NEW MEXICO LAW REVIEW

Volume 28
Issue 3 *Summer 1998*

Summer 1998

Professional Responsibility - The Tenth Circuit Strikes down New Mexico's Ban on Targeted Direct-Mail Lawyer Advertising - Revo v. Disciplinary Board of the Supreme Court

Farzana Kanji

PROFESSIONAL RESPONSIBILITY—The Tenth Circuit Strikes Down New Mexico's Ban on Targeted Direct-Mail Lawyer Advertising—*Revo v. Disciplinary Board of the Supreme Court*

I. INTRODUCTION

For centuries, lawyers have emphasized "that the promotion of justice, rather than the earning of fees, is the goal of the [legal] profession."[1] Although many lawyers still feel this way, the Supreme Court has noted that "[i]n this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. . . . [T]he belief that lawyers are somehow 'above' trade has become an anachronism . . . ."[2]

The Supreme Court's landmark decision in *Bates v. State Bar*[3] has led to an "avalanche" of lawyer advertising.[4] Lawyer advertising is being cited by many attorneys and state bar organizations as a significant factor contributing to the public's declining respect for the legal profession.[5]

Although most New Mexico lawyers tolerate lawyer advertising in general, whether or not New Mexico should permit direct-mail lawyer advertising to accident victims remains highly controversial. In 1992, the Supreme Court of New Mexico enacted Rule 16-701(C)(4), which amended the New Mexico Rules of Professional Conduct to ban all direct-mail advertising to personal injury victims and family members of wrongful death victims.[6] In 1996, Rule 16-701(C)(4) was challenged successfully in *Revo v. Disciplinary Board of the Supreme Court*.[7] The Tenth Circuit Court of Appeals held that the New Mexico ban on direct-mail solicitations to accident victims was unconstitutional.[8]

This Note briefly discusses the evolution of lawyer advertising, explains and analyzes the rationale of *Revo*, and explores the implications of *Revo* for New Mexico lawyers.

II. STATEMENT OF THE CASE[9]

M. Terrence Revo, a personal injury lawyer in Albuquerque, New Mexico, advertised by sending targeted direct-mail to persons injured in automobile accidents.[10] Revo discontinued this practice in 1992, when the Supreme Court of

---

1. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) (quoting Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958)).
2. Bates v. State Bar, 433 U.S. 350, 371-72 (1977).
3. 433 U.S. 350 (1977).
4. *See* Tonia S. Goolsby, Note, Florida Bar v. Went For It, Inc.: *Does Ambulance-Chasing in Florida Justify Advertising Reform in Arkansas?*, 49 ARK. L. REV. 795, 795 (1997) (citing David R. Gienapp, *Issues Facing the Legal Profession as the Profession Prepares to Enter the Twenty-First Century*, 40 S.D. L. REV. 207, 208 (1995)).
5. *See id.*
6. *See* N.M. R. PROF. CONDUCT 16-701(C)(4) (as amended, effective August 1, 1992).
7. 106 F.3d 929 (10th Cir.), *cert. denied*, 117 S. Ct. 2515 (1997).
8. *See id.* at 936.
9. The facts presented in this Part are paraphrased from *Revo*, 106 F.3d at 931-32.
10. Revo's proposed solicitation letter read as follows:
[Date] "LAWYER ADVERTISEMENT"
[Name and Address]

New Mexico enacted Rule 16-701(C)(4).[11] Revo sued the state, arguing that the ban violated both the First Amendment[12] and the Equal Protection Clause of the Fourteenth Amendment.[13]

The federal district court agreed with Revo, holding that New Mexico's blanket ban on direct-mail advertising violated Revo's First Amendment and Equal Protection rights.[14] The district court permanently enjoined the Rule's enforcement[15] and the Tenth Circuit affirmed the district court's ruling.[16]

III. HISTORICAL BACKGROUND

The Supreme Court heard its first lawyer advertising case, *Bates v. State Bar*,[17] in 1977. The appellants in *Bates*, licensed practicing attorneys in Arizona, advertised that they were offering "legal services at very reasonable fees"[18] and published a list of their fees for certain services in a daily newspaper.[19] This advertisement constituted a clear violation of Arizona's Disciplinary Rule 2-101(B).[20]

The Supreme Court analogized *Bates* to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*,[21] a case in which a Virginia statute

---

> Dear [Title and Name]:
> The Albuquerque Police [State Police] Department records show that you were recently involved in an auto accident. Unfortunately, such accidents are an all too common fact of life and can cause serious concern. I understand that dealing with injuries, emergency rooms, medical bills, lost earnings, damaged autos, rental cars, and insurance adjusters can be difficult and frustrating.
> In our system of legal justice, the injured person has certain rights and protections under the law. It is important that you know about your rights before deciding what to do.
> I have been an attorney for more than 16 years. I invite you to make an appointment for a free initial consultation and evaluation of your case. We will do our best to answer all your questions and you are under no obligation to hire my firm.
> I accept personal injury cases on a contingency fee basis, which means that my fee is based upon a percentage of your total recovery, before costs are deducted. Regardless of the outcome, the client will bear the expenses of the case. Some exceptions may apply. I have found that the earlier I become involved in a case, the more I can do on your behalf, therefore, I invite you to call today.
> If you have already retained the services of an attorney, I hope that your case will proceed well and that you will have a positive outcome. If you are not represented, then I ask you to think about what is at stake, now and for the future. If we can help please call.
> Respectfully,
> M. Terrence Revo

Revo, 106 F.3d at 931 n.2.

11. *See* N.M. R. PROF. CONDUCT 16-701(C)(4) compiler's annotation.
12. U.S. CONST. amend. I.
13. U.S. CONST. amend. XIV, § 1.
14. *See Revo* at 932.
15. *See id.*
16. *See id.* at 936.
17. 433 U.S. 350 (1977).
18. *Id.* at 354.
19. *See id.*
20. This rule prohibited lawyer advertising through "newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity." *Id.* at 355 (quoting ARIZ. SUP. CT. R. 29(a), DR 2-101(B), *available in* 17A ARIZ. REV. STAT. (Supp. 1976) (repealed 1984)).
21. 425 U.S. 748 (1976).

prohibited pharmacists from advertising the prices of prescription drugs.[22] In *Virginia Pharmacy*, the Court held that such communication, which it characterized simply as "I will sell you the X prescription drug at the Y price," was protected commercial speech under the First Amendment.[23] Similarly, in *Bates*, the Court held that application of Arizona's disciplinary rule to appellants' advertisement violated the First Amendment.[24] The *Bates* Court maintained that commercial speech informing the public of the availability of and prices for products and services promotes accurate and informed decisionmaking.[25] Therefore, a state may not prohibit the truthful advertising of legal services.[26]

The *Bates* Court, however, pointed out that, while lawyer advertising could not be subject to blanket suppression, it may be regulated.[27] Indeed, a year later in *Ohralik v. Ohio State Bar*[28] the Supreme Court held that the state of Ohio could regulate the direct, in-person solicitation of accident victims by attorneys for pecuniary gain under circumstances likely to cause harm to prospective clients.[29] The Court reasoned that a public advertisement, like the one in *Bates*, simply offers the recipient information and allows the recipient to act upon it or not.[30] In contrast, in-person solicitations may pressure the recipient, often for an immediate response, without providing an opportunity for comparison or reflection.[31] Subsequently, the Court in *In re RMJ*[32] held that the risk of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct' was so likely in the context of in-person solicitation, that such solicitation could be prohibited."[33] In other words, in-person solicitation actually undermines the individual and societal interest in promoting accurate and informed decision-making identified in *Bates*.[34]

Although the *Ohralik* Court permitted Ohio to prohibit "ambulance-chasing," the Court noted that a lawyer may give out unsolicited legal advice as long as the lawyer does not accept paid employment resulting from this advice.[35] This observation became the holding in *In re Primus*,[36] in which the Court held that a lawyer who communicated an offer of free assistance on behalf of a nonprofit organization to a lay person was protected under the First Amendment.[37] In *Primus*, the lawyer neither engaged in personal solicitation nor was he motivated by pecuniary gain, in contrast to *Ohralik* where the solicitation subject to regulation was both personal and for pecuniary gain.[38]

---

22. *See Bates*, 433 U.S. at 363 (citing *Virginia Pharmacy*, 425 U.S. at 749-50).
23. *Virginia Pharmacy*, 425 U.S. at 761.
24. *See id.* at 384.
25. *See id.* at 364.
26. *See id.* at 384.
27. *See id.* at 383.
28. 436 U.S. 447 (1978).
29. *See id.* at 454.
30. *See id.* at 457.
31. *See id.*
32. 455 U.S. 191 (1982).
33. See id. at 202.
34. *See Ohralik*, 436 U.S. at 458.
35. *See id.*
36. 436 U.S. 412 (1978).
37. *See id.* at 422.
38. *See id.*

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*,[39] the Supreme Court extended *Bates* when it ruled that attorneys can solicit legal business for pecuniary gain through printed advertisements containing truthful and nondeceptive information[40] regarding the legal rights of potential clients.[41] Zauderer had placed an advertisement in Ohio newspapers announcing his willingness to represent women who had suffered injuries from a particular intrauterine device.[42] The Court distinguished *Ohralik* because the advertisement in *Zauderer* did not entail the same hazards associated with in-person solicitation, a type of solicitation which presents "unique regulatory difficulties because it is 'not visible or otherwise open to public scrutiny.'"[43] As it did in *Bates*, the Court stressed the value of free flowing commercial information[44] and rejected the state's argument that lawyer advertising would encourage unnecessary litigation.[45] The Court observed that a person should not suffer a wrong silently instead of taking legal action.[46] Additionally, the Court rejected Ohio's arguments that lawyer advertising presents a unique regulatory problem of weeding out accurate statements from false or misleading ones.[47]

The Supreme Court further extended *Zauderer* in *Shapero v. Kentucky Bar Ass'n*[48] by holding that lawyers could solicit legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.[49] The Court reasoned that "the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable."[50] Like the print advertising in *Zauderer*, the Court found that targeted, direct-mail solicitation "generally—'poses much less risk of overreaching or undue influence' than does in-person solicitation."[51] By building on its opinion in *Zauderer*, the *Shapero* Court enlarged the scope of protected lawyer advertising.

After thirteen years of pro-lawyer advertising decisions, the Supreme Court, in a 5-4 decision, took the other side in *Florida Bar v. Went For It, Inc.*[52] The Court held that Florida could constitutionally prohibit its lawyers from using direct-mail

---

39. 471 U.S. 626 (1985).

40. The Supreme Court had previously ruled in *In re RMJ*, 455 U.S. 191 (1982), that lawyers can advertise the names of the jurisdictions in which they are licensed to practice. The Court later ruled in *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), that lawyers can also advertise certification by the National Board of Trial Advocacy.

41. *See Zauderer*, 471 U.S. at 647.

42. *See id.* at 630.

43. *Id.* at 641 (quoting *Ohralik*, 436 U.S. at 466).

44. *See id.* at 646.

45. *See id.* at 642.

46. *See id.* at 643 (citing Bates v. State Bar, 433 U.S. 350, 376 (1977)).

47. *See id.* at 643.

48. 486 U.S. 466 (1988).

49. *See id.* at 471.

50. *Id.* at 473-74.

51. *Id.* at 475 (quoting *Zauderer*, 471 U.S. at 642).

52. 515 U.S. 618 (1995).

advertising to solicit the business of personal injury or wrongful death victims or their relatives for thirty days after an accident.[53]

The majority in *Florida Bar* found that states have a substantial interest in protecting the privacy of potential clients and in regulating the practice of professions within their boundaries.[54] Consequently, the majority distinguished this case from *Shapero* in three ways. First, the Court noted that "*Shapero*'s treatment of privacy was casual" because "*Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests."[55] Instead of making a privacy-based argument, the state in *Shapero* focused primarily on the risks of overreaching that can result from targeted solicitations.[56] Second, *Shapero* dealt with a blanket ban on all forms of direct-mail solicitation without regard for time frame and the type of recipient involved.[57] Finally, the state in *Shapero* failed to gather evidence that would demonstrate that targeted direct-mail would actually cause any harm.[58]

In contrast, the dissent in *Florida Bar* observed that the majority's decision undercuts the line of precedents established by the Court to protect First Amendment speech, to the detriment of those victims most in need of legal assistance.[59] The dissent found it to be "uncontroverted" that when an accident leads to death or injury, it is usually immediately necessary to investigate the incident, identify witnesses, and preserve evidence.[60] Given the Court's reasoning in *Shapero* that a letter "can readily be put in a drawer to be considered later, ignored, or discarded," the dissent felt that the controlling effect of *Shapero* could not be avoided in *Florida Bar*, which also involved direct-mail advertising.[61] The dissent was not persuaded by the majority's privacy interest argument, noting that in *Zauderer* the Court specifically observed that advertising is not to be suppressed simply because some people may find it to be offensive.[62] If anything, the dissent noted that "direct solicitation may serve vital purposes and promote the administration of justice."[63]

Florida Bar is the most recent Supreme Court case to address lawyer advertising. Two years after this 5-4 decision, the *Revo* case came before the Tenth Circuit.

IV. DISCUSSION OF THE TENTH CIRCUIT'S RATIONALE IN *REVO*

As a general rule, false, misleading or deceptive attorney advertising is not protected by the First Amendment.[64] However, even if advertising is truthful and

53. *See id.* at 620.
54. *See id.* at 625.
55. *Id.* at 629.
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.* at 635 (Kennedy, J., dissenting).
60. *See id.* at 636.
61. *Id.* at 637 (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475-76 (1988)).
62. *See id.* at 638.
63. *Id.* at 639.
64. *See In re RMJ*, 455 U.S. 191, 203 (1982).

accurate, it may still be subject to state regulation.[65] In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[66] the Supreme Court articulated an analysis to be used in commercial speech cases to determine when regulation of commercial speech is constitutionally permissible.[67] This analysis, known as the *Central Hudson* test, made its first appearance in a lawyer advertising case, *In re RMJ*, in 1982. The *RMJ* Court held that a state must have a substantial interest in order to regulate lawyer advertising, and that this regulation must be in proportion to the interest served.[68]

In *Florida Bar*, the Court defined the *Central Hudson* test in terms of three separate but related prongs: 1) a state must assert a substantial interest in support of its regulation; 2) a state must "demonstrate that the restriction on commercial speech directly and materially advances that interest"; and 3) the regulation must be "narrowly drawn."[69] Each prong of the *Central Hudson* test must be satisfied by a state before a court will deem a regulation of lawyer advertising constitutional.[70]

In *Revo*, New Mexico argued that although the advertisement in question concerned a lawful activity, it was not protected speech because it was misleading.[71] New Mexico further argued that even if the advertisement was not misleading and, thus, protected speech, it was still subject to regulation because the *Central Hudson* test was met. New Mexico asserted: 1) that it had a substantial interest in "maintaining the public's respect for the legal system" and in protecting the privacy of accident victims;[72] 2) that a ban on personal injury solicitation letters would directly and materially advance that interest;[73] and 3) that the regulation was narrowly tailored to achieve its purpose.[74]

The Tenth Circuit rejected New Mexico's argument that Revo's letters were misleading because the Disciplinary Board itself admitted that Revo's letters were "carefully worded to avoid creating false impressions." [75] The Disciplinary Board also admitted that it had not received a single complaint from any recipient stating that the letter was false, misleading, unfairly coercive or "caused them to enter an attorney-client relationship unwillingly or without adequate information."[76]

The Tenth Circuit also rejected the state's argument that Revo's letters were inherently misleading because they were sent to accident victims, who as a class are especially vulnerable.[77] The court reasoned that because the letters were sent to all accident victims, regardless of their financial well-being, New Mexico's argument

---

65. *See id.*
66. 447 U.S. 557 (1980).
67. *See In re RMJ*, 455 U.S. at 203 n.15 (citing *Central Hudson*, 447 U.S. at 566).
68. *See id.* at 203.
69. Florida Bar v. Went For It., Inc., 515 U.S. 618, 624 (1995).
70. *See id.*
71. *See* Revo v. Disciplinary Bd. of the Supreme Court, 106 F.3d 929, 932-33 (10th Cir.), *cert. denied*, 117 S. Ct. 2515 (1997).
72. *Id.* at 933.
73. *See id.* at 934.
74. *See id.* at 935.
75. *Id.* at 932.
76. *See id.*
77. *See id.*

that the recipients of these letters were "not sophisticated enough to know that they are being preyed upon" was without merit.[78]

After concluding that the advertising in question was not false or misleading, the Tenth Circuit decided that New Mexico's asserted interests in protecting the privacy of its citizens and in protecting the image of the bar constituted "substantial interests" under the first prong of the *Central Hudson* test because the Supreme Court had previously recognized these interests as such in *Florida Bar*.[79] The Tenth Circuit, however, found that New Mexico's interest in protecting the reputation of its bar did not meet the second prong of the test; New Mexico's ban did not directly and materially advance its interest in protecting the integrity of the bar.[80] The Tenth Circuit reasoned that those New Mexico lawyers who use direct-mail solicitation and have been accused of unethical practices gain only a minority of their clients through direct-mail solicitation.[81] Therefore, a majority of these lawyers' clients will still be subject to bad lawyering.[82] In other words, the ban does not protect the reputation of the bar effectively. Moreover, the ban may prevent other ethical and competent lawyers who may choose to use direct-mail solicitation to advertise in the future from serving the public.[83]

Although the Tenth Circuit did not find that New Mexico's interest in protecting the bar's reputation met the second prong of the *Central Hudson* test, it found that the ban directly and materially advanced New Mexico's interest in protecting the privacy of accident victims by completely eliminating the receipt of these letters altogether.[84] Thus, the *Revo* Court held that the advertising ban fulfilled the second prong of the *Central Hudson* test.[85]

Despite the fact that New Mexico's privacy interest was found to satisfy the first two prongs of the test, the Tenth Circuit concluded that New Mexico's ban failed to meet the final prong.[86] New Mexico's chosen restriction was not narrowly tailored to withstand constitutional scrutiny under the *Central Hudson* test.[87] The Tenth Circuit came to this conclusion based on the Supreme Court's analysis in *Florida Bar*.[88]

The Supreme Court in *Florida Bar* found that the thirty-day rule was narrowly tailored because it was limited to a brief period of time and because there were many other ways for injured Floridians to learn about legal representation during that thirty-day period.[89] The Tenth Circuit noted that the thirty-day rule was held to be constitutional because it was both narrow in scope and in duration.[90] The Tenth Circuit concluded that New Mexico's complete ban on all personal injury direct-

78. *See id.* at 933.
79. *See id.* at 934.
80. *See id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.* at 935.
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See Florida Bar*, 515 U.S. at 633; *see also Revo*, 106 F.3d. at 935.
90. *See Revo*, 106 F.3d at 935.

mail solicitations was overbroad in both scope and duration.[91] Consequently, the Tenth Circuit found the *Revo* case to be more analogous to *Shapero*, which also involved a complete ban, than to *Florida Bar*, which involved only a thirty-day ban.[92]

The Tenth Circuit rejected New Mexico's argument that its ban was narrowly tailored because it only affected four lawyers.[93] The court pointed out that, in fact, the ban affects every New Mexico attorney who might ever decide to take on personal injury clients or who might decide to use direct-mail advertising to reach such clients.[94] Moreover, the court observed that "[m]erely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech."[95]

Additionally, New Mexico failed to show why it could not use less burdensome alternatives to address its concerns.[96] The Tenth Circuit pointed to three specific alternatives. First, the Tenth Circuit noted that New Mexico could have subjected the personal injury direct-mail letters to a screening process to prevent misleading potential clients; all other attorney direct-mail solicitations are subjected to this screening process.[97] Moreover, screening would be a feasible alternative in light of the state's claim that only four attorneys even send these letters.[98] Second, if the harms identified by New Mexico actually stemmed from the unethical practices of a handful of lawyers, the state could have enforced existing regulations under the Rules of Professional Conduct to address these harms.[99] Finally, the court noted that New Mexico failed to show why a thirty-day ban, similar to that in *Florida Bar*, would not adequately address the harms at issue.[100]

Although New Mexico argued that "the harms it has identified are without time limits, and that grieving does not fit into a neat thirty-day cycle,"[101] the court responded by noting that the Constitution favors the disclosure of information.[102] Ultimately, the Tenth Circuit found that New Mexico failed "to demonstrate that its interests outweigh the public's right to at some point receive truthful and non-misleading written advertising that is plainly and conspicuously marked 'Advertising Material' or 'Lawyer Advertising.'"[103]

V. ANALYSIS OF THE DECISION

The Tenth Circuit Court of Appeals correctly decided the *Revo* case. The Supreme Court has developed a strong body of case law protecting printed lawyer advertising. The decision in *Florida Bar* constituted only a small deviation from this

91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*
95. *Id.* (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988)).
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.* at 935-36.
100. *See id.* at 936.
101. *Id.*
102. *See id.*
103. *Id.*

trend because it permits states to place only an extremely limited ban on lawyer advertising, not a complete one. Consequently, the Tenth Circuit's decision in *Revo* is consistent with the Supreme Court's general acceptance of lawyer advertising.

The *Revo* decision is also in line with the Supreme Court's general aversion to complete bans and its deference to increased public awareness in the area of commercial speech. The Supreme Court has long since recognized the tension between the dangers of suppressing information and the dangers of allowing its dissemination.[104] The Supreme Court has chosen to move in the direction of allowing the free flow of information in the context of written lawyer advertisements instead of upholding complete bans. In both *Bates* and *Shapero*, the Court decided that the dangers involved in completely suppressing truthful and accurate lawyer advertising outweighed any dangers in permitting the speech.[105]

The Supreme Court treats lawyer advertising cases like other commercial advertising cases. Even in commercial product advertising cases, the Supreme Court opposes complete bans. In *44 Liquormart, Inc. v. Rhode Island*,[106] the Court held that a Rhode Island law completely forbidding the advertisement of liquor prices was unconstitutional.[107] The judgment in *44 Liquormart* was unanimous even though the Court split in its reasoning. Justice Stevens and three other Justices used the *Central Hudson* test[108] to arrive at their opinion.[109] They reasoned that a complete ban on the advertisement of liquor prices did not significantly promote the goal of reducing alcohol consumption in the state.[110] Justice O'Connor and three other Justices also applied the *Central Hudson* test and found that the final prong of the test, which requires that a regulation be sufficiently narrowly tailored, was unmet.[111] They noted that the Rhode Island ban was not narrowly tailored because other alternatives, such as raising taxes to reduce alcohol consumption, would achieve the same goal while being less restrictive.[112] Finally, Justice Thomas chose not to use the *Central Hudson* test, contending that the government's interest in maintaining public ignorance is per se illegitimate.[113]

A majority of the Court in *44 Liquormart* expressed support for a stricter review of commercial speech regulation even though there was disagreement on how to

---

104. Bates v. State Bar, 433 U.S. 350, 365 (1977).

105. *See id.* at 383-84; Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 479 (1988).

106. 517 U.S. 484 (1996).

107. *See id.* at 516.

108. *See* Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

109. *See 44 Liquormart*, 517 U.S. at 508 (opinion of Stevens, Kennedy, Souter & Ginsburg, JJ.); *see also* GEORGETOWN UNIV. LAW CTR., FIFTEENTH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION SYMPOSIUM 600-04 (1997) [hereinafter GEORGETOWN SECTION 1983 SYMPOSIUM]. There was no majority holding in *44 Liquormart*. There were four separate opinions authored by: 1) Justice Stevens; 2) Justice O'Connor; 3) Justice Thomas and 4) Justice Scalia. Justice Scalia concurred in the judgment but did not expressly concur in any of the other Justices' opinions. *See* 517 U.S. at 518 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia did not believe that the legitimacy of the *Central Hudson* test was in front of the Court at this time and as a result, he deferred to existing jurisprudence and merely concurred in the judgment of the Court on this issue. *See id.*

110. *See 44 Liquormart*, 517 U.S. at 498 (opinion of Stevens, Kennedy, Souter & Ginsburg, JJ.). *See also* GEORGETOWN SECTION 1983 SYMPOSIUM, *supra* note 109, at 595.

111. *See 44 Liquormart*, 517 U.S. at 532 (O'Connor, J., Rehnquist, C.J., Souter & Breyer, JJ., concurring). *See also* GEORGETOWN SECTION 1983 SYMPOSIUM, *supra* note 109, at 595.

112. *See 44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring).

113. *See id.* at 523.

make it stricter.[114] Justice Stevens' group (four votes) in *44 Liquormart* held that "complete bans on commercial speech—as opposed to other regulation—will be more highly scrutinized and will fail."[115] Justice Thomas adopted a functionally equivalent view by holding that the goal of preserving consumer ignorance, "the usual result of a flat ban on speech, is never a permissible state end."[116] Justice O'Connor's group (four votes, concurring) would apply the final prong of the *Central Hudson* test more strictly to require that "no regulation be upheld unless it is narrowly pursued by less drastic means."[117]

At the very least, the *44 Liquormart* decision demonstrates the Supreme Court's desire to treat cases involving complete bans with even more caution than it has in the past. Consequently, the fact that the *Revo* court also proceeded with caution and looked for less restrictive alternatives to ensure that the public's right to information was not suppressed parallels the Supreme Court's current approach.

VI. THE FUTURE OF LAWYER ADVERTISING IN NEW MEXICO

In his dissent in *Bates*, Justice Powell noted that the Court's decision to permit lawyer advertising will cause "profound changes in the practice of law."[118] Indeed, twenty years later, the effect of *Bates* and its progeny can be seen in New Mexico. According to a May 1997 poll commissioned by the State Bar, in a random sample of New Mexicans, fifty-six percent of survey respondents said that they had a negative impression of the legal profession because of lawyer advertising, while only fifteen percent said they had a positive impression.[119]

Given these statistics, the great concern about the impact of the *Revo* decision on New Mexico is understandable. Specifically, there are three major concerns about the *Revo* decision: 1) its effect on the reputation of the legal profession in New Mexico; 2) its effect on the privacy rights of New Mexicans; and 3) its effect on New Mexico lawyer advertising law.

The *Revo* decision's effect on the New Mexico Bar and the privacy rights of its citizens is unpredictable. Whether or not the decision has a significant effect depends on the number of New Mexico lawyers who choose to look at the *Revo* decision as an invitation to use direct-mail solicitation of accident victims as a means of advertising.

The *Revo* decision's effect on the legal profession may be insignificant. The fact that direct-mail solicitation of accident victims is now legally permissible is not likely to have a significant impact, given the already negative impression the public has of lawyers. The facts of the *Revo* case indicate that New Mexico's ban on direct-mail solicitation at the time it was enacted affected only four to eight

---

114. *See* GEORGETOWN SECTION 1983 SYMPOSIUM, *supra* note 109, at 604.
115. *Id.* at 602.
116. *Id.*
117. *Id.* at 603.
118. Bates v. State Bar, 433 U.S. 350, 389 (1977) (Powell, J., dissenting).
119. *See* Research & Polling, Inc., Poll Conducted for the State Bar of New Mexico, Table 58, Question 57 (May 1997) (on file with the *New Mexico Law Review*).

lawyers.[120] Moreover, there is no evidence that this small number has increased significantly since the *Revo* decision, or that it will.

The *Revo* decision's effect on the privacy rights of New Mexicans will depend on each individual letter recipient. While it is obvious that victims' privacy rights are invaded when they receive a personalized letter from a stranger who is aware of their suffering, this invasion is not necessarily burdensome. A victim who receives a letter plainly and conspicuously marked "Advertising Material" or "Lawyer Advertising," as in the *Revo* case,[121] can throw the letter in the trash before even opening it.[122] Throwing the letter in the trash is only as burdensome as discarding junk mail. Reading the letter, however, could be a burden on an individual. It could either cause the individual more pain and suffering by virtue of having to re-live the traumatic experience, or it could provide the individual with information and even some hope of just compensation for pain and suffering. Therefore, whether receiving direct-mail solicitations will cause an unacceptable invasion of New Mexicans' privacy rights depends on each individual. In other words, the *Revo* decision may cause anywhere from a mild to a severe impact on victims' privacy rights.

The *Revo* decision's effect on New Mexico lawyer advertising law seems more predictable. The decision will likely encourage the Bar to adopt a thirty-day rule similar to the one currently enforced in Florida[123] and in many other states.[124] This is because New Mexico has limited options. New Mexico can do one of three things: 1) completely permit direct-mail solicitation of accident victims; 2) adopt a thirty-day rule pursuant to the *Florida Bar* decision to restrict direct-mail solicitation for thirty days; or 3) create its own time frame and seek to restrict direct-mail solicitation for a different number of days. Given the state's aversion to direct-mail solicitation, it is unlikely that the state will choose the first option, leaving New Mexico either to accept the thirty-day rule or to fashion a rule with a different time limitation (e.g., forty-five day ban)[125] and be prepared to litigate the matter. At this point, given the enormous amount of time and money that was spent to try the *Revo* case, it is unlikely that New Mexico will litigate this matter any further. Therefore, it seems likely that New Mexico will adopt the thirty-day rule.

VII. CONCLUSION

The Tenth Circuit's decision in *Revo* is in line with Supreme Court precedent. The decision favors lawyer advertising and the free flow of information. The decision does not, however, completely prevent New Mexico from pursuing its substantial interests in protecting the reputation of the bar and the privacy of its citizens. Although New Mexico cannot constitutionally enact a complete ban on direct-mail solicitation to accident victims and their families, it can legally enact a

120. *See Revo*, 106 F.3d at 936.

121. *See id.*

122. *See, e.g.*, Florida Bar v. Went For It, Inc., 515 U.S. 618, 637 (1995) (Kennedy, J., dissenting).

123. FLA. R. PROF. CONDUCT 4-7.4(b)(A).

124. *See, e.g.*, ALA. R. PROF. CONDUCT 7.3(b)(1)(i); S.C. R. PROF. CONDUCT 7.3(b)(3); TENN. R. PROF. CONDUCT 2-104 (C)(1)(a).

125. Nevada has adopted a forty-five day rule that has not yet been challenged. *See* NEV. SUP. CT. R. 197(4).

thirty-day ban on such solicitations in order to protect these valuable interests pursuant to the Supreme Court's decision in *Florida Bar*. The thirty-day rule strikes an effective balance between the free flow of information and important state interests.

FARZANA KANJI