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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Appellant/Cross Appellee,

v.

CASE NO. 79,371
FLA. BAR NO. 212008

RICHARD RAMPELL,

Appellee/Cross Appellant.
_____/

ANSWER BRIEF OF CROSS APPELLEE

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PRELIMINARY STATEMENT

The State of Florida, Department of Professional Regulation, Board of Accountancy, the Appellants and Cross-Appellees in the instant cause, and Appellants and Defendants below, will be referred to herein as the Board of Accountancy or the Board.

Richard Rampell is the Appellee and Cross-Appellant in the instant cause, and was the Appellee and Plaintiff below, and will be hereinafter referred to as Rampell.

The record on appeal will be cited to parenthetically as (R-____) with the appropriate page number(s).

The decision of the district court below is reported at 589 So.2d 1352 (Fla. 4th DCA 1991).

STATEMENT OF THE CASE

The Board accepts Cross Appellant's Statement of the Case.

STATEMENT OF THE FACTS

The provisions of Section 473.323(1)(L), F.S. direct the Florida Board of Accountancy to promulgate rules regulating direct, in-person, uninvited solicitation to the extent that activities may be regulated within the bounds of Florida and federal constitutional law. As a result therefore, the Board of Accountancy has promulgated Rule 21A-24.002, which essentially prohibits CPAs, either directly through face-to-face solicitation or indirectly through telephonic or third party solicitation from engaging in non-memorialized client seeking when such activities are uninvited by the potential client. The provisions of Rule 21A-24.001, F.A.C., do not in any way impede solicitation which is in the form of memorialized conduct (e.g. by unsolicited mail, television or radio advertisements or the like) or which involve contact after invitation by a potential client as long as all activities are not false, fraudulent, deceptive or misleading. The only prohibitions on CPAs as to form or means of soliciting potential clients is that those activities may not include direct, in-person, uninvited solicitation.

The purpose of the prohibition is tied to the CPAs need to be completely independent as regards the audit or attest function. The audit or attest function involves an independent act on the part of a CPA opining on the financial statements of a client. This expression of opinion is the only practice in accountancy which is limited to CPAs in this state and involves a need for strict independence on the part of the CPA, so that the ultimate users of the opinions on financial statements can rely

upon the objectivity of the CPA in his opinion on financial statements of his clients. Notwithstanding the fact that a CPA is paid for his services by the client, the ultimate duty of the CPA as regards his professional judgment must be to any potential user of the opinion and the independence of the CPA must be so preserved as to make sure that the potential user trusts the CPA's judgment when he issues his opinion on his client's financial statements. Thus, while many other activities are included in the CPA's repertoire of services which he may render to a client, it is only the independent opinion on financial statements which is the basis for the CPA's licensure in this state and is in fact the only true basis for the profession at all.

The deposition and affidavit of Dooner (Plaintiff's Exhibit #1 at pp. 85-100 and attachment 2 to Deposition) as well as the deposition of Schine (Joint Exhibit E) clearly set forth the concern that sub rosa communications which are inherently unregulatable in unmemorialized direct, in-person, uninvited solicitation on the part of CPAs can result in a collusion between the CPA and his client to the ultimate detriment of the integrity and objectivity of the CPA's opinion on financial statements. Thus, the governmental interest asserted by Appellant as requiring the rules prohibiting direct, in-person, uninvited solicitation is the protection of the public from collusion between CPAs and their clients which could result from under the table agreements or promises made by a CPA in order to "get in the door" of a potential client. Further, since there is

no way to differentiate between the type of engagement for which a CPA may be soliciting a potential client, it is not possible to limit the types of non-memorialized uninvited solicitations to those relating only to the attest or audit engagement. Since no evidence of a direct, in-person, uninvited solicitation exists until after the damage may have been done by the CPA or by the CPA and the client agreeing to perform services with less than the acceptable degree of integrity and objectivity required for the attest function, other remedies, such as discipline after the fact, are not viable (since little or no evidence of improper activities in the solicitation would exist).[1]

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[1] In its opinion, the trial court referred to two publications entitled "A Report on the Special Committee on Solicitation by the American Institute of Certified Public Accountants", (Joint Exhibit C) and "A Survey on Prohibitions on Advertising and Solicitation Prepared for the American Institute of Certified Public Accountants" (Joint Exhibit D) and noted that the report of the Committee raised questions as to the CPAs' ban on certain forms of direct solicitation (R-80). Of course, as this Court knows, the AICPA as a private organization is subject to antitrust analysis in its activities which impact upon competition in a way that the State of Florida is not. Further, it is clear that the survey which was alleged to back up the concept that CPAs as a whole saw no need for prohibitions on solicitation is not applicable to the instant cause. The survey in question addressed other forms of solicitation on the part of CPAs than the direct, in-person, uninvited solicitation complained of here. (Joint Exhibit D pp. 19-20). Nevertheless, nearly 2/3 of the CPAs responding had grave difficulties with any uninvited solicitation (Joint Exhibit D p. 19). However, both the AICPA Committee on Solicitation and apparently, the trial court placed great emphasis on the Survey's conclusions that only a small minority of CPAs would themselves feel compromised if solicitation were permitted. (Joint Exhibit C p. 4) This is hardly surprising. It would be unusual to say the least for an individual to respond that he personally would be unethical in his conduct, if a certain form of seeking clients were made available to him. As such therefore, the Survey questions were so "loaded" in their format that the AICPA Committee on Solicitation received the advice it wished, given the probability of Federal anti-trust action already threatened by the FTC and the Department of Justice. The Committee did not address the

SUMMARY OF ARGUMENT

The rule the Florida Board of Accountancy enacted pursuant to the statutory direction of the Legislature of the State of Florida prohibiting direct, in-person, uninvited solicitation on the part of CPAs of prospective clients is facially constitutional and satisfies the requirements set forth in Central Hudson Gas v. Public Service Commission of New York, infra. As prescribed in Central Hudson, a governmental regulation on commercial speech will be upheld if:

(1) It regulates commercial speech as defined by this Court;

(2) It promotes a substantial governmental interest;

(3) It directly advances that interest; and

(4) Commercial speech is burdened no more than necessary to promote the substantial governmental interest. id.

The District Court of Appeal, in holding that the State's and the Board of Accountancy's rules are facially constitutional, correctly construed decisions of the U.S. Supreme Court affirming a state's ability to prohibit direct, in-person, uninvited solicitation by licensed professionals, based upon the need to protect the integrity of the profession being regulated coupled with the inherent incapacity of the State to adequately police unmemorialized direct solicitation contacts. The District Court of Appeal recognized, as the U.S. Supreme Court has done in U.S.

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underlying difficulty relating to the perception, apparently shared even by some 2/3 of the surveyed CPAs, that solicitation has an overall adverse impact on professionalism and ethics. (Joint Exhibit D p. 20-22).

v. Arthur Young, infra, that the public's perception of the independence and integrity of CPAs is the sine qua non of the profession. In addition, the District Court of Appeal recognized that in many engagements, especially those involving tax services such as Rampell seeks to provide, a CPA is just as much involved in a desire to persuade a client to engage him as an attorney. In short, the District Court of Appeal recognized that all of the elements which led the U.S. Supreme Court in Ohralik v. Ohio State Bar Ass'n, infra, to permit the State to prohibit categorically direct, in-person, uninvited solicitation of prospective clients by attorneys, are present within the context of the accounting profession as to solicitations by CPAs. The District Court of Appeal adequately addressed the impact upon the public, which relies upon the independent opinions of CPAs, that the presence of unregulated and unregulatable solicitation contacts by CPAs can and will result not only in acts of fraud or overreaching on the part of importuning CPAs, but also leave an odor of collusion when CPAs perform attest engagements for clients. Finally, Rampell errs in his assertion that other forms of regulation are available so as to hold that the regulation does not present a "reasonable fit" between its goal and its impact on commercial speech. The U.S. Supreme Court's holdings in Ohralik, Shapero and Zauderer, infra, have eloquently addressed the inherent impossibility of regulating non-memorialized direct, in-person solicitation contacts. As such therefore, the prophylactic rule at issue forms the only legitimate barrier by which the State can attempt to regulate a

practice which it legitimately deems to be a threat to the profession and its consuming public. Since the State of Florida bans only the type of solicitation at issue herein, and permits all other forms of non-fraudulent advertising to CPAs, more than ample alternative means exists for a CPA to seek out prospective clientele.

Additionally, the rule is a reasonable time, place and manner restriction. Reasonable time, place and manner restrictions may be imposed by states provided that the restrictions are justified without regard to the content of the commercial speech, are narrowly tailored to serve that interest and leave open ample alternative methods for communication, Barnes v. Glen Theatre, Inc., infra.

The primary analysis which must be determined is whether the rule at issue is enacted because the government disagrees with the content of the time, place and manner of its dissemination. Since the State does not prohibit any CPA from disseminating non-false, fraudulent or deceptive information surrounding his practice, including the soliciting of prospective clients, as long as the solicitation is memorialized, it is apparent that the rule addresses this particular manner of communication and not its content. While Rampell characterizes the rule as speaker specific and content based, such a characterization cannot resolve the inquiry into the constitutional legitimacy of the rule. All regulations of professional conduct which involve speech must be directed toward the actions of a particular speaker, i.e., the professional, however, they are justified not

based upon the speech itself, but upon the conduct surrounding the speech and the secondary effects of that conduct on the state's regulation of the profession in question. For the same reasons that a prophylactic rule is justified as to the speech itself, so too is a ban on this manner of solicitation appropriate. Only by banning this manner of communication can the professionalism of CPAs be assured, especially in light of the impracticability of less onerous forms of regulation. The rule is thus justified not based upon the content of the speech, but upon the conduct surrounding the speech and the secondary effects thereof, much as was noted by this Court in Metromedia, Inc. v. City of San Diego, infra, and in Ohralik, supra; the banning of this type of professional solicitation is legitimate, whether under a full-fledged commercial speech or under a time, place and manner analysis.

Finally, of course, more than ample alternative methods of communication exist for CPAs to advertise their professional services. The rules governing advertising and solicitation in the State of Florida permit all truthful advertising and solicitation through any mode or medium, with the exception only of that prohibited by the rule at issue.

ISSUE I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL HOLDING THAT SECTION 473.323(1)(L), F.S. AND RULE 21A-24.002, F.A.C., ARE CONSTITUTIONAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION WAS CORRECT AND SHOULD BE AFFIRMED BY THIS COURT.

Rampell's Complaint must be characterized as a direct facial attack upon a regulation which impacts upon commercial expression. The Board has not applied the rule to any activities of Rampell (no adjudication of the complaint filed against Rampell before the Board of Accountancy has occurred). Indeed, Rampell's standing to challenge the rule is established only insofar as he is a Florida-licensed CPA who would be governed by the rule and who desires to engage in solicitation to expand his tax and management advisory services practice. See Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569,574, 107 S.Ct. 2568,2572, 96 L.Ed.2d 500,507 (1987).

A facial challenge means an assertion that the law is "invalid in toto--and therefore incapable of any valid application." Steffel v. Thompson, 415 U.S. 452,474, 94 S.Ct. 1209,1223, 39 L.Ed.2d 505,523 (1974). When evaluating a facial challenge to a state law or regulation, the Court must consider any limiting construction that a state or local enforcement agency has proferred, Grayned v. City of Rockford, 408 U.S. 104,110, 92 S.Ct. 2294,2299, 33 L.Ed.2d 222,228 (1972).

As was noted in Village of Hoffman Estates v. Flipside Hoffman Estate, 455 U.S. 489,494,495, 102 S.Ct. 1186,1191, 71 L.Ed.2d 362,369 (1982):

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The Court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. [Footnotes omitted.]

The U. S. Supreme Court has consistently held, as to commercial speech, that the overbreadth of a law or rule is not usually capable of being challenged. As was noted in Bates v. State Bar of Arizona, 433 U.S. 350,380, 97 S.Ct. 2691,2707, 53 L.Ed.2d 810,834 (1977), "the justification of the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context," see San Francisco Arts & Athletics v. Olympic Committee, 483 U.S. 522,538, 107 S.Ct. 2971,2981, 97 L.Ed.2d 427,448 (1987).

There is no evidence or assertion herein that the rule impacts noncommercial speech at all, so as to justify the imposition of the overbreadth doctrine to its terms. While it is possible that the rule could be construed to include solicitation by a CPA where no pecuniary interest exists which would be in violation of the analysis set forth in In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), there is no evidence which shows that the Florida Board of Accountancy has ever

construed the rule in such a manner.[2] As such therefore, there is no "realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the Court." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789,801, 104 S.Ct. 2118,2126, 80 L.Ed.2d 772,784 (1982). Thus Rampell cannot complain, nor, in light of Rampell's obvious desire to engage in conduct which is clearly within the parameters of the rule can he claim, that as to him the rule is vague.

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557,566, 100 S.Ct. 2343,2351, 65 L.Ed.2d 341,351 (1980), the Court articulated a four-prong test which would be used to determine whether a governmental restriction on commercial speech would pass constitutional muster. First, the speech at issue must involve a lawful activity and not be false, fraudulent, deceptive or misleading. Second, the restriction on commercial speech must serve a substantial governmental interest. Third, the regulation must directly further the asserted governmental interest. Fourth, the

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[2] In addition to the fact that the Board of Accountancy has never construed Rule 21A-24.002, F.A.C., to impact upon noncommercial speech or speech wherein pecuniary gain is not involved, the statute pursuant to which the rule was adopted would foreclose such an interpretation. Section 473.323(1)(l), F.S., (the statutory authority for the rule) limits its application so as not to impact expression "to the extent that such solicitation constitutes the exercise of constitutionally protected speech." Thus the rule cannot be construed to contravene this Court's interpretations of what is "constitutionally protected speech," nor could it be applied to such expression.

regulation must be no more extensive than necessary to achieve the government's interest.[3]

As to the first prong of the Central Hudson test, the Board does not assert that all CPA solicitation of potential clients is either illegal or necessarily misleading. The State of Florida and the Board of Accountancy already permit multimedia advertising as well as various forms of solicitation of clients as set forth in the rules governing the practice of public accountancy in this state, see Rule 21A-24.001, F.A.C. It is to be noted however, that direct, in-person, uninvited solicitation, while perhaps not inherently false, fraudulent, deceptive or misleading in all commercial contexts,[4] appears without doubt to

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[3] The fourth prong of the Central Hudson test does not involve a requirement that the regulation be the "least restrictive means" necessary to achieve the governmental interest asserted. In Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Court specifically rejected any requirement which would mandate that the governmental regulation be the least restrictive regulation possible, and determined that there must be a "reasonable fit" between the government's asserted purpose and the means by which the government chooses to accomplish that purpose. The Court held that if the State makes a reasonable effort to differentiate harmless from harmful commercial speech, then the regulation will be sustained if the regulation's impact is in reasonable proportion to the interest asserted. Fox, at 492 U.S. 476-478, 109 S.Ct. 3033-3035, 106 L.Ed.2d 401-402.

[4] It is "clear . . . that regulation--and imposition of discipline--are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." In re R.M.J., 455 U.S. 191,202, 102 S.Ct. 929,937, 71 L.Ed.2d 64,73,74 (1982). Certain forms of commercial expression justify a complete ban as a result of a past history of deception and abuse, see Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979), Ohralik v. Ohio State Bar Association, supra, at 436 U.S. 464-465, 98 S.Ct. 1923, 56 L.Ed.2d 459.

be a mode of communication wherein the potential for harm is well founded,[5] see Ohralik v. Ohio State Bar Association, 436 U.S. 447,464-465, 98 S.Ct. 1912,1923, 56 L.Ed.2d 444,459 (1978).

Not only has the State of Florida, in concert with three other states,[6] realized the problems associated with direct, in-person, uninvited solicitation, but also, the United States Department of the Treasury has found similar forms of solicitation are inappropriate.[7] In the rules governing practice before the Internal Revenue Service, the Director of Practice has

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[5] Direct, in-person solicitation is a practice "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626,641, 105 S.Ct. 2265,2277, 85 L.Ed.2d 652,666(1985), citing Ohralik, supra, 436 U.S. at 464-465, 98 S.Ct. 1922-1923, 56 L.Ed.2d 458,459.

In Ohralik the Court noted that there are inherently detrimental aspects of face-to-face solicitation which have been addressed by the Federal Trade Commission, see 436 U.S. 465, 98 S.Ct. 1923, 56 L.Ed.2d 459.

[6] By statute, Georgia, (O.C.G.A., Section 43-3-35(i), (1988)), Texas (Tex. Rev. Civ. Stat. Ann. Art. 41A-1, § 6(a)(2), (1991)), and Louisiana, (by legislative action, see United States v. State Board of Certified Public Accountants of Louisiana, Civ. No. 83-1947, 1987 West Law 7905 (Eastern Dist. Louisiana, March 11, 1987), (allegation of restraints on advertising and solicitation of violating antitrust law dismissed on grounds that state legislature had approved the restraints)), prohibit such solicitation. Several other states prohibit such in-person solicitation by rule, as noted by the Eleventh Circuit Court of Appeals in Fane v. Edenfield, 945 F.2d 1514,1516 (11th Cir. 1992), cert.granted May 26, 1992.

[7] The fact that not all states have determined to prohibit direct, in-person, uninvited solicitation by CPAs does not invalidate the judgments of the states that do have such prohibitions. When acting as "laboratories of democracy" the various states should be entitled to "broad latitude" in exercising their traditional power to regulate learned professions and to protect the public and the profession from abuses, see Peel v. Attorney Registration and Disciplinary Commission of Illinois, 495 U.S. ___, 110 S.Ct. 2281,2297-2298, 110 L.Ed.2d 106-107 (1990), O'Conner J., dissenting.

specifically included certified public accountants as amongst those qualified practitioners for whom such solicitation is banned: (31 C.F.R. Section 10.30).

> No attorney, certified public accountant, enrolled agent or other individual eligible to practice before the Internal Revenue Service shall make, directly or indirectly, an uninvited solicitation of employment, in matters related to the Internal Revenue Service. Solicitation includes, but is not limited to, in-person contacts, telephone communications, and personal mailings directed to the specific circumstances unique to the recipient. This restriction does not apply to: (i) Seeking new business from an existing or former client in a related matter; (ii) solicitation by mailings, the contents of which are designed for the general public; or (iii) noncoercive in-person solicitation by those eligible to practice before the Internal Revenue Service while acting as an employee, member, or officer of an exempt organization listed in Sections 501(c)(3) or (4)[8] of the Internal Revenue Code of 1954 (26 U.S.C.).

As to the second prong of the Central Hudson test, there can no longer be any doubt that states have a legitimate and overriding interest under the police power in regulating the practice of public accountancy, see Heller v. Abess, 184 So. 122, (Fla. 1938), Mercer v. Hemmings, 170 So.2d 33 (Fla. 1964), U.S. v. Arthur Young, 465 U.S. 805,817, 104 S.Ct. 1495,1503, 79 L.Ed.2d 826,836 (1984).

In Arthur Young, the Court specifically found at 465 U.S. 817,818, 104 S.Ct. 1503, 79 L.Ed.2d 836, that:

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[8] The Department of the Treasury has proposed amendments to its rules governing advertising and solicitation of those practicing before the Internal Revenue Service, see April 21, 1991 Federal Register Vol. 56, No. 77 at pp. 16289-16291; however, these modifications address advertising and do not include any change in the ban on direct, in-person, uninvited solicitation.

> An independent certified public accountant performs a different role [than an advocate or confidential advisor]. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations. [Emphasis original.]

The asserted substantial governmental interest which forms the bedrock upon which the State's ban on direct, in-person, uninvited solicitation rests, flows directly from the State's legitimate police power regulation of this learned profession. The State is directly concerned with the perception as well as the reality of CPAs gaining clients (audit or otherwise) by a manner of solicitation which is inherently unregulatable, and will lessen the public's perception of the CPA as an independent arbiter of the legitimacy of a business entity's financial statements. Likewise, to the extent the CPA is acting as an advocate on behalf of the client, such as occurs in matters before the Internal Revenue Service as well as the various other state or federal taxing authorities, there is an obvious legitimate concern identical to that discussed by the Court in Ohralik, supra, that not only the professionalism of the CPA will be called into question, but also acts of fraud or overreaching

are likely to occur when the CPA solicits an unsuspecting consumer.[9]

In any event, the State's asserted governmental interest in regulating a learned profession, which has long been recognized as appropriate by the Court, includes not only the prevention of abuses on the part of CPAs, but also the maintenance and the prevention of erosion in true professionalism among CPAs practicing their profession.[10]

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[9] The Board draws this Court's attention to "A Report on the Special Committee on Solicitation by the American Institute of Certified Public Accountants" and "A Survey on Prohibitions on Advertising and Solicitation Prepared for the American Institute of Certified Public Accountants." The "Special Committee referred to in the "Report" was commissioned by the AICPA in 1979-81 to review the AICPA's ban on all forms of direct solicitation of clients by CPAs, see Rule 502 AICPA Code of Professional Ethics (1980) (Joint Exhibit C). The Special Committee's report led to the AICPA's rescinding its prohibition on such solicitation in 1981, (see Affidavit of Dooner, Attachment 2 to Deposition, Plaintiff's Exhibit 1).

The "Survey," however, addressed other forms of solicitation on the part of CPAs in addition to the direct, in-person, uninvited solicitation complained of here and shows the ambivalence of the CPA profession as to its decision to remove the ban, (Joint Exhibit D) Nearly 2/3 of the CPAs responding to the "Survey" had grave difficulties with uninvited solicitation in any form. The membership of the AICPA strongly agreed with the concept that "solicitation causes unsophisticated people to make decisions about CPA services that are not based upon their own objective choice" and that such solicitation will "reduce the public's expectation of the quality of CPA services." (Joint Exhibit D p. 5)

However, based primarily on antitrust concerns, see National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), the AICPA voided its ban on direct, uninvited solicitation in 1981 (Joint Exhibit C pp. 6-7), see Affidavit of Dooner (a member of the AICPA Committee on Solicitation), supra.

[10] As has been noted by the Court in Arthur Young, supra, CPAs in many circumstances have duties not only to their clients, but also to the the public which relies upon the integrity and impartiality of a CPA's opinion. In this sense, a CPA acts in a

The prohibition of direct, in-person, uninvited solicitation by CPAs of potential clients, directly advances the State's interests in the protection of clients and the public from improper, unregulated actions on the part of CPAs engaged in such solicitation, as well as the maintenance of "CPAs' true professionalism" and high standards of independence and integrity, both in reality and perception.[11]

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manner similar to that of an attorney, when an attorney functions as an "officer of the court." Just as an attorney, a CPA may be a self-employed businessman; however, just as an attorney "acts as a trusted agent of his client and as an assistant to the court in search of an appropriate solution to disputes," so too does a CPA act as an "umpire" in many of his engagements, especially when announcing an impartial ruling as to the accuracy of a client's financial statement, see Ohralik, supra, at 436 U.S. 460, 98 S.Ct. 1920, 56 L.Ed.2d 456.

[11] While the primary basis for the regulation is rooted in the protection of the professional standards of CPAs, and in the impracticability of other forms of regulation, it is abundantly clear that the state has an interest in protecting any potential client of a CPA from overreaching, undue influence or vexatious conduct during a solicitation, see Ohralik, supra. Thus the state's interest in protecting the privacy of potential CPA clients extends even to those solicitations where the CPA is attempting to obtain business in professional activities other than the attest function, e.g., tax preparations or financial advice. The protection of a potential client's right to privacy from certain modes of solicitation where vexatious conduct can occur and is inherently unregulatable, such as direct, in-person, uninvited solicitation, has long been recognized as a valid basis upon which certain modes of advertising and solicitation may be prohibited, see Pace v. State, 368 So.2d 340 (Fla. 1979), Carricarte v. State, 384 So.2d 1261 (Fla. 1980), National Funeral Services, Inc. v. Rockefeller, 870 F.2d 136 (4th Cir. 1989), Guardian Plans, Inc. v. Teague, 870 F.2d. 123 (4th Cir. 1989), Astro Limousine Service, Inc. v. Hillsborough County Aviation Authority, 678 F.Supp. 1561 (M.D. Fla. 1988) and Curtis v. Thompson, 840 F.2d. 1291 (7th Cir. 1988). This justification was cited at length by the Fourth District Court of Appeal in its Opinion upholding the rule at issue here in State Board of Accountancy v. Rampell, 589 So.2d 1357 (Fla. 4th DCA 199).

As the Court noted in Metromedia, Inc. v. City of San Diego, 453 U.S. 490,506, 101 S.Ct. 2882,2891-92, 69 L.Ed.2d 800,813,814 (1982), (validating the governmental power to ban commercial off-site billboards, while invalidating an ordinance which prohibited noncommercial billboards as well):

> [C]ommercial and noncommercial communications, in the context of the First Amendment, have been treated differently. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), held that advertising by attorneys may not be subject to blanket suppression and that the specific advertisement at issue there was constitutionally protected. However, we continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be. Id. at 379-381,383-384, 97 S.Ct., at 2706-2708, 2708-2709. In Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), the Court refused ot [sic] invalidate on First Amendment grounds a lawyer's suspension from practice for face-to-face solicitation of business for pecuniary gain.

The Court in Metromedia at 453 U.S. 506, 101 S.Ct. 2892, 69 L.Ed.2d 813,814, then went on to quote Ohralik, recognizing both the common sense and legal distinctions between speech involving a proposed commercial transaction and other varieties of speech:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that

> might be impermissible in the realm of noncommercial expression. Id. at 456, 98 S.Ct., at 1918.

The Court in Ohralik analyzed whether the prophylactic ban on attorneys directly soliciting clients for pecuniary gain directly advanced the state's interest in maintaining a high degree of professionalism on the part of licensed professionals:

> While the Court in Bates determined that truthful, restrained advertising of the prices of 'routine' legal services would not have an adverse affect on the professionalism of lawyers, this was only because it found 'the postulated connection between advertising and the erosion of true professionalism to be severely strained.' 433 U.S., at 368, 97 S.Ct., 2691, 53 L.Ed.2d 810 . . . The Bates Court did not question a state's interest in maintaining high standards among licensed professionals. Indeed to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of 'true professionalism.' [Emphasis original in Ohralik.]

Ohralik at 436 U.S. 460-461, 98 S.Ct. 1921, 56 L.Ed.2d 456. See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748,766, 96 S.Ct. 1817,1828, 48 L.Ed.2d 346 (1976) and National Society of Professional Engineers, supra, at 435 U.S. 696, 98 S.Ct. 1367, 55 L.Ed.2d 653 (1978).

The Court went on to discuss the substantive evils of solicitation, Ohralik at 436 U.S. 461, 98 S.Ct. 1921, 56 L.Ed.2d 457. Some of the stated evils which can be ameliorated by the prevention of direct, in-person, uninvited solicitation are not applicable to the practice of public accountancy--such as the stirring up of litigation. Others however, such as the assertion of fraudulent claims, the debasing of the profession and

potential harm to the client or the public involved in overreaching, overcharging, underrepresentation or misrepresentation, all are powerful and compelling arguments in favor of prohibiting such forms of solicitation in public accountancy.

Indeed, the Court in Ohralik at 436 U.S. 461, 98 S.Ct. 1921, 56 L.Ed.2d 457, noted that a lawyer who engages in personal solicitation may be more inclined to subordinate his client's best interest to his own pecuniary interest. The Court also noted that "[t]hese lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest." Such a concern is inherent in the public accountancy profession as well. A CPA soliciting a client for a tax engagement wherein he will act as an advocate on behalf of the client is essentially acting in a manner similar to that of an attorney pressing a client's claim in court.[12]

In the practice of public accountancy, the same "special problems of conflict of interest" arise if a CPA is involved in soliciting an audit client. While it may be less likely that a potential audit client will be seduced or intimidated into hiring a CPA as a result of an in-person solicitation, the potential for collusion is very real. As was stated by Louis Dooner in his

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[12] A fact which has been accepted by the Internal Revenue Service in prohibiting direct, in-person, uninvited solicitation of clients by attorneys, CPAs and other individuals authorized to practice before the I.R.S., see 31 C.F.R. Section 10.30., supra.

affidavit infra, it is the public's perception of a CPA as an independent outside observer and an opiner on the truth and accuracy of financial statements which justifies the profession's licensure. See Florida Accountants Ass'n v. Dandelake, 98 So.2d 323 (Fla. 1957), U.S. v. Arthur Young, supra. This protection of the public's perception of a CPA as being independent is singular justification for prohibiting a form of soliciting employment which the Court noted may "create special problems of conflict of interest."[13]

As was noted in Ohralik, the state's interest herein is preventive. "The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs," 436 U.S. at 464, 98 S.Ct. 1923, 56 L.Ed.2d 458,459. The Court went on to discuss the legitimate concerns of the state, noting that:

> The State's perception of the potential for harm in circumstances such as those presented in this case is well founded. The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in

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[13] Other activities of a CPA are also regulated and the rule on solicitation is an integral part of this larger overall regulatory scheme. Any CPA is subject to the disciplinary provisions of Section 473.322 and 473.323, F.S., whether he is performing the attest function or merely using his accounting skills in the preparation of tax returns or acting as a financial advisor. Also, activities of a CPA are subject to a partial prohibition or contingent fees (Section 473.319, F.S.) and the taking of commissions (Section 473.3205, F.S.). All of these regulations apply to all activities of CPAs which involve the use of their accounting skills and are evidence that the intent of the Florida Legislature is to protect the integrity and objectivity of CPAs in all their endeavors.

> the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the state to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited. [Footnotes omitted.]

436 U.S. at 464-466, 98 S.Ct. 1923,1924, 56 L.Ed.2d 459-460.

Similar concerns of the State in preventing harm before it occurs justify the imposition of a prophylactic rule against direct, in-person, uninvited solicitation for pecuniary gain on the part of certified public accountants. Only by preventing such contacts before they occur can the state prevent fraud, overreaching or misrepresentation (more likely when a CPA is engaged in tax representation, financial or management advisory services), or increase the appearance of a conflict of interest (more likely when a CPA solicits a client in an effort to obtain an engagement to perform an independent audit or other attest function).[14] In any event, whether the governmental interest

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[14] Rampell argues that the Fourth District Court of Appeal grounded its holding in part upon Article I, Section 23, Florida Constitution (guaranteeing right of privacy from governmental intrusion unless compelling interest shown) and that this was error on the part of the Fourth District Court of Appeal since the Rule herein involves a prohibition on solicitation by private individuals (CPAs) and has no relationship to governmental

being served is the prevention of consumer fraud by CPAs seeking new tax clients, or the maintenance of the reality and perception of CPAs acting as independent impartial analyzers of a business entity's financial statements, a prophylactic rule banning direct, in-person, uninvited solicitation directly advances vital societal concerns.[15]

The fourth prong of the Central Hudson test requires that the regulation must be no more extensive than is necessary to

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intrusions on privacy which are disfavored by the provisions of Article I, Section 23, see pp. 33-35 of Cross Appellants Initial Brief on the Merits. This is an obvious misreading of the opinion. The Fourth District Court of Appeal, at 589 So.2d 1357 simply cited Article I, Section 23 of the Florida Constitution, for the proposition that the State of Florida, by enacting such a constitutional provision against unwarranted interference in privacy rights, has evidenced a profound concern for the privacy rights of individuals in all circumstances. Thus, the District Court of Appeal drew support in its opinion that the rule in question is an appropriate protection of privacy rights of private individuals from vexatious and importuning non-governmental solicitors directly from Florida's asserted concerns involving governmental intrusions into privacy. A position recognized by this Court, see the The Florida Bar v. Schreiber, 407 So.2d 595 (Fla. 1981) Opinion vacated, 420 So.2d 599 (Fla. 1982). The Fourth District Court of Appeal did not hold that CPAs in private practice are somehow governmental agents within the meaning of Article I, Section 23, of the Florida Constitution.

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> Our decision in Ohralik that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as 'a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.' Zauderer, supra, 471 U.S., at 641, 105 S.Ct., at 2277. See Ohralik, supra, 436 U.S., at 457-458,464-465, 98 S.Ct., at 1919-1920, 1922-1923.

Shapero, infra, at 486 U.S. 475, 108 S.Ct. 1922, 100 L.Ed.2d 485.

accomplish its purpose. The requisite nexus between the governmental interest and the means used to achieve that interest has been defined in Board of Trustees v. Fox, supra.[16]

The affidavit of Dooner sets forth the State's concern that sub rosa communications are inherently unregulatable and can hide fraud, deceit or collusion on the part of CPAs. As has been noted by the Court on several occasions, there is no way to ascertain what types of under-the-table agreements or promises are made by a professional in order to "get in the door" of a potential client. Since no evidence of a direct, in-person, uninvited solicitation exists until after a CPA has defrauded his client or entered into a collusive agreement to perform an audit with less than the acceptable degree of integrity and

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> [W]e have not gone so far as to impose upon them [the regulators] the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions required is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,' Posadas, supra, at 341, 92 L.Ed.2d 266, 106 S.Ct. 2968,--a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' In re R.M.J., supra, at 203, 71 L.Ed.2d 64, 102 S.Ct. 929; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Fox at 492 U.S. 480, 109 S.Ct. 3035, 106 L.Ed.2d 403,404.

objectivity, remedies such as discipline after the fact are not viable, see Ohralik, supra, and Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988).

The Court's analysis justifying a prophylactic rule banning direct, in-person, uninvited solicitation in Ohralik is directly on point in the instant case. In Ohralik, 436 U.S. at 465-467, 98 S.Ct. 1923,1924, 56 L.Ed.2d 459-461, the Court flatly refused to analyze the prohibition on direct, in-person, uninvited solicitation of potential clients by attorneys on a case-by-case basis. This occurred not because of the damage done in that particular case, but because of the potential damage to the client and the public in any and all cases and the inherent incapacity of regulatory authorities to adequately remedy such damage by any other means, Ohralik at 436 U.S. 468, 98 S.Ct. 1924,1925, 56 L.Ed.2d 461. This prophylactic rule and the reasons for it were reaffirmed by the Court in Zauderer, supra, at 491 U.S. 641-643, 105 S.Ct. 2277, 85 L.Ed.2d 652, and in Shapero, supra, at 486 U.S. 472, 108 S.Ct. 1921-1922, 100 L.Ed.2d 483,384.[17]

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> Second, 'unique . . . difficulties,' Zauderer, supra, 471 U.S., at 641, 105 S.Ct., at 2277, would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is 'not visible or otherwise open to public scrutiny.' Ohralik, 436 U.S., at 466, 98 S.Ct., at 1924. See also ibid. ('[I]n-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession').

Shapero, supra at 486 U.S. 475, 108 S.Ct. 1922, 100 L.Ed.2d 485.

Ohralik, Zauderer and Shapero make it crystal clear that the state's ability to ban the solicitation at issue in the instant case as a result of the inherent inability to regulate such solicitation and profound potential for abuse bears no relation to the potential employment which may be gained by the CPA in any particular situation. The prohibition is appropriate notwithstanding the type of engagement sought, the degree of sophistication, business acumen, education or knowledge of the potential client, or even the good faith and honest effort of the vast majority of practitioners.[18] The regulation is based quite simply upon the need to protect the public from certain bad actors and the fact that the regulatory difficulties in policing direct, in-person, uninvited solicitation are such that when weighing the degree of public harm vis-a-vis the limitation on speech, an outright ban on such activities is appropriate.

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[18] "The relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." Shapero, supra at 486 U.S. 474, 108 S.Ct. 1922, 100 L.Ed.2d 485.

ISSUE II

THE PROVISIONS OF SECTION 473.323(1)(L), F.S., AND RULE 21A-24.002, F.A.C., ARE APPROPRIATE TIME, PLACE AND MANNER RESTRICTIONS ON PROFESSIONAL CONDUCT WITH ONLY AN INCIDENTAL IMPACT UPON COMMERCIAL SPEECH AND ARE CONSTITUTIONAL UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

Rule 21A-24.002, F.A.C., is a reasonable time, place and manner restriction on a form of commercial expression that is within the legitimate powers of government; serves a substantial governmental interest; is content neutral and leaves open ample alternative means of communication. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, supra, 425 U.S. 748,771, 96 S.Ct. 1817,1830, 48 L.Ed.2d 346,364 (1976).

All activities protected by the First Amendment, whether commercial or noncommercial in nature, have traditionally been subject to legitimate time, place and manner restrictions. The Court has accorded such regulations greater deference than regulations of speech aimed at the content of the speech, Perry Educational Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). At one time it was considered that time, place or manner restrictions and the test for evaluating such restrictions on expression might be limited to activities taking place only on public property, which reaches the status of a public forum, see Ward v. Rock Against Racism, 491 U.S. 781,791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The Court has now, however, clearly enunciated that time, place and manner restrictions on expression can be applied to the private sector as well, see Barnes v. Glen Theatre, Inc., 501 U.S. ____,

111 S.Ct. 2456,2460, 115 L.Ed.2d 504,511 (1991), City of Renton v. Playtime Theatre, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Court, in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d. 221 (1984), opined that the test to be used in determining whether a regulation is a valid time, place or manner restriction of expression protected by the First Amendment is that set forth in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

> This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the 'nonspeech' element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imposition inheres in these terms, we think it is clear that the government regulation is sufficiently justified, if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest. [Footnotes omitted.]

O'Brien, at 391 U.S. 376,377, 88 S.Ct. 1678,1679, 20 L.Ed.2d 672.

Applying the O'Brien test, it is obvious that Florida's rule prohibiting direct, in-person, uninvited solicitation by CPAs is justified despite an incidental limitation on one mode of commercial expression.

The first prong of O'Brien requires that the regulation be within the constitutional power of the government. It is too late in the day to seriously question the fact that the

government may constitutionally regulate conduct by members of the licensed professions, see Ohralik v. Ohio State Bar Association, at 436 U.S. 460, 98 S.Ct. 1920,1021, 56 L.Ed.2d 456 (1976), Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563, (1955), Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

Likewise, the rule furthers an important governmental interest. The Florida Legislature enacted Chapter 473, F.S. (regulating the practice of public accountancy) and stated as its purpose in so doing, that:

> The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

See Section 473.301, F.S.

In furtherance of the above-mentioned legislative purpose, numerous statutory and rule provisions have been enacted to preserve the actual and perceived independence and integrity of certified public accountants and to protect the public from dishonest or incompetent practitioners. The recognition by the Florida Legislature of the vital public interest in assuring that CPAs remain, both in reality and in the public's perception, independent, impartial professionals has been recognized by this Court as well, see United States v. Arthur Young & Co., 465 U.S. at 811-821, 104 S.Ct. 1499-1504, 79 L.Ed.2d 832-838 (1984),

wherein the Court noted specifically the importance of integrity and objectivity on the part of the CPA and the impact upon a client of the type of opinion rendered by the independent CPA.[19]

Indeed, just as the Court held in Ohralik, supra, at 436 U.S. 460-461, 98 S.Ct. 1921, 56 L.Ed.2d 456, that the furtherance of "true professionalism" of attorneys is a legitimate governmental interest justifying a ban on direct, in-person, uninvited solicitation, so too does the maintenance of the public's perception of the integrity and objectivity of certified public accountants justify a similar ban.

The third prong of the O'Brien test requires that the interest served by the regulation is justified without reference to the content of the regulated speech, see City of Renton, supra, at 475 U.S. 48, 106 S.Ct. 929, 89 L.Ed.2d 38 (1986).

Initially, it should be noted that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal, merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed," Giboney v. Empire Storage and Ice Co., 336 U.S. 490,502, 69 S.Ct. 694, 93 L.Ed. 834,843 (1949).

In Lowe v. S.E.C., 472 U.S. 181,231, 105 S.Ct. 2557,2584 86 L.Ed.2d 130,163,164 (1985), Justice White, in his concurrence with the judgment, quoted Justice Jackson in his concurring

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[19] "It is therefore not enough that financial statements be accurate; the public must also perceive them as being accurate. Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional." [Emphasis original.] See Arthur Young, supra, at 465 U.S. 819, 104 S.Ct. 1504, and 79 L.Ed.2d 837.

opinion in Thomas v. Collins, 323 U.S. 516,544-548, 65 S.Ct. 315,319-331, 89 L.Ed. 430,447-450 (1945). Justice Jackson concluded that the distinguishing factor between that which is considered a regulation on the conduct of a profession and that which is considered a prohibition on speech is whether the speech in any particular case was "associated with some other factor which the State may regulate so as to bring the whole within official control." 323 U.S. at 547, 65 S.Ct. at 330, 89 L.Ed. 449.

It is now clear that valid time, place and manner restrictions can be directed toward expression involving a particular topic and still not be impermissible.[20] Thus, in City of Renton, supra, and Barnes v. Glen Theatre, supra, the Court upheld regulations which impacted particular forms of expression because the regulations were aimed at the secondary effects of the expression on either the public morals (Barnes) or the public safety of the surrounding community (City of Renton).[21]

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[20] As has been noted by Justice Stevens "any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment, knows that it is incorrect to state that a "time, place or manner restriction" may not be based upon either the content or subject matter of speech." Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530,544-545, 100 S.Ct. 2326,2337-38, 65 L.Ed 2d. 319,333 (1980), (Stevens J. concurring).

[21] It is here that the Eleventh Circuit Court of Appeals erred in Fane, infra in rejecting the Board's assertion that the regulation is a legitimate time, place and manner restriction. Initially, the Court of Appeals erred in implying that a time, place and manner restriction cannot ban a particular form of expression. Barnes, supra, involves just such an unqualified ban on nude public dancing and was upheld by the Court. Secondly, the Court of Appeals' rejection of the Board's position on the basis that the regulation is a "speaker specific, unqualified ban

In addition to justifying the ban on direct, in-person, uninvited solicitation, as a result of the adverse secondary effects which the exercise of such conduct will have on a public relying upon the absolute integrity and objectivity of CPAs opining on financial statements,[22] the ban is also justified based upon the special dangers presented by this mode of expression combined with the impracticability of other less onerous forms of regulation.[23] See Zauderer v. Office of Disciplinary Counsel, at 471 U.S. 641-642, 105 S.Ct. 2277, 85 L.Ed.2d 666 (1985) O'Connor, J., dissenting. As was noted by

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on a category of expressive activity" and thus, is per se objectionable, is simply incorrect. The regulation is not addressed to commercial speech itself, but rather upon a particular manner of expressing that speech. As such therefore, the appropriate inquiry is whether or not the State has advanced non-content based reasons for banning the particular mode of solicitation prohibited by the rule in question.

[22] City of Renton, supra, at 475 U.S. 51-52, 106 S.Ct. 931, 89 L.Ed.2d 40, requires that the body enacting a regulation have a reasonable basis to believe that the harm to be protected against actually exists. It is not required that new studies be embarked upon or evidence be produced independently of others as long as the evidence relied upon is reasonably relevant to the problem addressed. The State herein need look only to the findings of the Court in Ohralik and the results of the "Survey" conducted by the AICPA (see Ftn. 9, supra) to justify its enactment of the regulation at issue herein.

[23] In Metromedia, supra, at 453 U.S. 515-516, 101 S.Ct. 2897, 69 L.Ed.2d 819,820, the plurality rejected a theory that the regulation affecting billboard advertising at issue therein could be characterized as a time, place and manner restriction in its prohibition of noncommercial billboards. The Court stated that "the ordinance does not generally ban billboard advertising as an unacceptable 'manner' of communicating information or ideas; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times." As to the instant rule, direct, in-person uninvited commercial solicitation by CPAs is "banned everywhere and at all times" and thus does not distinguish between permissible and impermissible commercial solicitation based on content.

Judge Edmondson in his dissent in Fane v. Edenfield, 945 F.2d at 1520, the sales pitches offered by attorneys when engaged in direct, in-person solicitation are clearly analogous to those which could be offered by CPAs. In both contexts, a highly trained professional has the ability to overwhelm the unwary and unlearned consumer.[24]

In Bates, supra, the state's assertion of the maintenance of professionals and the protection of potential clients was found to be too tenuous to justify an outright ban on lawyer advertisements, especially when other less sweeping methods of regulation existed to review written or electronic expressions of commercial speech. The fact that a tangible reviewable memorialization of the importuning lawyer's advertisement could be analyzed by the state licensing authority if a complaint of improper conduct was filed, mitigated against a complete ban. Similarly, the lack of the inherent immediacy found in an unwanted telephone in-person solicitation of a potential client, resulted in an implicit finding by the Court that the state's asserted desire to ban all lawyer advertising had to do with the

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[24] This is especially true when CPAs, such as Rampell, are primarily concerned with a tax practice. It would hardly be a shock to this Court to note, given the complexities of the various state and federal income tax rules, statutes and regulations, that a CPA trained in their application may well be in a similar position to that of an attorney "ambulance chasing" to find a potential personal injury client. In both circumstances the potential client is likely to be at his or her wit's end and ready to listen to any voice of approval or authority. The Department of the Treasury recognized the above-mentioned possibilities for vexatious conduct in rejecting any amendment to its rule prohibiting in-person solicitation by practitioners before the Internal Revenue Service after Ohralik, supra, was decided. See January 24, 1979 Federal Register, Vol. 44 No. 17 at pp. 4940-4941.

control of the speech itself rather than the protecting of the public from overbearing lawyers seeking work.

In Ohralik, however, as in the instant cause, the state's concern was based upon the mode of communication, not the communication itself.[25] The inability to adequately ascertain what may have been said during an uninvited telephone contact results in a vitiation of the state's ability to police fraudulent, coercive, or in the case of audit engagements, collusive acts of soliciting CPAs. Such a specter of helplessness on the part of the licensing authority, when confronted with issues that go to the core of the accounting profession's integrity and objectivity, can only result in the diminution of the profession's standing in the eyes of the public and a lessening of ethical standards. Therefore, the justification for banning the manner of solicitation at issue here comes from the inability of the state to regulate the method of communication and the subsequent effect of that inability on

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[25] Metromedia, supra, states at 453 U.S. 501, 101 S.Ct. 2889, 69 L.Ed.2d 810,811:

> Even a cursory reading . . . reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in Kovacs v. Cooper, 336 U.S. 77,97, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949): Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. [Footnote omitted.]

the profession's standing with the public as a whole, not as a result of any desire to stop CPAs from seeking potential clients.

In Ohralik, supra, at 436 U.S. 457, 98 S.Ct. 1919, 56 L.Ed. 2d 454, the Court permitted the state to ban just such direct, in-person, uninvited solicitations as those at issue in the instant cause when practiced by attorneys, because of the special dangers presented by such a mode of commercial communication. The Court did not subject the regulation in question to the heightened scrutiny required for content-based prohibitions. The Court held that the regulation prohibiting direct, in-person solicitation required less scrutiny than a content-based regulation:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in Bates and Virginia Pharmacy, it lowers the level of appropriate judicial scrutiny.

Ohralik, 436 U.S. at 457, 98 S.Ct. at 1919-1920, 56 L.Ed. at 454.

Indeed, it is difficult to analyze Bates, supra, and Ohralik, supra, other than by ascertaining that the Court determined that the distinction in the mode of communication at issue in the two cases was the deciding factor.[26] In Bates, the State unconstitutionally sought to ban lawyer solicitation of potential clients through the various print and electronic advertising media. As is noted above in Ohralik, the State had simply banned direct, in-person solicitation of potential

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[26] "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." Shapero, supra, at 486 U.S. 475, 108 S.Ct. 1922, 100 L.Ed.2d 485.

clients.[27] Both forms of solicitation were aimed at seeking prospective clients, and both sets of regulations banned that activity. In light of this Court's deference, when the states are involved in regulating learned professions, a rule can be accepted as a valid time, place and manner restriction if the justification for the restrictions deals with the maintenance of "true professionalism" coupled with the impossibility of meaningful regulation by any other means. Such circumstances justify a prophylactic ban on certain modes of expression as long as ample alternative methods of communication remain open. See Barnes, at 501 U.S. ___, 111 S.Ct. 2461-2463, 115 L.Ed.2d 512-514, Metromedia, at 453 U.S. 508-509, 101 S.Ct. 2892-2893, 69 L.Ed.2d 815, Burson v. Freeman, 60 U.S.L.W. 4395-4397 (U.S. May 26, 1992).

The regulation thus passes constitutional scrutiny. Consequently, whether the regulation is justified because of the secondary effects of such unchecked solicitation upon the State's regulatory scheme for the public accountancy profession,[28] as a reasonable regulation based upon traditional state authority

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[27] The Court recognized in the Ohralik companion case of In re Primus, supra, that direct solicitation of non-remunerative clients was essentially noncommercial speech and the public interest could not justify a prophylactic ban where the impact on the state's interest in maintaining professional standards was much less persuasive.

[28] See City of Renton, supra, at 475 U.S. 50-51, 106 S.Ct. 925, 89 L.Ed.2d 29, Barnes, supra, 111 S.Ct. 2468, 115 L.Ed.2d 521, Souter J., concurring.

in regulating learned professions,[29] or as a compelling state interest,[30] the rule meets applicable First Amendment constraints and is a legitimate and necessary part of a general State scheme for the regulation of the public accountancy profession.

In addressing the fourth prong of the O'Brien test there is little question that alternative channels of communication remain open. The regulation prohibits only direct, in-person, uninvited solicitation. All other forms of solicitation or advertising by CPAs are permitted as long as they are not false, fraudulent, deceptive or misleading, see Rule 21A-24.001, F.A.C., and Section 473.323(1)(f), F.S. Indeed in Ohralik, supra, and Shapero, supra, the Court has already accepted the legitimacy of prohibiting direct, in-person, uninvited solicitation of potential clients for remuneration, as long as other forms of communication remain open.

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[29] See Barnes, supra, at 111 S.Ct. 2463, 115 L.Ed.2d 515, Scalia J., concurring.

[30] Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 60 U.S.L.W. 4029,4034,4035 (U.S. Dec. 10, 1991), Burson v. Freeman, 60 U.S.L.W. 4393,4399,4400 (U.S. May 26, 1992).

CONCLUSION

This Honorable Court should affirm the decision of the Fourth District Court of Appeal and uphold as facially constitutional the Board's rule prohibiting direct, in-person, uninvited solicitation of perspective clients by CPAs under the First Amendment to the Constitution of the Unites States.

Respectfully submitted,

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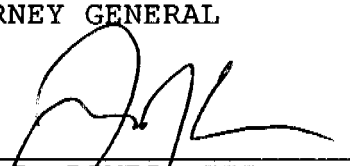

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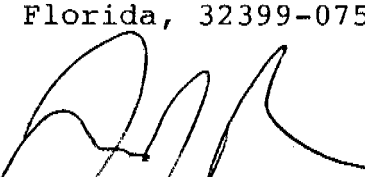
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by U.S. Mail to **ROBERT MONTGOMERY** and **REBECCA L. LARSON, ESQUIRE**, 1016 Clearwater Place, P. O. Box Drawer 3086, West Palm Beach, Florida, **KENNETH R. HART, ESQUIRE**, Ausley Law Firm, Post Office Box 391, Tallahassee, Florida, 32302, **PHILIP M. BURLINGTON** of **EDNA L. CARUSO, P.A.**, Suite 4B/Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401 and by interoffice mail to **LISA NELSON, COUNSEL**, Department of Professional Regulation, Legal Office, Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida, 32399-0750 on this 4th day of September, 1992.



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