IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2724

ROBERT M. MAYS
and
MARCIA M. BLUM, T/A KRETZ COMPANY

Plaintiffs-Appellees,

v.

J. JOSEPH CURRAN JR.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland
(William M. Nickerson, District Judge)

BRIEF OF APPELLEES

ROBERT M. MAYS, Esquire
800 Wellington Avenue
Bethesda, Maryland 20814
(301) 252-1500
Appellee and Lead Counsel

ALAN E. DERSCH, Esquire
406 Old Farm Road
Upper Marlboro, Maryland 20772
(301) 222-9236
Attorney for Appellee Marcia M. Blum

CORPORATE DISCLOSURE STATEMENTS, TO BE PROVIDED BY CLIENT, SHOULD BE BOUND HERE IN FRONT OF TABLE OF CONTENTS.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

ARGUMENT (CONT'D)

TABLE OF AUTHORITIES

Cases **Page**

Statutes

TABLE OF AUTHORITIES (CONT'D)

Statutes **Page**

Other

STATEMENT OF THE CASE[1]

Statement of Facts

Appellee Robert M. Mays is an attorney admitted to practice before the Bar of Maryland. Ninety-five percent of his practice is devoted to the legal representation of individuals charged in the Maryland courts with traffic offenses that can be penalized by incarceration. The remaining 5% of his legal practice is dedicated to the representation of criminal defendants in Laurel County (Maryland) Circuit Court. Mays maintains a client base by mailing letters advertising the availability of his services to individuals who have been issued traffic citations by Maryland law enforcement personnel and who have requested a criminal jury trial in Laurel County Circuit Court. (J.A. 53.) Mays obtains the names of these prospective clients from public records and immediately mails the targeted letters, usually well before the expiration of 30 days from the date on which the charging documents are filed by the State. (J.A. 54.)

---

[1]Appellees Robert M. Mays and Marcia M. Blum do not object to Appellant State's Statement of the Nature of the Case and Proceedings Below. However, Mays and Blum object to the State's Statement of Facts because, in discussing the legislative record, the Statement of Facts makes reference to documents the vast majority of which were not presented to the district court. In fact, the only material mentioned at pages 4-7 of the State's Corrected Brief which was presented to the district court in support of the constitutionality of Md. Code Ann., Bus. Occ. & Prof. § 10-605.1(a)(2) (Cum. Supp. 1996) is the testimony of members of the Maryland Criminal Defense Attorneys' Association before the Senate Judicial Proceedings Committee. (J.A. 64-71.) Mays and Blum also object to the State's implicit assertion at page 8 of the State's Corrected Brief that the district court improperly relied on the Attorney General's bill review letter to the Governor in making its determination. Indeed, the district court observed that it was no more bound by the opinion of the Attorney General set forth in his bill review letter than it was bound by the Attorney General's litigating position. The district court referred to the letter only because it found "the letter's arguments compelling and its conclusion inescapable." (J.A. 12.)

Appellee Marcia M. Blum is the owner and manager of Kretz Company (hereinafter "Kretz"), which provides services to members of the Maryland Bar, including the production and mailing of attorney advertising letters to individuals who have been charged with criminal offenses or incarcerable traffic offenses. Like Mays, Kretz also obtains the names of criminal and traffic defendants from public records. (J.A. 49.) Kretz attempts to have the letters reach the criminal and traffic defendants in the shortest time possible and well before the expiration of 30 days after the charging documents are filed. Kretz does not process or send any letters to victims of accidents or their survivors regarding the initiation of a civil action for damages. (J.A. 50.)

The Maryland General Assembly has attempted to curtail the efforts of attorneys such as Mays and support services such as Kretz to engage in the constitutionally protected practice of sending truthful and nondeceptive letters to potential legal clients known to face specific legal problems by enacting Md. Code Ann., Bus. Occ. & Prof. § 10-605.1(a)(2) (Cum. Supp. 1996),[2] which provides:

> (a) **In general.**—A lawyer may not send a written communication, directly or through an agent, to a prospective client for the purpose of obtaining professional employment if the communication concerns:
>
> . . . .
>
> (2) a criminal prosecution, or a prosecution of a traffic offense that carries a period of incarceration, involving the person to whom the communication is addressed or the person's relative, unless the charging

[2]Section 10-605.1(a)(1), which prohibits a plaintiff's personal injury lawyer from soliciting victims of accidents or disasters or their family members by targeted direct mail before the expiration of 30 days after the accident or disaster, was not challenged because neither Mays nor Blum solicits potential clients for the initiation of personal injury suits.

> document was filed more than 30 days before the date the communication is mailed.

An exception is made for circumstances in which a prospective client requests a written communication. *Id.* § 10-605.1(b). Mays and Blum challenged this restraint on their right to solicit clients on the basis that it violated their rights under the First and Fourteenth Amendments. (J.A. 28-38.) The district court agreed with their contentions and held that § 10-605.1(a)(2) was unconstitutional and enjoined its enforcement. (J.A. 9-25.)

SUMMARY OF ARGUMENT

The 30-day constraint on otherwise protected attorney speech, *see Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988) (state may not, consistent with First and Fourteenth Amendments, prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems), set forth in Md. Code Ann., Bus. Occ. & Prof. § 10-605.1(a)(2), is an impermissible limitation on commercial speech because it does not satisfy the intermediate scrutiny test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Under the *Central Hudson* analysis, the government may regulate truthful commercial speech that concerns lawful activity only if the government satisfies a three-pronged test: (1) the government must assert a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances the asserted interest; and (3) the regulation must be narrowly drawn. *Id.* at 564-65.

Section 10-605.1(a)(2) does not meet the second prong of the *Central Hudson* test because it fails to directly and materially advance the State's asserted interest in "protecting the privacy of individuals against intrusive attorney communications that negatively impact the integrity of the legal profession." (*See* State's Corrected Brief at 9.) The State has not established that the privacy violations it alleges are real and that § 10-605.1(a)(2) will alleviate the alleged harms to a material degree. *See Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). The new anecdotal evidence referred to by the State and by Amici Maryland Criminal Defendant Attorneys' Association, Inc., and North Carolina State Bar only serves to reinforce the conclusion of Appellees and the district court that the only real harm suffered by recipients of direct mail solicitations for traffic and criminal matters is the embarrassment at having been found out. It is apparent that any disrespect to the legal profession engendered by such solicitations is not caused by the timing of the targeted letters but by a general distaste for targeted direct mail solicitation. Accordingly, the 30-day ban on constitutionally protected speech will not alleviate the distaste to a material degree. Indeed, the limitation may well cause a very real harm to criminal and traffic defendants who will be deprived of one means of locating experienced counsel in their involuntary litigation against the State.

Similarly, § 10-605.1(a)(2) does not satisfy the third prong of the *Central Hudson* test because it is not narrowly drawn to protect the privacy interest asserted by the State. In the commercial speech context, the narrowly drawn requirement means that there must be a reasonable fit between the goals of the legislature and the means chosen to achieve those ends. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

The availability of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993). In this case, numerous obvious and less-burdensome alternatives to a 30-day ban on protected speech exist, such as prior approval of attorney form letters, labeling of attorney solicitations as advertisements, and notification of criminal defendants and traffic offenders that the charges against them are a matter of public record. To the extent that these measures do not satisfy those who just do not like targeted direct mail solicitation by attorneys, they can send a message to soliciting attoneys by not hiring them. In any event, a dislike of constitutionally protected speech is not a legitimate reason for banning it. Finally, there is not a reasonable fit between the furtherance of the asserted privacy interest and the 30-day restriction on attorney solicitation practices because the harm to those defendants deprived of one means of exercising their Sixth Amendment right to counsel in their involuntary litigation against the State far exceeds the goal served by the 30-day limitation.

The decision in *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), relied on by the State, does not require that this Court reverse the decision of the district court that § 10-605.1(a)(2) is unconstitutional. The Court in *Went For It* simply applied the *Central Hudson* intermediate scrutiny analysis to a 30-day ban on targeted direct mail solicitation of accident victims or their family members by plaintiffs' personal injury lawyers and held that it satisfied the *Central Hudson* requirements. The "personal grief" suffered by accident victims "in times of trauma" is quite distinct from the irritation and embarrassment a criminal

or traffic defendant may experience immediately following the pressing of charges. *Id.* at 2379. In addition, while a personal injury plaintiff with a three-year period in which to decide whether to bring suit may be entitled to a period of denial and escape, the overall interests of the criminal or traffic defendant are not served by refusing to address serious legal problems. Accordingly, the interest asserted by the State here is not entitled to the same treatment as that accorded the privacy interest promoted by the State of Florida in *Went For It*.

ARGUMENT

I. THE LOWER COURT PROPERLY APPLIED THE RELEVANT CASE LAW IN MAKING ITS INDEPENDENT EVALUATION OF MD. CODE ANN., BUS. OCC. & PROF. § 10-605.1(a)(2) AND HELD CORRECTLY THAT THE STATUTE'S 30-DAY BAN ON TARGETED DIRECT MAIL SOLICITATIONS BY ATTORNEYS WAS UNCONSTITUTIONAL.

A. The District Court Properly Relied On The Supreme Court's Holding In *Shapero v. Kentucky Bar Association*.

The State argues that the district court must be reversed because it held that the 30-day ban on targeted direct mail solicitation of traffic and criminal defendants was more analogous to the absolute ban on targeted direct mail solicitation prohibited by the Supreme Court in *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), than to the 30-day waiting period imposed on targeted direct mail solicitation of accident victims or their loved ones following an accident or disaster approved of by the Supreme Court in *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995). However, the district court did not overlook the *Went For It* decision. Indeed, the court applied the analysis of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), which was approved of

in *Went For It*, 115 S. Ct. at 2375-76, and concluded properly that that case did not dictate the outcome here because

> a thirty day ban on direct-mail to individuals facing criminal prosecutions presents entirely different issues and interests than does a similar ban on solicitation of personal injury plaintiffs.

(J.A. 16 (footnote omitted).)

It is of little consequence that the *Went For It* Court distinguished the substantial privacy concerns before it from those briefly addressed in *Shapero*, 486 U.S. at 476, *see Went For It*, 115 S. Ct. at 2378-79, since the district court in this case held that, based on the legislative evidence before it, the privacy interests of criminal defendants and traffic offenders facing possible incarceration were not comparable to those considered in *Went For It*. Accordingly, it was not improper for the district court to rely on *Shapero* and hold that the embarrassment experienced by traffic offenders and criminal defendants when they learn that their offenses are matters of public record was not a sufficient interest to justify the restriction of commercial speech. (J.A. 20.)

The facts that *Shapero* addressed a total ban and this case deals only with a 30-day ban on the right to exercise a First Amendment right do not make *Shapero* inapposite. As the district court pointed out, because the judicial process could have concluded within 30 days of the filing of charges in a criminal or incarcerable traffic case, the 30-day ban could in many cases result in an absolute ban, which is prohibited under *Shapero*. (J.A. 21-22.) Even if the 30-day ban does not always result in an absolute ban, because any restriction on speech is unconstitutional if it does not directly and materially further a substantial state interest, the "simple common sense" statement of the Court in *Shapero* that the invasion of

privacy occurs when the lawyer discovers the recipient's legal problems, not when he confronts the recipient through the use of targeted direct mail, 486 U.S. at 476, was still relevant to the district court's conclusion that, as evinced by the testimony before the Senate Judicial Proceedings Committee, § 10-605.1(a)(2) does not directly and materially advance the privacy interests asserted by the State. (J.A. 17-20.)

Moreover, the State's insistence that most traffic and criminal matters are not concluded within 30 days, even if true, does not detract from the district court's well-reasoned conclusion that the privacy concerns faced by defendants in those matters are wholly different from the interests alleged on behalf of tort victims and their families in *Went For It*. The point made by the district court was not that all criminal and traffic matters are concluded within 30 days, but that such matters *could* be concluded, in contrast to actions for personal injury, which need not even be commenced until three years after the disaster or accident.[3] *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101 (Repl. Vol. 1995). That all proceedings are not concluded within 30 days does not mean that a defendant will not face the forfeiture of certain rights in less than 30 days. *See*, *e.g.*, infra at p. 17. By the State's own admission, many of the delays in criminal and traffic matters can be attributed to lack

[3]Although the district court did not find as a matter of fact that all criminal and traffic matters are concluded within 30 days and, therefore, did not rely on Appellees' affidavits to support such a finding, it should be noted that the State has misconstrued Mays's affidavit at page 13 of the State's Corrected Brief. The State suggests that Mays will suffer no real harm from the effects of § 10-605.1(a)(2) because he obtains a direct mail base from the Laurel County Circuit Court records of those defendants requesting a jury trial, and Md. Code Ann., Cts. & Jud. Proc. § 4-302(e)(1) (Cum. Supp. 1996) permits a defendant to request a jury trial up until the date of trial in district court. However, Mays's affidavit makes clear that only 5% of his legal practice involves the representation of criminal defendants in Laurel County Circuit Court. (J.A. 53.)

of counsel. (*See* State's Corrected Brief at 13.) Surely an additional 30-day delay in targeted direct mail solicitation could only lengthen such delays, which can hardly be in the State's interest. More importantly, because the criminal defendant and traffic offender are brought into the justice system involuntarily, in contrast to the personal injury plaintiff who can investigate and orchestrate his or her case before even approaching the courts, the immediate need for counsel is far greater in the case of the criminal defendant and traffic offender than in the case of the personal injury plaintiff.

Finally, the State's observation that § 10-605.1(a)(2) is not a total ban on *all* direct mail to defendants is inapposite. The Supreme Court held in *Shapero* that a state could not prohibit lawyers from soliciting legal business by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. In *Went For It*, the Supreme Court held that a state could regulate targeted direct mail solicitation upon a showing that the restriction directly and materially advances a substantial state interest and that the restriction is narrowly drawn to protect that interest. Since the State here cannot meet either the *Shapero* or *Went For It* requirements, it is irrelevant that Mays and Blum can send other direct mail solicitations. That is not what this case is about.

B. The District Court Made An Independent Assessment Of The Law.

The State's contention that the district court was so impressed by the Attorney General's bill review letter to the Governor that it failed to make an independent assessment of the constitutionality of Md. Code Ann., Bus. Occ. & Prof. § 10-605.1(a)(2), is absurd. Although the district court referred to the analysis in the letter on several occasions, the court observed that it was no more bound by the opinion of the Attorney General set forth in his

bill review letter than it was bound by the Attorney General's litigating position. The district court referred to the letter only because it found "the letter's arguments compelling and its conclusion inescapable." (J.A. 12.) The district court applied the *Central Hudson* test, which was reaffirmed in *Went For It*, and concluded that the Maryland statute did not satisfy the intermediate scrutiny test.

II. THE 30-DAY WAITING PERIOD OF § 10-605.1(a)(2) VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE IT DOES NOT DIRECTLY AND MATERIALLY ADVANCE A SUBSTANTIAL STATE INTEREST, AND IT IS NOT NARROWLY DRAWN TO FURTHER THAT INTEREST.

Following a long line of precedent, the Supreme Court in *Went For It* reaffirmed that lawyer advertising is commercial speech that is accorded First Amendment protection. 115 S. Ct. at 2375. Of particular relevance to this case, a state cannot totally prohibit lawyers from soliciting potential clients for pecuniary gain by sending truthful and nondeceptive letters to individuals known to face specific legal problems. *Shapero*. As commercial speech, lawyer advertising, including targeted direct mail solicitation, may be regulated only if it satisfies intermediate judicial scrutiny, analyzed under the framework set forth in *Central Hudson*. Under the *Central Hudson* test, the government may regulate truthful commercial speech that concerns lawful activity only if the government satisfies a three-pronged test: (1) the government must assert a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances the asserted interest; and (3) the regulation must be narrowly drawn. 447 U.S. at 564-65. The district court properly applied this test and found that the 30-day waiting period of § 10-605.1(a)(2) could not be sustained.

A. The District Court Found That The State Had Satisfied The First Prong Of The *Central Hudson* Test By Asserting A Substantial Interest In Protecting The Privacy Of Criminal Defendants And Traffic Offenders Against Intrusive Attorney Contact That Negatively Impacts On The Legal Profession.

The State contends that § 10-605.1(a)(2) "advances a substantial interest in protecting the privacy of individuals against intrusive attorney communications that negatively impact the integrity of the legal profession." (*See* State's Corrected Brief at 9.) Although the State goes on for almost four pages in its brief arguing that the district court erred in refusing to find it had satisfied the first prong of the *Central Hudson* test (*see* State's Corrected Brief at 15-19), the district court held in one two-sentence paragraph that the State had asserted a substantial interest. (J.A. 15.)

> That the [State]'s asserted interests are substantial in the abstract does not mean, however, that its [regulation of lawyer-targeted direct mail] solicitation serves them. The penultimate prong of the *Central Hudson* test requires that a regulation impinging upon commercial expression "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. " *Central Hudson Gas & Electric Corp.*, 447 U.S. at 564, 100 S. Ct. at 2350.

Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993). Accordingly, simply meeting the first prong of the *Central Hudson* test does not relieve the State of its burden to satisfy the other two requirements.

B. The 30-Day Prohibition On Targeted Direct Mail Solicitation By Attorneys Does Not Directly And Materially Advance The State's Asserted Interest In The Privacy Of Defendants.

The district court's decision striking down § 10-605.1(a)(2) must be affirmed because the State has failed to satisfy the second prong of the *Central Hudson* test. The State's

burden of proving that the 30-day prohibition on targeted direct mail attorney solicitation advances its interest in privacy in a direct and material way

> is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Went For It, 115 S. Ct. at 2377 (internal quotations omitted).

Having utterly failed to persuade the district court that the legislative record supports the conclusion that the interests asserted by the State in this case are the same as those proffered by Florida in *Went For It*, the State now attempts to go outside the legislative record in its efforts to demonstrate that the 30-day prohibition on targeted direct mail solicitation directly and materially advances the privacy interests of criminal and traffic defendants. As illustrations, the State cites to the example of an Illinois man who lied to his 70-year-old mother about a drunk driving charge and then had to explain why he was receiving attorney solicitation letters in the mail, to one situation where a woman discovered her husband in a compromising position through inadvertent disclosure of attorney-targeted direct mail, and to other undefined circumstances where children and parents confronted one another with their heretofore unknown legal problems. (*See* State's Corrected Brief at 19-20.) The State also refers to the testimony before the Senate Judicial Proceedings Committee wherein it was stated that many clients of members of the Maryland Criminal Defense Attorneys' Association reported being outraged that attorneys had found out about their legal difficulties. (J.A. 64.) (*See* State's Corrected Brief at 21.) However, these anecdotes only serve to reinforce the conclusion of Appellees and the district court that the only real harm

suffered by recipients of direct mail solicitations for traffic and criminal matters is the embarrassment at having been found out. And the Supreme Court in *Shapero* opined that because the invasion of privacy in such cases occurs, if at all, when the lawyer discovers the legal problems, and not when he confronts the recipient in a targeted letter, a restriction on targeted direct mail solicitation does not advance the interests of privacy. 486 U.S. at 476.

That the Supreme Court in *Went For It* was not persuaded by its own brief privacy analysis in *Shapero* is not pertinent to this Court's determination in this matter because the interest asserted by Florida in *Went For It* was distinct from the interest discussed in *Shapero* and asserted by the State in this case. The Court in *Went For It* was concerned with the intrusion upon the personal grief of accident and disaster victims and their loved ones in the immediate wake of the accident or disaster. *See* 115 S. Ct. at 2379. Therefore, not merely the contents of the letter, but the mere receipt itself could cause a severe detrimental impact upon the recipient. *Id.* The anecdotal evidence offered by the State, however, does not establish, apart from the intervening nosiness or inadvertent discovery by family members, that criminal or traffic defendants would be traumatized by the mere receipt of a targeted letter.

The Supreme Court has previously recognized that targeted direct mail solicitation of a person who has not unambiguously stated a position against litigation does not, in and of itself, invade the recipient's privacy. *In re Primus*, 436 U.S. 412, 435 n.28 (1978). The threat to a recipient's privacy posed by a written letter is, thus, quite distinct from the privacy interest interfered with when an attorney solicits a potential client in person. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 465 n.25 (1978). In the latter case, the recipient is a

captive. In the former situation, the recipient can merely ignore the communication. The State, of course, cannot legislate against lack of communication among family members or among the opening of private mail of family members or just plain boorish behavior on the part of family members. It should not be permitted to limit the First Amendment rights of attorneys in order to accommodate these human foibles. Where, as here, the invasion of privacy occurs prior to receipt of the targeted letter and not, as in *Went For It*, when the grieving and traumatized accident victim or victim's family member receives the letter, the harm may be alleviated by a simple trip to the trash can. *See Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 72 (1983) (invalidating federal ban on direct mail advertisements for contraceptives).

The State also refers to the results of a North Carolina Bar study which purports to demonstrate that more traffic defendants report feeling aggravated and that their privacy has been invaded by targeted direct mail solicitation by attorneys than do potential personal injury plaintiffs. (*See* State's Corrected Brief at 21-22.) However, as just stated, prevention of the type of so-called invasion of privacy experienced by criminal and traffic defendants is not directly advanced by a prohibition on targeted direct mail. Moreover, as the district court correctly noted, because the State's interest in protecting the integrity of the legal profession is derivative of the State's interest in the fair administration of justice, the State cannot rest on the speculative harm to the reputation of the legal profession to justify the limitation on the free flow of commercial information concerning legal representation. (J.A. 22-23.) The fact that protected speech is offensive to some people has never been a

justification for suppression. *Carey v. Population Services International*, 431 U.S. 678, 701 (1977); *see also Bolger*, 463 U.S. at 71.

Even if this Court were not already persuaded that the interest asserted by the State on behalf of criminal defendants and traffic offenders takes this case outside the control of *Went For It*, the obvious distinction between a grieving tort victim's interest in legal representation in the future and a criminal defendant's or traffic offender's immediate need for legal counsel should convince this Court that other interests besides the privacy rights of a "grieving" potential litigant are at stake. Unlike the criminal defendant who becomes involved instantly in involuntary litigation against the State, a personal injury victim typically has three years to consider his or her course of action. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101. The criminal defendant must act decisively in order to protect important rights. (J.A. at 20-21.) Therefore, the urgency of the criminal defendant's need for legal representation is a critical factor which outweighs any interest he may have in postponing the embarrassment of facing his criminal charges. Moreover, the criminal defendant or traffic offender who is ultimately incarcerated, unlike the civil litigant, enjoys a constitutionally protected *right* to counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The fact that the criminal defendant is in litigation against the very entity which is attempting to limit his right of access to information concerning available legal representation, i.e., the State, demands that the privacy interest asserted by the State must far outweigh the interest of criminal defendants in learning about legal representation. This is simply not the case, since the interest in representation is far greater than the so-called privacy interest. Such a ban on attorney speech runs contrary to the Supreme Court's recognition that "[i]nformation

. . . facilitates the consumer's access to legal services and thus better serves the administration of justice." *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 110 (1990) (footnote omitted); *see also* Note, *Leading Cases*, 109 Harv. L. Rev. 111, 198 (1995) (arguing that restrictions on attorney advertising are anticompetitive measures that impose significant burdens on both consumers and new attorneys entering the market).

The State and Amici make much of the fact that, contrary to statements made in the district court's opinion, criminal and traffic matters frequently are not concluded at the close of 30 days. Moreover, the State and Amici point out that criminal defendants are given information concerning the need for legal counsel, as well as directions on who to contact to obtain representation. In addition, other forms of legal advertising, such as billboards and the Yellow Pages, remain an available source of information about attorneys within the first 30 days following the filing of charging documents. Amicus Curiae Maryland Criminal Defense Attorneys' Association considers its low-fee panel the sole necessary option for those who do not qualify for the Public Defender but cannot afford an attorney. All of this overlooks the plain fact that where the 30-day prohibition on targeted direct mail solicitation does not directly and materially advance the asserted interest in privacy, no limitation on that form of attorney advertising is permissible. That not all criminal and traffic matters are concluded within 30 days does not diminish the fact that such matters *could* be concluded before attorneys were permitted to exercise their First Amendment rights and send targeted letters to potential clients, in clear violation of *Shapero*. Significantly, the fact that legal proceedings may not have concluded within 30 days does not mean that a criminal defendant or traffic offender may not have forfeited important rights in less than 30 days. For example,

a person charged with driving while intoxicated who either refuses to take an alcohol concentration test or who takes a test indicating an alcohol concentration of 0.10 or more has a right to request a hearing to show cause why his driver's license should not be suspended.[4] Md. Code Ann., Transp. II § 16-205.1(b)(3) (Cum. Supp. 1996). However, only if the request for a hearing is made within 10 days of being stopped by a police officer will the hearing be scheduled within 45 days. Section 16-205.1(b)(3)(v)(i). If the DWI defendant requests a hearing within 30 days, but after the expiration of 10 days, the hearing need not be held within 45 days, and the 45-day-long temporary driver's license issued by the police officer at the time of the traffic offense will not be extended until the date of the hearing. Although the police officer is required to inform the traffic offender of the right to request a hearing, the recitation of a law enforcement officer to a supposedly inebriated offender cannot replace the counsel of an experienced attorney in more sober circumstances. Under this scenario, the failure to obtain legal counsel within 10 days could cause major inconveniences beyound the criminal matter, and the failure to obtain counsel within 30 days could result in the absolute forfeiture of the privilege to drive.

On the theory that if others do it it must be all right, the State points out that other jurisdictions have placed similar temporary bans on attorney-targeted direct mail solicitation. (*See* State's Corrected Brief at 21-22.) Since research shows that none of the statutes or rules cited by the State has been challenged in court and upheld as constitutional, the fact of their existence hardly constitutes evidence that § 10-605.1(a)(2) directly and materially

[4]The driver's license is confiscated by the police officer at the time of the offense. Md. Code Ann., Transp. II § 16-205.1(b)(3)(i) (Cum. Supp. 1996).

advances the State's interest in privacy from the intrusion of attorneys. Furthermore, the State has misrepresented the contents of Ky. Rev. Stat. Ann. § 21A.300 (Michie Cum. Supp. 1996).[5] Kentucky's 30-day prohibition bars direct solicitation by an attorney or his agent of

> a victim of the accident or disaster, or a relative of the victim, for the purpose of obtaining professional employment relating to a criminal or civil action, or claim for damages, arising out of the traffic citation, injury, accident, or disaster.

Id. § 21A.300(1). While the statute mentions "criminal . . . action" and "traffic citation," it plainly does not bar solicitation of anyone other than a victim or a relative of a victim. Since "victim" generally refers to one who has been injured by the acts of another, it is not clear under what lexicon the State would equate "victim" with "criminal defendant" or "traffic offender." Furthermore, from the fact that Tenn. Code Ann. § 23-3-110 became law only pursuant to a state constitutional provision making legislation effective following the governor's failure to sign a bill without giving reasons, it can be concluded that the Tennessee statute became law more as a matter of political expediency than due to any conviction that it was a supportable limitation on commercial speech.

In summary, it is apparent that any disrespect to the legal profession engendered by targeted direct mail solicitation is not caused by the timing of the targeted letters, as was the case in *Went For It*, but by a general distaste for targeted direct mail solicitation. Accordingly, it is difficult to imagine how the 30-day ban on constitutionally protected

---

[5]The State continues to refer to Ky. Rev. Stat. Ann. § 23A.300, even in its Corrected Brief. However, no such statute exists, and Chapter 23A is entitled "Circuit Court." Ky. Rev. Stat. Ann. § 21A.300, however, is entitled "Prohibition against solicitation of professional employment from victim or relative of victim of accident or disaster." Chapter 21A covers the Supreme Court of Kentucky.

speech will alleviate the distaste to a material degree. Indeed, the limitation may well cause a very real harm to criminal and traffic defendants who will be deprived of one means of locating experienced counsel in their involuntary litigation against the State. It is clear that both the State and Amici, the Maryland Defense Attorneys' Association, in particular, share this general distaste for attorney solicitation and would like to see it banned in its entirety. The elitist notion that attorneys are not engaged in commerce is unrealistic, and efforts to further this falsehood will not improve the reputation of the bar. *See* Note, *supra*, 109 Harv. L. Rev. at 197-99. Fortunately for Appellees, the Supreme Court declared that targeted direct mail solicitation was protected speech in *Shapero* and did not overrule that holding in *Went For It*. In the latter case, the Supreme Court simply applied the *Central Hudson* test and found that it had been met.

C. The 30-Day Prohibition On Targeted Direct Mail Solicitation Is Not Narrowly Drawn To Serve The State's Interest.

Even if the Court were to find that the State has demonstrated that § 10-605.1(a)(2) directly and materially furthers a substantial state interest, the statute does not satisfy the third prong of the *Central Hudson* test because it is not narrowly drawn to protect the privacy interest asserted by the State. In the commercial speech context, the State need not show that it has used the least restrictive means of achieving its goal so long as there is a reasonable fit between the goals of the legislature and the means chosen to achieve those ends. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989). Nonetheless, the availability of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit'

between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993); *see*, *e.g.*, *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995) (statute barring beer labels from displaying alcohol content did not have reasonable fit to goal of curbing "strength wars" because numerous less intrusive options were available, such as limiting alcohol content of beer, prohibiting marketing emphasizing alcohol strength, or limiting ban to malt liquor, the market segment allegedly threatened by strength wars).

The State's initial treatment of the requirement that its limitation on protected speech must be narrowly drawn is to proffer that consumers have many alternatives to targeted direct mail solicitation. (*See* State's Corrected Brief at 23.) Although the State purports to rely on *Went For It* in support of this offering, it should be pointed out that the Court in *Went For It* mentioned the availability of other forms of attorney advertising only *after* concluding that there were no numerous and obvious less-burdensome alternatives to Florida's 30-day ban on targeted direct mail solicitation of accident victims and their families. 115 S. Ct. at 2380. Therefore, the State's argument is irrelevant if it has no lawful basis for banning, even temporarily, commercial speech. The third-prong inquiry remains whether the State has numerous and obvious less-burdensome alternatives to a ban on protected speech, *not* whether the recipients of attorney commercial speech have alternative means of learning about legal representation.

In the case at bar, the State itself has mentioned several obvious and less-burdensome alternatives to a 30-day ban on attorney speech. (*See* State's Corrected Brief at 22, 23.) For example, the State could require advance approval of written communications, *see*, *e.g.*, Fla.

Bar Rule 4-7.4(b)(2)(B); Iowa Rules of Professional Responsibility DR 2-101(B)(4)(b), or the labeling of envelopes and letters as advertisements. *See*, *e.g.*, Fla Bar Rule 4-7.4(b)(2)(A); Iowa Rules of Professional Responsibility DR 2-101(B)(4)(d). The Supreme Court in *Shapero* mentioned advance approval of written communications as an obvious and less-restrictive alternative to a 30-day ban on commercial speech which would more precisely address the asserted interest in that case. 486 U.S. at 476. Moreover, although the district court here did not find the need to address the third prong of the *Central Hudson* test, the court opined that it was doubtful that the State could satisfy that requirement since an obvious and less-restrictive alternative to a 30-day ban was the prior approval of attorney direct mail solicitations. (J.A. 18.)

In addition, the State could easily alleviate the shock some criminal and traffic defendants experience at learning that the charges against them are a matter of public record by simply advising them of that fact at the time they are charged. *Cf.* Fla. Bar Rule 4-7.4(b)(2)(J) (requiring attorney to mention in targeted direct mail solicitation how he obtained information concerning recipient's potential legal problem). While these measures may not mollify those who just do not like targeted direct mail solicitation by attorneys, their annoyance will be duly reflected in the market in that they will not hire those attorneys who solicit through targeted direct mail. In any event, as stated none-too-subtly throughout this brief, a dislike of constitutionally protected speech is not a legitimate reason for regulating it. *Carey*, 431 U.S. at 701.

Finally, there is not a reasonable fit between the furtherance of the public's privacy interests and the 30-day restriction on attorney solicitation practices because the harm to

those defendants deprived of one means of finding an attorney for their involuntary litigation against the State far exceeds the goal served by the 30-day limitation. The State insists that criminal defendants and traffic offenders are not harmed all that much by the 30-day prohibition on speech because there are numerous other means of learning about legal representation, and the system favors the legal representation of criminal defendants. (*See* State's Corrected Brief at 24-25.) However, in spite of the current availability of other forms of attorney advertising, including targeted direct mail solicitation, and despite the best efforts of the State and of Mays's direct competitors, the Maryland Criminal Defense Attorneys' Association, to make defendants aware of their right to obtain counsel, the State's anecdotal evidence reveals that many defendants have not obtained legal counsel within 30 days of being charged, even though it is critical that they obtain counsel as soon as possible. (J.A. 66.) Indeed, the State admits that many delays in the resolution of criminal proceedings are caused by adjournments granted so that defendants may obtain counsel. (*See* State's Corrected Brief at 13.) It is hard to perceive how omitting one source of information on the availability of attorney services, especially a source that is personalized to the needs of the recipient, could further the administration of justice. Accordingly, § 10-605.1(a)(2) fails to satisfy the third prong of the *Central Hudson* test.

CONCLUSION

For the reasons just stated, the Court should affirm the holding of the district court that Md. Code Ann., Bus. Occ. & Prof. § 10-605.1(a)(2) violates the First and Fourteenth Amendments. In the alternative, the Court should remand this matter to the district court for consideration of the expanded legislative record the State has purported to rely on before this Court.

Dated: February 6, 1997

Respectfully submitted,

ROBERT M. MAYS, Esquire
800 Wellington Avenue
Bethesda, Maryland 20814
(301) 252-1500
Appellee and Lead Counsel

Appellee and Lead Counsel

ALAN E. DERSCH, Esquire
406 Old Farm Road
Upper Marlboro, Maryland 20772
(301) 222-9236

Attorney for Appellee Marcia M. Blum

CERTIFICATE OF SERVICE

I certify that on February 7, 1997 two copies of the Brief of Appellees were sent by first-class mail, postage prepaid, to the following attorneys of record:

Margaret Witherup Tindall, Esquire
Staff Attorney
Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202-2021

M. Albert Figinski, Esquire
Weinberg & Green, LLC
100 South Charles Street
Baltimore, Maryland 21201

Edwin M. Speas Jr., Esquire
Senior Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

Robert M. Mays