IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,371

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY, Appellant/Cross Appellee, vs. RICHARD RAMPELL, Appellee/Cross Appellant.	DCA CASE NO.: 89-2668 LOWER CASE NO.: CL-87 4207 AA

CROSS-ANSWER BRIEF OF AMICUS CURIAE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF APPELLANT/CROSS-APPELLEE

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INTRODUCTION

The Florida Institute of Certified Public Accountants ("FICPA") is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. Founded in 1905, FICPA is an active professional organization of approximately 17,000 Certified Public Accountants ("CPA"), working to improve the accounting profession and to better serve the public. The FICPA is the fifth largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government and education. Other membership categories include associate members, retired CPAs, and CPAs domicile outside the State of Florida.

One of the primary purposes of the FICPA is to encourage the analysis, discussion, and understanding of issues related to the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States, monitoring legislation affecting the practice of public accountancy, assisting in the development of auditing, accounting and ethical standards, and educating the public with regard to the responsibilities of CPAs. These areas of activity bear directly on the issues now before this Court.

STATEMENT OF THE CASE AND FACTS

FICPA was not involved in the trial of this matter, but participated in the appeal before the Fourth District Court of Appeals as Amicus Curiae in Support of Appellant. FICPA has been granted consent to file a brief in this matter as Amicus Curiae in support of Appellant/Cross Appellee by counsels for Appellant/Cross Appellee and Appellee/Cross Appellant and has filed a brief with this Court as to the constitutionality of section 473.317, Florida Statutes.

In addition, FICPA has filed a brief with the United States Supreme Court in support of the State of Florida as to the constitutionality of section 473.323(1)(l), Florida Statutes, the prohibition herein challenged. See Fane v. Edenfield, 945 F.2d 1514 (11th Cir. 1991), cert. granted, 60 U.S.L.W. 3719 (May 26, 1992)(No. 91-1574).

FICPA adopts Appellant's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

This matter is before this Court as a result of the Fourth District declaring Section 473.323(1)(l), Florida Statutes, which prohibits certified public accountants ("CPAs") from engaging in uninvited, in-person solicitation of specific new clients, constitutional under the First Amendment of the United States Constitution. The Fourth District correctly reviewed recent United States Supreme Court decisions, the State's interest in regulating the practice of accountancy, and the extent of the prohibition to declare the prohibition constitutional.

As early as 1938, Florida subjected the practice of accountancy to regulation pursuant to the State's police powers. Courts have recognized that states have a legitimate interest in regulating the professional standards for professions, including the professional standards of CPAs, and in prohibiting the potential for improper and vexatious conduct, such as coercion, overreaching, invasion of privacy, and undue influence. The State's interest in maintaining professional standards and preventing the potential for harm supports the prohibition of in-person solicitation. Contrary to the argument of Cross Appellant, the potential for harm is sufficient justification for the prohibition and the State is not required to show actual harm.

Additionally, the State has a legitimate state interest in protecting the "attest function." Although CPAs provide a wide range of accounting and tax services, one of their primary

functions is to furnish attest services. Attest services refer to the process by which CPAs audit or review their client's financial statements and express certain opinions as to those financial statements. In the performance of these services, CPAs are required to be independent from their clients. It is customary for investors, creditors, and others to rely upon these opinions in making financial and economic decisions. The unique relationship among accountants, their clients, and third parties creates a substantial state interest in the regulation of these services and in the practice of public accounting, generally. Based on these interests, it is clear that the State's interest in the regulation at issue is substantial and more than sufficient to pass scrutiny under applicable case law.

Moreover, the prohibition in question directly furthers the State's identified interests and is narrowly tailored to accomplish such. Section 473.323 does not prevent CPAs from providing information to prospective clients, from soliciting prospective clients through other means, or from providing information to prospective clients who have contacted them or responded to other forms of solicitation by CPAs. This limited prohibition on uninvited, in-person solicitation by CPAs is consistent with existing case law concerning in-person solicitation by professionals and clearly aids in preserving the relationship of independence required between CPAs and their clients when performing attest services.

The State clearly has a substantial interest in the regulation of the practice of public accounting, the provision of attest services, in preventing improper and vexatious conduct by professionals in the solicitation of prospective business clients, and in the privacy interests of its citizens. The prohibition on in-person solicitation is carefully tailored, consistent with case law involving solicitation and is no more extensive than necessary to accomplish its purpose.

ARGUMENT

I. FLORIDA'S PROHIBITION ON UNINVITED, IN-PERSON SOLICITATION OF A SPECIFIC CLIENT BY CERTIFIED PUBLIC ACCOUNTANTS IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT.

The Fourth District correctly held Florida's prohibition of uninvited, in-person solicitation of specific clients by certified public accountants to be constitutional based on decisions of the United States Supreme Court and other courts regarding regulation of commercial speech.

A. The History of the United States Supreme Court's Decisions Regarding Uninvited, In-Person Solicitation Under the First Amendment.

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the United States Supreme Court held, for the first time, that the simple communication, "I will sell you the X prescription drug at the Y price," without any editorial comment, was entitled to some degree of First Amendment protection.[1] Virginia had declared it unprofessional conduct for a licensed pharmacist to advertise prescription drug prices. Id. at 749-50. The Court held:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.[2]

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[1]Before Virginia Pharmacy, the Court had held commercial speech did not have protection under the First Amendment. See, e.g., Valentine v. Chrestensen, 316 U.S. 52 (1942).

[2]Such speech, although protected, is still subject to reasonable time, place, and manner regulation, and may be prohibited where false or misleading. Virginia Pharmacy, at 770-71. The following year, the Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977),

In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the United States Supreme Court, in an unanimous opinion, limited the protection furnished commercial speech and upheld a state's right to forbid in-person, uninvited solicitation by an attorney where the goal of the solicitation is the attorney's pecuniary gain.[3] The attorney had been suspended after offering, for a fee, his services to accident victims shortly after their injury. The Court dismissed out of hand the assertion that such solicitation was on a par with truthful advertising:

> [I]n-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment ... 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 protection of the First Amendment, as was held in Bates and Virginia Pharmacy, it lowers the level of appropriate judicial scrutiny.

Id. at 455, 457 (emphasis added). The Court noted that special problems, not present with advertising, appear with in-person solicitation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual ... In-person solicitation ... actually may disserve the individual and societal interest, identified in Bates, in facilitating "informed and reliable decisionmaking."

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reviewed a blanket prohibition on media advertisement of legal services. Framing its holding narrowly, the Court ruled that states may not prohibit a lawyer's truthful newspaper advertisement of fees for routine legal services. Id. at 384.

[3]Cf. In re Primus, 436 U.S. 412 (1978)(held unconstitutional disciplinary rule prohibiting attorney solicitation where the attorney informed prospective clients by letter that free legal assistance was available from the American Civil Liberties Union).

Id. at 457-58. The Court recognized that states have a legitimate interest in protecting consumers and regulating commercial transactions, and bear a special responsibility for maintaining standards among members of a licensed profession. Id. at 460. Given Ohio's compelling interest in preventing fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct," the Court held that for the limited instance of uninvited, in-person solicitation an outright, prophylactic ban of such communication was justified. Id. at 462.[4]

The Court refined its commercial speech analysis in Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), and articulated a four-prong test for determining the constitutionality of all government restrictions of commercial speech. First, the speech at issue must concern a lawful activity and not be misleading. Second, the restriction on commercial speech must serve a substantial governmental interest. Third, the regulation must directly further the asserted interest, and finally, the regulation must be no more extensive than necessary to achieve the state's interest. Id. at 566.[5]

Since Central Hudson, the Court has applied the four-prong test to other challenges involving commercial speech. In Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), the

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[4]Similarly, for the limited instance of in-person solicitation, the state need not prove actual harm to prospective clients; rather, it may prohibit such solicitation on the basis of the potential for overreaching. Ohralik at 466-67. See also Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988) (same); In re Primus (showing of potential danger sufficient); Resort Dev. Int'l, Inc. v. City of Panama City Beach, 636 F. Supp. 1078 (N.D. Fla. 1986) (to require a higher standard would elevate commercial speech qualifiedly protected to the full-protection awarded non-commercial speech under the First Amendment).

[5]In Central Hudson, the utility had opposed, on First Amendment grounds, an order by the New York Public Service Commission banning all promotional advertising intended to stimulate purchase of utility services while allowing informational advertising designed to shift consumption. Applying the above test, the Court found Central Hudson's advertisement met the first three prongs, but failed the fourth prong as the Commission had made no showing that a more limited regulation would not be as effective. Id. at 566-70.

Court was confronted with a prohibition on written solicitation, holding unconstitutional a prohibition of targeted, direct-mail solicitation by a lawyer for pecuniary gain. The Court distinguished Ohralik, stating:

> In assessing the potential for over-reaching and undue influence, the mode of communication makes all the difference. 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 out-right fraud." Second, "unique ... difficulties," 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."

Id. at 475 (citations omitted).[6]

Section 473.323 is completely consistent with, and goes no further, than that approved by Ohralik, and reaffirmed in Shapero. As the prohibition directly advances the State's interest in regulating such solicitation, and is narrowly tailored to do such, it passes review under Central Hudson.

B. Central Hudson Applied.

In reaching its decision, the Fourth District applied the four-prong test of Central Hudson. Each prong is examined below.

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[6]Additionally, in In re R.M.J., 455 U.S. 191 (1982), the Court invalidated a number of rules which restricted an attorney's ability to advertise truthful information, such as an attorney's areas of practice and the courts in which he was admitted to practice. 455 U.S. at 196-198. In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), an Ohio attorney had been disciplined for advertising his services to individuals charged with drunk driving and to women injured by an IUD device. 471 U.S. 629-630. The Court declared unconstitutional a prohibition on solicitation of legal business through general advertisements containing advice and information on specific legal problems. The Court additionally upheld disclosure requirements relating to contingency fee agreements as reasonably related to a state's interest in preventing deception of consumers. Id. at 653.

1. In-Person Communications are Inherently Conducive to Fraud, Undue Influence, Overreaching, Invasion of Privacy, and other Forms of Vexatious Conduct.

Enacted pursuant to the police power of the State of Florida, the prohibition of uninvited, in-person solicitation is necessary, in part, in order to protect consumers from the evils of fraud, undue influence, overreaching, intimidation, invasion of privacy and other forms of "vexatious conduct" in order to maintain the professional standards of CPAs.[7] Identical reasons were used by the U.S. Supreme Court in Ohralik to uphold a similar prohibition as it related to solicitation by attorneys. Ohralik, 436 U.S. at 457-58. By section 473.323, the State also seeks to prevent improper and vexatious conduct in the practice of accountancy.

Since Virginia Pharmacy, the focus of the U.S. Supreme Court's decisions concerning commercial speech has been the protection of the right to disseminate information, which dissemination facilitates the decision-making process for consumers. Virginia Pharmacy, 425 U.S. at 748. Because in-person solicitation is inherently conducive to overreaching and other forms of misconduct, such solicitation does not serve the informational function protected by the First Amendment, but may actually disserve such:

> [I]n-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment .... 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 protection of the First Amendment, as was held in Bates and Virginia Pharmacy, it lowers the level of appropriate judicial scrutiny.... [In-person solicitation] falls within the State's proper sphere of economic and

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[7]Cross Appellant devotes a substantial portion of his Brief to the question of whether the prohibition violates the Sherman Act as an unlawful restraint of trade. That question is not before this Court as it is well settled that the proscriptions of the Sherman Act do not apply to state legislatures. See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 455 U.S. 97 (1980).

> professional regulation ... [and] appellant's conduct is subject to regulation in furtherance of important state interests.

Ohralik at 455, 457, 459 (emphasis added). And in Shapero, the Court recognized "face-to-face solicitation [as] a 'practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.'" Id. at 475. Accordingly, although the Court has been confronted with numerous forms of commercial promotion, only the possibility for abuses inherent with in-person solicitation have justified a blanket prohibition of such speech.

Recent Supreme Court decisions have also recognized the potential for abuse inherent with in-person solicitation. In International Society for Krishna Consciousness, Inc. v. Lee, 60 U.S.L.W. 4749 (June 26, 1992), in-person solicitation was found to present "risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable .... The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase." Id. at 4753. And in United States v. Kokinda, 497 U.S. 720 (1990), the U.S. Supreme Court upheld a prohibition on the uninvited solicitation of funds on government property. In both decisions, the U.S. Supreme Court recognized that the abuses inherent with in-person solicitation, along with a state's interest in managing its property, justified the burden on commercial speech.

The Court's analysis in Ohralik and subsequent cases applies equally as well to Florida's prohibition on uninvited, in-person solicitation by a CPA. Like the prohibition in Ohralik, uninvited, in-person solicitation by a CPA is a business transaction, and "does not stand on a par with truthful advertising about the availability and terms of the services to be provided." Here, Cross Appellant does not seek to convey information which cannot be delivered by any

other means, but rather seeks to solicit for remunerative employment, which is nothing more than a business transaction. Such speech serves the First Amendment little, if at all, and the State may regulate such in accord with its interest in maintaining the standards of its professions and in preventing the potential for abuse. Numerous other methods are available by which Cross-Appellant could provide the information he seeks to convey, including through advertisement and direct-mail solicitation. As the Fourth District found, the potential for abuse is present and, combined with the State's substantial interest in regulating the practice of public accountancy, justifies the prohibition.

2. The State has a Substantial Interest in Regulating the Practice of Public Accounting, in Protecting the Attest Function and in Protecting Privacy Rights.

Regulating Public Accounting

Since 1938, Florida has subjected accountancy to regulation pursuant to the State's police power. In Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938), the Florida Supreme Court held the profession of accountancy was sufficiently charged with public interest to justify legislation providing for the registration of accountants and prohibiting the practice of accountancy as a certified public accountant in the State without certification. See also Accountant's Society of Va. v. Bowman, 860 F.2d 602, 605 (4th Cir. 1988)(regulation of public accountancy permissible in order to protect public); Mercer v. Hemmings, 170 So.2d 33, 39 (Fla. 1964)(profession of accountancy subject to appropriate regulation as "a state has a legitimate interest in regulating a highly skilled and technical profession such as public accountancy").

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court stated:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect

> the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."

Id. at 792. See also Ohralik, supra (state bears special responsibility for maintaining standards among members of a licensed profession). In Virginia Pharmacy, the Court recognized that the services of a professional are significantly different from the product of a manufacturer, including, for example, the absence of a standardized product and the potential for confusion with regard to the nature or need for such service. In In re R.M.J., 455 U.S. 191 (1982), the Court stated:

> The Court [in Bates] emphasized that advertising by lawyers still could be regulated. False, deceptive, or misleading advertising remains subject to restraint, and the Court recognized that advertising by professions poses special risks of deception -- "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."

Id. at 200.

The Fourth District properly held that the practice of accountancy, like the practice of law, is a highly skilled and technical profession, in which years of education and training are necessary. Both professions must struggle with an intricate system of statutes and regulations, with interpretations and amendments to same. The potential for confusion as to the nature or need for such services by laymen is as great for accounting services as it is for legal services. Because of the inherent inequality between all professions and consumers of such services, the State has a legitimate concern that a professional will use this specialized knowledge to the disadvantage of the consumer.

Like attorneys, CPAs acquire knowledge and expertise indispensable in today's society but which even the most sophisticated lay person would find confusing. Although this circumstance does not mean that CPAs will take advantage of a client, it is the possibility that CPAs might use their specialized knowledge to solicit a potential client that justifies the State's interest in and regulation of this communication.[8] Indeed, in the area of tax practice, certain services provided by tax attorneys and CPAs are identical and the reasons that support a ban for attorneys applies equally to CPAs. In these instances, the prohibition of uninvited, in-person solicitation of prospective clients serves precisely the same function. It would make no sense to prohibit attorneys from in-person solicitation of prospective tax clients, but yet, to hold a similar prohibition of in-person solicitation by CPAs for the same services to be unconstitutional. To date, more than 12 states, by statute or regulation, prohibit such communications. See Fane v. Edenfield, 945 F.2d at 1516.

The disparity between professionals and others forms the basis for such prohibition, not only as to CPAs but also as to doctors, psychiatrists, and other professions. Numerous other states have enacted prohibitions on uninvited, in-person solicitation as to other professions, including for example, statutory prohibitions against the uninvited solicitation by optometrists,[9]

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[8]Cross Appellant erroneously argues that proof of actual harm is not required; rather, a state may prohibit such solicitation based on the potential for misconduct. Ohralik, 436 U.S. at 466-67; Shapero, 486 U.S. at 472; In re Primus, 436 U.S. 412 (1978)(showing of potential danger sufficient). Because in-person solicitation is inherently conducive to abuse, that potential exists for attorneys and other professions, including CPAs.

[9]See, e.g., Del. Code Ann. tit. 24, § 2113(7)(f)(1987); Minn. Stat. Ann. § 148.57 (West 1989).

health care professionals,[10] and dentists.[11] Furthermore, an overwhelming number of states prohibit a professional from utilizing a solicitor to solicit employment.[12]

Here, the Fourth District found that the State's interest in regulating in-person solicitation is a result of the profession's specialized knowledge and the inherently coercive nature of such communications:

> Whether the solicitation is by a lawyer or a CPA, pressure can be exerted on a potential client to make a hasty and uninformed decision. While CPAs may not be trained in the art of persuasion, they are trained in the intricacies of taxes and financial statements which even the most sophisticated lay person finds confusing. We are not so naive as to think that all CPAs would never take advantage of a client if allowed to personally solicit the client, any more than we think that all lawyers are "bad apples" who exploit every prospective client. It is the possibility of harmful solicitation and the knowledge that -- whether by the door-to-door salesman, the attorney, or the CPA -- all in-person solicitation is particularly susceptible to abuse which allows the State to regulate such conduct.

State Dep't of Professional Regulation v. Rampell, 589 So.2d 1352, 1357 (4th DCA 1991).

Cross Appellant argues that Florida is isolated in its prohibition. However, as set forth above, that clearly is not true. In addition, the Department of Treasury has enacted a similar prohibition with regard to CPAs, attorneys, and enrolled agents practicing before the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms. See 31 C.F.R. §§ 8.41 and 10.30. CPAs in every state are subject to the Department of Treasury's prohibitions when

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[10]See, e.g., Ky. Rev. Stat. Ann. § 438.065 (Michiel Bobbs-Merrill 1985); La. Rev. Stat. Ann § 37:1743 (West Supp. 1992).

[11]See, e.g., Minn. Stat. Ann. § 150A.11 (West 1989); Mont. Code Ann. § 37-4-502 (1991); S.C. Code Ann. § 40-15-190(17) (Law. Co-op. Supp. 1990).

[12]See, e.g., Ariz. Rev. Stat. Ann. § 32-854.01(6) (1986 & Supp. 1992) (podiatry); Cal. Bus & Prof. Codes § 2273 (West 1990 & Supp. 1992) (physician); Colo. Rev. Stat. Ann. § 12-35-118(1)(s) (1991) (dentist); Haw. Rev. Stat. § 453-8(a)(2) (1985 & Supp. 1989) (physician); Md. Health Occ. Code Ann. § 14-404(a)(14) (1991 & Supp. 1991) (same); S.C. Code Ann. § 40-55-150(14) (Law. Co-op. 1986 & Supp. 1990) (psychologists).

practicing before these federal agencies. When it was suggested to the Department that these prohibitions were unnecessary in light of Ohralik, the Department disagreed:

> The Department believes that the complexity of our tax laws and the anxiety which many taxpayers feel when confronted with matters such as examination of tax returns, imposition of tax liens and estate tax issues for bereaved family members of decedents indicate that, at this stage of our experience, limitations be placed on in-person solicitation. Hence to avoid the opportunity for overreaching, the invasion of a taxpayer's privacy and situations where the judgment of the practitioner on behalf of the client may be clouded by his own pecuniary self-interest, the prohibition on in-person solicitation is continued in the final regulations.

44 Fed. Reg. 17 (Jan. 1979). Clearly, if the federal government considers the issue of import, Florida can also.

Restrictions on in-person solicitation act as concrete reminders to the practicing CPA of why it is improper for any member of this profession to be regarded as a trade or occupation. The Supreme Court has recognized that the implementation of codes of ethics have served the professions well by imposing certain standards beyond that prevailing in the market place. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 676-77 (1985); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975); Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 247 (1957). This push for higher standards inures to the benefit of the state and its citizens, who knowingly or unknowingly, rely on the higher ethical standards for protection. The state clearly has a compelling interest in ensuring that natural forces do not conspire to transform its professions, including the practice of accountancy, into crafts or businesses. Because of the inherent inequality in the relationship between a professional and consumers, consumers must place their trust in professions, and it is not unreasonable for the State to condition its grant of special privilege and standing upon the acceptance of additional restraints.

Cross Appellant also argues that this Court should declare Florida's prohibition unconstitutional as the State did not carry its burden. However, the depositions of Louis Dooner, past chairman of the Florida Board of Accountancy, and Jerome Schine, past chairman and present member of the Board of Accountancy, both of whom are experts in the field of accountancy, clearly demonstrate the legitimate purpose and need for the statute and regulation. See Deposition of Dooner, Plaintiff's Exhibit No. 1, at 74-75, 87, 93-95, 100; Deposition of Schine, Plaintiff's and Defendant's Exhibit E, at 30, 55. Both testified that such regulation is necessary to preserve the integrity and independence of auditing services and to prevent improper conduct. Moreover, the prohibition has been in effect in Florida since 1969 and by all accounts has worked well, with few reported violations. Under no circumstances can the fact that the prohibition has achieved its intended effect provide a basis for declaring it unconstitutional.

Cross Appellant also argues that Ohralik should be interpreted as applying only to the solicitation of the emotionally vulnerable and unsophisticated personal injury victims, in contrast to solicitation by CPAs of "prosperous business people." Ohralik cannot be read as applying solely to the solicitation of the emotionally vulnerable and unsophisticated, but rather extends to all in-person solicitation, including solicitation of non-personal injury clients. See Shapero, 486 U.S. at 474 ("[I]nquiry is not whether there exists potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger...[so as to] exploit any susceptibility.") Cross Appellant's distinction based on the profession and the type of client is without support and ignores entirely the State's interest in maintaining professional standards among CPAs and in preventing the potential for confusion.

Moreover, there are instances where potential clients for accounting services are as susceptible to improper solicitation as personal injury victims. Such instances include a company

under the immense strain of impending bankruptcy or regulatory action, for example, a savings and loan association. In such a circumstance, a company may seek to present financial information based on the selection of certain alternative accounting or tax treatments. Undue influence, overreaching, and fraud are just as valid concerns in these instances as they are for personal injury victims. Consequently, the State has a legitimate state interest in regulating the practice of accountancy and in preventing improper and vexatious conduct so as to maintain the standards of the profession.

Attest Services

Additionally, the need for section 473.323 is made critical because of the provision of attest services, which only CPAs may provide. Attest services refer to the process by which a CPA scrutinizes financial statements prepared by an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accordance with generally accepted accounting principles. Such an opinion may only be issued by a licensed CPA, and its issuance is subject to state regulation and rules. See Florida Accountants Ass'n v. Dandelake, 98 So.2d 323 (Fla. 1957). See also Section 473.315, Florida Statutes and Rules 21A-22.001-22.008, Florida Administrative Code.

Unlike an attorney whose duty it is to present his client's case in the most favorable light:

> An independent certified public accountant performs a different role. 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.

United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984). This responsibility requires a CPA to be prepared to take positions adverse to his client's interest. Yet, it is this independence and integrity by CPAs in providing attest services that make attest services so valuable to commerce within the State of Florida.

Perhaps unlike any other service, the provision of attest services serves a critical link in our free market economy. Creditors, stockholders, investors, and others rely upon opinions of CPAs for assurance regarding the financial information of others. Independent certification assists in ensuring that financial statements contain financial information which is fairly presented in accordance with generally accepted accounting principles. Such fairly presented financial information is essential, in a free market economy, in order to allocate economic resources efficiently. This Court recently acknowledged the heavy reliance the financial community places upon audited financial statements in First Fla. Bank, N.A. v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990). Indeed, as the U. S. Supreme Court has recognized, it is not only the fact, but also the appearance of independence and accuracy by CPAs in their attest capacity, which is so essential to commerce. United States v. Arthur Young & Co., 465 U.S. at 819-20, n.15. Without this appearance and reassurance, creditors and others would have little confidence in an entity's financial statements. Thus, the CPA acts as a balance between management's interests and the investment community's and others' need for objective, accurate disclosure of financial information.

This balance, however, could be upset, or appear to be upset, if CPAs were permitted to engage in in-person, uninvited solicitation of clients. It is not difficult to imagine a situation by which a client could be solicited and tempted to switch CPAs based on the selection of certain alternative accounting treatments. The issue is of sufficient magnitude that the Securities and

Exchange Commission has expressed grave concerns about "opinion shopping" and has stepped up enforcement activities against its improper use. See, e.g., Martin, An Effort to Deter Opinion Shopping, 14 J. Corp. Law 419, 430-31 (1980); May, Accountants and The SEC: How to Avoid the Appearance of "Opinion Shopping", 15 Sec. Reg. L.J. 154 (1987).

There is simply no doubt that the State's interest in ensuring that such audits are performed in a manner in which creditors and others in the State will have confidence, is paramount. As such, the State has a legitimate interest in the regulation at issue for it to pass scrutiny under the U. S. Supreme Court's decisions.

Privacy

The Fourth District also noted that solicitation directly infringing upon a citizen's right to privacy. As Shapero recognized in the limited instance of in-person solicitation, a state may enact such a prohibition to protect its citizens' privacy. See also National Funeral Serv. Inc. v. Rockefeller, 870 F.2d 136 (4th Cir.), cert. denied, ____ U.S. ____, 110 S.Ct. 409, 107 L.Ed.2d 374 (1989) (upholding prohibition on solicitation of funeral contracts as necessary to preserve, inter alia, consumer's right to privacy); Resort Dev. Int'l, Inc. v. City of Panama City Beach, 636 F.Supp. 1078 (N.D. Fla. 1986) (upholding prohibition on solicitation on city's beaches to protect privacy of persons).

Clearly, the State has a legitimate right to protect the privacy of its citizens from intrusion by uninvited, in-person solicitation whenever it chooses to do so. This is especially true with regard to solicitation of professional services, where "the public lacks sophistication concerning [professional] services ..." In re R.M.J., 455 U.S. at 200. When viewed accordingly, it is

clear that the State has a significant and legitimate interest in the regulation at issue. As such, the prohibition passes review under the second prong of Central Hudson.[13]

3. The Prohibition of Uninvited, In-Person Solicitation of a Specific Client Directly Furthers the State's Interest.

The third prong of Central Hudson requires that the prohibition directly further the State's interest. By enacting a prophylactic ban, the State has clearly acted in a very direct and causal manner to prevent the evils of overreaching and undue influence, to protect the attest function, and to protect the privacy of its citizens. The United States Supreme Court has had no trouble finding that similar prohibitions directly further a state's interest in preventing the problems associated with solicitation of professional services. See, e.g., Ohralik, supra; Shapero, supra; International Society of Krishna Consciousness, supra. As such, the prohibition passes the third prong of Central Hudson.

4. The Prohibition of Uninvited, In-Person Solicitation is No More Extensive than Necessary.

As to the fourth prong, that the prohibition be no more extensive than is necessary to serve the interest asserted, that also is met.

The prohibition prohibits only the uninvited, in-person solicitation by the CPA. The prohibition does not prohibit the advertisement or targeted, direct mail solicitation of clients by CPAs. Cross Appellant is free to identify prospective customers and to target those customers for direct mail solicitation. He is prohibited only from initiating these acts by telephone or in-

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[13]Contrary to Cross Appellant's assertion, the Fourth District did not base its decision upon Article I, section 23 of the Florida Constitution, which sets forth Florida's right to privacy. Rather, it cited the provision as further evidence of this State's commitment to protecting the right of privacy generally.

person without invitation from the prospective client. Cross Appellant is free to send this information to the prospective client in writing along with a request that the client contact him. If the prospective client responded to this written request by contacting Cross Appellant, he could provide the same information that he claims he wants to initiate by oral solicitation.

Cross Appellant also argues that a blanket prohibition on solicitation is unnecessarily restrictive, as alternative regulations are available. Similar arguments were rejected in Ohralik, where the Court found a blanket prohibition to be the only way to effectively deal with the problem:

> If appellant's views were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession, in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

Id. at 466-67 (emphasis added).[14] Contrary to Cross Appellant's argument, there are no alternative and less restrictive means of regulating the conduct at issue. The regulations cited by the lower court can only be utilized on an after-the-fact basis, based upon subsequent discovery of the misconduct. The State by this regulation is attempting to provide an effective and objective mechanism before misconduct occurs. The State has a compelling interest in such regulation, which interest permits the State to apply, as Ohralik found, remedies before the fact. To have dealt with this situation in another manner would require an army of investigators, and yet, in the end, would still not have been as effective as an outright prohibition. No effective pre-screening mechanism, such as that approved in Zauderer for advertising, is available to

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[14]In Shapero, the Court stated, "'unique ... difficulties' 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.'" 486 U.S. at 475.

prevent the problems associated with in-person solicitation. Accordingly, the alternatives proposed by Cross Appellant fail Central Hudson's requirement that the State's interest "be served as well by a more limited restriction." Id. at 564 (emphasis supplied). As such, the regulation passes the fourth prong of Central Hudson and should be declared constitutional.

C. The Fourth District's Decision is Consistent with Decisions of this Court and other courts.

The Fourth District's decision is also consistent with decisions of this Court and other courts. In Pace v. State, 368 So.2d 340 (Fla. 1979), this Court upheld a prohibition on in-person solicitation by lawyers. See also Carricarte v. State, 384 So.2d 1261 (Fla.), cert. denied, 449 U.S. 874 (1980) (affirming Pace in light of United States Supreme Court decisions). As Pace noted, the legislature is free, under its police power, to enact legislation proscribing this type of conduct as inimical to the public:

> As interpreted above, we do not find the statute to be violative of the State or Federal Constitution. F.S. Section 877.02(1), F.S.A., falls in the class of acts mala prohibita within the province of the legislature to enact. The legislature, drawing upon its knowledge of conditions inimical to the public welfare in the community and perceiving that solicitation of legal business by an attorney or by others in privity with him and acting in his behalf represents a social evil which for many years had been denounced as an unethical practice in the legal profession, had constitutional power to make such practice a criminal offense.

Id. at 343, quoting State ex rel. Farber v. Williams, 183 So.2d 537 (Fla.), cert. denied, 385 U.S. 845 (1966).[15] See also Florida Bar v. Schreiber, 407 So.2d 595 (Fla. 1981), opinion vacated, 420 So.2d 599 (Fla. 1982); Matter of Anis, 599 A.2d 1265 (N.J.), cert. denied, ____

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[15]The lower court's decision also calls into question other anti-solicitation provisions enacted by the Florida legislature. See, e.g., § 460.413(m) (solicitation prohibited by chiropractors); § 497.043 (solicitation by cemetery companies for cemetery plots prohibited); § 470.026 (solicitation by funeral directors and others prohibited); and § 484.056(t) (solicitation of optical devices and hearing aids prohibited).

U.S. ____, 112 S.Ct. 2303, 119 L.Ed.2d 225 (1992)(declaring constitutional prohibition on direct-mail solicitation).

A number of other courts have also declared such prohibitions constitutional. In National Funeral Services v. Rockefeller, supra, a statute prohibiting the solicitation, including by telephone, of funeral contracts was upheld as necessary to protect consumers from overreaching and high pressure sales tactics and to preserve the consumer's right to privacy. Id. at 142. See also Guardian Plans Inc. v. Teague, 870 F.2d 123 (4th Cir. 1989), cert. denied, _____ U.S. _____, 110 S.Ct. 218 (1989)(upholding prohibition on telemarketing solicitation of funeral services). In Resort Dev. Int'l, Inc. v. City of Panama City Beach, 636 F. Supp 1078 (N.D. Fla. 1986), the Northern District of Florida upheld a prohibition of solicitation upon the city's beaches as necessary to protect its beaches from the "nuisances [of solicitation] and in prohibiting unreasonable interferences with the 'flow, recreation, enjoyment, and privacy of persons ... on the sand beach areas.'" Id. at 1083. And in Astro Limousine Serv. v. Hillsborough City Aviation Auth., 678 F. Supp. 1561 (M.D. Fla.), aff'd, 862 F.2d 877 (11th Cir. 1988) the court upheld a prohibition on the advertising and solicitation by non-contract carriers at an airport, rejecting the argument that society's interest in making informed decisions took precedence over the substantial governmental interest in the safety of the airport's passengers and the State's interest in promoting commerce and tourism. Id. at 1566. See also American Future Sys. v. Pennsylvania State Univ., 752 F.2d 854 (3d Cir. 1984), cert. denied, 473 U.S. 911 (1985) (upholding prohibition of solicitation of college students at dorm); Harnish v. Manatee County, Fla., 783 F.2d 1535 (11th Cir. 1986) (upholding prohibition of portable signs as unsightly).

Cross Appellant cites in support the Eleventh Circuit's decision in Fane v. Edenfield, 945 F.2d 1514 (11th Cir. 1991), pet. for cert. granted, (May 26, 1992), which reviewed the

constitutionality of section 473.323 and declared it unconstitutional. That decision is now being reviewed by the U.S. Supreme Court and was wrongly decided for a number of reasons. First, the Eleventh Circuit limited Ohralik to the solicitation by a "trained advocate" or of the emotionally vulnerable. Judge Edmondson, in his dissent from the majority's decision, correctly pointed out that Ohralik applies to other professions:

> But this quoted language [trained advocates] was not at the heart of Ohralik's reasoning. I think Ohralik's reasoning reaches professionals other than lawyers.... In-person solicitation is potentially harmful chiefly because lawyers, as professionals, have (and are perceived by lay people to have) specialized knowledge beyond that of their solicited clients.... The client, when compared to the professional is almost always unsophisticated when it comes to the subject of the professional's work. The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance.
>
> CPAs also have (and are perceived to have) knowledge beyond that of the potential clients which CPAs could well use to entice or to intimidate clients. For example, CPAs provide tax advisory services and financial management services to clients, when many of these prospective clients may be ignorant of their potential rights and their potential liabilities. To think that clients may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable....

Id. at 1521.

In addition, the Eleventh Circuit also failed to recognize the State's interest in the regulation of its professions. As set forth above, under case law of both this Court and the U.S. Supreme Court, that interest is more than sufficient to support the prohibition. The Fourth District correctly reviewed the State's interest in the prohibition and applied Supreme Court precedent to declare constitutional Florida's prohibition. Fane was wrongly decided and should not provide a basis for overturning the Fourth District's decision.

II. FLORIDA'S PROHIBITION ON UNINVITED, IN-PERSON SOLICITATION BY CPAs IS NOT VAGUE.

Cross Appellant also argues that Florida's prohibition is unconstitutionally vague. In order to raise vagueness in a challenge to the constitutionality of a statute, however, Cross Appellant must show that the statute is vague as applied to him. Yet, Cross Appellant does not dispute that the statute applies to him.

In Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), the court of appeals had sustained a challenge to a drug ordinance, relying on vagueness in the application of the ordinance to a hypothetical third parties. The United States Supreme Court emphatically disapproved of that approach and upheld the ordinance:

> A plaintiff who engages in some conduct that is clearly proscribed cannot complain of vagueness in the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing the other hypothetical applications of the law.

455 U.S. at 495; see also Broadrick v. Oklahoma, 413 U.S. 601 (1973)(collecting cases). Village of Hoffman specifically rejected the argument that a party may raise the vagueness or overbreadth of a statute as applied to others in a commercial speech context. 455 U.S. at 494-99.

The Supreme Court further discussed the application of vagueness to commercial speech in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), where the Court noted an exception had developed for first amendment speech in recognition that such speech is often fragile and an overbroad or vague statute might serve to "chill" the protected speech. That concern, however, "applies weakly, if at all" with regard to commercial speech. "Common sense differences" exist between commercial speech and other first amendment speech. Id. at 380. See also Virginia Pharmacy, 425 U.S. at 771 (1976). Given the hearty and robust nature of commercial speech,

no justification exists for extending that exception to commercial speech. Bates, 433 U.S. 381. As Cross Appellant presents no serious contentions that he is in doubt as to the statute's application to him, he is barred from raising it and contrary to his argument, such speech is not entitled to a more stringent examination.

Cross Appellant specifically argues that the phrase "uninvited solicitation" is impermissibly vague. Yet, the same phrase was before the U.S. Supreme Court in Ohralik and the Court expressed no concern about such a prohibition. See also Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986)(upholding against vagueness challenge statute restricting advertising by gambling casino); Guardian Plans Inc. v. Teague, supra (upholding against vagueness challenge statute prohibiting solicitation by the funeral profession).

The test for determining whether a statute is unconstitutionally vague is whether persons of common intelligence and understanding are given sufficient notice as to the proscribed activity. See Reynolds v. State, 383 So.2d 228, 229 (Fla. 1980). Because that is the basis for Cross Appellant's challenge, he in essence argues that he and other accountants lack the "common intelligence and understanding" that are present in other professions. In the field of economic regulation, as here, the standard is even less strict as the affected persons or entities are comparatively more sophisticated and may seek administrative guidance. Village of Hoffman, 455 U.S. at 498.

Here, it simply cannot be doubted that the terms contained in the prohibition are, along with the accompanying rule, clear enough to provide practitioners in the field sufficient guideline as to their actions. If doubt exists, practitioners may seek guidance, as to their activities, including the hypotheticals Cross Appellant urges to this Court. Judge by these standards, the challenged statute more than meets the standards required for constitutional review.

CONCLUSION

For the foregoing reasons, the Fourth District's decision should be affirmed and Florida's prohibition on uninvited, in-person solicitation be declared constitutional.

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