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 professional conduct, and the distinction between professional services and standardized consumer products.

Id. at 676.

[279] Id. at 673 – 674.

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 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 of the personal financial interest of the attorney, "… 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, she 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 cannon, "Lawyers are professionals, and as such they have a greater obligation."[284] Finally, she reached this conclusion based on her philosophical belief that lawyers have a higher duty to society which dictates that they not accept employment after giving unsolicited legal advice.[285] Furthermore, since the state

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280 Id. at 673.
281 Id. at 678.
282 Id.
283 Id. at 676.
284 Id.
285 Justice O'Connor intones the following ethical understanding of a lawyer's professionalism:

> 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, see Florida Bar v. Schreiber, 420 So,2d 599 (Fla. 1982) (opinion of Ehrlich, J.) substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards that apply to the public at large.

has a substantial interest in protecting the public from undue influence and overreaching by self-interested lawyers, she would defer to the state for making this regulatory call even if the information conveyed in the advertisement is truthful.[286] Additionally, the state had a substantial interest in calling for the highest professional conduct of its lawyers and thus the Court should defer to the state in determining what that standard of conduct should be.[287]

Justice O'Connor was next able to give a more detailed analysis of the Court's commercial free speech doctrine as applied to legal advertising and solicitation in *Shapero v. Kentucky Bar Association*, decided in 1988.[288] That case involved a lawyer who sought legal work by sending letters to potential clients who had been identified as having their home mortgages in foreclosure.[289] He had sought prior approval from the Kentucky Attorneys Advertising Commission (hereinafter Commission) which had been 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 definitely protected by the First

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Id. at 677.

[286] Id. at 677.

[287] In contemplating the state's interest in establishing a higher standard of professional a conduct that reflects the idea of self-sacrifice, Justice O'Connor found:

> 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. at 678.

[288] 486 U.S. 466 (1988).

[289] Id. at 469.

[290] Id. , footnote 1.

Amendment.[291] As Justice Brennan stated, "Lawyer advertising is in the category of constitutionally protected commercial speech."[292] There was minimal potential of harm to clients[293] and the state had much less restrictive methods for insuring that the lawyers sending such targeted mailing would do so without being misleading.[294] One suggested alternative to a direct ban was to have the envelope "…bear a label identifying it as an advertisement."[295]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, gave a full throated dissent in opposition to the ever expanding world of legal advertising and solicitation. She strongly criticized the Court's use of the *Zauderer* case as the basis for deciding the present case:

> That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. 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

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[291] Id. at 479 – 480.

[292] Id. at 472.

[293] In commenting on the lack of a substantial government interest, Justice Brennan noted:

> 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, (citing Zauderer). 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.(citing Zauder).

Id at 475.

[294] Id. at 476 – 477.

[295] Id. at 477. See ABA Professional Rules of Professional Conduct Model Rule 7.3(c) which adopts this suggestion.

be reexamined.[296]

In presenting this critique, she first reminded her colleagues that she dissented in *Zauderer* because she would have preferred 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. One, she 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] Two, 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 First Amendment, 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 by which a court could review whether a government

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[296] Id. at 480.
[297] Id. at 481.
[298] Id. at 481.
[299] Id.
[300] Justice O'Connor forthrightly states her opinion that the commercial free speech doctrine has been expanded too broadly:

> The latest developments, in *Zauderer* and now today, 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. at 484.
[301] Id. at 483 – 484.

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] I take her to mean that such letters have a psychological impact that would promote a person to respond to the inquiry because of the formal nature of the letter. 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 report may lend itself to improper influence and overreaching on the lawyer's part, with

[302] Id. at 485.
[303] Id. at 484.
[304] Id.
[305] Id. 481 – 482.
[306] Id. at 482.

the client obtaining a false sense of trust in the lawyer.[307] And third, because the sender is a lawyer whom we generally hold in 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] So 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 find that the state has 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

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[307] Justice O'Connor notes:

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

Id., at 481 – 482.

[308] Id.

[309] Id.

[310] In distinguishing between direct-mail advertising and in-person solicitation, Justice O'Connor would still uphold some form of regulation:

> Although I think that the regulation at issue today is even more easily defended that the one at issue in Zauderer, I agree that the rationale for that decision may fairly be extended to cover today's case. Targeted direct-mail advertisements – like general advertisements but unlike the kind of in-person solicitation that may be banned under Ohralik v Ohio State Bar Assn. – can at least theoretically be regulated by the states through pre-screening mechanisms.

Id., at 481 – 482.

[311] Id. at 485.

who use slick advertising techniques.[312] In *Shapero*, Justice O'Connor could find that 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 his or her 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 unselfish loyalty to that client.[315] She is not persuaded by contrary claims that the restrictions on legal advertising inhibit economic efficiency by denying lawyers the ability to transmit price information so that consumers can make an informed decision.[316]

In concluding her dissent, Justice O'Connor turns more deeply to the essence of her stance on professionalism. From a philosophical point of view, she again strongly asserted her disagreement with the finding in *Bates* that commercial speech in the form of legal advertising is protected by the First Amendment because legal services are not in

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[312] Id. at 486.
[313] Id. at 485 – 486.
[314] Id. at 486.
[315] Id. at 489 – 490.
[316] Justice O'Connor observed that economic analysis can work against the desire for maintaining core professional values, noting:

> 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. at 488.

the same class as consumer products.[317] The conflating of legal services with consumer goods and services was a Court dictated policy decision which she found, "In my view, that policy decision 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 she would defer to the States in their proper role of regulating the conduct of lawyers and would apply the principles of *Central Hudson* to uphold the States' interest in doing so.[319]

The role of the states in articulating professional values is an awesome task 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 inevitably wield in a political system like ours.[320]

For her, the idea of special privileges is derived from several realities. First, to become a

[317] Id. at 487.
[318] Id. at 487.
[319] Id.
[320] Id. at 489.

member of the profession, lawyers must be equipped with extensive training and knowledge about how our legal system functions.[321] Second, because of their education, lawyers have a unique, legal skills 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] And third, with that power comes a recognition that lawyers are committed to the ideal of "public service", broadly defined.[323] This proposition she draws 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] Again, this is the ideal that tracks back to the earlier discussion on *State Bar of Arizona v. Arizona Land Title and Trust Company*.[325]

Here one senses that Justice O'Connor is reflecting on the notion that lawyers are public servants committed to upholding the system of justice even when that requires the sacrifice of one's own interests.[326] Accordingly, to achieve the traditional ideal of public service, the profession must be regulated 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."[327] In accepting the immense power conferred upon attorneys, a bargain is struck to place the client's interest above the personal interest of the attorney with the understanding that some attorneys will not always do so. Therefore regulations, such as

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[321] Justice O'Connor reiterates the idea of a traditional profession by identifying lawyers as a "special class." Id. at 489.
[322] Id. at 490.
[323] Id. at 489.
[324] Id., citing R. Pound, The lawyer from Antiquity to Modern Times (1953).
[325] See text supra., accompanying notes .
[326] Id.
[327] Id. at 488 – 489.

those that restrict advertising and solicitation are needed to guard against the momentum of economic self-interest from edging out the ideals of the profession.[328] That task can certainly be left, in part, to the states to develop appropriate models for obtaining those ideals.[329] Moreover, it requires a comprehensive effort to promote professional ideals including law schools, bar associations, and developing an air of expectation for aspiring to the highest ideals.[330]

As more cases involving lawyer free speech rights came before the Court, she continued to be in the minority waiting for the day when the Court would see the error of its ways in the *Bates* case.[331] 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

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[328] Id. at 490

[329] Justice O'Connor recognized that restrictions on advertising and solicitation are but part of the process of establishing appropriate ethical conduct, but nonetheless a necessary part to combat the forces of economic expediency. She noted:

> 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. at 409 – 491.

[330] A broad approach is necessary to keep economic expediency from overtaking the professional ideal of public service as noted by Justice O'Connor:

> 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. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a subclass of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Id. at 490.

[331] Id. at 487.

Advocacy (NBTA).[332] 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.[333] The Court found that the letterhead was not misleading nor would the public be confused that the certification was state sponsored.[334] In a plurality opinion by Justice Stevens[335], the Court found that since the certification designation was neither actually or inherently misleading, the Disciplinary rule violated the attorney's First Amendment rights.[336] He also dismissed the argument that it was potentially misleading because the state had not established a sufficient substantial interest justifying a prophylactic rule.[337]

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[332] 496 U.S. 91(1990).

[333] Under the disciplinary rules, an attorney could list the areas of practice as permitted by In re. RMJ, supra., note , but could not hold himself out as a specialist in an area of law.

> In 1987, the Administrator of the Attorney Registration and Disciplinary Commission of Illinois (Commission) filed a complaint alleging that petitioner, by using 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 are 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. at 97.

[334] Id. at 103 -104.

[335] Justices Brennan, Blackmun, and Kennedy joined the opinion. Justice Marshall, joined by Justice Brennan filed an opinion concurring in the judgment.

[336]

> Petitioner's letterhead was neither actually nor inherently misleading. There is no dispute about the bona fides and the relevance of NBTA certification. The Commission's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment. Disclosure of such information such as that on petitioner's letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys.

Id. at 110 – 111.

[337] Justice Stevens found:

> The commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information. [citations omitted] Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.

Id. at 108.

Justice O'Connor's dissenting opinion was joined by Chief Justice Rehnquist and Justice Scalia. She again asserted that the commercial free speech doctrine was applied far too broadly.[338] Reading the facts of the case, she found that while the designation as a certified civil trial specialist was truthful, nonetheless the designation would be 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 because the "… certification is tantamount to a claim of quality and superiority…"[340] Accordingly, she would defer to states in making a decision about regulating the profession in this matter.[341] Finally, as stated at the beginning of her opinion, the ultimate problem with this case was the impact on developing standards of professionalism:

> 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

[338] Justice O'Connor was not persuaded that inserting disclaimers about what the certification means would cure the misleading nature of placing this information on the letterhead and she found:

> 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. at 126.

[339] Noting that 19 other states had bans on listing specialty certifications, even when true, she 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. at 121.

[340] Id. at 123.

[341] Id. at 121.

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 regulating 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 found the Florida ban on accountant in-person solicitation to not be in the same category as the overreaching and undue influence problems that animated the challenge in *Ohralik*.[347] Moreover, under *Central Hudson*, 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

[342] Id. at 119.
[343] 507 U.S. 761 (1992)
[344] Id. at 763 – 764.
[345] Id. at 770.
[346] The Court applied the Central Hudson test the Florida Board of Accountancy (Board) asserted interest in imposing a ban on certified public accountants (CPA'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 board 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.

Id. at 768.
[347] Id. at 774.

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 found, "though 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 begins her solo dissenting opinion by again declaring that *Bates* and its progeny were wrongly decided.[351] She found these prior cases were grounded on a narrow consideration of the harmful and deceptive nature of professional advertising.[352] Justice O'Connor would rather situate the First

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[348] Id. at 771.

[349] For the Court 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 the Court held:

> 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.
>
> If a prospective client does not decide to meet with Fane, there is no expectation or pressure to retain Fane on the spot; instead, he or she most often exercises caution, checking references and deliberating before deciding to hire a new CPA.

Id. at 775 -776.

[350] Id. at 767.

[351]

> I continue to believe that this Court took a wrong turn with Bates v. State Bar of Arizona, (citations omitted), and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech.

Id. at 778.

[352] Id.

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]

Any analysis must first be placed in the context of 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 getting clients must not diminish the ideal of a 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 best to 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 she parts from the majority's view that in-person solicitation by accountants was significantly different that in-person solicitation by lawyers prohibited

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[353] Id.

[354] In this ideal of serving the public, Justice O'Connor noted:

> In particular, the States may prohibit certain "forms of competition usual in the business world," (citing Goldfarb, supra, note) on the grounds that pure profit seeking degrades the public-spirited culture of the profession and tat 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.

Id.

[355] Id. See also Shapero at 483.

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 naïve potential client."[357]

Second, on the question whether the regulation advances the state's interest (the second prong of *Central Hudson*), Justice O'Connor found that the Court did not do an adequate factual analysis of the reason for the rule.[358] The majority opinion was based its findings on the mere suggestion that as applied to *Edenfield v. Fane* in the business context, it violated the First Amendment.[359] Yet, the Court found that the anti-solicitation rule as designed to promote ethical standards for accountants did not generally violate the First Amendment analysis.[360] And finally, applying the third part of the *Central Hudson* analysis, Justice O'Connor would conclude 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

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[356] Justice O'Connor stated her reasoning as follows:

> 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 (citation omitted) 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. (citation omitted) The result reached by the majority today cannot be squared with Ohralik.

Id. at 779

[357] Id. at 780.

[358] Id.

[359] In reviewing the as-applied 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. at 780. See also Id. at 771 for the majority's discussion of the as-applied approach in the context of business seeking for accountants.

[360] Id. at 767, 771.

persons, especially those with small businesses.[361] Hence, she 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 majority, this summation was the hook that Justice O'Connor would use to "restrain [this] logic within reasonable bounds" as she said in *Shapero*[363] as we shall see in the Section VI.

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

And finally, one should mention three cases involving the role of lawyers in criminal matters. 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 – one concerns speaking publicly about a client's case, and the other concerns a lawyer's ability to speak untruths in behalf of a client. All three of them suggest that attorneys, while providing legal services to clients, also have a larger duty to society and thus are not solely in service to those who pay the fee.

The first case, in which Justice O'Connor wrote the majority opinion, is *Strickland v. Washington*,[364] which set the standard for determining the constitutional requirement of effective assistance of counsel in a criminal matter. In that case, a defendant convicted of murder appealed his death penalty sentence on the grounds of ineffective assistance of

[361] Id. at 781.
[362] Id.
[363] Shapero, supra., note ,at 480.
[364] 466 U.S. 688 (1984).

counsel, claiming that his lawyer failed to properly present evidence that would have mitigated against the death penalty. In evaluating that claim, Justice O'Connor laid out a two part test requiring that, "First, the defendant must show that counsel's performance was deficient…. Second, the defendant must show that the deficient performance prejudiced the defense."[365] For our purposes, the case is important because it demonstrates the crucial role counsel plays in our system of justice, especially when a person's life and liberty are at stake. As to that role of effective assistance of counsel, she proclaimed that, "In giving meaning to the requirement, however, we must take its purpose – to ensure a fair trial—as the guide."[366] Her goal was to ensure "fundamental fairness"[367] in our system of law.[368] In other words, in order for the law to be *majestic*, it must fully protect the rights of the individuals who are called to defend themselves in court, and that it is the lawyer, whose performance in that role, must be worthy of the rights guaranteed by the Sixth Amendment.[369]

The challenge of speaking out for the client or in behalf of the client presents ethical and practical issues for the attorney. First consider the case of a lawyer sanctioned for speaking out in his client's behalf in *Gentile v. State Bar of Nevada*.[370] This is a noncommercial First Amendment case involving the proper method for an attorney to

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[365] Id. at 687.
[366] Id. at 686.
[367] Id. at 696.
[368] Id.
[369] Id. at 688.
[370] 501 U.S. 1030 (1991).

make a public statement about a client undergoing a criminal prosecution.[371] 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 of attorneys will be to present sufficient, truthful information about the matter without unduly prejudicing the fair trial rights of the criminal defendant. The difficulty comes in drafting a disciplinary rule with precise parameters that permit free speech but inhibits overzealous dialogue. The ABA has established the test of forbidding speech that has a material likelihood of causing substantial material prejudice in obtaining a fair trial.[372]

In *Gentile*, the attorney carefully attempted to stay within the framework of the disciplinary rule, but was nonetheless sanctioned.[373] The Supreme Court, in a divided set of opinions favoring the appealing lawyer, found that the problem was the rule itself was too vague as to what was permitted and what was proscribed.[374] Justice O'Connor filed a concurring opinion agreeing with the judgment of the court because the contested rule was too vague.[375] For the purpose of further expounding on her professionalism perspective, it is significant to highlight her thinking about the public service role of the lawyer. She noted that, "Lawyers 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

[371] Id. at 1048 – 1049.
[372] See, Rotunda and Dzienkowski, Professional Responsibility: A Student's Guide, at 876 – 878 (2012 -2013).
[373] Gentile, supra, note , at 1050.
[374] Gentile, at 1048.
[375] Id. at 1082.

constitutionally protected speech."[376] Her framework for analyzing free speech issues is accordingly grounded in the notion that lawyers, as professionals, have duties that reflect their critical role in our system of justice and in preserving the rule of law. Hence, it is proper for state bars to place constraints on the First Amendment rights of lawyers.[377]

And finally, consider the dilemma of the attorney who is asked to speak an untruth in behalf of a client or support the client's desire to do so. In *Nix v. Whitesides*[378] a criminal defendant in a murder trial sought to testify in his own defense

by purposely creating a false defense to the charge. 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 lie would have to be disclosed to the judge.[379] 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.[380]

The United States Supreme Court found that his constitutional rights had not been violated. First, the defendant did not have a right to testify falsely in his own behalf.[381] Second, using the standard set out in *Strickland v. Washington*[382], the lawyer acted within the reasonable range of appropriate conduct for handling the proposed

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[376] Id. at 1081 – 1082.
[377] Id.
[378] 475 U.S. 157 (1985)
[379] Id. at 161.
[380] Id. at 162.
[381] Id. at 173.
[382] Supra., note .

perjury and did not prejudice the defendant right to a fair trial.[383]

Justice O'Connor joined the Court's opinion which was written by Chief Justice Warren Burger, joined by Justices Brennan, Blackmum and Stevens, who each also authored concurring opinions.[384] While they all agreed with the result, the issue raised in the concurring opinions was whether Chief Justice Burger's opinion overstated the doctrinal basis of the ruling. Chief Justice Burger extensively detailed the appropriate ethical standards and methods of reconciling the attorney's various ethical duties in this circumstance. [385] Justice Brennan suggested that while the Court's extensive historical discussion and review of the ethical rules was informative, the Court was beyond its authority in attempting to shape ethical rule for states.[386] Justice Blackmun found that the issue was too complicated to provide a definitive answer as to the appropriate response to client proposed perjury considering challenge of confidentiality, loyalty, duties to the tribunal, and the particularities of each individual case.[387] He would defer to the individual states to establish the appropriate ethical responsibilities of lawyers.[388]

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[383] 475 U.S. 157, at 175.
[384] Id. at 159. Justice Blackmun's opinion was joined by Justices Marshall, Stevens and Brennan.
[385] Id. at 169 – 171.
[386] Id. at 176 – 177. Justice Brennan suggested that the sentiment express was mere dicta, noting:

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 the he will perjure himself is pure discourse without the force of law.

Id. at 177.

[387] Id. at 188 – 189.
[388] Justice Blackmun strongly urged that the Court defer to the States is setting ethical rules:

> I am therefore am troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings. [citation omitted] The States, of course, do have a

Justice Stevens' opinion mirrored this assessment and suggested that the question of lawyer's ethical response to client perjury had not been decided by this case.[389]

The diversity of opinions demonstrates the challenges the justices have in reviewing matters of professionalism. There are varying and competing philosophical perspectives on professionalism and on how much deference to give to the states in setting ethical limits. As we have seen this is the core challenge 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

As noted at the beginning of this article, Justice O'Connor stated in *Shapero* that she hoped the Court would affect a cure to the misapplication of First Amendment principles promulgated in *Bates* and the line of cases that followed.[390] She was motivated by a desire to "…preserve the legal profession as a genuine profession."[391] However, in *Florida Bar v. Went For It*,[392] she took the prior case law as a given and applied the facts to them, thereby validating the Florida regulatory system as being within the previously

> 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.

Id. at 189.

[389] Id. at 190 – 191.

[390] Shapero, at 491, supra., note .

[391] Id. at 491.

[392] Florida Bar v. Went For It, supra., note .

establish parameters of commercial free speech doctrine.[393] She in essence took her dissent in *Edenfield* and applied the reasoning to this case.[394] It also helped that Justice Clarence Thomas joined the court replacing Justice Thurgood Marshall in 1991 and Justice Stephen Breyer replaced Justice Harry Blackmun in 1994 and both joined her majority opinion with Justice Antonin Scalia and Chief Justice William Rehnquist.

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. The targeted solicitation of victims and their families directly after a tragic disaster is a serious breach of their privacy at a time of a uniquely vulnerable moment of unspeakable grief.[395] While the conduct of the lawyers is certainly condemnable, it is the protection of the public from this specific harm that the state is attempting to achieve.[396] Moreover, such solicitation "…the reputation of the legal profession in the eyes of Floridians has suffered commensurately."[397] From this position the state had a compelling interest in enacting the regulation. Second, the regulation advances this interest in protecting the grieving public by shielding potential clients for a short, reasonable time protecting their privacy in a time of grief.[398] And further, it does something about the poor image of

[393] Id. 622 – 624.
[394] See discussion, supra., text accompanying notes ….
[395] Justice O'Connor reviewed the holding in *Shapero* and found that its treatment of privacy was too casual and failed to consider "…the special dangers of overreaching inhering in targeted solicitations. Id. at 629. For her, Florida Bar was trying to protect the privacy of citizens, noting:

> The Bar has argued, and the record reflects, that the personal privacy and tranquility of [Florida's] citizens from the crass commercial intrusion of attorneys upon their personal grief in times of trauma.

Id. at 630.
[396] Id.
[397] Id. at 625.
[398] Id at 630.

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."[399] And finally, the regulation is narrowly drawn by allowing direct mail solicitation after 30 days, thereby affording lawyers the opportunity to convey otherwise protected communications to potential clients.[400] It does not prohibit lawyers from using other mediums, such as media advertising, to announce their availability for providing legal services.[401] And persons who are in the immediate trauma of a disaster have not been disadvantaged by lacking access to legal services if needed to cope with the myriad matters following such a tragedy.[402]

Justice Kennedy applied the three prong test of *Central Hudson* and came to a much different conclusion.[403] For him, the state has not articulated a significant government interest especially in light of the Court's decision in *Shapero* which permitted targeted mailings.[404] The mode of communication, a mailing, did not present a danger as would be the case if the lawyer was soliciting the client in-person, as was prohibited in *Zauderer*.[405] Moreover, Justice Kennedy found that just the possibly of offending

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[399] Id. at 631.

[400] Justice O'Connor's application of this prong is derived from a test that requires only a reasonable fit to promote the state's interest. Id. at 632. She finds this regulation meets that criterion:

> 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.

Id. at 633.

[401] Id. at 633 – 634.

[402] Justice O'Connor maintains "...that Floridians have little difficulty finding a lawyer when they need one." Id. at 634.

[403] Id. at 636.

[404] Id. at 638.

[405] Kennedy dismissed the privacy concerns as one that had already been resolved in previous cases:

someone with the mailing was not sufficient reason place a ban on this expression of information.[406] And finally, as to the state interest in protecting the profession's reputation, giving information on how the legal system may have benefits to the public as he notes:

> 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.[407]

As to the second prong of the analysis, there is no substantial government interest to advance and little credible evidence that actual harm is occurring.[408] Hence, as to the third prong, Justice Kennedy concludes, "…the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit."[409] The regulation is overbroad and may cover potential clients who might wish to learn of the availability of a

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

Id. at 637.

[406] Id. at 638

[407] Id. a 639.

[408] Justice Kennedy affirmatively states that:

> 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.

Id. at 641. He also finds no evidence that damage is being done to the Bar. Id.

[409] Id. at 641.

lawyer's services.[410] In that situation, a client may be delayed in receiving information necessary to protecting important legal rights.[411] The bottom line for Justice Kennedy is that direct-mail solicitation works and clients should be given every avenue to receive information. He concludes:

> The 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 and attorney.[412]

As these two approaches suggest, this case carries with it the same tensions and issues involved in the *Bates* case that were discussed earlier in this article in Section III above.[413] Justice O'Connor's opinion and the dissenting opinion of Justice Kennedy, have differing viewpoints on the First Amendment, the factual supports for the regulations, and philosophical differences about the role of the Court is reviewing state regulation of attorney conduct in advertising and solicitation matters specifically, and professionalism in general. These tensions are woven into the analysis that each Justice brings to the consideration of Florida's targeted mailing rules.

Justice O'Connor's First Amendment analysis is premised on the belief that commercial free speech, while important, is not in the same classification as political

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[410] Id. at 642 – 643.
[411] Id. at 643.
[412] Id. at 644.
[413] See discussion, supra. at

speech.[414] She notes, "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."[415] This is consistent with her writings on the First Amendment in *The Majesty of the Law*, discussed earlier.[416] She emphasizes that the Court, in reviewing the regulation, should utilize mid-level scrutiny, a standard of review that is generally used for fundamental rights such as political free speech and expression.[417]

In dissent, Justice Kennedy did not buy into Justice O'Connor's proposed cure to *Bates*. He vehemently disagreed with any retreat from established First Amendment principles.[418] One could read Justice Kennedy to argue that free speech of any kind should be given the level highest protection, declaring:

> 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.[419]

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[414] Id. at 623.
[415] Id.
[416] See discussion supra., text accompanying notes .
[417] Florida Bar v. Went For It, supra., note , at 623 – 624.
[418] Justice Kennedy is clear that this targeted, direct-mail solicitation is protected:

> 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 v. State Bar of Arizona* [citations omitted]. 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.

Id. at 635.
[419] Id. at 637.

For him, this is based on his point of view that the clients have a right to receive this information because it is vital to their efforts to protect their legal rights.[420] Furthermore, the regulation amounts to government censorship, a proposition that the First Amendment does not countenance.[421]

The two justices also read the fact differently and emphasized different studies to base their opinions. Justice O'Connor found the Bar's extensive study sufficient to establish the factual basis of the government's substantial interest in regulating direct-mail solicitation.[422] 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 CPA's direct, targeted mailing, by suggesting that in that instance, the state failed to articulate a cognizable harm.[423] Here the harm to the public was adequately demonstrated. Then she distinguished *Shapero* as a case that did not provide sufficient evidentiary basis for demonstrating the harm that the state had an interest in preventing.[424] In *Florida Bar v. Went For* It, there was significant, unrefuted evidence to not only validate a finding of harm, but also to undergird the regulatory scheme that was

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420 Id. a 643.

421 Noting that the majority opinion goes against prior First Amendment cases, Justice Kennedy stated:

> 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.

Id. at 645.

422 Justice O'Connor reports:

> The Bar submitted a 106-page summary of it 2-year study of lawyer advertising and solicitation to the District Court. That summary contains sate-both statistical and anecdotal-supporting the Bar's contentions that the Florida pubic views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession.

Id. at 626.

423 Id.

424 Id. at 629.

designed to eliminate the harm.[425] 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.[426] 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.[427] He found that the documents submitted by the Bar were inadequate because they were not descriptive enough, was incompetently prepared, and statistically suspect.[428] 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 assessing their legal and financial position in a rational manner."[429]

And finally, they each conclude their opinions with a philosophical statement about the Court's role in setting standards of professionalism. Justice O'Connor reemphasized her believe that while commercial speech has constitutional protection, it does not rise to same level as traditional free speech analysis. This is especially true when it comes to attorneys "…because the standards and conduct of state-licensed

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425 Id. at 628.
426 Id. at 636.
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> 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. at 641.
428 Id. at 640 – 641.
429 Id. at 642.

lawyers have traditionally been subject to extensive regulation by the States....".[430] The heart of the matter is that direct-mail solicitation at a vulnerable time is unprofessional conduct and promotes "...the erosion of confidence that such repeated invasions have engendered."[431] One can only conclude that her vision of a learned profession with unique public obligations should always be upheld to the extent practicable as the discussion in Section I suggests.

Justice Kennedy comes from a different philosophical perspective because he placed the emphasis on the First Amendment rights of both the lawyer to disseminate information and the client to receive that information.[432] Moreover, he did not agree with the proposition that the Court could shape the discourse on professionalism, saying, "...it amounts to mere sermonizing".[433] Protecting and promoting the dignity of the profession was not a judicial role, at least as far as constitutional doctrine is concerned.[434]

In the end, *Florida Bar v. Went For It* brings us back to where the Court began with its analysis in *Bates*, with more questions than answers. 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

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[430] Id. at 635.
[431] Id.
[432] Id. at 636.
[433] Id. at 645.
[434] Justice Kennedy believed that the State cannot improve the profession's image "...by suppressing information about the profession's business aspects. 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. at 645.

they advertise or solicit clients, how should the Court weigh any factual evidence to determine the extent of the 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

There are many ways to consider the historical significance of the Bates and O'Steen case. Culturally, it reflects a major demographic shift as the first Baby Boomers are entering the world of work and claiming their place in it. With them comes the energy of the sixties that witnessed the opening up of society on many levels. (The civil rights movement demanding the full portion of rights guaranteed by the Constitution. Then there was the women's right and gay rights movement each wishing to express their view of a society where equal rights are achieved.) Politically, citizens are expressing themselves with contentious protest movements and more and more lawyers are using the courts to achieve broad social change. The Supreme Court itself is in an era of expanding constitutional doctrines. Explain further.

By the mid-seventies, we are on the verge of an economic revolution. There is a growing recognition that we are in a global economy. Technologically, the world is

entering the personal computing age and the coming of the dot com boom. The Bates and O'Steen Law Clinic hoped to achieve economies of scale through technology. In fact, it is the dawning of the digital age that brings about the entrepreneurship revolution of the eighties.

Entrepreneurship changes how we look at the marketplace. We are looking for new, faster, more efficient methods and models for doing business. The MBA becomes the degree of choice for those entering the world of business. With that development, the business schools are scientifically studying how to achieve better marketing results to reach new and emerging markets.

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. They also represent the big growth of individuals entering law school, many out to change the world. Viewed from the cultural base of its time, this case is the introduction to post-modern practice of law and the tensions that this brings to a profession that wants to maintain its traditions. This is what Collins and Portas identify as the ability to preserve the core of one's traditions and at the same time stimulate progress in order to maintain a competitive position in a world of infinite change.