

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: FLORIDA BAR Petitioner v. G. STEWART McHENRY,  
WENT FOR IT, INC., AND JOHN T. BLAKELY

CASE NO: No. 94-226

PLACE: Washington, D.C.

DATE: Wednesday, January 11, 1995

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MAINTENANCE

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 FLORIDA BAR :

4                      Petitioner                      :

5 v. : No. 94-226

6 G. STEWART McHENRY, WENT FOR :

7 IT, INC., AND JOHN T. BLAKELY :

8 - - - - - X

9 Washington, D.C.

10 Wednesday, January 11, 1995

11           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   11:04 a.m.

14      APPEARANCES:

15 BARRY SCOTT RICHARD, ESQ., Tallahassee, Florida; on behalf  
16 of the Petitioner.

17 BRUCE S. ROGOW, ESQ., Fort Lauderdale, Florida; on behalf  
18 of the Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in case number 94-226, Florida Bar v. G. Stewart  
5 McHenry.

6 Mr. Richard.

7 ORAL ARGUMENT OF BARRY SCOTT RICHARD

8 ON BEHALF OF THE PETITIONER

9 MR. RICHARD: Mr. Chief Justice and may it  
10 please the Court:

11 This case arose out of the adoption by the  
12 Florida supreme court of a rule which prohibited attorneys  
13 from engaging in direct mail solicitation to victims of  
14 accidents or their survivors for a period of 30 days after  
15 the accident.

16 The district court declared that the rule was  
17 unconstitutional, and the Eleventh Circuit affirmed. In  
18 an unusual postscript to its opinion, the Eleventh Circuit  
19 stated that it was disturbed that it was required by this  
20 Court's earlier decision in Bates and its progeny to reach  
21 that result.

22 The concern that was expressed by the Eleventh  
23 Circuit reflected similar concerns expressed by at least  
24 seven justices in full or partial dissents in Bates and  
25 the cases following Bates.

1           Bates itself was a limited decision by its own  
2     characterization. It held only that a State could not  
3     entirely prohibit an attorney from engaging in what the  
4     Court later in Ohralik referred to as restrained  
5     advertising of the rates for routine legal services and  
6     nothing more.

7           A year later, in Ohralik, this Court stated that  
8     the States had a critical interest in maintaining the high  
9     standards of professionalism in connection with attorney  
10    advertising, and in fact it permitted States to prohibit  
11    altogether an attorney from engaging in direct, person-  
12    to-person solicitation of any nature.

13           QUESTION: Does Florida permit lawyers to  
14    solicit business in person?

15           MR. RICHARD: No, ma'am, it does not.

16           In doing so, this Court in Ohralik noted that an  
17    attorney's interest in his or her remunerative employment  
18    was charged with only marginal First Amendment concerns,  
19    and that regulation of that type of advertising falls  
20    within the State's proper sphere of economic and  
21    professional regulation.

22           In Ohralik, the Court noted a significant  
23    distinction between the restrained advertising that the  
24    Court had permitted in Bates and what it referred to in an  
25    earlier case of Railroad Trainmen v. West Virginia as

1 ambulance chasing. The case this Court stated in Ohralik  
2 did not involve ambulance chasing.

3 Ten years later, however, in Zauderer and  
4 Shapero, the Court prohibited the States from regulating  
5 what in essence amounted to ambulance chasing. In  
6 Zauderer, the Court held that States could not prohibit  
7 direct solicitation of clients based upon a particular  
8 legal problem, and in Shapero, the Court took another  
9 giant step forward when it held that States could not  
10 regulate the direct, targeted solicitation of particular  
11 individuals who had suffered or were about to suffer a  
12 particular legal problem.

13 QUESTION: How do you distinguish this case from  
14 that of Shapero? It seems pretty close.

15 MR. RICHARD: Justice O'Connor, I believe that  
16 this case can be distinguished from Shapero on the basis  
17 of the fact that it is a reasonable time, place, or manner  
18 restriction.

19 QUESTION: Well, doesn't a time, place, and  
20 manner restriction have to be content-neutral?

21 MR. RICHARD: It does, and we believe that --

22 QUESTION: How is this content-neutral?

23 MR. RICHARD: Well, we believe it is content-  
24 neutral within the scope of what this Court has  
25 interpreted as content-neutral. What it said in Clark v.

1 Community for Creative Nonviolence, and in Ward v. Rock  
2 Against Racism, and in Renton v. Playtime Theatres is that  
3 the issue, the principal inquiry in determining content  
4 neutrality, and I'm quoting from Ward, is whether the  
5 Government's purpose in control -- is the controlling  
6 consideration.

7 Government regulation of expressive activity is  
8 content-neutral, the Court said, so long as it is  
9 justified without reference to the content of the  
10 regulated speech.

11 QUESTION: But doesn't this regulation address  
12 only certain types of speech, and it's there with  
13 reference to a particular kind of speech?

14 MR. RICHARD: Yes, Justice Connor, it does, but  
15 this Court has never --

16 QUESTION: O'Connor.

17 MR. RICHARD: -- has never said that simply  
18 because you must make reference to the content in order to  
19 determine whether or not it falls within the scope of the  
20 regulation, that it therefore violates the content-neutral  
21 rule.

22 QUESTION: Yes, but you justify this regulation  
23 by what the communication says.

24 MR. RICHARD: We justify it --

25 QUESTION: And that was not true in the cases

1       that you've cited.

2               MR. RICHARD: It justifies -- I'm sorry.

3               QUESTION: Here, you do justify the regulation  
4       in terms of the content of the communication. That's the  
5       whole point of the case.

6               MR. RICHARD: Well, Just --

7               QUESTION: Now, you might -- you might still  
8       prevail, but it's not content-neutral.

9               MR. RICHARD: Well, Justice Kennedy, I would  
10       suggest that it's justified by the nature of the person to  
11       whom the communication is sent, the circumstances of that  
12       individual.

13               In Renton, clearly it's necessary to make  
14       reference to the nature of the film to determine whether  
15       or not it contains adult situations, which is what the  
16       Renton ordinance provided, that you had to -- you could  
17       prohibit it within certain zoned areas.

18               You must, therefore, make reference to the  
19       content of the film to determine whether or not it's  
20       subject to the regulation, but what this Court said was  
21       that that wasn't the controlling factor if the purpose of  
22       it was not to control the content but rather to control  
23       the secondary effects of it.

24               It said the same thing essentially in Ward, that  
25       you have to look at whether or not reference to the

1 content was for the purpose of controlling the content.  
2 Here the content is permitted --

3 QUESTION: But do you think the effect on the  
4 person to whom the message is addressed is a secondary  
5 effect within the meaning of Renton?

6 MR. RICHARD: Well, that -- that is, Your Honor,  
7 if you're talking about the effect upon that individual.  
8 If you're talking about the --

9 QUESTION: In Renton, you're not talking about  
10 the people who wanted to go to these theaters.

11 MR. RICHARD: Well, you are --

12 QUESTION: You're talking about what it did to  
13 the neighborhood.

14 MR. RICHARD: You're talking about the effect  
15 upon the community and the surrounding area.

16 QUESTION: Not the audience or the message.  
17 Whereas here, you're talking about the effect of the  
18 message on the people who receive it.

19 MR. RICHARD: What we're suggesting, Your Honor,  
20 is that the State has the right to determine that it has a  
21 secondary effect upon the legal profession as a whole and,  
22 in turn, the administration of justice, and that the  
23 ability of the State to make that judgment has been  
24 entirely removed by this Court's prior opinions.

25 QUESTION: What the State is saying, then, is

1     that a certain number of lawyers will chase ambulances if  
2     we don't prohibit them, and it's going to make the whole  
3     bar look bad if they find out that these people are  
4     chasing ambulances, therefore we'll prohibit it. That  
5     sounds like an odd justification.

6             MR. RICHARD: What we're talking about, Justice  
7     Rehnquist, is the extent to which we are going to permit  
8     the States to make these judgments, as opposed to the  
9     extent to which the Federal courts are going to  
10    micromanage the question of attorney advertising, and  
11    what's happened here is that as a matter of law,  
12    essentially this Court has said that the question of  
13    whether or not a given type of attorney advertising will  
14    have an adverse effect upon the view of the public as to  
15    lawyers and the institutions that they serve is beyond the  
16    scope of State consideration.

17            QUESTION: Well, but is it really a terribly  
18    legitimate State goal to say, we want to protect not the  
19    substance of the reputation of the legal profession but  
20    the appearance of the reputation?

21            MR. RICHARD: Well, Your Honor, I believe it is.  
22    The justices of this Court and most judges wear black  
23    robes. We hold these proceedings in a magnificent  
24    edifice. We require lawyers to meet certain dress codes.  
25    Why do we do that? We do that, I would --

1                   QUESTION: Personal injury lawyers, not probate  
2 lawyers. Potential plaintiffs' lawyers, not potential  
3 defendants' lawyers. How can you say this isn't based on  
4 content if it is the potential personal injury plaintiff's  
5 lawyer that is being stopped within 30 days but not the  
6 probate lawyer, not the insurance adjuster, and not the  
7 attorney for the potential defendant?

8                   MR. RICHARD: Well, that's indistinguishable,  
9 Justice Ginsburg, I would suggest, from the Renton  
10 situation with adult films. What we're really talking  
11 about when you ask that question is whether it's  
12 underinclusive, which is not a constitutional issue. You  
13 can make reference to the content if your purpose is not  
14 to control the content. Here, the State of Florida  
15 doesn't seek to control the content.

16                  QUESTION: I don't see how, in terms of your  
17 justification, the privacy of the person, it makes any  
18 difference whether the person who is making the  
19 solicitation is an insurance adjuster for the other side,  
20 or a potential defendant's lawyer, or a probate lawyer.  
21 If the idea is this person should be let alone, should not  
22 get lawyer' letters, then I don't understand even the  
23 rationale for saying only certain kinds of lawyers.

24                  MR. RICHARD: Well, Justice Ginsburg, that may  
25 well be true, and it's an issue that was addressed by this

1 Court in Ohralik, where they mentioned precisely what Your  
2 Honor is saying with regard to the possibility of  
3 adjusters contacting individuals.

4 What the Court said in Ohralik, which I think is  
5 accurate, implicitly what they said was, that's not a  
6 constitutional question. That can be dealt with and, in  
7 fact, is dealt with by courts which view with a very dim  
8 eye agreements that are entered into by individuals prior  
9 to the time that they've had an opportunity to visit with  
10 a lawyer, but that's -- that is --

11 QUESTION: Did Ohralik say only personal injury  
12 lawyers can't have face-to-face contact, or was this all  
13 lawyers?

14 MR. RICHARD: That is what the rule says, but  
15 this Court has said time and time again -- well, it  
16 doesn't define the lawyer. It says that you can't contact  
17 a person in order to solicit business for a period of  
18 30 days after a personal injury. Now, that, of course,  
19 wouldn't affect an adjuster, who's not a lawyer. It  
20 wouldn't affect a lawyer for an insurance company who is  
21 not seeking to solicit business.

22 But this Court has said time and time again that  
23 the State may deal with these issues on a step-to-step  
24 basis as it sees a need for it, and that that's not a  
25 constitutional issue, so it may well be that the State

1 ought to go back at some point and look at that question  
2 as to whether or not it should be expanded, but the  
3 constitutional issue before this Court is whether the  
4 State can deal with this as to anyone.

5 QUESTION: Does the State bar regard this  
6 Court's decision in Edenfield v. Fane as a guiding light  
7 in this area? You seem to be making a grand scale attack  
8 on everything since Bates, so I would like to know in  
9 particular, since that has been an important decision in  
10 this line of commercial advertising lawyer solicitation  
11 cases, Edenfield v. Fane, do you regard that as a  
12 precedent that you have no quarrel with?

13 MR. RICHARD: The Edenfield case was a case of  
14 limited application, and we do not have a problem with  
15 Edenfield. We believe -- and I'm glad you asked the  
16 question, because we believe that the essential problem  
17 here was created in Zauderer and in Shapero, and not  
18 solely because this -- and that goes well beyond the  
19 question of whether this is a time, place, or manner  
20 restriction.

21 We believe that the decisions that were made in  
22 Zauderer and Shapero were blatantly inconsistent with two  
23 other lines of cases that this Court had been deciding  
24 simultaneously. One of them was the cases on commercial  
25 solicitation, commercial advertising generally, and the

1 other was what we have referred to in our brief as the  
2 institutional speech cases.

3 What this Court said in Central Hudson v. Public  
4 Service Commission and in Board of Trustees v. Fox is that  
5 the States are entitled to considerable deference in  
6 determining where to draw the line on commercial  
7 advertising, and when it begins to be too much to meet the  
8 requirements of the First Amendment.

9 In Board of Trustees v. Fox, in addition to  
10 saying that there is no least restrictive means test, the  
11 Court said this: it said, we have been loath to second-  
12 guess the Government's judgment regarding where to draw  
13 the line. We take into account the difficulty of  
14 establishing with precision the point at which  
15 restrictions become more extensive than their objective  
16 requires, and provide the legislative and executive  
17 branches needed leeway in a field, commercial speech,  
18 traditionally subject to Government regulation.

19 Well, at the same time the Court was saying  
20 that, it was saying with respect to lawyers -- and this is  
21 just commercial solicitation, which in Ohralik the Court  
22 said was only marginally charged with First Amendment  
23 protection. At the same time it said that, it  
24 essentially, in Zauderer and Shapero, gave the courts --  
25 gave the States no leeway -- no leeway to deal with this.

1 It basically said, you don't have a substantial enough  
2 interest to consider it.

3 In fact, in Shapero, in part 3 of Shapero, which  
4 represented the views of only four justices but  
5 nevertheless was part of the opinion of the Court, it said  
6 you couldn't even deal with the format of the letter. You  
7 couldn't even deal with the letter that was essentially a  
8 used-car type of an advertisement that said to an  
9 individual, free legal services, that made subjective  
10 predictions of success, that said, call me now.

11 Now, In Ohralik, this Court said that the State  
12 had a substantial interest in avoiding the potential that  
13 a lawyer, because of the lawyer's training and experience,  
14 could be overbearing with an individual, and yet, in  
15 Shapero, in part 3 of Shapero, it essentially said, you  
16 can use any type of enticement to get that individual to  
17 call you, and then you're basically free.

18 QUESTION: So suppose that in Florida -- I  
19 can -- suppose there's been a bad accident, and it  
20 involves a man or a woman who knows nothing about law, so  
21 obviously they're terribly upset, and I can understand why  
22 you might want to keep lawyers away from them for 30 days.

23 But suppose that man or that woman, who's  
24 terribly upset and doesn't have much money and knows  
25 nothing about law, would like to find a lawyer. How, in

1 Florida, can they do it? That is, what well-known ways  
2 are there for people who know nothing about law, who have  
3 just been in a bad accident, who think they might need a  
4 lawyer, who don't have friends who are lawyers, how do  
5 they find out where to go?

6 MR. RICHARD: Well, there are numerous ways to  
7 do it. They can, of course, look in the yellow pages,  
8 they can call the local bar, they can call friends who are  
9 lawyers, but beyond that, we are not suggesting to this  
10 Court --

11 QUESTION: I'm not asking you -- I wanted a  
12 factual answer. That is, I'm -- what actually do they do?  
13 They could go to the yellow pages, maybe they have a  
14 friend who has a lawyer, and you say, call the bar. What  
15 does that involve? What does that involve? Is there a  
16 system so that people who don't know how to get to lawyers  
17 can?

18 MR. RICHARD: Both of --

19 QUESTION: Is there a lawyer referral service --

20 QUESTION: Yes, what is there?

21 QUESTION: -- operative?

22 MR. RICHARD: Yes, ma'am. Both at the State  
23 level and at the local bar level there are lawyer referral  
24 services.

25 QUESTION: How does it work?

1                   MR. RICHARD: You call the bar and they make  
2     available to you from a list of lawyers those who have  
3     indicated that they handle that type of work. In  
4     addition, Florida recognizes both designation of fields  
5     and specialization as certification, so there are a  
6     list -- lawyers are listed in the yellow pages by  
7     designation of a field or by certi -- the fact that  
8     they've been certified to handle a particular field.

9                   My understanding is that most States now permit  
10    lawyers to list in the yellow pages with designations.

11                  QUESTION: Do lawyers advertise on television in  
12    Florida?

13                  MR. RICHARD: Yes, they do.

14                  QUESTION: Personal injury lawyers?

15                  MR. RICHARD: Yes, they do.

16                  QUESTION: And do they advertise on billboards  
17    in Florida?

18                  MR. RICHARD: I'm not aware of whether or not we  
19    have billboard advertising, but this Court's decision in  
20    Shapero would not allow the State to control billboard  
21    advertising. In fact, part 3 wouldn't allow the State to  
22    control what it looked like.

23                  QUESTION: But should we be con --

24                  QUESTION: May I ask another question about the  
25    Florida practice? Does the bar routinely either prohibit

1 or encourage letters to accident victims within the first  
2 30 days of the accident?

3 MR. RICHARD: The bar takes no position as to  
4 that, because it believes it is not permitted to as a  
5 result of this Court's decisions.

6 QUESTION: Did the bar association -- I'm  
7 talking about the bar association, not individual lawyers.  
8 Does the bar association affirmatively make an effort to  
9 make known to the accident victims that they have this  
10 referral service available?

11 MR. RICHARD: Oh, yes, sir, and as a matter of  
12 fact it has publications that it attempts to widely  
13 distribute, it has public service announcements that it  
14 distributes, all of which a bar is entitled to do as a  
15 public service in the Florida --

16 QUESTION: And they mail those to the accident  
17 victim within the 30-day period after the accident?

18 MR. RICHARD: I'm not aware of any practice by  
19 the Florida Bar to mail things to any victims.

20 QUESTION: I'm just wondering if it would be  
21 consistent with your position here to say maybe we should  
22 prohibit it because they don't want to be -- they're --  
23 you know, they're emotionally disturbed during that 30-  
24 day period.

25 MR. RICHARD: Well, I would like to address

1     that, Justice Stevens. In the first place, I think that  
2     would -- personally, I see nothing wrong with a letter  
3     that does not seek to get business for a given lawyer  
4     advising an individual that they have rights that they may  
5     seek a lawyer for, and in that regard, the Florida Bar is  
6     not asking this Court to reverse the holding in Bates.

7             The holding in Bates simply said that restrained  
8     advertising of availability and prices of services for  
9     routine legal matters are permissible under the First  
10    Amendment. We don't challenge that, but we believe that  
11    the Court should return to the States the ability to  
12    manage the degree and the manner in which lawyers proceed  
13    to do that, rather than --

14            QUESTION: Within limits. You're not quarreling  
15    with Ibanez.

16            MR. RICHARD: That's correct. Ibanez, which --

17            QUESTION: Indeed, you supported -- you came in  
18    as a friend of this Court and said the State is not  
19    permitted to have that kind of regulation.

20            MR. RICHARD: Yes, Justice Ginsburg, and we were  
21    happy with the opinion that you wrote in the case, and the  
22    opinion was a unanimous opinion, and we had no problem  
23    with Ibanez whatsoever.

24            Ibanez went to an extreme by saying that a  
25    person could not even -- a lawyer, according to the Board

1 of Accountancy, could not even indicate that that lawyer  
2 was also a CPA, a simple, truthful statement which had --  
3 which reflected nothing with respect to any substantial  
4 State interest, and I can't see how that could, either.  
5 Now --

6 QUESTION: Well, maybe you want to add a word or  
7 two. You're interested very much in all these legal  
8 cases, which is right, but I'm interested at the moment in  
9 the facts. That is, on the one hand you're saying what  
10 justifies this are lawyers' reputations and the need to  
11 give a man or a woman a little -- a few days of peace.

12 On the other hand, they're saying, but how would  
13 such a person find a lawyer when they might need one?  
14 Now, so far you've said the yellow pages, which strikes me  
15 as not terrific, the -- maybe they've seen some ads  
16 somewhere, and then there's this thing called the referral  
17 service. But I mean, does the referral service get to  
18 people? Do they know about it? Is there a way for a  
19 human being to find a lawyer when he or she feels he needs  
20 one?

21 MR. RICHARD: Justice Breyer --

22 QUESTION: One way is they'll write him a  
23 letter, and then he'll know somebody's interested.

24 MR. RICHARD: -- I'd like to give you several  
25 responses to that. There are those things. In addition,

1 because we are not asking this Court to overturn Bates,  
2 there's no reason why a lawyer who desires to make the  
3 public aware of the fact that that lawyer is available and  
4 provides services in a given area should not be able to  
5 run an ad. That's not the issue, we believe, in this  
6 case.

7 In addition, we don't believe that it's a  
8 proper, constitutional purpose for the Federal courts to  
9 micromanage the question you're raising, which is, to what  
10 extent should States be able to tell lawyers that they can  
11 or cannot engage in these activities?

12 The one other remark that you made that I would  
13 like to respectfully comment on was that the substantial  
14 State interest that we were suggesting here was that  
15 lawyers be able to protect their reputations, which is  
16 what the respondent wishes to suggest is the substantial  
17 State interest, and I think that trivializes what we are  
18 really suggesting here.

19 We are not saying that lawyers should be able to  
20 protect their reputations, but what we are saying is that  
21 we learned several hundred years ago that the manner in  
22 which we treat our fundamental institutions, that the  
23 dignity which we grant to those institutions, has a great  
24 deal to do with the respect the public has in them and  
25 their credibility as institutions.

1 QUESTION: May I follow up on how this works?  
2 Suppose that you do go to the yellow pages and you phone  
3 an attorney and you say, I've had a terrible accident,  
4 will you please write me a letter about the terms of the  
5 employment, and this is all within the first or second  
6 day. Is the lawyer permitted to write the letter?

7 MR. RICHARD: Yes, he is, or she is.

8 QUESTION: How does -- that's -- is there some  
9 exception to the written communications rule that you  
10 quote at page 2? I mean, I assumed that your answer would  
11 be what it is, but I don't get that from reading the  
12 regulation at page 2 of your brief.

13 MR. RICHARD: Florida interprets that rule not  
14 to prohibit it once a contact has been made with the  
15 lawyer and he has a relationship with the potential  
16 client. Florida does not interpret that rule to prohibit  
17 a lawyer from responding to a prior request by a client,  
18 or a potential client.

19 QUESTION: What about -- suppose a relative of a  
20 client writes -- tells the attorney please write my  
21 nephew?

22 MR. RICHARD: Your Honor, you're asking me  
23 questions now that I don't know the answer to. I don't  
24 know whether Florida has addressed that, or the extent to  
25 which it has addressed that. The only concern that I have

1 here is the extent to which the lower court said Florida  
2 cannot address it at all.

3 QUESTION: Well, we have to examine the  
4 regulation as it's given to us, and as I read it, at least  
5 in the case that I put the lawyer could not write the  
6 client, or the proposed client.

7 MR. RICHARD: Florida I can tell you doesn't  
8 interpret it that way, but the question of that  
9 interpretation was never an issue in this case, and --

10 QUESTION: Mr. Richard -- I'm sorry. I didn't  
11 mean to interrupt you. Please finish your answer to  
12 Justice Kennedy.

13 MR. RICHARD: I was just going to point out that  
14 there's a significant distinction between what Your Honor  
15 is suggesting and a mass mailing of innumerable letters to  
16 an individual who has just been involved in an accident or  
17 a personal tragedy at any point and who has not sought any  
18 lawyer, and finds a virtual feeding frenzy taking place as  
19 to who that individual is going to select as a lawyer, or  
20 whether that individual is going to select anybody, and  
21 the issue here which this Court has recognized is that  
22 there is a substantial State interest in protecting the  
23 professional standards of the bar, and the question is  
24 what does that mean, and I would suggest --

25 QUESTION: I thought your -- I thought your

1 primary justification was protecting those who were in  
2 shock and grief.

3 MR. RICHARD: Well, we --

4 QUESTION: And you said, we don't want to  
5 trivialize this case by saying we're simply trying to  
6 protect the image of the bar.

7 MR. RICHARD: We see --

8 QUESTION: I took it from that that your primary  
9 justification is the sensibilities of the people to whom  
10 the letters would be addressed.

11 MR. RICHARD: Justice Souter, we have advanced  
12 two separate substantial interests. One of them is the  
13 protection of the -- or the enhancement of the  
14 professional standards of the legal profession, and the  
15 second is not so much to protect individuals, but that the  
16 State has a substantial interest in maintaining a  
17 community standard of privacy and tranquility, the same  
18 thing --

19 QUESTION: Well, if that is the -- to the extent  
20 that that is the justification, may I take you back to the  
21 underinclusiveness point, because the issue that is raised  
22 by that is the extent to which the regulation in question  
23 really does have any substantial effect in accomplishing  
24 your object, and when it is as underinclusive as this  
25 is -- insurance adjusters can get in touch with them,

1 potential defendants can get in touch with them, probate  
2 lawyers can get in touch with them, and so on -- isn't  
3 that a rather heavy mark against your justification, to be  
4 as underinclusive as that?

5 MR. RICHARD: Well, the Florida supreme court,  
6 and the Florida Bar prior to that, perceived a particular  
7 problem. The problem that the bar perceived and that the  
8 supreme court perceived was that attorneys were obtaining  
9 mass listings from the Department of Motor Vehicles of  
10 individuals who had been injured, and sending mass --

11 QUESTION: Well, I have no doubt of that. I  
12 mean, I will assume that, but there's still the problem of  
13 underinclusiveness, because the same people can be  
14 victimized by insurance companies and by defendants and by  
15 other kinds of lawyers, and how do you deal with the  
16 underinclusiveness problem?

17 MR. RICHARD: Well, this Court has said in a  
18 number of cases that underinclusiveness is not itself  
19 unconstitutional.

20 QUESTION: No, but it goes very much to the  
21 question of the degree to which your regulation advances  
22 the interest that you claim.

23 MR. RICHARD: I think that's correct.

24 QUESTION: I suppose one reason for the  
25 underinclusiveness, if it be that, is that the Florida bar

1 can't regulate insurance adjusters.

2 MR. RICHARD: Well, that is an answer, Your  
3 Honor, and that's correct. It cannot regulate  
4 insurance --

5 QUESTION: No, but it can regulate defense  
6 lawyers and probate lawyers.

7 MR. RICHARD: It can regulate defense lawyers,  
8 but Florida apparently has not perceived a problem with  
9 defense lawyers inundating an individual who's been -- who  
10 has been injured.

11 QUESTION: There can only be one defense lawyer  
12 at a time, I suppose. That's right. There wouldn't be a  
13 flood of them in any one case.

14 (Laughter.)

15 QUESTION: But it seemed to me it might be  
16 equally offensive to the plaintiff.

17 MR. RICHARD: You know, Your Honor, the lower  
18 court here didn't strike --

19 QUESTION: What is the evidence that there's  
20 these mass mailings? Is that really the fact? I can  
21 understand there'd be a lot of them, but what do you mean  
22 by mass mailing? What does a typical injured plaintiff  
23 get in the mail, according to their --

24 MR. RICHARD: That's not in the record, Your  
25 Honor, and I don't know the answer to that question.

1           QUESTION: Mr. Richard, for purposes of judging  
2   this case, do we have to simply -- do we not, in fact,  
3   simply assume that what is being used here is State power,  
4   and therefore it -- as a practical matter it's the State  
5   rather than a bar association as such which is being  
6   judged by First Amendment standards? Is that a correct  
7   assumption?

8           MR. RICHARD: That is correct, Your Honor. It's  
9   the Florida supreme court that adopts this rule. Through  
10  the Florida bar as an arm of the court, the court requests  
11  the bar to propose rules to it, but it is the Florida  
12  supreme court, after public debate, at which, by the way,  
13  the Florida supreme court hears from the public at  
14  large -- it's not limited -- the court will adopt the rule  
15  as it sees fit, and will modify the rule that's been  
16  proposed.

17           QUESTION: And one of those justices made the  
18  point that several of the questions you've received are  
19  trying to get at -- Justice Shaw. How do you answer his  
20  concern that this ban will effectively deprive many  
21  accident victims of information that would be helpful to  
22  them at the most crucial time for them, that that 30-day  
23  period may be the most crucial time when they need help  
24  most?

25           MR. RICHARD: We think here are numerous ways in

1     which the Florida bar and the Florida supreme court  
2     through the bar can remedy that problem, which is  
3     essentially a problem of the social question of how we  
4     make people aware of the accessibility of legal services.

5             We do not believe it's necessary to remedy that  
6     problem by the Federal courts, and in particular this  
7     Court, decreeing that it is beyond the power of the State  
8     to consider the strictly commercial implications of  
9     certain types of attorney advertising.

10            Because what's happened here is, it has been  
11     raised to a constitutional level, and what has been  
12     imposed upon the States in reality is a least restrictive  
13     means test and what appears to be pretty close to a clear-  
14     and-convincing-evidence test, something that hasn't been  
15     done in any of the other commercial fields, and something  
16     in fact that hasn't been done in fields involving  
17     political and ideological speech when it comes to issues  
18     of protecting public privacy and public tranquility and  
19     issues involving matters that may affect the mission of  
20     other fundamental public institutions in which this Court  
21     has said considerable deference must be granted to the  
22     States to make this decision.

23            Instead, when it comes to attorney advertising,  
24     the Court has interjected itself and Federal courts have  
25     interjected themselves to the point of saying, we will

1 manage this issue, and we will allow the States whatever  
2 the other problems may be that the States ought to be able  
3 to address.

4 The real question here is, shouldn't the States  
5 be able to address whether or not an attorney, by the  
6 manner in which he is approaching individuals with whom he  
7 has no prior relationship, by the manner in which he is  
8 presenting himself and, in turn, the legal profession, and  
9 perhaps in turn the administration of justice, shouldn't  
10 the State be able to consider whether or not that has an  
11 unduly adverse effect upon not only that individual, not  
12 only a community standard of propriety in terms of privacy  
13 and tranquility, but upon the entire --

14 QUESTION: Thank you, Mr. Richard. Your time  
15 has expired.

16 MR. RICHARD: Thank you, Mr. Chief Justice.

17 QUESTION: Mr. Rogow.

18 ORAL ARGUMENT OF BRUCE S. ROGOW

19 ON BEHALF OF THE RESPONDENTS

20 MR. ROGOW: Mr. Chief Justice, and may it please  
21 the Court:

22 The fundamental premise of the commercial speech  
23 cases is that truthful, nonmisleading information is of  
24 great benefit to the listener, and that's what this case  
25 is about.

1           The letters at issue in this case are highly  
2 regulated by the Florida Bar. At page 12-A of the  
3 appendix to our brief, we set forth the extensive  
4 regulations about these letters -- what they must contain,  
5 what they must say, the fact that the envelope and each  
6 page must be stamped "Advertisement."

7           These are the least intrusive, the most discreet  
8 forms of communication, and the question is whether or not  
9 that mode of communication can be precluded by the Florida  
10 Bar for a period of 30 days during the time, as then-  
11 Chief Justice Shaw of the Florida supreme court said,  
12 during the time when a person is most in need of the  
13 information.

14           And yes, the question of underinclusiveness, as  
15 Mr. Richard I think has now conceded, goes to whether or  
16 not this regulation directly and materially advances  
17 substantial State interests, and if one of those State  
18 interests is this theoretical privacy right, then how is  
19 that State interest directly and materially advanced by a  
20 rule which precludes the lawyer from sending a letter  
21 informing a person of his or her rights but allows the  
22 insurance adjuster or the defense lawyer to communicate  
23 with that person any time.

24           QUESTION: Well, certainly some of our cases,  
25 Mr. Rogow, in the commercial speech area have said that

1 the Government can confront evils one step at a time. It  
2 doesn't have to regulate the whole waterfront before it  
3 addresses a single evil that it perceives.

4 MR. ROGOW: It is true, Mr. Chief Justice, but  
5 there are several problems with this. One, the evil, if,  
6 indeed, it is an evil to hear truthful, nonmisleading  
7 information, and we don't subscribe to the notion that  
8 that's evil or injurious in any way, but that evil, if  
9 it's going to be directly and materially stopped, if a  
10 State regulation is going to accomplish that, has to be  
11 even-handed. It has to be fair.

12 QUESTION: Why can't they say --

13 QUESTION: Of course, at the time the First  
14 Amendment was adopted, all advertising by lawyers could  
15 have been restricted. I mean, this is a -- the change was  
16 effected by our decision in Bates. I don't know that the  
17 change has to go so far as to say that you cannot in any  
18 respect treat lawyers differently.

19 MR. ROGOW: Justice Scalia, the change --

20 QUESTION: That's been a long tradition.

21 MR. ROGOW: It has, and lawyers are treated  
22 differently. Indeed -- indeed, the regulations that the  
23 Florida Bar imposes are different.

24 QUESTION: So at least insurance adjusters are  
25 irrelevant.

1 MR. ROGOW: No, I don't think they're irrelevant  
2 when the purpose stated by the bar, Justice Scalia, is to  
3 protect the privacy of people at moments when they've had  
4 an accident.

5 QUESTION: That's one purpose. The other  
6 purpose is the decorum that's appropriate to the  
7 instrumentalities of justice.

8 MR. ROGOW: The State has made this argument,  
9 which basically is an image and dignity argument. There  
10 is absolutely nothing in this record that supports the  
11 notion that truthful, nonmisleading letters sent to  
12 people, highly regulated letters, have any impact upon the  
13 administration of justice. That's a hollow argument.  
14 It's a shallow argument that's been made.

15 The lesson from Virginia Board of Pharmacy and  
16 Central Hudson is that commercial speech is of value, and  
17 if it is of value, then it must have protection. All I  
18 hear -- I hear no rule suggested by the bar. I hear this  
19 kind of vague leave it to the States, but --

20 QUESTION: Well, Mr. Rogow, supposing the bar  
21 were to conclude, and the Florida supreme court should  
22 agree, that this kind of solicitation gives an impression  
23 to people who receive it that lawyers are extremely  
24 greedy, and very anxious to make a lot of money.

25 Do you think the State or the bar has any --

1 consistent with the First Amendment could somehow try to  
2 prevent that image from prevailing?

3 MR. ROGOW: I do not think it could try to  
4 prevent that image by trying to preclude truthful,  
5 nonmisleading speech. There are ways to try to preclude  
6 it. President Bushnell of the ABA in this month's ABA  
7 Journal, in his president's letter, says we should address  
8 the good things that we do. That is the high road. The  
9 high road is to let the public know, as the bar in Florida  
10 and other States have done, that lawyers serve important  
11 purposes righting wrongs, redressing grievances, not to --  
12

13 QUESTION: Well, what if the Florida State Bar  
14 tries that and it just doesn't work. People still think  
15 lawyers are greedy.

16 (Laughter.)

17 MR. ROGOW: We have fought an image issue for a  
18 long time, Mr. Chief Justice. It's not going to be  
19 remedied simply by precluding these letters, certainly not  
20 under the constitutional standards that have been set by  
21 this Court.

22 QUESTION: We should probably pass a statute  
23 saying you can't say un-nice things about lawyers.

24 (Laughter.)

25 QUESTION: And not read Dickens or Shakespeare.

1 (Laughter.)

2 QUESTION: I wondered if that was them.

3 QUESTION: And not admit greedy people to  
4 practice law.

5 MR. ROGOW: I'm sorry, Mr. Justice Souter?

6 QUESTION: Not admit greedy people to practice  
7 law.

8 MR. ROGOW: Justice Breyer --

9 QUESTION: I'm certainly glad I never passed  
10 through the stage of being a lawyer before --

11 (Laughter.)

12 QUESTION: It might have helped you, actually.

13 (Laughter.)

14 QUESTION: The -- what I wondered was this. It  
15 seemed to me they're -- a) I don't know if they're arguing  
16 this as their strongest justification, but it did make an  
17 impression upon me that a man or a woman who has just  
18 suffered a serious accident, maybe has lost a husband or a  
19 wife, is not a model of a rational consumer, and so what  
20 they're saying is, protect that person for 30 days both  
21 from harassment and so that when a choice of lawyer is  
22 made it's more rational.

23 You can tell them during that 30 days who's  
24 available. You can refer them to the referral service.  
25 You could keep big lists of people. You could keep all

1 the advertising material in one place and tell them, go  
2 there, but for 30 days, leave them alone so that they have  
3 a chance to make this decision more rationally.

4 Now, that I took it, at least to me, was a  
5 fairly powerful justification. Now, what's wrong with it?

6 MR. ROGOW: Well, Justice Breyer, grief is not  
7 the gravamen of this rule and, indeed, there are two other  
8 portions of the rule that address that. One precludes  
9 harassment, and the other says that if a person -- if a  
10 lawyer knows or should know that a person is not able to  
11 make a principled decision, then that person should not be  
12 contacted.

13 But remember, this rule applies to all  
14 accidents, not just the grief-stricken situation, and I  
15 think that people who are in grief need some information,  
16 too. The suggestion that a letter, which can be  
17 discarded, and this Court has said that in both Bolger  
18 Drugs and in Shapero, the suggestion that a letter which  
19 can be discarded somehow intrudes upon that grief I think  
20 stretches the notion of this mode of communication.

21 QUESTION: Yes, but your opponent says it's not  
22 one letter, it's a flood of letters, and as I understand  
23 it you said there's nothing in the record, and I haven't  
24 read this, but they do refer to a study that the bar made  
25 that indicated that this was regarded as a problem of some

1 magnitude.

2 MR. ROGOW: The study that the bar made was made  
3 of 200 people in 1987 who apparently received direct mail  
4 letters, and something like 11 percent, or 21, said that  
5 they were offended by receiving the direct mail letters.  
6 Now, that is not the kind of burden of proof that the bar  
7 would have to carry under Ibanez or any of the First  
8 Amendment cases dealing with this.

9 But even if some people are offended -- and I'm  
10 sensitive to the good manners of respecting grief. Even  
11 if they are --

12 QUESTION: Well, do you think your client is  
13 sensitive to such matters? Perhaps you are, Mr. Rogow,  
14 but this -- now, who is it you're presently representing?  
15 It's not a lawyer, it's some entity, as I understand --

16 MR. ROGOW: It is a lawyer, Justice O'Connor.  
17 John Blakely is a lawyer who sends direct mail  
18 advertising, and he is a plaintiff in the case along with  
19 Went For It, Inc., which is a referral service.

20 QUESTION: Went For It, Inc., and do you  
21 represent Went For It, Inc.?

22 MR. ROGOW: I do, and --

23 QUESTION: And would you describe for us just  
24 what it is that Went For It, Inc. does in Florida to  
25 contact accident victims? Does it study police reports

1 and get information about any incidents and then identify  
2 the people and write letters?

3 MR. ROGOW: It does not, Justice O'Connor,  
4 because as a referral agency, all it can do is identify  
5 people who may be in need of this information and then a  
6 lawyer can obtain that information from the referral  
7 service, but the referral service is bound by the same  
8 rules as the lawyer is, and that's why Went For It, Inc.  
9 is a plaintiff also in the case.

10 QUESTION: Yes, but I -- it gets information  
11 about accidents and then --

12 MR. ROGOW: Shares them with lawyers.

13 QUESTION: -- shares that with lawyers who send  
14 letters to these victims.

15 MR. ROGOW: Yes, Justice O'Connor, letters that  
16 are highly regulated by the bar that must include a  
17 statement of the lawyer's qualifications that are at the  
18 same moment --

19 QUESTION: And what does it do? It looks at  
20 police reports or something?

21 MR. ROGOW: Police reports, accident reports,  
22 which are matters of public record.

23 QUESTION: And presumably it also runs ads, does  
24 it?

25 MR. ROGOW: It does not. It does not, no.

1 QUESTION: Do the lawyers run some ads, do  
2 you --

3 MR. ROGOW: Well, some lawyers may run  
4 advertisements of different sorts, but whether or not they  
5 run an advertisement of their availability is different  
6 from running an advertisement saying, I am in the referral  
7 business.

8 QUESTION: The service Went For It provides is  
9 finding names of victims and furnishing them to lawyers  
10 who pay them for that information --

11 MR. ROGOW: Yes, Justice O'Connor.

12 QUESTION: -- is that it?

13 MR. ROGOW: Yes. The commercial speech cases  
14 that we rely upon, Bates --

15 QUESTION: Mr. Rogow, maybe you could just go  
16 back and amplify your statement that these letters are  
17 highly regulated. Now, there isn't a form letter that the  
18 bar association gives out.

19 MR. ROGOW: Well, actually, there is, Justice  
20 Ginsburg, although it's not in this record. The bar has  
21 recently promulgated a handbook for lawyer advertising  
22 which contains forms of suggested different kinds of  
23 communications that would meet bar standards, but no, the  
24 regulation that is before the Court sets out 15 or 16, and  
25 they were summarized by the court of appeals, regulations

1 upon the letters.

2 QUESTION: Could -- does the bar, or could it,  
3 consistent with the First Amendment, require pre-screening  
4 of letters, solicitation letters that are going to be sent  
5 out within the first 30 days, or ever?

6 MR. ROGOW: I don't think the bar could -- could  
7 require pre-screening, and one of the problems is, is that  
8 this delay in the access to information is inconsistent  
9 with the notion that it is important for people to have  
10 information quickly, and I think that the bar agrees, and  
11 has stated in its brief, that it is important to  
12 communicate to people the availability of legal services.

13 But there is no pre-screening, but there is a  
14 contemporary submission.

15 QUESTION: Not letter-by-letter, but the  
16 attorney's own form letter.

17 MR. ROGOW: I -- perhaps the bar could request  
18 these letters and look at them. There is a contemporary  
19 filing of each letter with the Florida Bar Advertising  
20 Commission, I think it is, so a lawyer is obligated to  
21 also send a copy of the letter after it's been out, and so  
22 the bar would have an opportunity to review these letters,  
23 but it would not be prior to the submission of these  
24 letters, to the depositing of them in the mailbox.

25 We rely upon the commercial speech cases which

1 form the underpinnings of the decision below and have been  
2 consistent. There is no reason to retreat, and the bar  
3 has really offered no principled reason to retreat from  
4 the line of cases, beginning with Virginia Board of  
5 Pharmacy, running through Central Hudson, Bates, Zauderer,  
6 RMJ, which are on the foundation that I have said, that  
7 truthful, nonmisleading information conveyed in a mode,  
8 and the mode the Court described in Shapero, the most  
9 unobtrusive mode of communication, conveyed in a mode  
10 which the bar has now even taken a step beyond and  
11 regulated and required that they be stamped with  
12 "Advertisement," that these are threatening to any  
13 substantial State interest.

14 Basically, the bar's argument is, is that that  
15 line of cases from Central Hudson through Ibanez should be  
16 discarded, or at least discarded as to lawyers, and that  
17 Bates, RMJ, and Zauderer were wrongly decided, and that  
18 really is the essence of what the bar is saying, and its  
19 other suggestions -- the measure of an argument oftentimes  
20 is how far one must stretch to make it, and when the bar  
21 likens these lawyers' letters to sound trucks and  
22 residential picketers, trying to draw strength from  
23 residential privacy, from those kinds of analogies, I  
24 think that demonstrates how far the bar must reach to try  
25 to get around what the established jurisprudence is.

1                   And when the bar says lawyers are like prisoners  
2     and military personnel and schoolchildren and the  
3     institutional speech cases should somehow or other be  
4     applied to lawyers, I think that, too, demonstrates how  
5     difficult the bar's case is, but it is --

6                   QUESTION: What do you refer to as the  
7     institutional speech cases, Mr. Rogow?

8                   MR. ROGOW: Pardon me, Mr. Chief Justice?

9                   QUESTION: You referred to the institutional  
10    speech cases. What cases are those? I'm not sure I know  
11    exactly what you mean.

12                  MR. ROGOW: Kuhlmeier, Hazelwood v. School  
13    District, whether or not schoolchildren can publish  
14    things, Goldman, the yarmulke case in the military,  
15    situations in which there is custody and control in  
16    employment and property interests at stake of the  
17    Government. I think those analogies just reach too far.

18                  The bottom line in this case is whether  
19    truthful, nonmisleading, carefully tailored information  
20    regulated by the bar harms any substantial State interest.  
21    The answer --

22                  QUESTION: Do you think there's room for any  
23    more regulation under the commercial speech doctrine for  
24    people who are licensed by the State to carry out their  
25    duties? It isn't as though a lawyer is a totally free

1 agent. The lawyer, presumably in Florida as in most  
2 States, must be licensed by the State, and the State  
3 thereby gains more control over that person than over  
4 somebody who goes into the business of selling shoes, for  
5 example.

6 MR. ROGOW: It is true, Justice O'Connor, and  
7 they are more highly regulated, and yet that regulation  
8 must be delicate, because the lawyer's work informing  
9 people of their rights, remedying wrongs, redressing  
10 grievances, may be more important than selling shoes, and  
11 so it needs to be able to be communicated if it's truthful  
12 and nonmisleading, and that's exactly what this case is  
13 about.

14 There is no issue in this case about anything  
15 being untruthful or anything being misleading. This  
16 information is important. It needs to be protected. The  
17 court of appeals decision should be affirmed.

18 CHIEF JUSTICE REHNQUIST: Thank you,  
19 Mr. Richard.

20 The case is submitted.

21 (Whereupon, at 11: 50 a.m., the case in the  
22 above-entitled matter was submitted.)  
23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of*

*The United States in the Matter of:*

*FLORIDA BAR Petitioner v. G. STEWART McHENRY, WENT FOR IT, INC., AND JOHN T. BLAKELY*

*CASE NO.94-226*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Am. Mari Federico*

(REPORTER)