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IN THE SUPREME COURT OF FLORIDA

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

Appellant,

vs.

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

RICHARD RAMPELL,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

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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).

The appendix with index is being filed under separate cover with the brief.

STATEMENT OF THE CASE

The Complaint in this cause was filed on May 7, 1987 in the Fifteenth Judicial Circuit Court seeking a declaratory judgment and injunctive relief (R-1). The action challenged the constitutionality of various Florida Statutes as well as rules promulgated by the Florida Board of Accountancy which prohibit certified public accountants (CPAs) from engaging in any direct, in-person, uninvited solicitation of new clients (Section 473.323 (1)(L), F.S., and Rule 21A-24.002, F.A.C.), and in certain circumstances engaging in competitive bidding on attest function engagements (Section 473.317, F.S. and Rule 21A-24.003, F.A.C.).

These challenges were based upon alleged violations of the First and Fourteenth Amendments to the United States Constitution and Article I, paragraphs 2,4,9 and 10 and Article II, Section 3 of the Florida Constitution. The jurisdiction of the circuit court was invoked under the provisions of Sections 86.11 and 120.73, F.S. Appellant answered the Complaint on June 23, 1987 (R-17). Both parties filed Motions for Summary Judgment (R-51, R-68), and the Circuit Court proceeded to trial on the stipulated evidence set forth in the record and, after hearing, the argument of counsel (R-78). Final Judgment was entered on September 28, 1989 (R-77), based on the evidence presented and found that Sections 473.317 and 473.323(1)(L), F.S., were unconstitutional and enjoined the Appellant from enforcing these statutes and consequently the rules promulgated thereto, 21A-24.002 and 21A-24.003, F.A.C. That judgment was appealed to the

Fourth District Court of Appeal on October 12, 1989 (R-83). On October 16, 1991 the Fourth District Court of Appeal, per Judge Warner, rendered its opinion (at 589 So.2d 1352 set out in full in Appendix A) reversing the Circuit Court's opinion that Rule 21A-24.002, F.A.C. was unconstitutional but affirming the Circuit Court's holding that Section 473.317, F.S. and Rule 21A-24.003, F.A.C., were facially unconstitutional as violative of the First Amendment to the United States Constitution (589 So.2d at 1358-60), Judge Stone dissented as to that portion of the District Court of Appeal's Opinion finding the above-mentioned statute and rule unconstitutional (589 So.2d at 1360). Motions for Rehearing and Clarification were filed by both Appellant and Appellee and were denied on January 14, 1992. This appeal was filed on February 7, 1992. On February 13, 1992, Appellee filed a notice of cross-appeal.

STATEMENT OF FACTS

Appellee, Rampell, is a Certified Public Accountant (CPA) employed by the firm of Rampell and Rampell, P.A., located in Palm Beach County, Florida. Rampell is licensed under the laws of the State of Florida as a CPA and is subject to Chapter 473, Florida Statutes and the rules and regulations promulgated in Chapter 21A, Florida Administrative Code, by the Department of Professional Regulation, Board of Accountancy.

As the circuit court noted in its final judgment below, the case "proceeded to trial on the introduction of stipulated evidence, argument of counsel and affidavits" (R-78). All parties agreed that the hearing held on September 25, 1989, would be considered as a final hearing on the merits which would result in the final judgment which was entered by the Circuit Court on September 28, 1989, (R-77).

This statement of facts will set out the Board's reading of the stipulated record below, as to the rules and statutes partially regulating competitive negotiation on attest engagements by CPAs--which is the issue before this Court on this appeal. This brief will not address the constitutionality of the statute and rules regulating direct, in-person, uninvited solicitation.[1]

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[1] The issue of the constitutionality of CPA's engaging in direct, in-person, uninvited solicitation was decided in favor of the Board by the Fourth District Court of Appeal; however, the Eleventh U.S. Circuit Court of Appeals has held the same rule to be unconstitutional, Fane v. Edenfield, 945 F.2d 1514 (11th Cir. 1991) cert. pending, U.S. S.Ct., Case No. 91-1594.

The regulations on competitive negotiation for audit and attest engagements, first appear in Florida Statutes in 1969 (although in the rules of the Board since at least 1945), see Section 473.30, F.S., and continued in existence with certain amendments through two sunset reviews by the Florida Legislature in 1979 and 1985. Florida is the only state which, by statute, regulates the form of competitive negotiations which a CPA may enter into when seeking an attest engagement. In Section 473.317(1)-(5)(a), F.S., there are provisions for competitive negotiation in the private sector (virtually identical to those set forth in Section 287.055, F.S., as to state, county and local procurement of the services of architects and engineers). Somewhat modified provisions for competitive negotiation for audits of municipalities and the legislature are set forth in Section 473.317(5)(b), F.S. The statute is set out in full in Appendix B.

Rules governing the procedures for competitive negotiation are found in Rule 21A-24.003, F.A.C., (set out in Appendix C). The statutes and regulations governing competitive negotiation for attest engagements in the State of Florida are limited to only those types of engagements. CPAs are permitted to engage in any form of price competition as long as the engagement being sought does not require that a CPA attest as to the " . . . reliability or fairness of presentation of financial information or utilize any form of disclaimer, which is intended or understood to convey an assurance of liability as to matters not

specifically disclaimed . . ." (Section 473.322(1)(c), F.S.)

The Board presented evidence from the publication "CPA Audit Quality--A Framework For Procuring Audit Services, United States General Accountancy Office, August 1987, (GAO AFM D-87-34) set out in full in Appendix D (Exhibit 1 to Plaintiff's Exhibit 1 to Dooner's Deposition, hereinafter GAO Report pp. ____) that on numerous occasions the Federal government and its constituent agencies, which do engage in competitive bidding on attest engagements, have found that price is the main or only procurement criteria for a CPA's services (GAO Report pp. 34-53). The only empirical data available, once again, from the GAO Report, shows that when price becomes the only or the main criteria for procurement that the technical quality of a CPA's opinion in attest engagements is more likely to be unacceptable (GAO Report pp. 34, 55-58).

The rules and the statute do not prohibit a CPA from providing a basis of fee to a client under several circumstances, e.g., during a competitive negotiation with the client wherein the CPA may propose one fee, the client may counter-propose, and the CPA could come back with another fee all during the same negotiation. It does not appear that the statute or rule foreclose a CPA from engaging in actual fee negotiation with a client. Further, any client who determines that he seeks a sole source for his audit work may request and receive a fee from a CPA who is so notified that he is the sole source, see Section 473.317(5)(a), F.S. If the CPA is already the existing auditor

for the client then once again, he may submit a basis of fee to the client, see Section 473.317(2), F.S. (which excludes from the regulation an offer to an existing client). All of these provisions indicate that the prohibitions contained in the statute and rule do not involve a complete bar to the presentation of fee information to a prospective client on the part of a CPA nor of negotiations about that proposed fee.

Section 473.315(5)(b), F.S., as well as Section 11.45(3)(a)4.j., F.S., provide for partial competitive negotiation including negotiation as to fee with regard to legislative, municipal and county audits filed with the Auditor General of the State of Florida. The provisions of these statutes essentially allow that, once ranking has occurred on the basis of qualifications (not including basis of fee) the governing body of the municipality or, in the case of the Legislature, the Joint Legislative Management Committee, may reopen negotiations with the first three ranked CPA firms essentially on a round robin basis. After talking with numbers 1, 2 and 3, and receiving a basis of fee from each, a city, for example, could go back to #2 and reopen negotiation knowing what the other two top-ranked auditors had proposed as to their fees and likewise with #2 knowing what they had proposed.[2]

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[2] It should be noted that all the audits in question in the statutory exception are governmental audits and are required to be filed with the Auditor General of the State of Florida in accordance with rules developed by him and the State Board of Accountancy (See F.S. 11.45(3)(a)4.o.) and as such are subject to review and analysis as to compliance with technical standards both by the Auditor General and by the Board of Accountancy. Audits which are provided to private clients by CPAs are not susceptible as to review for technical compliance unless and

Once again, it cannot be emphasized enough that the restrictions on competitive negotiations set forth in Section 473.317, F.S., apply only to attest engagements and do not prohibit a CPA from quoting prices for all other services provided to a potential client, such as tax advice, management consulting or bookkeeping services.

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until a complaint is filed against a CPA for providing a substandard product, see F.S. Section 455.227. Secondly, all negotiations relating to the selection of an auditor for a state county or local audit must be conducted in the "Sunshine" and all information surrounding the work performed on the audit are subject to the provisions of the Public Records law, see Sections 286.001 and 119.07, F.S. Audits for private clients, unless required to be filed with a public agency as a result of Florida or Federal statutes, are not open to review and indeed in certain circumstances, even when filed with a public agency may not be reviewed by the general public. All of these circumstances caused the Legislature to believe that under strict controls some competitive negotiation involving the top three-ranked firms based on qualifications and fees could be provided in audits for local governmental entities wherein privacy constraints set forth in the Florida Constitution (See Article I, Section 23, Florida Constitution (1968)) do not apply. Likewise, of course, audits of private clients may not be intended for general public distribution and may include information which could result in a detriment to the client if the same types of public disclosure requirements were made as presently exist for all audits of governmental entities in the State.

SUMMARY OF ARGUMENT

The partial regulation on competitive negotiations for attest engagements provided in Section 473.317, F.S., and Rule 21A-24.003, F.A.C., is rationally related to a valid governmental purpose and does not violate the due process clause of the Florida and Federal Constitutions. The statute and rule do not involve restrictions on commercial speech but are rather restrictions on certain forms of professional conduct with an incidental impact on speech.

Assuming arguendo that the statute and rule do restrict commercial speech, they involve acceptable restrictions on certain forms of commercial speech. The substantial governmental interest forwarded by the prohibition of various forms of competitive bidding on attest engagements is to require that clients, when determining whether to hire a CPA to perform an audit or review, must consider only the objective qualifications of the CPA to perform the engagement in determining what ranking to give the CPA or his firm amongst any potential auditor. The clear intent of the prohibition on CPAs submitting a basis of fee prior to being ranked on qualifications is to promote the state interest in making certain that attest engagements performed by CPAs or firms are performed competently in accordance with the technical standards promulgated by the Board of Accountancy under the provisions of Section 473.315, F.S., without regard to fee competition with other CPAs. The Legislature, in enacting Section 473.317, F.S., was concerned that if CPAs bid on engage-

ments wherein they were required to perform independently of the client's desires and to render an independent opinion on financial statements, CPAs would compromise their independence if they were required to compete with each other as to fees, as opposed to their objective qualifications, to perform the audit in question. The preservation of the attest function is the ultimate rationale for the licensing of Certified Public Accountants in this State. The impact of fee-based competition would, as found by the Legislature, inherently cause a diminution in the quality of the product of attest function engagements and thus should be prohibited except in the context of competitive negotiation based on a ranking of firms in light of their qualifications.

ISSUE I

THE PROVISIONS OF SECTION 473.317, F.S., AND RULE 21A-24.003, F.A.C., ARE REGULATIONS OF PROFESSIONAL CONDUCT WITH ONLY AN INCIDENTAL IMPACT ON COMMERCIAL SPEECH AND THUS THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL HOLDING THE STATUTE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IS IN ERROR.

A

As this Court well knows, the statutes enacted by the Legislature of the State of Florida and rules promulgated pursuant thereto are presumed to be constitutional and shall be upheld in the absence of a clear violation on the part of the Legislature of constitutional restraints and further that this Court shall indulge in all presumptions in favor of the constitutionality of the Legislature's enactments, see State v. Kinner, 398 So.2d 1360 (Fla. 1981), and Belk-James, Inc., v. Nuzum, 358 So.2d. 174 (Fla. 1978).

It is also clear that states' interests in regulating learned professions, such as certified public accountancy, are extremely important and entitled to great deference, even when under constitutional scrutiny, see Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923), and Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Rampell and the District Court assert that the partial regulation of competitive negotiation on private attest function engagements contained in Section 473.317, F.S., and Rule 21A-

24.003, F.A.C., violate Rampell's First Amendment rights. The right alleged to be violated is the ability to submit a fee or basis of fee (as defined in the statute) either as part of a response to a proposal from a private client who wishes a CPA to perform an audit or review of the client's business and then "attest as an expert in accountancy" as that term is defined in Section 473.322(1)(c), F.S., or in a CPA's advertisement to obtain an attest engagement for a specific fee.

The provisions of Section 473.322(1)(c), F.S., and Rule 21A-24.003, F.A.C., require that a CPA seeking to perform the attest function for a private client, where there is a competitive selection, must initially submit to the prospective client only his objective qualifications and abilities with no fee or basis of fee included. The client is then required to rank the CPAs based on the objective qualifications of the various firms and then to commence negotiation with the top ranked firm and proceed down the list. Only at the time that negotiations have begun with each individual CPA firm in the ranking may a fee proposal be provided by the CPA to the prospective client. The clear rationale of the Legislature in requiring the abstinence from competitive fee bidding on the part of CPAs who are engaged in a competitive negotiation conducted by a private audit or review client, is to require the CPA to base his proposed fee for his services only upon what the CPA perceives as the actual scope of the attest engagement involved, and the CPA's own judgment as to the cost to his firm of providing the services required to comply

with the technical requirements for the presentation of an attested opinion on financial statements independent of any fee-based competition on the part of other CPAs interested in performing the engagement.[3]

In enacting this provision, the Legislature of the State of Florida has determined that fee-based competition as to private attest engagements would result in the undermining of the quality of the opinion rendered in such engagements and thus that such fee-based competition should be prohibited. The overriding public policy objective is that the independent auditor who renders an opinion on financial statements must base his fees and thus, to a large extent, the quality of the work performed, on the objective analysis of the scope of the attest engagement and the services which must be performed in order to meet an acceptable standard of public accounting practice and that those standards must not be lowered or even perceived to be lowered as the result of competitive price competition with other interested CPAs.

The initial analysis the District Court overlooked which must be used in determining whether the above-mentioned prohibitions pass constitutional muster is whether the statute and rule in question involve either a regulation of speech or of professional conduct. It is quite clear that the "power of

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[3] This type of procedure prohibiting fee-based competition prior to awarding government contracts is already in place in Florida as regards architects and engineers. See Section 287.055(4) and (5), F.S., and with regards to Architects and Engineers is the procedure followed for procurement in the Federal Government. See 40 U.S.C. Sections 541-544 (The "Brooks Architect-Engineer Act").

government to regulate the professions is not lost whenever the practice of a profession involves speech." See Lowe v. S.E.C., 471 U.S. 181,228, 105 S.Ct. 2557, 2582 L.Ed.2d (1985), Justice White concurring. As was stated in Giboney v. Empire Storage and Ice Company, 336 U.S. 490,502, 69 S.Ct. 684,690-691, 93 L.Ed.2d 834 (1949):

> 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.

In analyzing the statute and rule in question, one must consider whether the statute involves the regulation of the conduct of a profession or a prohibition on speech. In Lowe, supra, Justice White, at 472 U.S. 231, quoted Justice Jackson in his concurring opinion in Thomas v. Collins, 323 U.S. 516,544-548, 65 S.Ct. 315,319-331, 89 L.Ed. 430 (1945), wherein Justice Jackson stated that:

> . . . So the state to an extent not necessary now to determine may regulate one who makes a business or livelihood of soliciting funds or memberships for unions. But I do not think that it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen telling them to unite in general or to join a specific union.

Justice Jackson continued to conclude 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.

Justice White continued in his analysis in Lowe, supra, at 472 U.S. 232, 105 S.Ct. at 224, that:

> These ideas help to locate the point where regulation of a profession leaves off and prohibitions on speech begin. One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on the freedom of speech of the press subject to First Amendment scrutiny. Where the personal nexus between the professional and client does not exist and speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to

> the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech or the press." [Footnotes omitted, emphasis supplied.]

See also Accountant's Society of Virginia v. Bowman, 860 F.2d 602,604,605 (4th Cir. 1988), Underhill Associates, Inc., v. Bradshaw, 674 F.2d 293 (4th Cir. 1982) and Accountants Association of Louisiana v. State, 533 So.2d 593 (La.1989).

It is Appellant's contention that the ban on competitive bidding set forth in 473.317, F.S., and Rule 21A-24.003, F.A.C., is indeed a regulation of professional activity and that the impact on speech is only incidental. There is clearly a personal nexus in place between a CPA responding to a potential private client's request for proposals amid a competitive selection context sufficient to meet the test of professional regulation set forth by Justice White in his concurrence in Lowe, supra. While the conduct which is prohibited herein by the statute and rule may involve words which in another context could be considered speech protected by the First Amendment, in the circumstances of the instant cause such "speech" operates only in the context of a legitimate professional regulation. A CPA, when determining to propose on a particular competitive audit engagement, has already created a personal nexus between himself and a potential client insofar as he must exercise his professional judgment in analyzing the needs of the proposed client and the qualifications of his own firm even when putting together a proposal based on objective qualifications alone, and

determining that he, as a CPA, has the capability of performing the engagement. This requirement of professional competence exists as an initial first step which must be determined by each CPA with regard to any particular engagement prior to his even seeking to undertake an engagement with a client, see Rule 21A-22.001(1). As such therefore, a CPA, in determining to respond to a proposal on an attest engagement has already created a personal nexus of judgment between himself and the prospective client which requires the CPA to analyze whether he and his firm are capable of performing the engagement notwithstanding any consideration of the amount of his fee.[4] It is submitted that it is precisely in order to prohibit any compromise of the professionalism of a CPA that he is not permitted to discuss fee with a client where a competitive situation exists until the CPA has had the opportunity objectively and without regard to other potential bids to independently analyze the capacity of his firm to perform the engagement and the reasonable cost that such professional accounting services will entail.[5]

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[4] This concern, i.e., that a CPA will not charge an adequate fee to perform his task as an independent auditor competently, has led Texas (Texas Statute Chapter 646 Section 20(a), 1989, attached as Appendix E) to presume that a CPA will lose his independence if he fails to charge a fee that reflects his actual labor. This is another example of a state's concern that fee competition will lead to substandard audits or impinge on a CPA's independence.

[5] To this extent the partial prohibition on competitive price quotation on attest engagements is similar to a "time, place or manner" regulation discussed in City of Renton v. Playtime Theaters, Inc., 475.U.S. 41,48-54, 106 S.Ct. 925,929-933, 89 L.Ed.2d 29 (1986). Since the clear purpose of prohibiting bidding competition for attest engagements is the maintenance of the integrity of the CPA's opinion of financial statements and the public's perception thereof, it is apparent that the

The statute and rule are in fact intended to assure that in competitive circumstances a CPA will follow the general competence standards set forth in Rule 21A-22.001, F.A.C., promulgated pursuant to Section 473.315, F.S. The challenged statute and rule thus directly relate to mandated requirements involving professional judgment on the part of CPAs, and as such therefore, the challenged statute and rule's impact on "speech" is only incidental to a valid state regulation of professional conduct.

In the absence of a direct impact on First Amendment rights, the statute and rule need to be analyzed as to whether they rationally serve a legitimate state interest and are not arbitrary or capricious. State ex rel Church v. Yeats, 74 Fla. 509, 77 So. 262 (1917). As police power regulations the statute and rule will be struck down only if they are found to be arbitrary and unreasonable which clearly they are not, McInerney v. Ervin, 46 So.2d. 458 (Fla. 1950), State ex rel Barnett v. Lee, 123 Fla. 252, 166 So. 565 (Fla. 1936).

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justification for the restriction is not the speech (competitive bidding or pricing) itself, but the secondary impact of such commercial contacts. The rule and statute are thus more in the nature of regulations on the time and manner of price communication rather than limitations on commercial speech. cf. Barnes v. Glen Theatre, Inc., ___ U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), Metromedia, Inc. v. City of San Diego, 453 U.S. 490,508-513, 101 S.Ct. 2882,2892-2895, 69 L.Ed.2d 800 (1981).

ISSUE II

ASSUMING ARGUENDO THAT SECTION 473.317, F.S., AND RULE 21A-24.003, F.A.C., ARE RESTRICTIONS ON COMMERCIAL SPEECH, THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL HOLDING THAT THE STATUTE AND RULE ARE UNCONSTITUTIONAL AND VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IS ERRONEOUS.

The Fourth District Court of Appeal analyzed the constitutionality of Section 473.317, F.S., in light of the U.S. Supreme Court's test in Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), which states as follows:

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The District Court continued on to find that, as set forth in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), quotations of price are protected commercial speech. The District Court found, however, that proffering fees for CPA audit work is not inherently misleading, citing Bates v. State

Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), for the proposition that price advertising cannot be inherently misleading, as long as the professional advertising the price does the "necessary work at the advertised price" 433 U.S. at 373, 97 S.Ct. at 2703.

A

The District Court's opinion misreads Bates. The Supreme Court specifically found in Bates, as to attorneys, that "the only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like. . ." 433 U.S. at 372, 97 S.Ct. at 2703. The Supreme Court's holding in Bates, thus, was that advertising for standardized legal services was not inherently misleading. The performance of an audit by a CPA is however, by no means a standardized service.[6]

The providing of an audit service to a client by a CPA simply will not lend itself to standardization or bidding. The purpose of an audit is to provide, for the users of the financial

[6] The Supreme Court in Bates, 433 U.S. at 373, 97 S.Ct. 2704 at ftn. 28, noted that advertising of standardized legal services could not be prohibited as inherently misleading, simply because an "occasional client who misperceives his legal difficulties" may find that the quoted standardized fee will not fit that client's particularized problems. The Court opined that an ethical attorney, upon realizing a client's particular difficulties would either engage in normal negotiations, or counsel the client to go on to another attorney, without charging a fee for the consultation necessary to discover the client's unique requirements. In the practice of public accountancy, audits, by their very nature, always involve unique requirements which are impossible to standardize, see Deposition of Dooner p. 101-103.

statements of the client, an opinion by an independent arbiter, a CPA, that the financial statements fairly and adequately represent the financial condition of the client's business. As such therefore, while the CPA is in the employ of the client, it is clear that the ultimate purpose of the opinion is not necessarily for the client's direct benefit, but is rather to assure the users of the client's financial statements that those financial statements can be relied upon, or not, as the case may be. See First Florida Bank v. Max Mitchell and Co., 558 So.2d 9 (Fla. 1990), and United States v. Arthur Young & Co., 465 U.S. 805,817-820, 104 S.Ct. 1495,1503-1504, 79 L.Ed.2d 826 (1984).

In light of the foregoing, a CPA, who under applicable technical, and independent standards, must perform all tasks necessary in order to opine on the truth and accuracy of a financial statement, is inherently engaged in misleading the public to believe that he would be able to perform a competent audit, when he does not yet have the ability to analyze, even in a basic manner, the scope of the work necessary to complete the audit of the potential client. Instead of the situation mentioned in Bates, whereby only an occasional client will find that the standardized or bid price may not meet that client's individual needs, in the case of the audit function, it is apparent that a standardized or bid price will legitimately allow a CPA to serve very few audit clients. Instead of the "occasional client" most engagements will result in a misper-

ception on the part of the CPA and/or the client as to what is really necessary in order to perform the required services.[7]

It is the position of the Board of Accountancy that the District Court of Appeal misperceived the thrust of the Supreme Court's decision in Bates, relating to the inherently misleading nature of advertising standardized legal services. The Court specifically found that only routine services were the type of services that lend themselves to price advertising. Thus it is apparent that the advertising of fixed prices for non-routine or complicated legal matters, would have resulted in a different analysis. The Court quite probably would have found that the perception of the public that a complex legal question could be resolved for a fixed price would result either in inherently misleading advertising on the part of attorneys, or a lessening of the profession's respect in the eyes of the public. This is so, since virtually all legal fees for non-standardized engagements would be required to be renegotiated in light of the client's actual needs, once the ethical attorney reviewed the client's file. Similarly, since the public's perception of CPAs as independent arbiters is as important as their actual

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[7] It is the Board's position that offering to perform an attest engagement for a fixed or ascertainable fee in any competitive context, either in the classic competitive bidding format as part of a response to a request for proposals or simply as a fee quote in mass advertising would be prohibited by the statute. As noted above at pp. 16-17 of this brief, it is the Board's position, not addressed by the District Court, that once a CPA has begun to analyze a client's needs in preparation for proposing a basis of fee on an attest engagement, the CPA-client relationship is appropriately addressed in the context of regulation of conduct and not through a commercial speech analysis, see Lowe v. SEC, supra.

independence, see United States v. Arthur Young, supra, at 465 U.S. 819, Ftn. 15, 104 S.Ct. 1503-1504, the quotation of fees for non-standardized audit work, in a bidding context, must necessarily result in either lack of competent professional work on the part of CPAs, or contrariwise, in constant renegotiations, as a result of a clients' unique problems. In either event, instead of the rare circumstance, such as where a client who seeks a standardized name change will find some unique problem requiring an attorney to deviate from a standardized or bid fee, the audit function would constantly result in either the CPA being unable competently to fulfill his function at the fee quoted, or be required ethically to renegotiate the fee in light of the client's particular circumstances. As opposed to a standardized fee schedule for standardized work wherein only the occasional client will require the ethical professional to modify his fee quotes in the audit function, the exception will become the rule.[8]

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[8] Bids submitted in response to requests for proposals will result in similar difficulties. If a CPA proposes on an engagement in a competitive bidding context the CPA would be more likely to submit a proposed fee that is unrealistically low if the CPA is in price competition with other licensees. Under the statute, both the CPA and the client know that a rejection of the proposing CPA must lead to the client having to cease negotiations and move to a CPA less well qualified--by the client's own estimation. Thus, the incentive exists for the client to hire the CPA at a price which will allow the CPA to adequately perform his services for the client and to insure the integrity of the CPA's opinion when submitted to the ultimate users--the public.

B

After finding that the state statute prohibiting competitive bidding on private audits meets the second prong of the Central Hudson test (that the asserted governmental interest be substantial) the District Court of Appeal went on to find that the statute does not directly advance the governmental interest asserted. See Rampell, supra, at 589 So.2d 1359,1360. This finding is also erroneous.

It is true, as the District Court states, that it is the basic position of the Board that competitive bidding on attest engagements will result in circumstances where cost will become a controlling factor on the part of the client. As a result, the Board argues, clients will choose auditors on the basis of price, thus leading to substandard audits, and, as the District Court notes, " . . . defeat the governmental interest in maintaining the quality of audit information on which the public relies." (Rampell, supra, at 589 So.2d 1359.)

The District Court, however, after noting that the GAO report shows that it is legitimate for the State to believe that choosing a CPA based on cost alone increases the chances of an unacceptable audit, went on to find, since the GAO considers price to be a factor to be taken into account when hiring an auditor, that competitive bidding must be acceptable as a matter of sound policy.

Initially, it should be noted that the U.S. General Accounting Office, in reviewing audits done for or on behalf of

the United States Government, is bound by the rules and statutes passed or approved by the Congress of the United States. Since the Congress has determined in the Federal Government Procurement Act (41 U.S.C. 253, 48 CFR 15.605) that price must be considered as part of the procurement of audit services, the GAO is not in a position to ignore a statutorily mandated requirement of Congress in analyzing the appropriate manner of procuring governmental audits. Despite the foregoing, however, it is apparent from the GAO report that price is considered minimally important as compared to the qualifications of the auditor and the CPA's history of performing competent auditing work, see pp. 34-35 of the GAO report.

Section 473.317, F.S., which permits quotation of fees only after ranking on the basis of objective non-fee based qualifications, appropriately forces the client to consider as his potential auditor, independently of the bottom line and only after a dispassionate review of credentials, a CPA who will be best capable of performing the best audit, both for the benefit of a client and especially for the users of the audit opinion.

C

The District Court then went on to analyze the Bates opinion in specifically stating at 589 So.2d 1359 that "the Court has also rejected the justification promoted by the state, that pricing information may be prohibited to assure that the consumer chooses quality over price," citing Bates, 433 U.S. at 375, 97 S.Ct. at 2704. The Supreme Court's determination in Bates,

however, must be read in the context of the analysis of pricing information on standardized legal services. A more appropriate citation to the Bates opinion, is in the Courts' position on the "adverse effect of advertising on the quality of service" found at 433 U.S. 378-379, 97 S.Ct. 2706. In rejecting this basis for prohibiting certain forms of advertising, the Court stated:

> It is argued that the attorney may advertise a given "package" of service at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client's needs. Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising. And the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized. Indeed, the assertion that an attorney who advertises a standard fee will cut quality is substantially undermined by the fixed-fee schedule of appellee's own prepaid Legal Services Program. Even if advertising leads to the creation of legal clinics like that of appellants' clinics that emphasize standardized procedures for routine problems--it is possible that such clinics will improve service by reducing the likelihood of error.

It is clear that the Court's rejection of advertising vis-a-vis a lack of quality of service is tied directly to the standardization of the services being offered in the price advertising discussed in Bates. As was discussed above, attest engagements are by their very nature not capable of standardi-

zation. Thus, if CPAs are permitted to quote standardized fees for work which inherently is not capable of standardization, the quality of work must suffer. This would be so, if for no other reason than that, as stated above, numbers of clients will find that the CPA is not capable of performing quality service within the fee quotes or bids, because of the fact that each attest engagement is unique. This fact will result in consistent fee disputes, thus undermining the profession's integrity in the eyes of the public. Even more disastrously, CPAs may well cut corners in order to perform their services within the framework of a competitively bid contract. Notwithstanding the finding of the District Court, it is apparent that the provisions of Florida Statutes prohibiting competitive bidding on private attest engagements will result in less shoddy work on the part of CPAs, since most CPAs and their clients will be required to choose their auditors on the basis of objective non-price based qualifications, which, by encouraging competent audits from the beginning, as opposed to providing for tort liability after an audit failure, is a more appropriate manner of protecting the public and ensuring the integrity of the CPA profession.

D

The District Court also erred in determining that the partial prohibition on competitive bidding for attest engagements, is not a "reasonable fit" between the regulation and its purpose, see Board of Trustees of New York v. Fox, 109 S.Ct. 3028,3035 (1989). The District Court correctly cited Virginia

State Board of Pharmacy, supra for the proposition that a complete suppression of price information from potential clients cannot withstand constitutional scrutiny. In the instant cause, however, and under the instant statutory scheme, complete suppression of price information does not exist.

As was noted by the District Court, the provisions of Section 473.317, F.S., and Rule 21A-24.003, F.A.C., do not prohibit CPAs from quoting fees to clients. The statute and rule only prohibit the quotation of a fee or basis of fee where a competitive bidding situation exists. A CPA is perfectly free to quote a client a fee, if he is assured by the client that a competitive bidding situation does not exist, or if he is the already existing auditor. (Rule 21A-24.003, F.A.C.) A CPA is further permitted to quote a fee to a client during one on one negotiations after a ranking based on objective qualifications and capabilities.[9] In any event, the provisions of the statute and rule at issue do not prohibit the dissemination of fee quotes for attest engagements, but merely restrict the context in which such quotes can be given. A CPA is free to quote the fee the CPA believes will result in sufficient compensation to perform the engagement based upon the CPA's independent judgment, not influenced by competing bidders. This restriction is a reasonable limitation on the CPA's right to disseminate commercial

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[9] It is also to be noted that Virginia State Board of Pharmacy merely prohibited suppression of pricing information on commodities such as drugs and the like, just as Bates merely prohibited suppression of all communication of pricing for standardized legal services.

price information, given the state's interest in preserving the public's perception of the CPA's independence when engaging in the attest function.

CONCLUSION

As Judge Stone states in his dissent in the District Court, "the statutory scheme advances a valid government interest sufficiently limited and tailored to address the goal of protecting third parties, such as stockholders, investors, guarantors, creditors and various governmental entities, having no alternative to reliance on the integrity and independence of the attesting auditor." See Rampell, supra, at 1360.

The governmental interest stated by Judge Stone is part of the overall scheme set forth in Ch. 473 and the rules promulgated thereto, which is intended to preserve intact the public's perception of a CPA as an independent arbiter. The overall purpose of the regulation is appropriate and meets applicable First Amendment constraints. The decision of the Fourth District Court of Appeal holding Section 473.317, F.S., and the rule promulgated thereto unconstitutional, should be reversed by this Court, and the statute and rules reinstated.

Respectfully submitted,

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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 **CHARLES F. TUNNICLIFF, ESQUIRE**, Department of Professional Regulation, Legal Office, Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida, 32399-0750 on this 23rd day of April, 1992.

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