

Lawyers and the Public

Lawyers are not civil servants unless they work for the government. However, they are considered to be “officers of the court” with certain public responsibilities beyond what other licensed professionals, such as plumbers and carpenters, possess. As you read the following case, consider the nature of the relationship between lawyers and the public at large.

Florida Bar v. Went For It, Inc.

515 U.S. 618 (1995)

O'Connor, J.

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.

In 1989, the Florida 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. 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 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 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. Another Florida lawyer, John T. Blakely, was substituted in his stead.

Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) we invalidated a state statute barring pharmacists from advertising prescription drug prices. One year later, however, the Court applied the Virginia State Board principles to invalidate a state rule prohibiting lawyers from advertising in newspapers and other media. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), 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." 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. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech.

The Florida 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. This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affect[t] the administration of justice." 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. 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."

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." Our precedents also leave no room for doubt that the protection of potential clients' privacy is a substantial state interest.

The Florida 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. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." 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.

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" and "Solicitors Out of Bounds," newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. 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 injured and his fiancée was killed in an auto accident. Another found it "despicable and inexcusable" that a Pensacola lawyer wrote to his mother three days after his father's funeral. Another described how she was "astounded" and then "very angry" when she received a solicitation following a minor accident. Still another described as "beyond comprehension" a letter his nephew's family received the day of the nephew's funeral. 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."

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 to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. 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. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding lawyers when they need one. 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.

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. This case, however, 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.

Kennedy, J., 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 Arizona*. 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.

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. 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 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.

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 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.

Topics for Further Discussion

1. Justice O'Connor says this case "concerns pure commercial advertising." Is informing potential clients of the availability of legal services the same as advertising a product? Does Justice Kennedy agree that this case is one of commercial speech?

2. What is the basis of the majority's opinion upholding the Florida law: that the privacy of people should be protected or that the reputation of lawyers should be improved?

3. How would you go about finding a lawyer if you needed one? Do you think that ordinary people can find a lawyer easily? If making legal services available is a good thing, why would sending letters to potential clients be bad?

4. The introduction to the case mentions that one of the lawyers originally involved was disbarred for other reasons. Disbarment is the ultimate sanction for lawyers, involving the cancellation of the lawyer's license to practice law. Usually, disbarment involves some serious misconduct. The Court does not reveal the reason behind the disbarment in this case, but whatever it was it was not because of the issues raised in this matter.

Duties and Obligations of Lawyers

Lawyers in the United States are regulated by rules governing their conduct as professionals. Each state is free to make its own rules, but most such rules are based on two documents produced by the American Bar Association: the Model Rules of Professional Conduct passed in 1983 and amended a number of times since, and the earlier Model Code of Professional Responsibility. Their basic themes are much the same, but the documents differ in some details. For our discussion, we will rely primarily on the Model Rules. Lawyer discipline is handled at the state bar association level, where disciplinary boards will accept complaints from clients and other lawyers, conduct hearings, and mete out appropriate punishment for wrongdoing.

Competence

The first Model Rule deals with the duty of the lawyer to represent the client adequately. It says, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This may seem like an obvious requirement, but it is one that — far too frequently — is not fulfilled. In an age of increased specialization, a universal definition of competence may be hard to establish. A tax attorney with many years of experience may be much better prepared to handle a dispute with the Internal Revenue Service, but the Rules do not

Doe ex rel. Doe v. Perry Community School Dist.

650 N.W.2d 594 (Iowa 2002)

Streit, J.

Litigants in a civil sexual abuse case against a school district want the court to stop their lawyer's new law firm from representing the school district in the litigation. The law firm, Bradshaw, Fowler, Proctor & Fairgrave, P.C., argues it has implemented a screening mechanism sufficient to prevent the disclosure of confidential information between the disqualified associate, Jason Palmer, and the other members of the firm. The district court found adequate screening procedures were in place to ensure there was no actual conflict between the other members of the firm and its client. Because the representations by Palmer for the plaintiffs and the Bradshaw law firm for the defendants bear a substantial relationship to each other, we reverse and remand.

Russell Alan Gronewold, an eighth-grade teacher at Perry Middle School was convicted of sexually abusing Jane Doe, one of his fourteen-year-old students. Attorney Brent Cashatt of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler served as Doe's guardian *ad litem* in the criminal case. Attorney Jason Palmer was an associate with the Smith law firm at that time and appeared as the Does' attorney.

Doe and her parents retained Cashatt, Palmer, and Jan Mohrfeld to represent them in their civil suit against Gronewold, the Perry Community School District, and principal Arthur Pixler. Palmer attended a pre-petition conference with the clients. He prepared a draft of the petition using the clients' file, including internal memoranda. Palmer signed the petition and it was filed on February 26, 2001.

On March 21, 2001, members of Bradshaw, Fowler, Proctor & Fairgrave, P.C., appeared on behalf of the school district and Pixler. Palmer joined the Bradshaw firm in August 2001. Because of the conflict between Bradshaw's current representation of the defendants and Palmer's prior representation of the Does, Palmer filed a motion to withdraw as counsel for the Does.

The Does filed a motion to disqualify the Bradshaw firm based upon Palmer's prior representation of the Does in the same lawsuit. The district court denied the motion. The court presumed confidences were divulged by the Does to Palmer in the prior representation which may be relevant to the current representation. However, the court found it was clear Bradshaw ensured there was no actual conflict by creating a "Chinese Wall." The court further noted to disqualify Bradshaw at this stage of the proceedings would deny the defendants counsel of their choice and place them at a disadvantage in the lawsuit. We granted the Does' application for interlocutory appeal.

This case presents an issue of first impression in Iowa. We must determine whether a screening mechanism known as a Chinese Wall is sufficient to allow a law firm to eliminate the conflict of an attorney who switched sides of representation during the same case. In general, an attorney must be disqualified from representing

Conflicts of Interest

As part of the lawyer's duty to the client, she may not be involved with other representations or activities that would conflict with the client's interests. Lawyers are required to avoid even the appearance of a conflict. This is related to the confidentiality requirement. For example, a lawyer may represent an auto manufacturer in a defense to a personal injury product defect lawsuit. As a result of the representation, she will learn a great deal about the company's design process. Later on, a different person claiming injury might want to hire her to represent him as plaintiff against the company. The lawyer must refuse, unless the conflict is disclosed to both parties and they give an informed waiver.

Entering into business transactions with clients is a particularly dangerous undertaking, although it may seem perfectly reasonable at the time. A lawyer representing a client in developing a piece of property may believe that the development offers a good chance for profit. At the same time, the client might like to minimize the amount he must pay the lawyer. Thus, they might want to consider giving the lawyer part ownership in return for his waiving his fees. Later, however, if the business goes bad, the interests of the lawyer and the client may come to differ.

The prohibition against conflict of interest even applies to others in the same law firm. Model Rule 1.10 says that if one of the lawyers in the firm would be disqualified from taking the case because of a conflict, all of them are disqualified. For this reason, when lawyers move from one firm to another, the new firm must make sure that hiring the attorney will not cause conflicts with its existing clients. Similarly, when a new potential client comes seeking help, the law firm must first search its records to confirm that taking on the representation will not conflict with its existing obligations. In some cases, if the new client is big enough, the firm may decide to give up its association with the old client. In doing so, however, it must ensure that the needs of the existing client are taken care of by other lawyers. Also, it may not use any information that it gained as a result of its previous relationship against the previous client.

As law firms become larger, the disqualification rules become all the more difficult to monitor. A firm with offices around the globe must maintain a sophisticated computer database of clients and their matters that can be checked for conflicts in a timely manner. With so many lawyers in the United States, another attorney can always be found. That is not always the case in countries that have far fewer members of the bar, where the number of lawyers who can handle complex international business transactions in foreign languages may be few indeed. Such countries often tolerate law firms simultaneously representing competitors, perhaps insisting only on some separation between the attorneys actually responsible for the different clients. This is sometimes called a "Chinese Wall," deriving from analogy to the Great Wall of China.

a party against a former client if the two representations bear a "substantial relationship" to each other. Here, Bradshaw contends its implementation of a Chinese Wall is sufficient to avoid disqualification of the entire law firm.

The Does do not need to show confidences were actually disclosed by Palmer to prove a conflict exists. To show the Bradshaw firm must be disqualified, the Does must only prove there is a substantial relationship between the former and the present representation. In determining whether a substantial relationship exists, we consider: (1) the nature and scope of the prior representation; (2) the nature of the present lawsuit; and (3) whether the client might have disclosed a confidence to her attorney in the prior representation which could be relevant to the present action. The former client must be given the presumption confidences were disclosed.

Bradshaw admits a substantial relationship exists between the two representations. Palmer's former representation of the Does and Bradshaw's current representation of the defendants involve the same case. Palmer filed a motion to withdraw from the current litigation because of his previous participation in the Does' case. The pending lawsuit includes allegations that the school district and principal knew Gronewold molested Doe but did nothing to stop the continual harassment and abuse. Such issues necessarily involve sensitive and confidential information. The Does likely disclosed confidences to Palmer in the prior representation which would certainly be relevant in Bradshaw's defense of the school district and principal. As such, we conclude there is a substantial relationship between the former and the present representations. This determination alone requires disqualification of the Bradshaw firm.

Because of the strong appearance of impropriety, once we conclude a substantial relationship exists between the two representations, disqualification cannot be avoided.

The extent of Palmer's involvement in the prior representation is clear. Palmer first appeared in this case as Does' attorney. On one occasion, Palmer met with Mr. and Mrs. Doe to discuss whether the Does should file a civil law suit. Palmer had telephone conversations with the Does. He signed pleadings and entered his appearance on behalf of the Does. Brent Cashatt, Jane Doe's guardian *ad litem*, testified "confidences were exchanged." Paige Fiedler joined the Smith attorneys in the lawsuit only a few days prior to the date the Does filed their lawsuit. Cashatt stated that prior to Fiedler taking over, Palmer had done most of the work on the case. Palmer drafted the petition in the civil suit. In drafting the petition, Palmer had access to the entire case file, including all internal memoranda, correspondence to and from the Does, and attorney notes from confidential meetings, and telephone calls with the Does. The Smith law firm ultimately filed Palmer's draft of the petition with some revisions. Though there is some question regarding whether Palmer drafted the exact petition filed, there is no doubt Palmer signed the filed petition.

Given these circumstances, we find a reasonable layperson would conclude Bradshaw's current representation would compromise the integrity of the trial and would

harm the Does. This conflict before us did not arise as the result of Palmer's prior representation in a different, unrelated matter. Rather, Palmer's firm now stands as adversary against the Does in the very litigation in which Palmer first served as their trusted attorney. When Palmer left the Smith firm, he stopped advocating for the Does by taking a new position clearly adverse to their best interests.

To analogize to baseball, [Palmer] has not only switched teams, he has switched teams in the middle of the game after learning the signals. That [Palmer] has been benched by his new team does little to ameliorate the public perception of an unfair game.

For a lawyer to represent the Does today, and the defendant school district and principal tomorrow in the same litigation "creates an unsavory appearance of a conflict of interest that is difficult to dispel in the eyes of the lay public or even the bench and bar." Despite the attempted screening, continued representation constitutes a threat to the adversarial process and creates an undeniably strong appearance of impropriety.

Though Bradshaw concedes there is a substantial relationship between the prior and current representations, it attempts to minimize the degree of Palmer's involvement in the plaintiff's case and emphasizes the steps it took to lessen his contact with the defense. Specifically, Bradshaw argues the use of a Chinese Wall allows the firm to avoid imputed disqualification. Bradshaw contends it has taken precautionary measures to prevent disclosure of confidential information. The firm asserts Palmer, now at the Bradshaw firm, has no involvement in or access to the Does' case. Bradshaw contends it has taken and will continue to take "appropriate safeguards to completely isolate Mr. Palmer from involvement in or knowledge about this case."

The presence or absence of a Chinese Wall does not enter into our analysis of whether there is a substantial relationship between two representations. We consider whether a substantial relationship exists based upon the nature and scope of the prior representation, the nature of the present lawsuit, and whether confidences may have been disclosed. If we determine a substantial relationship exists, then unequivocally, the law firm must be disqualified. This is such a case. This is not a case where Palmer did not have involvement in the case prior to his switch to Bradshaw. As discussed above, Palmer's involvement was substantial, significant, and intimate. A Chinese Wall will not prevent the conclusion that a substantial relationship exists and Palmer's new firm cannot continue to represent the defendants.

It appears Bradshaw implemented the Chinese Wall only *after* the Does filed their petition to disqualify the firm. There is no evidence to suggest Bradshaw took any steps to prevent Palmer from divulging the Does' confidences to the other Bradshaw attorneys prior to that time. There is also little evidence to prove Bradshaw implemented procedures to prevent the other Bradshaw attorneys from discussing sensitive matters regarding the present lawsuit. We presume Palmer and the Bradshaw lawyers will act within the confines of our rules of ethics and professional responsibility. However, confidence in attorneys alone does not overcome the strong

appearance of impropriety in cases such as this where the litigation involves sensitive and confidential matters.

We approve of the use of Chinese Walls under certain circumstances to overcome imputed disqualification of a law firm. Such circumstances do not exist in this case. There is a substantial relationship between the former and present representations. Accordingly, it is improper for Bradshaw to continue its representation and it must be disqualified. We conclude the district court abused its discretion in denying Does' petition to disqualify Bradshaw. We reverse and remand for further proceedings consistent with this opinion.

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Topics for Further Discussion

1. The lawyer who changed law firms was an associate in the first firm and became an associate in the second. He was not a partner of the law firm. Should this make any difference?
2. Could the second law firm have done anything more to prevent being disqualified from representing the school district?
3. Ordinarily, a party may only appeal from a lower court judgment once the final judgment has been entered. In some cases, an interlocutory appeal (a provisional appeal) will be allowed to resolve a critical point in advance. The issue of who could represent the school district would affect the entire trial; thus, it was appropriate for an interlocutory appeal.

Simpson Performance Products, Inc. v. Robert W. Horn, P.C.

92 P.3d 283 (Wyo. 2004)

Voigt, J.

The appellant, Simpson Performance Products, Inc. (SPP), hired the appellee, Robert W. Horn (Horn), to conduct an investigation and to provide legal counsel regarding a possible lawsuit by SPP against the National Association of Stock Car Auto Racing (NASCAR). Upon completing his work, Horn submitted a bill to SPP for \$40,383.29 for legal fees and costs. SPP paid Horn \$20,000.00, but refused to pay the balance. Horn sued SPP to collect the outstanding amount. The district court found in favor of Horn. SPP now appeals, claiming that Horn is not entitled to the entire fee because his representation of E.J. "Bill" Simpson (Simpson), individually, violated Rule 1.9 of the Wyoming Rules of Professional Conduct for Attorneys at Law (Rule 1.9). Finding no violation of Rule 1.9, we affirm.

Horn represented SPP in investigating a possible lawsuit against NASCAR. He then represented Simpson, who had recently resigned as the CEO of SPP, in a lawsuit against NASCAR involving the same facts and cause of action. The issue presented