Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

May 9, 2023

4:00 to 6:00 p.m.

In-person at the Utah Law and Justice Center with Zoom available

Welcome and approval of minutes.	Tab 1	Simón Cantarero, Chair, presiding
Discussion/Action: **Rule 7.1**: Review comments and subcommittee recommendations. • Subcommittee recommends a more focused rule that could survive a constitutional challenge. • Some comments mentioned rules that passed constitutional muster in Florida after review by the US Supreme Court. See highlighted case, attached (*Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620–21, 115 S. Ct. 2371, 2374, 132 L. Ed. 2d 541 (1995)) •	Tab 2	Robert Gibbons (subcommittee chair), Mark Hales, Julie Nelson, Billy Walker, and Gary Sackett.
Discussion/Action: Referral fees and fee sharing (Rules 1.0, 1.5, 5.4(b), 5.8): • Rule 1.0: definitions for legal fees, fee sharing, and referral fees. • Rule 1.5: Added clarifying fee sharing provision (fee sharing provisions in (e) removed in 2020 but not replaced). • Rule 5.4: Clarified comments re fee sharing; added comment r.e. kickback statute. • Rule 5.8: Updated "lawyer" to "legal professional" to capture referral fees between lawyers and LPPs; added comment re kickback statute.	Tab 3	Alyson McAllister (subcommittee chair), Nancy Sylvester, Billy Walker, and Ian Quiel, Beth Kennedy

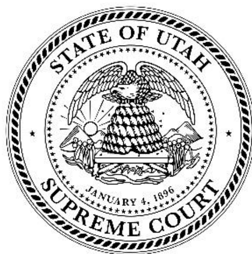
Meetings are in-person at the Utah Law and Justice Center and are generally held on the 1st Tuesday of the month from 4 to 6 p.m.

2023 Meeting Schedule: ●January 3●February 7●March 7●April 11●May 9●June 6●August 1● ●September 5●October 3● November 7●December 5●

http://www.utcourts.gov/committees/RulesPC/

Projects in the pipeline: • **Rule 1.1:** Added well-being comment; submitted to Supreme Court. • **Rule 8.4(c):** The universe of investigative activities attorneys may undertake. Resubmitted rule to the Supreme Court for comment recirculation. • **Rule 1.2** (cannabis advising): Submitted research to Supreme Court on other states' approaches to lawyers and cannabis. • **Rules 8.4 and 14-301**: Assigned to Judicial Council's Fairness and Accountability Committee (historical memo attached to August materials).		--

Tab 1



Utah Supreme Court's
Advisory Committee on the Rules of Professional Conduct

[Draft] Meeting Minutes
April 11, 2023

Via Zoom
16:00 Mountain Time

Simon Cantarero, presiding.

Attendees:
Simon Cantarero, Chair
Cory Talbot, Vice Chair
Billy Walker
Hon. James Gardner
Joni J. Jones
Jurhee Rice
Mark Hales
Gary Sackett
Ian Quiel
Hon. Mike Edwards
Hon. Amy Oliver
Robert Gibbons
Adam Bondy
Alyson McAllister
Austin Riter
Christine Greenwood (ex officio)

Staff:
Nancy Sylvester
Nick Stiles

Guests:
Michael Cipriano

Excused:
Phillip Lowry
Dane Thorley
Hon. M. Alex Natt, Recording Secretary
Hon. Trent Nelson
Julie J. Nelson

1. **Welcome and approval of the March 2023 meeting minutes (Chairman Cantarero)**

   Chairman Cantarero recognized the existence of a quorum and called the meeting to order at 4:00 pm.

   Chairman Cantarero asked the committee if everyone had an opportunity to review the minutes from the March meeting. Billy Walker moved to approve the minutes; Adam Bondy seconded. The Motion passed by acclamation.

2. **Rule 1.1 Competence and Well-being (Judge James Gardner, Judge Amy Oliver, and Nancy Sylvester)**

   The Committee discussed the proposal to add ABA draft Comment 9 and reviewed it against the rule references (1.16, 5.1, 5.2, 5.3, 8.3, and 14-301). The Committee discussed that a comment would remind lawyers to take care of themselves as part of their competency, rather than force them to do it.

   Following discussion, Judge Gardner moved to recommend the comment to the Supreme Court for publication. Billy Walker seconded. The Motion passed by acclamation.

3. **Adjournment.**
   The meeting was adjourned at 4:40 p.m. The next meeting will be held on May 9, 2023.

Tab 2

115 S.Ct. 2371
Supreme Court of the United States

FLORIDA BAR, Petitioner v. WENT FOR IT, INC., and John T. Blakely.

No. 94–226.

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Argued Jan. 11, 1995.

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Decided June 21, 1995.

Synopsis

Lawyer and lawyer referral service brought action challenging constitutional validity of Florida Bar rules which prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident. The United States District Court for the Middle District of Florida, Elizabeth A. Kovachevich, J., 808 F.Supp. 1543, held that 30–day ban on such advertising violated First Amendment. Florida Bar appealed. The Eleventh Circuit Court of Appeals, Black, Circuit Judge, 21 F.3d 1038, affirmed. The Supreme Court granted certiorari, 115 S.Ct. 42, and the Court, Justice O'Connor, held that restriction withstood First Amendment scrutiny under three-part *Central Hudson* test for restrictions on commercial speech.

Reversed.

Justice Kennedy, filed dissenting opinion in which Justice Stevens, Justice Souter, and Justice Ginsburg, joined.

**2373 *Syllabus*[*]

*618 Respondent lawyer referral service and an individual Florida attorney filed this action for declaratory and injunctive relief challenging, as violative of the First and Fourteenth Amendments, Florida Bar (Bar) Rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The District Court entered summary judgment for the plaintiffs, relying on *Bates v. State Bar of Ariz.,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, and subsequent cases. The Eleventh Circuit affirmed on similar grounds.

Held: In the circumstances presented here, the Bar Rules do not violate the First and Fourteenth Amendments. Pp. 2375–2381.

(a) *Bates* and its progeny establish that lawyer advertising is commercial speech and, as such, is accorded only a limited measure of First Amendment protection. Under the “intermediate” scrutiny framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is “ ‘narrowly drawn,’ ” *id.,* at 564–565, 100 S.Ct. at 2350–2351. Pp. 2375–2376.

(b) The Bar's 30–day ban on targeted direct-mail solicitation withstands *Central Hudson* scrutiny. First, the Bar has substantial interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. Second, the fact that the harms targeted by the ban are quite real is demonstrated by a Bar study, effectively unrebutted by respondents below, that contains extensive statistical and anecdotal data suggesting that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. *Edenfield v. Fane,* 507 U.S. 761, 771–772, 113 S.Ct. 1792, 1800–1801, 123 L.Ed.2d 543; *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466, 475–476, 108 S.Ct. 1916, 1922–1923, 100 L.Ed.2d 475; and *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 72, 103 S.Ct. 2875, 2882, 77 L.Ed.2d 469, distinguished. Third, the ban's scope is reasonably well *619 tailored to its stated objectives. Moreover, its duration is limited to a brief 30–day period, and there are many other ways for injured Floridians to learn about the availability of legal representation during that time. Pp. 2376–2381.

21 F.3d 1038 (CA11 1994), reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, THOMAS, and BREYER,

JJ., joined. KENNEDY, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 2381.

Attorneys and Law Firms

Barry Scott Richard, Tallahassee, FL, for petitioner.

**2374 Bruce S. Rogow, Fort Lauderdale, FL, for respondents.

Opinion

*620 Justice O'CONNOR delivered the opinion of the Court.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such Rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

I

In 1989, the Florida Bar (Bar) completed a 2–year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues,* 571 So.2d 451 (Fla.1990). Two of these amendments are at issue in this case. Rule 4–7.4(b)(1) provides that "[a] lawyer shall not send, or knowingly permit to be sent, ... a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." Rule 4–7.8(a) states that "[a] lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer." Together, these Rules create a brief 30–day blackout period after an accident during which lawyers may not, directly or *621 indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4–7.4(b)(1) and 4–7.8(a) as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc., represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit, *Florida Bar v. McHenry,* 605 So.2d 459 (Fla.1992). Another Florida lawyer, John T. Blakely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Bar had substantial government interests, predicated on a concern for professionalism, both in protecting the personal privacy and tranquility of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Bar's extensive study, the Magistrate Judge found that the Rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Bar's motion for summary judgment on the ground that the Rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, 808 F.Supp. 1543 (MD Fla.1992), relying on **2375 *Bates v. State Bar of Ariz.,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), and subsequent *622 cases. The Eleventh Circuit affirmed on similar grounds, *McHenry v. Florida Bar,* 21 F.3d 1038 (1994). The panel noted, in its conclusion, that it was "disturbed that *Bates* and its progeny require the decision" that it reached, 21 F.3d, at 1045. We granted certiorari, 512 U.S. 1289, 115 S.Ct. 42, 129 L.Ed.2d 937 (1994), and now reverse.

II

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A

Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage. Until the mid–1970's, we adhered to the broad rule laid out in *Valentine v. Chrestensen,* 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942), that, while the First Amendment guards against government restriction of speech in most contexts, "the Constitution imposes no such restraint on government as respects purely commercial advertising." In 1976, the Court changed course. In *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, we invalidated a state statute barring pharmacists from advertising prescription drug prices. At issue was speech that involved the idea that " 'I will sell you the X prescription drug at the Y price.' " *Id.,* at 761, 96 S.Ct., at 1825. Striking the ban as unconstitutional, we rejected the argument that such speech "is so removed from 'any exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.,* at 762, 96 S.Ct., at 1826 (citations omitted).

In *Virginia Bd.,* the Court limited its holding to advertising by pharmacists, noting that "[p]hysicians and lawyers ... do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.,* at 773, n. 25, 96 S.Ct., at 1831 n. 25 (emphasis in original). One year later, however, the Court applied the *Virginia Bd.* principles to invalidate a state rule prohibiting lawyers from advertising in newspapers *623 and other media. In *Bates v. State Bar of Arizona, supra,* the Court struck a ban on price advertising for what it deemed "routine" legal services: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like."433 U.S., at 372, 97 S.Ct., at 2703. Expressing confidence that legal advertising would only be practicable for such simple, standardized services, the Court rejected the State's proffered justifications for regulation.

Nearly two decades of cases have built upon the foundation laid by *Bates.* It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. See, *e.g., Shapero v. Kentucky Bar Assn.,* 486 U.S. 466, 472, 108 S.Ct. 1916, 1921, 100 L.Ed.2d 475 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 637, 105 S.Ct. 2265, 2274, 85 L.Ed.2d 652 (1985); *In re R.M.J.,* 455 U.S. 191, 199, 102 S.Ct. 929, 935, 71 L.Ed.2d 64 (1982). 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. " '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 477, 109 S.Ct. 3028, 3033, 106 L.Ed.2d 388 (1989), quoting *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). We have observed that " '[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.' " 492 U.S., at 481, 109 S.Ct., at 3035, quoting *Ohralik, supra,* 436 U.S., at 456, 98 S.Ct., at 1918.

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them **2376 under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Under *Central Hudson,* the government may *624 freely regulate commercial speech that concerns unlawful activity or is misleading. *Id.,* at 563–564, 100 S.Ct., at 2350. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be " 'narrowly drawn.' " *Id.,* at 564–565, 100 S.Ct., at 2350–51.

B

"Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions," *Edenfield v. Fane,* 507 U.S. 761, 768, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993). The Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. See Brief for Petitioner 8, 25–27; 21 F.3d, at 1043–1044.[1] This interest obviously factors into the

Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affec[t] the administration of justice." *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues,* 571 So.2d, at 455; see also Brief for Petitioner 7, 14, 24; 21 F.3d, at 1043 (describing Bar's effort "to preserve the integrity of the legal profession"). *625 Because direct-mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately. See Pet. for Cert. 14–15; Brief for Petitioner 28–29. The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, " 'is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.' " Brief for Petitioner 28, quoting *In re Anis,* 126 N.J. 448, 458, 599 A.2d 1265, 1270 (1992).

We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and ... as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975); see also *Ohralik, supra,* 436 U.S., at 460, 98 S.Ct., at 1920–1921; *Cohen v. Hurley,* 366 U.S. 117, 124, 81 S.Ct. 954, 958–959, 6 L.Ed.2d 156 (1961). Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." See *Edenfield, supra,* 507 U.S., at 769, 113 S.Ct., at 1799. In other contexts, we have consistently recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown,* 447 U.S. 455, 471, 100 S.Ct. 2286, 2295–2296, 65 L.Ed.2d 263 (1980). Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which **2377 the State may legislate to protect, is an ability to avoid intrusions." *Frisby v. Schultz,* 487 U.S. 474, 484–485, 108 S.Ct. 2495, 2502–2503, 101 L.Ed.2d 420 (1988).

Under *Central Hudson*'s second prong, the State must demonstrate that the challenged regulation "advances the Government's interest 'in a direct and material way.' " *626 *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995), quoting *Edenfield, supra,* 507 U.S., at 767, 113 S.Ct., at 1798. That burden, we have explained, " 'is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " 514 U.S., at 487, 115 S.Ct., at 1592, quoting *Edenfield, supra,* 507 U.S., at 770–771, 113 S.Ct., at 1800. In *Edenfield,* the Court invalidated a Florida ban on in-person solicitation by certified public accountants (CPA's). We observed that the State Board of Accountancy had "present[ed] no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." 507 U.S., at 771, 113 S.Ct., at 1800. Moreover, "[t]he record [did] not disclose any anecdotal evidence, either from Florida or another State, that validate[d] the Board's suppositions."*Ibid.* In fact, we concluded that the only evidence in the record tended to "contradic[t], rather than strengthe [n], the Board's submissions." *Id.,* at 772, 113 S.Ct., at 1801. Finding nothing in the record to substantiate the State's allegations of harm, we invalidated the regulation.

The direct-mail solicitation regulation before us does not suffer from such infirmities. The Bar submitted a 106–page summary of its 2–year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. Summary of the Record in No. 74,987 (Fla.) on Petition to Amend the Rules Regulating Lawyer Advertising (hereinafter Summary of Record), App. H, p. 2. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about *627 those attorneys who use direct mail advertising." Magid Associates, Attitudes & Opinions Toward Direct Mail Advertising by Attorneys (Dec. 1987), Summary of Record, App. C(4), p. 6. Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. *Id.,* at 7. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." *Ibid.* Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail. *Ibid.*

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The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" (The Miami Herald, Sept. 29, 1987) and "Solicitors Out of Bounds" (St. Petersburg Times, Oct. 26, 1987), newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. See Summary of Record, App. B, pp. 1–8 (excerpts from articles); see also Peltz, Legal Advertising—Opening Pandora's Box, 19 Stetson L.Rev. 43, 116 (1989) (listing Florida editorials critical of direct-mail solicitation of accident victims in 1987, several of which are referenced in the record). The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was " 'appalled and angered by the brazen attempt' " of a law firm to solicit him by letter shortly after he was **2378 injured and his fiancee was killed in an auto accident. Summary of Record, App. I(1), p. 2. Another found it " 'despicable and inexcusable' " that a Pensacola lawyer wrote to his mother three days after his father's funeral. *Ibid.* Another described how she was " 'astounded' " and then " 'very angry' " when *628 she received a solicitation following a minor accident. *Id.,* at 3. Still another described as " 'beyond comprehension' " a letter his nephew's family received the day of the nephew's funeral. *Ibid.* One citizen wrote, " 'I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste.... I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind.' " *Ibid.*

In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the Rule lacked "any factual basis," Plaintiffs' Motion for Summary Judgment and Supplementary Memorandum of Law in No. 92–370–Civ. (MD Fla.), p. 5—we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. In dissent, Justice KENNEDY complains that we have before us few indications of the sample size or selection procedures employed by Magid Associates (a nationally renowned consulting firm) and no copies of the actual surveys employed. See *post,* at 2384. As stated, we believe the evidence adduced by the Bar is sufficient to meet the standard elaborated in *Edenfield v. Fane,* 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50–51, 106 S.Ct. 925, 930–931, 89 L.Ed.2d 29 (1986); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584–585, 111 S.Ct. 2456, 2469–2470, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," *Burson v. Freeman,* 504 U.S. 191, 211, 112 S.Ct. 1846, 1858, 119 L.Ed.2d 5 (1992). Nothing in *Edenfield,* a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more. After scouring the record, we are satisfied that the ban on direct-mail *629 solicitation in the immediate aftermath of accidents, unlike the rule at issue in *Edenfield,* targets a concrete, nonspeculative harm.

In reaching a contrary conclusion, the Court of Appeals determined that this case was governed squarely by *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). Making no mention of the Bar's study, the court concluded that " 'a targeted letter [does not] invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.' " 21 F.3d, at 1044, quoting *Shapero, supra,* 486 U.S., at 476, 108 S.Ct., at 1923. In many cases, the Court of Appeals explained, "this invasion of privacy will involve no more than reading the newspaper." 21 F.3d, at 1044.

While some of *Shapero* 's language might be read to support the Court of Appeals' interpretation, *Shapero* differs in several fundamental respects from the case before us. First and foremost, *Shapero* 's treatment of privacy was casual. Contrary to the dissent's suggestions, *post,* at 2382, the State in *Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests. See generally Brief for Respondent in *Shapero v. Kentucky Bar Assn.,* O.T.1987, No. 87–16. Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations.*Ibid.* Second, in contrast to this case, *Shapero* dealt with a broad ban on *all* direct-mail solicitations, whatever the time frame and whoever the recipient. Finally, the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State's effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and **2379 overreaching. 486 U.S., at 475, 108 S.Ct., at 1922–1923. Because the State did not make a privacy-based argument at all, its empirical showing on that issue was similarly infirm.

*630 We find the Court's perfunctory treatment of privacy in

Shapero to be of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents. While it is undoubtedly true that many people find the image of lawyers sifting through accident and police reports in pursuit of prospective clients unpalatable and invasive, this case targets a different kind of intrusion. The Bar has argued, and the record reflects, that a principal purpose of the ban is "protecting the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." Brief for Petitioner 8; cf. Summary of Record, App. I(1) (citizen commentary describing outrage at lawyers' timing in sending solicitation letters). The intrusion targeted by the Bar's regulation stems not from the fact that a lawyer has learned about an accident or disaster (as the Court of Appeals notes, in many instances a lawyer need only read the newspaper to glean this information), but from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untargeted letter mailed to society at large is different in kind from a targeted solicitation; the untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Bar's study.

Nor do we find *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), dispositive of the issue, despite any superficial resemblance. In *Bolger,* we rejected the Federal Government's paternalistic effort to ban potentially "offensive" and "intrusive" direct-mail advertisements for contraceptives. Minimizing the Government's allegations of harm, we reasoned that "[r]ecipients of objectionable mailings ... may ' "effectively avoid further bombardment of their sensibilities simply by averting their eyes." ' " *Id.,* at 72, 103 S.Ct., at 2883, quoting *Consolidated *631 Edison Co. of N.Y. v. Public Serv. Com'n of N.Y.,* 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980), in turn quoting *Cohen v. California,* 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). We found that the " 'short, though regular, journey from mail box to trash can ... is an acceptable burden, at least so far as the Constitution is concerned.' " 463 U.S., at 72, 103 S.Ct., at 2883 (ellipses in original), quoting *Lamont v. Commissioner of Motor Vehicles,* 269 F.Supp. 880, 883 (SDNY), summarily aff'd, 386 F.2d 449 (CA2 1967). Concluding that citizens have at their disposal ample means of averting any substantial injury inhering in the delivery of objectionable contraceptive material, we deemed the State's intercession unnecessary and unduly restrictive.

Here, in contrast, the harm targeted by the Bar cannot be eliminated by a brief journey to the trash can. The purpose of the 30–day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, see *post,* at 2382–2383, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. See Brief for Petitioner 7, 14, 24, 28.[2] Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former. We see no basis in *Bolger,* nor in the other, similar cases cited by the dissent, *post,* at 2382–2383, for dismissing the Bar's assertions of harm, particularly *632 given the unrefuted empirical and anecdotal basis for the Bar's conclusions.

**2380 Passing to *Central Hudson*'s third prong, we examine the relationship between the Bar's interests and the means chosen to serve them. See *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S., at 480, 109 S.Ct., at 3034–3035. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In *Fox,* we made clear that the "least restrictive means" test has no role in the commercial speech context. *Ibid.* "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Ibid.* (citations omitted). Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417, n. 13, 113 S.Ct. 1505, 1510 n. 13, 123 L.Ed.2d 99 (1993), for example, we observed that the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech ... is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."

Respondents levy a great deal of criticism, echoed in the dissent, *post,* at 2384–2386, at the scope of the Bar's restriction on targeted mail. "[B]y prohibiting written communications to all people, whatever their state of mind," respondents charge, the Rule "keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice." Brief for Respondents 14. This criticism may be parsed into two components. First, the Rule

does not distinguish between victims in terms of the severity of their injuries. According to respondents, the Rule is unconstitutionally overinclusive insofar as it bans targeted mailingseven *633 to citizens whose injuries or grief are relatively minor. *Id.,* at 15. Second, the Rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for victims' attentions. Any benefit arising from the Bar's regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents' allegations of constitutional infirmity. We find little deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regulation that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are "severe" and some situations appropriate (and others, presumably, inappropriate) for grief, anger, or emotion, the Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30–day period. Unlike respondents, we do not see "numerous and obvious less-burdensome alternatives" to Florida's short temporal ban. *Cincinnati, supra,* at 417, n. 13, 113 S.Ct., at 1510, n. 13. 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.

Respondents' second point would have force if the Bar's Rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted *634 to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. See generally Rule 4–7.2(a), Rules Regulating The Florida Bar ("[A] lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television, and recorded messages **2381 the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4–7.4"); *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues,* 571 So.2d, at 461. These ample alternative channels for receipt of information about the availability of legal representation during the 30–day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent, see *post,* at 2385. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding a lawyer when they need one. See, *e.g.,* Summary of Record, App. C(4), p. 7; *id.,* App. C(5), p. 8. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. See, *e.g., Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991); *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). This case, however, *635 concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the " 'subordinate position' " of commercial speech in the scale of First Amendment values. *Fox,* 492 U.S., at 477, 109 S.Ct., at 3033, quoting *Ohralik,* 436 U.S., at 456, 98 S.Ct., at 1918–1919.

We believe that the Bar's 30–day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the

harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

The judgment of the Court of Appeals, accordingly, is *Reversed.*

Justice KENNEDY, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

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 Ariz.,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). 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. With all respect for the Court, in *636 my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, **2382 represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. 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. See, *e.g., Edenfield v. Fane,* 507 U.S. 761, 766–767 [113 S.Ct. 1792, 1797–1798], 123 L.Ed.2d 543 (1993). If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care *637 and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in enacting the speech restriction is a substantial one. *Ante,* at 2376. The State says two different interests meet this standard. The first is the interest "in protecting the personal privacy and tranquility" of the victim and his or her family. Brief for Petitioner 8. As the Court notes, that interest has recognition in our decisions as a general matter; but it does not follow that the privacy interest in the cases the majority cites is applicable here. The problem the Court confronts, and cannot overcome, is our recent decision in *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct, in-person solicitations and direct-mail solicitations. *Shapero,* like this case, involved a direct-mail solicitation, and there the State recited its fears of "overreaching and undue influence." *Id.,* at 475, 100 S.Ct., at 1922. We found, however, no such dangers presented by direct-mail advertising. We reasoned that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.,* at 475–476, 100 S.Ct., at 1923. We pointed out that "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.,* at 474, 100 S.Ct., at 1922. In assessing the substantiality of the evils to be prevented, we concluded that "the mode of communication makes all the difference." *Id.,* at 475, 100 S.Ct., at 1922. The direct mail in *Shapero* did not present the justification for regulation of speech presented in *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 98 S.Ct.

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1912, 56 L.Ed.2d 444 (1978) (a *638 lawyer's direct, in-person solicitation of personal injury business may be prohibited by the State). See also *Edenfield, supra* (an accountant's direct, in-person solicitation of accounting business did implicate a privacy interest, though not one permitting state suppression of speech when other factors were considered).

To avoid the controlling effect of *Shapero* in the case before us, the Court seeks to declare that a different privacy interest is implicated. As it sees the matter, the substantial concern is that victims or their families will be offended by receiving a solicitation**2383 during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these "are classically not justifications validating the suppression of expression protected by the First Amendment." *Carey v. Population Services Int'l.,* 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977). And in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), where we struck down a ban on attorney advertising, we held that "the mere possibility that some members of the population might find advertising ... offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id.,* at 648.

We have applied this principle to direct-mail cases as well as with respect to general advertising, noting that the right to use the mails is protected by the First Amendment. See *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 76, 103 S.Ct. 2875, 2885–86, 77 L.Ed.2d 469 (1983) (REHNQUIST, J., concurring) (citing *Blount v. Rizzi,* 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971)). In *Bolger,* we held that a statute designed to "shiel[d] recipients of mail from materials that they are likely to find offensive" furthered an interest of "little weight," noting that "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 463 U.S., at 71, 103 S.Ct., at 2883 (citing *Carey, supra,* at 701, 97 S.Ct., at 2024–2025). It is only where an audience is captive that we will *639 assure its protection from some offensive speech. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 542, 100 S.Ct. 2326, 2335–2336, 65 L.Ed.2d 319 (1980). Outside that context, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Bolger, supra,* at 72, 103 S.Ct., at 2883. The occupants of a household receiving mailings are not a captive audience, 463 U.S., at 72, 103 S.Ct., at 2883, and the asserted interest in preventing their offense should be no more controlling here than in our prior cases. All the recipient of objectional mailings need do is to take "the 'short, though regular, journey from mail box to trash can.' " *Ibid.* (citation omitted). As we have observed, this is "an acceptable burden, at least so far as the Constitution is concerned." *Ibid.* If these cases forbidding restrictions on speech that might be offensive are to be overruled, the Court should say so.

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the *amicus* brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from no other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise from an unethical or improper practice, the majority begs a most critical question by assuming that direct-mail solicitations constitute such a practice. 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 (as *amicus* the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public's opinion by suppressing speech *640 that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban **2384 advance that asserted state interest in a direct and material way. *Edenfield,* 507 U.S., at 771 [113 S.Ct., at 1800]. The burden of demonstrating the reality of the asserted harm rests on the State. *Ibid.* Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's

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interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar (Bar), one of the adverse parties, and submitted to the District Court in this case. See *ante,* at 2377. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," *ante,* at 2377, but when examined, it is noteworthy for its incompetence. The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct-mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from *641 that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct-mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct mail (some of them favorable), excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic. 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 nondeceptive speech. See, *e.g., Edenfield,* 507 U.S., at 771–772 [113 S.Ct., at 1800–1801].

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. Indeed, when asked at oral argument what a "typical injured plaintiff get[s] in the mail," the Bar's lawyer replied: "That's not in the record ... and I don't know the answer to that question." Tr. of Oral Arg. 25. Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat *642 ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss, but our speech jurisprudence requires that it do so. *Central Hudson,* 447 U.S., at 569–571, 100 S.Ct., at 2353–2354; *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 3034–3035, 106 L.Ed.2d 388 (1989).

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, see *ante,* at 2380, but making such distinctions is not important in this analysis. Even were it significant, the **2385 Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, see, *e.g.,* United States Sentencing Commission, Guidelines Manual § 1B1.1, comment., n. 1(b), (h), (j) (Nov. 1994), and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement. *Ante,* at 2380.

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

Even as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents. *643 The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do

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resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it concedes the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services. Cf. *Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1, 3–4, 84 S.Ct. 1113, 1115–1116, 12 L.Ed.2d 89 (1964).

The reasonableness of the State's chosen methods for redressing perceived evils can be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried. Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed. See, *e.g.,* Rules Regulating the Florida Bar, Rule 4–1.5 (Statement of Client's Rights) (effective Jan. 1, 1993). The State's restriction deprives accident victims of information which may be critical to their right to make a claim for compensation for injuries. The telephone book and general advertisements may serve this purpose in part; but the direct solicitation ban will fall on those who most need legal representation: for those with minor injuries, the victims too ill informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement *644 negotiations or evidentiary discussions with investigators for opposing parties. One survey reports that over a recent 5–year period, 68% of the American population consulted a lawyer. N.Y. Times, June 11, 1995, section 3, p. 1, col. 1. 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 an attorney. The very fact that some 280,000 direct-mail solicitations are sent to accident victims and their survivors in Florida each year is some indication of the efficacy of this device. Nothing in the Court's opinion demonstrates that these efforts do not serve some beneficial role. A solicitation letter is not a contract. Nothing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel, after an interview with one or more interested attorneys, can be deliberate and informed. And if **2386 these communications reveal the social costs of the tort system as a whole, then efforts can be directed to reforming the operation of that system, not to suppressing information about how the system works. The Court's approach, however, does not seem to be the proper way to begin elevating the honor of the profession.

IV

It is most ironic that, for the first time since *Bates v. State Bar of Arizona,* the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct-mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information *645 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. I agree that if this amounts to mere “sermonizing,” see *Shapero,* 486 U.S., at 490, 108 S.Ct., at 1930 (O'CONNOR, J., dissenting), the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that “the ethical standards of lawyers are linked to the service and protection of clients.” *Ohralik,* 436 U.S., at 461, 98 S.Ct., at 1921.

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The 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. “[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.” *Edenfield,* 507

Rule 7.1. Communications Concerning a Lawyer's Services.

Effective:

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or

(3) contains a testimonial or endorsement that violates any portion of this Rule.

(b) A lawyer shall not interact with a prospective client in a manner that involves coercion, duress, or harassment.

(c) **Personal injury, wrongful death, accident, or disaster**. A lawyer shall not send, or knowingly permit to be sent, a written communication to a prospective client for the purpose of obtaining professional employment:

(1) if the written communication concerns an action for personal injury or wrongful death, or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person,

(2) unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

(d) **Accepting referrals.** A lawyer shall not accept referrals from a lawyer referral service unless the service engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

~~(c) Direct solicitation of a potential client by a lawyer is prohibited. Direct solicitation means any form of written or oral communication done for the purpose of obtaining professional employment, including:~~

~~(1) in-person contact,~~

~~(2) telephone call,~~

~~(3) text,~~

~~(4) email,~~

32 ~~(5) fax, or~~
33 ~~(6) any other electronic communication.~~
34 ~~(d) Paragraph (c) does not apply where the prospective client is a close friend, relative, or former~~
35 ~~client of the lawyer, or where the contact is made at the request of a third party who is a close~~
36 ~~friend or relative of the prospective client.~~
37 ~~(e) General advertising materials sent by mail or email that are clearly identified as advertising~~
38 ~~materials are not prohibited by this rule.~~
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41 **Comments**
42 [1] This Rule governs all communications about a lawyer's services. Whatever means are used to
43 make known a lawyer's services, statements about them must be truthful.
44 [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement
45 is misleading if it omits a fact necessary to make the lawyer's communication considered as a
46 whole not materially misleading. A truthful statement is also misleading if there is a substantial
47 likelihood that it will lead a reasonable person to formulate a specific conclusion about the
48 lawyer or the lawyer's services for which there is no reasonable factual foundation.
49 [3] By way of example, this Rule permits the following, so long as they are not false or
50 misleading: public dissemination of information concerning a lawyer's name or firm name,
51 address, email address, website, and telephone number; the kinds of services the lawyer will
52 undertake; the basis on which the lawyer's fees are determined, including prices for specific
53 services and payment and credit arrangements; the use of actors or dramatizations to portray the
54 lawyer, law firm, client, or events; the courts or jurisdictions where the lawyer is permitted to
55 practice, and other information that might invite the attention of those seeking legal assistance.
56 [4] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or
57 former clients may be misleading if presented so as to lead a reasonable person to form an
58 unjustified expectation that the same results could be obtained for other clients in similar matters
59 without reference to the specific factual and legal circumstances of each client's case. Similarly,
60 an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other
61 lawyers may be misleading if presented with such specificity as would lead a reasonable person
62 to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer

63 or qualifying language may preclude a finding that a statement is likely to create unjustified
64 expectations or otherwise mislead the public.
65 [5] A lawyer can communicate practice areas and can state that he or she "specializes" in a field
66 based on experience, training, and education, subject to the "false or misleading" standard set
67 forth in this Rule. A lawyer shall not state or imply that the lawyer is certified as a specialist in a
68 particular field unless the lawyer has been certified as a specialist by an objective entity and the
69 name of the entity is clearly identified in the communication.
70 [6] In order to avoid coercion, duress, or harassment, a lawyer should proceed with caution when
71 initiating contact with someone in need of legal services, especially when the contact is "live,"
72 whether that be in-person, face-to-face, live telephone and other real-time visual or auditory
73 person-to-person communications, where the person is subject to a direct personal encounter
74 without time for reflection.
75 [7] Firm names, letterhead and professional designations are communications concerning a
76 lawyer's services. A firm may be designated by the names of all or some of its current members,
77 by the names of deceased or retired members where there has been a succession in the firm's
78 identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be
79 designated by a distinctive website address, social media username or comparable professional
80 designation that is not misleading. A law firm name or designation is misleading if it implies a
81 connection with a government agency, with a deceased lawyer who was not a former member of
82 the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or
83 with a public or charitable legal services organization. If a firm uses a trade name that includes a
84 geographical name such as "Springfield Legal Clinic," an express statement explaining that it is
85 not a public legal aid organization may be required to avoid a misleading implication.
86 [8] A law firm with offices in more than one jurisdiction may use the same name or other
87 professional designation in each jurisdiction.
88 [9] Lawyers may not imply or hold themselves out as practicing together in one firm when they
89 are not a firm, as defined in Rule 1.0(d), because to do so would be false and misleading.
90 [10] It is misleading to use the name of a lawyer holding public office in the name of a law firm,
91 or in communications on the law firm's behalf, during any substantial period in which the lawyer
92 is not practicing with the firm. A firm may continue to use in its firm name the name of a lawyer

93 who is serving in Utah's part-time legislature as long as that lawyer is still associated with the
94 firm.
95 [11] See Rules 5.3 (duties of lawyers and law firms with respect to the conduct of non-lawyers);
96 Rule 8.4(a) (duty to avoid violating the Rules through the acts of another); and Rule 8.4(e)
97 (prohibition against stating or implying an ability to influence improperly a government agency
98 or official or to achieve results by means that violate the Rules of Professional Conduct or other
99 law).
100 [12] This Rule differs from the ABA Model Rule. Additional changes have been made to the
101 comments ~~and it incorporates language previously found in Rule 7.3, which was repealed in~~
102 ~~2020.~~and language from the Florida attorney advertising rules has also been incorporated at
103 paragraphs (c) and (d). The Supreme Court in *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620–
104 21, 115 S. Ct. 2371, 2374, 132 L. Ed. 2d 541 (1995), found that the rule language at issue passed
105 constitutional muster in proscribing solicitation—for a brief time period—in certain sensitive
106 situations.
107

Tab 3

1 **Rule 1.0. Terminology.**

2 Effective:

3 (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in
4 question to be true. A person's belief may be inferred from circumstances.

5 (b) "Confirmed in writing," when used in reference to the informed consent of a person,
6 denotes informed consent that is given in writing by the person or a writing that a lawyer
7 promptly transmits to the person confirming an oral informed consent. See paragraph (f) for
8 the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the
9 time the person gives informed consent, then the lawyer must obtain or transmit it within a
10 reasonable time thereafter.

11 (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to
12 permit the client to appreciate the significance of the matter in question.

13 (d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional
14 corporation, sole proprietorship or other association authorized to practice law; or lawyers
15 employed in a legal services organization or the legal department of a corporation or other
16 organization.

17 (e) “Fee sharing” means any division of legal fees between legal professionals.

18 (ef) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or
19 procedural law of the applicable jurisdiction and has a purpose to deceive.

20 (fg) "Informed consent" denotes the agreement by a person to a proposed course of conduct
21 after the lawyer has communicated adequate information and explanation about the material
22 risks of and reasonably available alternatives to the proposed course of conduct.

23 (gh) "Knowingly," "known" or "knows" denotes actual knowledge of the fact in question. A
24 person's knowledge may be inferred from circumstances.

25 (hi) “Lawyer” denotes lawyers licensed to practice law in any jurisdiction of the United States,
26 foreign legal consultants, and licensed paralegal practitioners, insofar as the licensed paralegal
27 practitioner is authorized in Utah Special Practice Rule 14-802, unless provided otherwise.

28 (ij) “Legal fees” refer to the charges that a legal professional or law firm assesses for providing
29 legal services, which may include time spent on legal research, preparation of legal

30 documents, court appearances, and advice on legal matters. These fees are typically negotiated
31 and agreed upon between the lawyer and client in advance of the legal work and may be
32 based on factors such as the complexity of the legal issue, the lawyer's experience and
33 expertise, and the amount of time and resources required to handle the matter.
34 (~~j~~k) “Legal Professional” denotes a lawyer and a licensed paralegal practitioner.
35 (~~j~~l) “Licensed Paralegal Practitioner” denotes a person authorized by the Utah Supreme Court
36 to provide legal representation under Rule 15-701 of the Supreme Court Rules of Professional
37 Practice.
38 (~~k~~m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a
39 professional corporation, or a member of an association authorized to practice law.
40 (~~l~~n) “Public-facing office” means an office that is open to the public and provides a service that
41 is available to the population in that location.
42 (~~m~~o) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the
43 conduct of a reasonably prudent and competent lawyer.
44 (~~n~~p) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes
45 that the lawyer believes the matter in question and that the circumstances are such that the
46 belief is reasonable.
47 (~~o~~q) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of
48 reasonable prudence and competence would ascertain the matter in question.
49 (~~p~~r) “Reckless” or “recklessly” denotes the conscious disregard of a duty that a lawyer is or
50 reasonably should be aware of, or a conscious indifference to the truth.
51 (s) “Referral fee” means any exchange of value beyond marginal or of minimal value that is
52 paid for the referral of a client, whether in cash or in kind. Fees shared with a legal
53 professional who continues to represent the client in the matter referred and fees paid for
54 generating consumer interest for legal services with the goal of converting the interests into
55 clients are not referral fees for purposes of these rules.
56 (~~p~~t) "Screened" denotes the isolation of a lawyer from any participation in a matter through the
57 timely imposition of procedures within a firm that are reasonably adequate under the

circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(~~q~~u) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(~~r~~v) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(~~s~~w) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the

87 rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule
88 that the same lawyer should not represent opposing parties in litigation, while it might not be
89 so regarded for purposes of the rule that information acquired by one lawyer is attributed to
90 another.
91 [3] With respect to the law department of an organization, including the government, there is
92 ordinarily no question that the members of the department constitute a firm within the
93 meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the
94 identity of the client. For example, it may not be clear whether the law department of a
95 corporation represents a subsidiary or an affiliated corporation, as well as the corporation by
96 which the members of the department are directly employed. A similar question can arise
97 concerning an unincorporated association and its local affiliates.
98 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services
99 organizations. Depending upon the structure of the organization, the entire organization or
100 different components of it may constitute a firm or firms for purposes of these Rules.
101 **Fraud**
102 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is
103 characterized as such under the substantive or procedural law of the applicable jurisdiction
104 and has a purpose to deceive. This does not include merely negligent misrepresentation or
105 negligent failure to apprise another of relevant information. For purposes of these Rules, it is
106 not necessary that anyone has suffered damages or relied on the misrepresentation or failure
107 to inform.
108 **Informed Consent**
109 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed
110 consent of a client or other person (e.g., a former client or, under certain circumstances, a
111 prospective client) before accepting or continuing representation or pursuing a course of
112 conduct. See, e.g, Rules 1.2(c), 1.6(a), 1.7(b), 1.8, 1.9(b), 1.12(a), and 1.18(d). The communication
113 necessary to obtain such consent will vary according to the rule involved and the
114 circumstances giving rise to the need to obtain informed consent. Other rules require a lawyer
115 to make reasonable efforts to ensure that the client or other person possesses information

116 reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8. Ordinarily,
117 this will require communication that includes a disclosure of the facts and circumstances
118 giving rise to the situation, any explanation reasonably necessary to inform the client or other
119 person of the material advantages and disadvantages of the proposed course of conduct and a
120 discussion of the client's or other person's options and alternatives. In some circumstances it
121 may be appropriate for a lawyer to advise a client or other person to seek the advice of other
122 counsel. A lawyer need not inform a client or other person of facts or implications already
123 known to the client or other person; nevertheless, a lawyer who does not personally inform the
124 client or other person assumes the risk that the client or other person is inadequately informed
125 and the consent is invalid. In determining whether the information and explanation provided
126 are reasonably adequate, relevant factors include whether the client or other person is
127 experienced in legal matters generally and in making decisions of the type involved, and
128 whether the client or other person is independently represented by other counsel in giving the
129 consent. Normally, such persons need less information and explanation than others, and
130 generally a client or other person who is independently represented by other counsel in giving
131 the consent should be assumed to have given informed consent.
132 [7] Obtaining informed consent will usually require an affirmative response by the client or
133 other person. In general, a lawyer may not assume consent from a client's or other person's
134 silence. Consent may be inferred, however, from the conduct of a client or other person who
135 has reasonably adequate information about the matter. A number of rules require that a
136 person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of
137 "writing" and "confirmed in writing," see paragraphs (r) and (b). Other rules require that a
138 client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For
139 a definition of "signed," see paragraph (r).
140 **Referral Fees**
141 [8] Fees paid for generating consumer interest for legal services with the goal of converting the
142 interests into clients include lead generation service providers, online banner advertising, pay-
143 per-click marketing, and similar marketing or advertising fees.
144 **Screened**

[~~8~~9] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[~~9~~10] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[~~10~~11] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[~~10a~~11a] The definitions of “consult” and “consultation,” while deleted from the ABA Model Rule 1.0, have been retained in the Utah Rule because “consult” and “consultation” are used in the rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

Rule 1.5. Fees.

Effective:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or

percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) Fee sharing is permitted between legal professionals who are acting as co-counsel on a matter except as otherwise prohibited by these rules or Utah Special Practice Rule 14-802.

(~~e~~f) A licensed paralegal practitioner may not enter into a contingent fee agreement with a client.

(~~f~~g) Before providing any services, a licensed paralegal practitioner must provide the client with a written agreement that:

(1) states the purpose for which the licensed paralegal practitioner has been retained;

(2) identifies the services to be performed;

(3) identifies the rate or fee for the services to be performed and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation;

52 (4) includes a statement printed in 12-point boldface type that the licensed paralegal
53 practitioner is not an attorney and is limited to practice in only those areas in which
54 the licensed paralegal practitioner is licensed;

55 (5) includes a provision stating that the client may report complaints relating to a
56 licensed paralegal practitioner or the unauthorized practice of law to the Office of
57 Professional Conduct, including a toll-free number and Internet website;

58 (6) describes the document to be prepared;

59 (7) describes the purpose of the document;

60 (8) describes the process to be followed in preparing the document;

61 (9) states whether the licensed paralegal practitioner will be filing the document on
62 the client's behalf; and

63 (10) states the approximate time necessary to complete the task.

64 (~~g~~h) A licensed paralegal practitioner may not make an oral or written statement
65 guaranteeing or promising an outcome, unless the licensed paralegal practitioner has
66 some basis in fact for making the guarantee or promise.

67 **Comment**

68 **Reasonableness of Fee and Expenses**

69 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the
70 circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will
71 each factor be relevant in each instance. Paragraph (a) also requires that expenses for
72 which the client will be charged must be reasonable. A lawyer may seek reimbursement
73 for the cost of services performed in-house, such as copying, or for other expenses
74 incurred in-house, such as telephone charges, either by charging a reasonable amount to
75 which the client has agreed in advance or by charging an amount that reasonably
76 reflects the cost incurred by the lawyer.

77 **Basis or Rate of Fee**

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obligated to return any unearned portion. See Rule1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.

For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Fee Sharing

[7] Paragraph (e) permits fee sharing arrangements between legal professionals, with some limitations. For example, fee sharing between lawyers and licensed paralegal practitioners may be limited by Utah Special Practice Rule 14-802.

[8[Fee sharing by legal professionals with anyone who is not a legal professional is only permitted in accordance with Rule 5.4 and Standing Order No. 15.

Disputes over Fees

[~~7~~9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of

133 damages. The lawyer entitled to such a fee and a lawyer representing another party
134 concerned with the fee should comply with the prescribed procedure.

135 [~~8~~10] This rule differs from the ABA model rule.

136 ~~[8a] This rule differs from the ABA Model Rule by including certain restrictions on~~
137 ~~licensed paralegal practitioners.~~

1 **Rule 5.4. Professional Independence of a Lawyer.**

2 Effective:

3 (a) A lawyer may provide legal services pursuant to this Rule only if there is at all times
4 no interference with the lawyer's:

5 (1) professional independence of judgment,

6 (2) duty of loyalty to a client, and

7 (3) protection of client confidences.

8 (b) A lawyer may permit a person to recommend, retain, or pay the lawyer to render legal
9 services for another.

10 (c) A lawyer or law firm may share legal fees with a nonlawyer if:

11 (1) the fee to be shared is reasonable and the fee-sharing arrangement has been
12 authorized as required by Utah Supreme Court Standing Order No. 15;

13 (2) the lawyer or law firm provides written notice to the affected client and, if
14 applicable, to any other person paying the legal fees;

15 (3) the written notice describes the relationship with the nonlawyer, including the
16 fact of the fee-sharing arrangement; and

17 (4) the lawyer or law firm provides the written notice before accepting
18 representation or before sharing fees from an existing client.

19 (d) A lawyer may practice law with nonlawyers, or in an organization, including a
20 partnership, in which a financial interest is held or managerial authority is exercised by
21 one or more persons who are nonlawyers, provided that the nonlawyers or the
22 organization has been authorized as required by Utah Supreme Court Standing Order
23 No. 15 and provided the lawyer shall:

24 (1) before accepting a representation, provide written notice to a prospective client
25 that one or more nonlawyers holds a financial interest in the organization in which

the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and

(2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.

Comments

[1] The provisions of this Rule are designed to protect the lawyer's professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information.

[2] Where someone other than the client pays the lawyer's fee or salary, manages the lawyer's work, or recommends retention of the lawyer, as stated in paragraph (b), that arrangement does not modify the lawyer's obligation to the client. ~~As stated in paragraph (a), such arrangements must not interfere with the lawyer's professional judgment.~~ See also Rule 1.8(f) (lawyer may accept compensation from a third party ~~as~~ so long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[2] This Rule ~~does~~ should not be read to ~~not~~ lessen a lawyer's obligation to adhere to the Rules of Professional Conduct and does not authorize a nonlawyer to practice law by virtue of being in a business relationship with a lawyer. It may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to disclose client information to third parties, as the lawyer's duty to maintain client confidences would be compromised.

~~[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).~~

52 [3] Paragraph (c) does not permits individual lawyers or law firms to pay referral fees to
53 nonlawyers. for client referrals, share fees with nonlawyers, or allow third party
54 retention. In each of these instances, the financial arrangement must be reasonable,
55 authorized as required under Supreme Court Standing Order No. 15, and disclosed in
56 writing to the client before engagement and before fees are shared. Supreme Court
57 Standing Order No. 15 governs fee sharing arrangements with nonlawyers. Before
58 engaging in any fee sharing or referral fee arrangement, legal professionals should be
59 familiar with U.C.A. §76-10-3201. Prohibition on kickbacks. Fee sharing, legal fees, and
60 referral fees are defined in Rule 1.0. Whether in accepting or paying for referrals, or fee
61 sharing, the lawyer must protect the lawyer's professional judgment, ensure the lawyer's
62 loyalty to the client, and protect client confidences.

63 [4] Paragraph (d) permits individual lawyers or law firms to enter into business or
64 employment relationships with nonlawyers, whether through nonlawyer ownership or
65 investment in a law practice, joint venture, or through employment by a nonlawyer-
66 owned entity. In each instance, the nonlawyer--owned entity must be approved by the
67 Utah Supreme Court for authorization under Standing Order No. 15.

68 [5] This Rule rule differs from the ABA model rule.

1 **Rule 5.8. Referral Fees.**

2 Effective:

3 (a) A referral fee paid to a legal professional who does not represent the client in the
4 referred matter must:

5 (1) not be paid until an attorney fee is payable to the legal professional representing
6 the client in the referred matter;

7 (2) not be passed along to the client either as a cost or an increase of the total attorney
8 fee; and

9 (3) be subject to the client's giving informed consent, confirmed in writing, to the
10 terms of the referral fee arrangement.

11 (b) Any referral fee payable in the case must be reasonable relative to the total attorney
12 fees that may ultimately be earned. The factors to be considered in determining the
13 reasonableness of a referral fee include the following:

14 (1) the referral fee customarily paid in the locality for similar referrals;

15 (2) the amount of work performed by the referring legal professional and the amount
16 of work anticipated to be performed by the legal professional taking over the matter;

17 (3) the amounts involved and the potential results; and

18 (4) the nature and length of the referrer's relationship with the client.

19 (c) Referral fees to anyone who is not a legal professional are prohibited.

20 **Comment**

21 [1] Paragraph (a)(1) prohibits legal professionals from paying a referral fee until the legal
22 professional who represents the client in the matter is entitled to be paid attorney fees.

23 [2] In the case of a contingent fee matter, the legal professional may not pay the referral
24 fee until the legal professional is entitled to receive the contingent fee, which may be at
25 the conclusion of the matter.

26 [3] A legal professional should only refer a matter to another legal professional whom the
27 referring legal professional reasonably believes is competent to handle the matter
28 diligently. See Rules 1.1 and 1.3.

29 [4] Paragraph (a)(2) prohibits a legal professional from charging a client in a referred
30 matter a higher fee, or from seeking payment of greater costs, than the legal professional
31 charges other clients where no referral fee was paid. For the definitions of "informed
32 consent," "confirmed in writing," "legal professional," and "referral fees," see Rule 1.0.

33 [5] The term "amounts involved" in paragraph (b)(2) refers to things such as the
34 estimated value of the case, claims, estate, commercial transaction, anticipated recovery,
35 insurance limits, and statutory limits.

36 [6] Paragraph (c) forbids payments for referring clients or legal matters to anyone who is
37 not a legal professional.

38 [7] Before engaging in any referral fee arrangement, legal professionals should be familiar
39 with U.C.A. §76-10-3201. Prohibition on kickbacks. Referral fees are defined in Rule 1.0.

40 [8] This rule is not part of the ABA Model Rules.

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