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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 79,371

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

Petitioner/Appellant,

-vs-

RICHARD RAMPELL,

Respondent/Appellee.

BRIEF OF RESPONDENT ON THE MERITS

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PREFACE

This is an appeal from a Final Judgment of the Circuit Court, which was affirmed in part and reversed in part by the Fourth District Court of Appeals. The parties will be referred to by their proper names or as they appeared in the trial court. The following designations will be used:

(R) - Record-on-Appeal
(SR) - Supplemental Record
(A) - Appellant's Appendix
(AA) - Appellee's Appendix

STATEMENT OF THE CASE

Appellee/Cross-Appellant, Richard Rampell (hereafter "Rampell" or "Appellee"), will present herein a Statement of the Case and Facts relevant to both the main appeal and the cross-appeal. Rampell accepts the Board of Accountancy's (hereafter "Board"), Statement of the Case with regard to the proceedings below, but will elaborate regarding the lower courts' rulings.

The trial court ruled that the prohibition against direct, in- person, uninvited solicitation was an unconstitutional infringement of Appellee's right to free speech, both under the Federal and the State Constitutions. The trial court also determined that the solicitation ban was unconstitutionally vague, focusing primarily on the ambiguity of the terms "uninvited solicitation," and "specific potential client" (R80). Additionally, the trial judge ruled that the prohibition against competitive bidding was violative of both the State and the Federal Constitutional provisions governing free speech (R77-78).

The Fourth District affirmed the trial court's ruling on the competitive bidding prohibition, but reversed as to the solicitation prohibition, STATE DEPARTMENT OF PROFESSIONAL REGULATION v. RAMPELL, 589 So.2d 1352 (Fla. 4th DCA 1991). In finding the ban against solicitation to be valid, the Fourth District determined

that the restraint on speech was permissible, but did not address the trial court's ruling that the statute was unconstitutionally vague. The Board has appealed the Fourth District's decision regarding the competitive bidding provisions. Rampell has cross-appealed as to the solicitation prohibition.

Since the historical background of the competitive bidding and solicitation prohibitions are interrelated, a brief summary of that background is presented below. Thereafter, the facts and provisions relevant to each issue will be presented separately.

STATEMENT OF THE FACTS

Historical Background - National:

Although accounting has been an established profession for centuries,[1] it was not until the beginning of the Twentieth Century that prohibitions against competitive bidding and solicitation were promulgated in the United States. As noted by the Federal Trade Commission, much of the impetus behind the rules was generated by the private associations of accountants (Plaintiff's Exh. #10, p.5). The American Association of Public Accountants[2] was organized in 1887 (Plaintiff's Exh. #10, p.5). In 1917, that organization promulgated a rule against solicitation or encroachment of other members' clients (Plaintiff's Exh. #10, p.15):

> No member shall directly or indirectly solicit the clients nor encroach upon the business of another member, but it is the right of any member to give proper service and advice to those asking [for] such service or advice.

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[1]/The genesis of the accounting profession is generally recognized as occurring in 1492 when an Italian monk, Luca Paccioli, invented double entry bookkeeping.

[2]/The American Association of Public Accountants was the predecessor to the current national organization, the American Institute of Certified Public Accountants (hereafter the "AICPA").

In 1940, the rule was expanded to preclude encroachment on the business of any public accountant, not just a member of the national organization (Plaintiff's Exh. #10, p.15). In 1948, the rule was again amended to eliminate the "loophole" that permitted members to solicit business from persons who had not already retained an accountant (Plaintiff's Exh. #10, p.15).

There were no restrictions on competitive bidding until 1937 when the Connecticut Society of Certified Public Accountants adopted a rule prohibiting it (Plaintiff's Exh. #10, p.22). That prohibition was adopted by the national association in 1941 (Plaintiff's Exh. #10, p.23).

In the late 1970's, regulations of professional associations which prohibited solicitation and competitive bidding became the subject of administrative and judicial scrutiny. In 1978, the United States Supreme Court in NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS v. UNITED STATES, 435 U.S. 679 (1978), declared the organization's prohibition against competitive bidding to be clearly anticompetitive in nature and an unlawful restraint of trade within the meaning of the Sherman Act, 15 U.S.C. §1. In 1979, the Federal Trade Commission determined that restrictions against advertising and solicitation adopted by the American Medical Association constituted unfair methods of competition, IN THE MATTER OF AMA, 94 F.T.C. 980 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980). In that opinion, the FTC stated that "the nature or character of these restrictions is sufficient alone to establish their anticompetitive quality...." 94 F.T.C. at 1005.

At the same time that the National Society of Professional Engineers and the AMA were having their regulations scrutinized, the Justice Department investigated the AICPA's prohibitions against solicitation and advertising (Plaintiff's Exh. #10, p.16-17). In late 1978, the AICPA's legal counsel stated in an opinion letter that it was unlikely that the ban on direct, uninvited oral or in-person solicitation could be

successfully defended against an antitrust challenge (Plaintiff's Exh. #7, p.7). Counsel stated (Plaintiff's Exh. #7, p.8):

> At the present time we are not aware of any consistent, credible and persuasive body of facts that would sustain the reasonableness of that ban.

As a result of pressure from the Justice Department, the AICPA authorized a mail ballot to repeal the prohibition (Plaintiff's Exh. #7, p.9). In March 1979, the AICPA members voted to eliminate the ban, with 68.7% of the vote in favor of that change (Plaintiff's Exh. #7, p.9). The Justice Department was advised of the elimination of the solicitation ban and the contemplated antitrust suit was not pursued (Plaintiff's Exh. #7, p.9).

In 1980, the membership of the AICPA passed a resolution to authorize the creation of a Special Committee on Solicitation, (Plaintiff's Exh. #7, p.11). The law firm retained to assist the Committee issued an opinion letter concluding that the AICPA could not reimpose the prior ban on direct, uninvited solicitation without creating a significant risk of antitrust liability (Plaintiff's Exh. #7, p.71). Counsel noted that the ban on solicitation would likely be found to constitute a significant restraint on competition among AICPA members, especially since it was likely they would face evidence that solicitation is more effective and less costly a competitive tool than advertising (Plaintiff's Exh. #7, p.73). Counsel stated (Plaintiff's Exh. #7, p.82):

> [T]o support the prophylactic rationale for an outright ban on direct, uninvited oral solicitation, the AICPA would have to come forward with some concrete examples of abuses by accountants who have engaged in such activity. However, based on the record thus far available -- including the state board and state society questionnaire responses -- we are unaware of any body of empirical data which would satisfy this burden. [Footnote deleted.]

Counsel also indicated its belief that the prohibition would not survive a First Amendment challenge, noting, inter alia, that the decision in OHRALIK v. OHIO

STATE BAR ASSOCIATION, 436 U.S. 447 (1978), was factually distinguishable (Plaintiff's Exh. #7, p.113-20).

Based on the advice of counsel and its own survey of its members, the Special Committee unanimously concluded (Plaintiff's Exh. #2, p.174):

> We should not include in our code of professional ethics a prohibition of direct, uninvited solicitation of potential clients, either by oral or written means, [because] our report describes the arguments, dealing with impairment of independence, and rejects them as a basis for imposing the ban, because of a lack of empirical evidence [that] one who solicits is less independent than one who doesn't.

Historical Background - Florida:

In 1905, the Florida Legislature created the Florida State Board of Accountancy (hereafter "the Board") and, in 1927, it authorized the Board to promulgate canons of professional ethics, the violation of which would be grounds for suspension of the CPA's license. In 1969, the Legislature amended the statutes governing the practice of public accountancy, Ch. 69-36, Laws of Florida. The Legislature enacted, for the first time, statutory prohibitions against competitive bidding and solicitation. Fla. Stat. §473.211 (1969) banned solicitation of virtually any sort, including personal communications or the distribution of newsletter or publications to anyone other than existing clients. Fla. Stat. §473.30 (1969), prohibited competitive bidding for any public accounting services.

In 1979, the statutory scheme governing public accounting came up for its first "sunset" review. The Florida Institute of Certified Public Accountants (hereafter "FICPA"), lobbied for the retention of the restrictions on solicitation and competitive bidding (Plaintiff's Exh. #1, p.61). Louis Dooner, one of the Board's expert witnesses in this case, described the lobbying process at the AICPA convention in October 1981. After being asked by the moderator at a panel

discussion how the Florida accountants "could possibly convince a legislature to put [the solicitation ban] in?" (Plaintiff's Exh. #2, p.194), Dooner stated, inter alia, (Plaintiff's Exh. #2, p.194-95):

> Well, I should get our Executive Director/Lobbyist up here, to tell you how he managed it...How is it possible to convince the legislature? In 1979, the accountancy statute was under "sunset." The ban on solicitation was part of the package that we wanted to keep. We gave up other things; it was part of the bargain. There are several guys in the room, here, today, that were very much involved in that, and they know, probably, more about it than I do, but there was a lot of give and take. We gave up prohibition on bidding, on everything except the attest function. We gave up a lot of the other behavioral standards, and were able to keep this [ban against direct solicitation] in the statute, through "sunset."

Mr. Dooner also stated at that meeting (Dooner Dep. p.60):

> [T]o sell a state legislature the concept of a ban on direct, uninvited solicitation on its merits, alone, would be extremely difficult.

As indicated by Dooner, in 1979, the Florida Legislature limited the ban against competitive bidding to the attest function, and limited the prohibition against solicitation to direct, in-person, uninvited solicitation, see Fla. Stat. §§473.317 (1979); 473.323(1)(l) (1979).

The Florida statutes on public accountancy were reviewed again in 1985. The staff of the Senate Economic, Community, and Consumer Affairs Committee prepared a review of Chapter 473 in preparation for the Legislature's analysis. The review provided a history of the legislation on public accountancy in Florida (AA6-10), and discussed the statutory provisions in detail (AA10-21). The committee also discussed the Board's rules, its enforcement of them, and the cost and benefits of the regulations (AA21-53). The Report stated (AA54):

> [T]he prohibitions on competitive bidding and solicitation of clients could be deleted from the law. Both provisions are anticompetitive in nature and serve to insulate some practitioners from the competition of the free market.

> Neither provision appears to be necessary to protect the public health, safety, and welfare.

The Report noted that similar prohibitions had been deemed anticompetitive under the Sherman Antitrust Act (Joint Exh. A, p.55). The committee recommended that both prohibitions be deleted, noting that they increased the cost to consumers and were "apparently designed primarily to benefit practitioners" (AA62-65).[3] Nonetheless, those provisions were not deleted by the Legislature, and the amendments were limited to the inclusion of continuing education requirements and other minor changes in the act (see Session Laws, Chapter 85-9).

Facts Underlying this Case:

The facts which precipitated this lawsuit were summarized with admirable objectivity in the Board's brief to the Fourth District. In the interest of brevity, and to avoid disputes regarding those facts, Appellee will quote and rely on that rendition of the underlying facts:

> In the summer of 1986, Appellee was advised that a CPA serving two local businesses in Palm Beach County had retired. Appellee believed at that time that the clients of the retired CPA were without accounting services. Therefore, on September 2, 1986, Appellee contacted representatives of the two local businesses by telephone to inquire as to whether or not the businesses had arranged for accounting services and to introduce himself and offer his firm's services. Appellee also sent follow up letters thanking the representatives for taking the time to speak with him and reiterating his firm's interest in performing accounting services for the respective businesses. In addition, Appellee enclosed a brochure which set out the experience and expertise of his firm which had enjoyed 28 years of continued accounting practice.
>
> Shortly thereafter Appellee was contacted by a member of a competing CPA firm, who criticized him for

[3]/The committee recommended that the disciplinary section could be amended to prohibit CPAs from soliciting clients in a manner that was false, fraudulent, misleading, or deceptive (AA56).

communicating with the abovementioned businesses, and threatened to file a complaint based on "anti-solicitation" laws and regulations. Appellee told the complainant that he believed that said laws and rules were unconstitutional, anti-consumer and anti-free enterprise.

> On October 15, 1986, the competing CPA firm did, however, file a complaint with the Department of Professional Regulation, Board of Accountancy, which charged Appellee with alleged violations of Rule 21A-24.002, F.A.C.

Thereafter, a hearing was scheduled to determine whether there was probable cause to believe that Rampell had violated Fla. Stat. §473.323(1)a, and Rule 21A-24.002. That hearing was stayed pending resolution of this lawsuit.

Competitive Bidding [Main Appeal]:

Fla. Stat. §473.317(1) provides:

> A licensee [CPA] shall not make a competitive bid for a professional engagement in which the licensee will attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed.

The statute defines "competitive bid" as the submission of an offer, either orally or in writing, directly or indirectly, to perform a professional engagement "for an estimated fee, a fixed fee, or a basis of fee," Fla. Stat. §473.317(2).

The Board has promulgated regulations implementing the ban against competitive negotiations, see Rule 21A-24.003. That Rule includes a definition of "basis of fee," as follows (Rule 21A-24.003(2)(a)):

> "Basis of fee" shall be deemed and construed to mean a quotation of range of fee by minimum or maximum amounts, a quotation of either an average hourly rate or hourly rates by level of personnel with or without estimated hours, a quotation of estimated hours with or without hourly rates or any other formula from which estimated hours or a money amount may be computed as an

indicated basis of determining the actual or estimated fee.

Fla. Stat. §473.317(5) mandates the procedure by which any private-sector client may select a CPA to perform work involving the attest function. The client is required to rank the CPA firms in order of preference and then may negotiate a contract with the highest-ranked licensee. Only after the chosen CPA firm is informed of its selection, and is assured that the client is not negotiating with any other CPA is the chosen licensee permitted to disclose any information about the fee. If the client is unable to negotiate a satisfactory contract with the first-ranked licensee the negotiations "shall be formally terminated" and the client is then permitted to undertake negotiations with the second-ranked licensee. If negotiations with the second-ranked licensee are unsuccessful, they must be "formally terminated," after which the client proceeds to the next-ranked licensee and so on, until a satisfactory contract is reached. However, after terminating negotiations with a licensee, the prospective client is not permitted to go back and enter into a contract with a prior-ranked CPA firm. Subsection (5)(b) provides an exemption from this procedure for the legislature or municipality.

The Board presented the testimony of Dooner and Schine as evidence supporting the competitive bidding prohibition. Dooner's opinion was that if a CPA submits a competitive bid, he or she is more likely to fail to properly analyze the scope of the audit engagement (Dooner's Dep. p.103). Dooner claimed that a report on CPA audit quality issued by the United States General Accounting Office (hereafter "GAO"), in August 1987, supported the Board's position. However, the GAO Report recommended competitive bidding for audit services, and considered that element to be a "critical attribute" for the effective procurement of audit services (GAO Report p.1).[4] Dooner relied on a finding in the Report that where

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[4]/The GAO Report is attached to Dooner's deposition as Exh. #1).

cost was the only consideration in selecting an auditor, 90% of the audits were unacceptable (GAO Report p.34). However, the GAO Report did not determine that that finding justified a prohibition on competitive bidding, and provided no support for Dooner's opinion that the inadequate audits were the result of a failure to properly analyze the scope of the engagement. Dooner admitted that despite the fact that competitive bidding for audit services is permissible in every other state, there has never been a study that indicates that it adversely affects the quality of audits in those states (Plaintiff's Exh. #1, p.26).

Schine also relied on the GAO Report as the sole empirical basis justifying the prohibition against competitive bidding (Joint Exh. E, p.8). Schine could not cite any other empirical data supporting the prohibition. He admitted that his firm, which operates nationally, engages in competitive bidding in other states and that it had not affected the quality of their audits[5] (Joint Exh. E, p.23-24).

The Plaintiff presented evidence that the prohibition against competitive bidding was not justified by any empirical evidence. The GAO Report found that competition was one of the four "critical attributes" to an effective procurement process. The Report stated (GAO Report, p.25):

> OMB circular A-102, attachment O, "Procurement Standards," states that maximum open and free competition should be a basic principle of all governmental procurements regardless of dollar value or method of procurement. In the procurement of audit services, competition takes place when a number of presumably qualified firms compete against each other to provide the entity with audit services by submitting their respective proposals. <u>The presence of competition in the procurement process helps the entity control costs by increasing the likelihood that a quality engagement will be</u>

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[5]/At the September 25, 1989, hearing before the trial court, the parties stipulated that Mr. Chopin, one of Plaintiff's witnesses, would testify that when he has difficulty determining the prices of a national accounting firm, he simply calls one of the firm's out-of-state offices and finds out what they charge in Florida (SR2-3).

> performed by an auditor at a fair price. [Emphasis supplied.]

Evidence was presented which supported the trial court's conclusion that one of the motivating factors for the limitation on competitive bidding is the CPA's self-interest in minimizing competition and maintaining a higher fee structure. Schine admitted that permitting competitive bidding would result in lower fees for auditing services (Joint Exh. E, p.61). A memorandum of the FTC regarding various prohibitions on accountants including, inter alia, competitive bidding, noted the inherently anticompetitive nature of those restrictions (Plaintiff's Exh. #10). That Report quoted extensively from the United States Supreme Court's decision in NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS v. UNITED STATES, supra, where the Court stated (435 U.S. at 692), "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character" of such conduct.

After extensive argument and briefing, the trial court ruled, inter alia, that the prohibition against competitive bidding was unconstitutional as violating the right to free speech provisions in the Federal and State Constitutions. The trial judge found that there was no evidence to justify the Board's contention that competitive bidding adversely affected a CPA's independence and integrity. The trial court found that the State's interest asserted by the Board to support the prohibitions, i.e., the protection of the attest function was, in reality, a pretext. The Final Judgment stated (R80-81):

> It is clearly evident that Florida's anti-solicitation rule and ban on competitive bidding are designed to promote an illegitimate end -- to discourage competition among CPAs, and thus further entrench the long-established members of the profession.

The trial court noted in the Judgment that there were numerous other provisions available to protect the asserted State's interest. These included statutes which prohibit a CPA from performing any task unless the individual licensee and his

firm were independent with respect to it, Fla. Stat. §473.315, and which prohibited CPAs from engaging in fraudulent or deceptive conduct, Fla. Stat. §473.323(f)(k). Additionally, the trial judge noted that the possibility of legal liability, professional discipline, and loss of reputation, would also operate to restrain CPAs from compromising the quality of his or her work. For those reasons, the court found that the competitive bidding prohibition was unconstitutional, and enjoined the Defendant from enforcing it.

The Fourth District affirmed the trial judge's ruling that the prohibition against competitive bidding for private audits was unconstitutional. The Fourth District noted that price information was a type of speech that had been specifically held by the United States Supreme Court to be protected commercial speech, and that such information could only be misleading if the CPA "does not do what he or she contractually agrees to do for the price bid," (589 So.2d at 1358). The court also concluded that the prohibition did not directly advance the government's interest since it did not prevent shoddy work, but only eliminated price competition, 589 So.2d at 1359.

Solicitation [Cross-Appeal]:

Fla. Stat. §473.323(1)(l) provides:

> The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:...
>
> Engaging in direct, in person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board.

Pursuant to that statute, the Board promulgated Rule 21A-24.002 regarding solicitation. The subsection of that rule which is at issue herein states (Rule 21A-24.002(2)(c)):

> A licensee [CPA] shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services:...(c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

Subsection (3) of that rule contains the Board's definition of the "direct, in-person, uninvited solicitation."[6]

In the trial court and the Fourth District, the Board justified the prohibition against solicitation as being necessary to ensure that CPAs are completely independent with respect to the attest function. It was never argued that direct solicitation by CPAs was inherently misleading, or that the privacy of the public was intended to be protected. No legislative history indicating the lawmaker's intent was presented by the Board. The only evidence presented by the Board to support its argument consisted of the deposition and affidavit of Dooner[7] and Schine (Appellant's Brief p.7). Neither ever suggested that the solicitation ban was intended to protect the public's privacy. In fact, Dooner expressly denied that to be a justification (Plaintiff's Exh. #2, Dooner Dep. p.66):

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[6]/Rule 21A-24.002(3) provides:

> For purposes of this rule, the term "direct, in-person, uninvited solicitation" shall be deemed and construed to mean any communication which directly or implicitly requests an immediate oral response from the recipient. Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited. Indirect forms of solicitation such as giving speeches, conducting educational seminars, distributing professional literature by mail or other forms of delivery that are not "in-person," writing books and articles, etc., are permitted.

[7]/Attached to Dooner's deposition as Exhibit #2 was an affidavit he executed which was filed in a federal case involving a constitutional challenge to the solicitation prohibitions at issue here, SCOTT FANE v. FRED H. EDENFIELD, JR., et al., Civil Case No. TCA 88-40264-MMP, United States District Court, for the Northern District of Florida.

> The ban on direct, in person, uninvited solicitation is for the protection of users of financial statements. It is not to protect the public from solicitors.

Both witnesses testified that the solicitation prohibition was only intended to prevent impairment to the independence of the CPA. However, neither witness testified that there was any empirical data supporting the claim that direct, in-person, uninvited solicitation adversely affected the independence of a CPA. Schine admitted in his deposition that he knew of no empirical data or any "concrete evidence" that solicitation impaired the independence of a CPA (Joint Exh. E, p.21-22). Dooner acknowledged that the AICPA rejected the prohibition against solicitation because there was a "lack of empirical evidence that one [CPA] who solicits is less independent than one who doesn't" (Plaintiff's Exh. #1, p.50-51).

Schine's opinions differed slightly from Dooner's with respect to the purpose of the ban against direct, in-person, uninvited solicitation. Perhaps because he acknowledged that there was no evidence that solicitation affected a CPA's independence, Schine testified that the purpose of the ban was to safeguard the perception of independence between the CPA and the client (Joint Exh. E, p.21-22). Curiously, Schine is a partner in a national accounting firm which engages in direct, uninvited solicitation in the forty-seven states that permit it (Joint Exh. E, p.23). He testified that to his knowledge the independence of the members of his firm has never been impaired as a result of that conduct (Joint Exh. E, p.23). Schine provided no evidence that there was any erosion of the public's perception of CPAs in the states where solicitation is permitted.

The Board presented no evidence that direct, in-person, uninvited solicitation had ever resulted in a single false or deceptive audit. Dooner, who had served on the Board's Probable Cause Panel, testified that the only complaints regarding solicitation he was aware of were filed by other CPAs (Plaintiff's Exh. #1, p.67).

Schine admitted that he could not provide one example of an audit failure which had resulted from direct, uninvited solicitation (Joint Exh. #, p.22).

The AICPA's Special Committee on Solicitation issued a Report which was admitted into evidence by stipulation (Joint Exh. C). The Special Committee stated in the Report (Joint Exh. C, p.4):

> We are unaware of the existence of any empirical data supporting the theories that CPAs (a) are not independent of clients obtained by direct, uninvited solicitation or (b) do not maintain their independence in mental attitude toward those clients subjected to direct uninvited solicitation by another CPA. We have heard allegations by some CPAs that the independence of CPAs would be impaired under those conditions, but many CPAs do not agree that their own independence would be impaired.
>
> Furthermore, our survey of members' attitudes disclosed that a preponderance of the AICPA membership believes that direct uninvited solicitation to acquire clients does not impinge on the independence of CPAs.

The trial court found that solicitation prohibition violated the free speech provisions in the Federal and State Constitutions. Despite the fact that the Board never argued that solicitation was inherently misleading, or that the prohibition was intended to protect the public from solicitors, the Fourth District reversed the trial court on those grounds.

<u>Solicitation - Vagueness</u>:

The trial court was presented with extensive evidence that the Defendant's prohibition against "direct, in-person, uninvited solicitation" was vague. Substantial evidence on this point was presented by the Board's own witnesses, Dooner and Schine. At the AICPA convention, Dooner stated (Plaintiff's Exh. #2, p.193-94):

> You have heard, here, today, the difficulty in defining "direct, uninvited solicitation." I dare say, if you ask

> this group, in this room, to define what it is, you would come up with at least twenty different definitions of what "direct, uninvited solicitation" is.

Dooner testified that the Board had determined in an advisory opinion that direct, in-person solicitation of clients at breakfast clubs was not "uninvited" within the meaning of the Rule 21A-24.002 and, therefore, was not prohibited. Dooner testified that that exemption also applied to luncheon clubs, Rotary clubs, Kiwanis, country clubs, etc. (Plaintiff's Exh. #1, p.69-71). His justification for that interpretation was that a person who belonged to such a club is willing to be solicited (Plaintiff's Exh. #1, p.71). However, when he was asked whether Rampell, who is a member of the local Opera Board, could solicit members at its meetings, Dooner stated he could not because (Plaintiff's Exh. #1, p.72), "The Opera Board has an objective to be carried out and it's not put together for socializing with each other."[8] Dooner admitted that there were no guidelines to determine at which social functions a CPA would be permitted to solicit business (Plaintiff's Exh. #1, p.74).

Dooner also had difficulty determining whether the prohibition applied to a situation in which an accountant calls a businessman and says to his secretary, "I am an accountant and I'd like to discuss with Mr. Jones his business," and the businessman then accepts the call (Plaintiff's Exh. #1, p.79). After a significant pause (estimated by counsel to be 45 seconds to a minute), Dooner stated that the "overall scenario" was "very gray" with respect to the prohibition (Plaintiff's Exh. #1, p.80). He later stated he would have to "think about it long and hard before I make a decision" (Plaintiff's Exh. #1, p.81-82).

Further evidence of the vagueness of the rule is the fact that the survey commissioned by the AICPA attempted to determine what CPAs consider "direct,

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8/At the conclusion of an extended colloquy following that determination, Dooner admitted he made an error in rendering that opinion so quickly (Plaintiff's Exh. #1, p.73-74).

uninvited solicitation," and noted various ambiguities in the responses (Joint Exh. C, p.20). At the 1981 convention, the consultant who conducted the survey stated that it indicated "there is no easy way to define what direct, uninvited solicitation is" (Plaintiff's Exh. #2, p.191).

Additionally, the Board's representations to the court reflected the vagueness of the prohibition. At the hearing on September 25, 1989, counsel for the Board informed the court that the prohibition was only against "one-on-one" communications (SR104). Curiously, neither the Board's rules, nor its witnesses, stated that the prohibition was limited to "one-on-one" communications.

Additionally, the Board's counsel argued that the exemption for social clubs was justified (SR107):

> Now it is beyond doubt that in some circumstances there will be an element of caveat emptor that occurs where a solicitation really has not happened. That's the concept of the social club, the cultural club, the luncheon club and the like where all the parties agree that when someone goes there it's intended to implicitly -- they agree either implicitly or otherwise that why [sic] they are there is to talk about their businesses.
>
> There has to be an element where solicitation doesn't exist any more. I think that's why the Board has taken the position that that's acceptable, that's not abnormal. That is the same thing that our profession does.[9]

Counsel for the Board admitted, in response to a hypothetical from the court, that the application of the prohibition was a "gray area" (SR141-42). Counsel also stated (SR142), "I think even the Supreme Court would accept the fact that solicitation is a gray area."

The trial judge ruled that the prohibition against direct, in-person, uninvited solicitation was unconstitutionally vague, specifically noting ambiguity in the

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[9]/No attempt was made to justify that exemption under the alleged purpose of the rule, i.e., to protect the independence of the CPA or the user of the financial statements.

statutory phrase "uninvited solicitation" and "specific potential client" (R80). The Fourth District's opinion did not address the vagueness issue at all, and Rampell's Motion for Rehearing, which noted that omission, was denied without comment.

SUMMARY OF ARGUMENT

The Fourth District properly ruled that the prohibition against competitive bidding imposed by Fla. Stat. §473.317 is unconstitutional as violating the constitutional right to free speech under the Federal and State Constitutions. That statutory prohibition is properly analyzed as an infringement of free speech and not simply as a regulation of professional conduct since it clearly prevents the dissemination of truthful information about lawful activity. Moreover, the prohibition does not directly advance the governmental interest since it only restrains the dissemination of information to the public, which does not directly affect the professional conduct of CPAs.

The Fourth District erred in reversing the trial court's determination that the ban against direct, in-person, uninvited solicitation contained in Fla. Stat. §473.323(1) is unconstitutional. The Fourth District justified its holding on the basis that solicitation by CPAs infringes on the privacy of the public, and could involve possible harm or abuses. However, the Board never argued and, in fact, denied, that the statute was enacted to protect the public from solicitors. Moreover, the mere possibility that harm might occur from the solicitation is not a basis for upholding a blanket prohibition against it. The United States Supreme Court has held that to justify such a prophylactic ban the speech must be either inherently misleading or experience must show that it has injurious consequences. There is no evidence that such solicitation has been misleading, especially in view that CPA services are directed toward sophisticated clientele. Moreover, the mere possibility

of harm is insufficient to justify the prophylactic ban. Therefore, the Fourth District erred in holding the prohibition constitutional.

The Fourth District also erred in reversing the trial court's ruling that Fla. Stat. §473.323(1) and the regulations promulgated by the Board implementing it are vague. The Fourth District did not address this issue, although it was a specific and separate holding of the trial court. The evidence shows that the Board interprets the prohibition in such a way that direct, in-person solicitation is permitted at civic organization meetings, social clubs, and trade shows; but not at, for example, opera guilds. Moreover, as the Board's experts demonstrated, the application of the definition of direct, in-person, uninvited solicitation was very difficult even with respect to simple hypotheticals.

In summary, this Court should uphold the Fourth District's determination that the prohibition against competitive bidding is unconstitutional and quash that portion of the Fourth District's order that holds the ban against direct, in-person, uninvited solicitation to be constitutional.

POINT ON APPEAL

THE FOURTH DISTRICT PROPERLY HELD THAT THE PROHIBITION AGAINST COMPETITIVE BIDDING CONTAINED IN FLA. STAT. §473.317 IS UNCONSTITUTIONAL.

ARGUMENT

The Board and the Amicus contend that the Fourth District erred in determining that the prohibition against competitive bidding, which precludes the dissemination of any information regarding the basis of a fee for audit services in a competitive setting, violates the First Amendment. Their contention that the suppression of such information is not protected by the First Amendment was clearly

rejected by the United States Court in VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC., 425 U.S. 748 (1976), as found by the Fourth District in this case; and as supported by subsequent United States Supreme Court decisions. Additionally, the Fourth District properly determined that the prohibition did not directly advance the governmental interest asserted, and that it is more extensive than necessary. Prior to discussing the legal principles involved, certain characterizations of the Board and the Amicus relating to the intent and effect of the prohibition must be addressed.

The Board contends that the "clear rationale of the legislature in enacting the prohibition" is (Appellant's Initial Brief p.12):

> [T]o 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....[10]

There is no legislative history supporting that characterization, and the language of the statute does not support it. If Florida were to enact a statute such as Texas, which precludes CPAs from providing services at below "direct cost", Ch. 646 §20(a) (1989), perhaps that legislative motivation could be inferred. However, Fla. Stat. §473.317 places absolutely no restrictions or even guidelines on how a CPA determines his proposed fee(s). If a CPA decides to minimize the work involved in performing the audit, or to bid a price below his actual cost, he can do so and still be in total conformity with the statute.

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[10]/Strangely absent from that characterization is the profit motive, which the trial court found was the underlying motivation for the prohibition. The Board's concern for the protection of the attest function is relied upon to support a position that economically benefits the accounting profession as a whole, i.e., the prohibition against competitive bidding. However, the concern for the attest function does not motivate the Board to take action regarding the inherent conflict involved in a CPA providing management advisory services and acting as an auditor for the same client. Eliminating that obvious conflict would clearly ensure the integrity of the attest function, but would not be economically beneficial to the accounting profession.

The Amicus contends that the statute is designed to force clients and CPA's to focus on the quality of the audit, and not its price (Amicus Brief p.9, 11). There is absolutely no support for that assertion in either the statute or the record. Fla. Stat. §473.317 does not require a client to negotiate with the licensees in the order of their perceived quality; it only requires that the client do so "in order of preference." If a client is intent on obtaining the cheapest audit possible, he can certainly review the proposals with that consideration in mind and exercise a preference for the CPA(s) who appears to be willing to perform the least work to complete the audit. There is nothing in the statute which compels the CPA to focus on the quality of the audit. As noted by the Fourth District:

> The regulations at issue do not directly advance the Government's interest as they do not prevent shoddy work [low quality audits]; they only eliminate price competition.

The Amicus' contention that the statute prevents "opinion shopping" is also unfounded. Nothing in the statute prohibits the client or the CPA from discussing the methods, motivations, or means for the proposed audit; the only subject that is prohibited is cost. Fla. Stat. §473.317(4) provides:

> A licensee may respond to any request from a person or entity for a proposal giving qualifications and other factual information, excluding any quotation as to basis of fee.

Obviously, a client can engage in blatant "opinion shopping" without violating the statute.

The Board's contention that the statute involves regulation of the conduct of a professional or a prohibition on speech is without merit. Moreover, the statute prohibits the client's ability to obtain truthful information about lawful activity and, thus, even though it involves matters of commerce, it implicates the constitutional right to free speech, CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION OF NEW YORK, 477 U.S. 557, 566 (1980). The statute does

not purport to affect the professional standards of the CPA, nor the considerations of the client. The cases relied upon by the Board to characterize the statute as simply a regulation of professional conduct are easily distinguishable.

In LOWE v. SECURITIES AND EXCHANGE COMMISSION, 471 U.S. 181, 228 (1985), the SEC sought to enjoin the publishing of non-personalized investment advice by a person who was not a registered "investment advisor" for purposes of the Investment Advisor's Act. The majority opinion held that there was a statutory exclusion that permitted the publishing of the information, even though the author was not a registered investment advisor. Justice White (joined by Chief Justice Berger and Justice Rehnquist) concurred in the decision, but disagreed with the majority's reliance on the statutory exclusion. Justice White chose to premise the reversal on the basis that precluding publication of the investment advice violated the First Amendment.

In his concurring opinion, Justice White acknowledged that a government may restrict entry into professions through licensing, and that such restrictions do not necessarily implicate First Amendment protection. He also noted that it was not up to the legislature to decide when a statute involves professional regulation and when it involves regulation of speech. That was solely a function of the court, 105 S.Ct. at 2583. Justice White then concluded his analysis by stating (472 U.S. at 233):

> As applied to limit entry into the profession of providing investment advice tailored to the individual needs of each client, then, the Investment Advisers Act is not subject to scrutiny as a regulation of speech - it can be justified as a legitimate exercise of the power to license those who would practice a profession, and it is no more subject to constitutional attack than state-imposed limits on those who may practice the professions of law and medicine. <u>The application of the Act's enforcement provisions to prevent unregistered persons from engaging in the business of publishing investment advice for the benefit of any who would purchase their publications, however, is a direct restraint on freedom of speech and of</u>

the press subject to the searching scrutiny called for by the First Amendment. [Emphasis supplied.]

Under that analysis, clearly the prohibition contained in Fla. Stat. §473.317 must be analyzed as a direct restraint on freedom of speech since it does not involve any limitation on entry into the profession of public accountancy, it only restricts the dissemination of information. It directly limits the ability of the client to obtain truthful information about lawful activity.

GIBONE v. EMPIRE STORAGE AND ICE COMPANY, 336 U.S. 490 (1949), also does not support the Board's contentions. In that case, the Court upheld the application of a Missouri statute that prohibited agreements and combinations in restraint of trade to union members who attempted, through picketing, to prevent a company from selling goods to non-union workers. The conduct at issue, i.e., the agreement and combination to restrain trade was independent of the speech itself, and the court held that the state's regulation of it did not violate the First Amendment. The court also noted that the allegedly protected speech was solely intended to induce the company to violate the Missouri statute and, thus, did not involve harmful conduct.

The other cases cited by the Board are also distinguishable. ACCOUNTANT SOCIETY OF VIRGINIA v. BOWMAN, 860 F.2d 602 (4th Cir. 1988), upheld regulations prohibiting non-CPA's from using certain terms to describe their work, and from using certain terms to describe themselves to the public. The regulations at issue in that case did not in any way inhibit the dissemination of information, only its characterization in such a way as to create a misleading impression that the non-CPA was capable of performing the work of a CPA.

Similarly, ACCOUNTANTS ASSOCIATION OF LOUISIANA v. STATE, 533 So.2d 1251 (La.App. 1988), pet. den., 538 So.2d 593 (La. 1989), involved unlicensed accountants challenging a regulation prohibiting them from issuing review

reports. The Court upheld the regulation and specifically noted (533 So.2d at 1254):

> The rendering of financial reports such as an accountant's review report is not so much speech as it is the manner in which the accountant expresses himself in the practice of his profession - .

Clearly, the regulation in that case did not prohibit, in any way, the dissemination of information; it was merely intended to prevent confusion regarding the status of the unlicensed accountant.

HILL ASSOCIATES, INC. v. BRADSHAW, 674 F.2d 293 (4th Cir. 1982), bears no relation to the case sub judice. In that case, three non-resident securities brokers brought a suit challenging the constitutionality of the registration provision of the Virginia Securities Act which required them to register as a prerequisite to transacting business in the state. After discussing the various legal challenges, the court summarily rejected the First Amendment challenge, concluding that the registration provisions did not regulate commercial speech nor prohibit the non-resident securities brokers from advertising; they only imposed registration as a prerequisite.

As indicated above, none of the cases relied upon by the Board support its conclusion that the statute in this case only regulates professional conduct and is not a restriction on speech. The statute clearly prohibits the dissemination of pricing information by the CPA, as well as the ability of the client to discuss that subject. Therefore, clearly, the statute must be analyzed as a restriction on commercial speech.

In the Board's argument that the statute survives scrutiny under a commercial speech analysis, the Board makes an argument that is neither supported by the record, nor by logic. The Board contends that the provision of audit services to a client does not lend itself to "standardization or bidding," and, thus, competitive

bidding would be inherently deceptive. The Board cites Dooner's deposition pp. 101-03, as supporting that contention. In fact, nothing on those pages of Dooner's deposition address standardization or the impossibility of bidding on audit services. Every state except Florida permits competitive bidding for audit services. Moreover, Fla. Stat. §473.317 permits a CPA to quote a fee once the licensee has been "selected." If bidding on attest functions is impossible and inherently deceptive, why is it permitted at that point? Clearly it is not impossible for it to be done in a non-deceptive manner. The Board's argument also ignores that the statute prohibits the disclosure of "a basis of fee," which includes any information regarding the minimum or maximum amounts, the hourly rate(s), or any other formula from which the estimated hours or a money amount can be determined, Rule 21A-24.003. Thus, the contention that the statute prohibits the disclosure of information because audits are not susceptible to "standardization or bidding" is obviously without merit since the statute prohibits any information regarding how the fee is computed, not simply a precise or firm estimate of the anticipated fee. As a result, the Board's contention that the information involved is necessarily misleading is without any factual or logical basis. As noted by the Fourth District, the pricing information at issue (589 So.2d at 1358), "[C]an only be misleading if the CPA does not do what he or she contractually agrees to do for the price bid."

The Board's reliance on the GAO Report is without merit. As noted by the Fourth District, that study concluded that competitive negotiation is the preferred method of obtaining audit services, 589 So.2d at 1359.[11] The Fourth District also noted that the Board has produced no evidence that the quality of audits in Florida

[11]/Contrary to the contention of the Amicus, nothing in the GAO Report supports the contention that competitive bidding is misleading (Amicus Brief p.12).

is higher than those performed in other states where competitive bidding and price quotation is allowed. The Board has not challenged that observation in its brief.

Utilizing the analysis created in CENTRAL HUDSON v. PUBLIC SERVICE COMMISSION, supra, the Fourth District also properly determined that the prohibition against competitive bidding does not directly advance the governmental interest asserted. The Fourth District noted that the prohibition does not prevent low quality audits, it only eliminates price competition, 589 So.2d at 1359. The Board contends that Fla. Stat. §473.317 "appropriately forces the client to consider as his potential auditor, independent of the bottom line and only after a dispassionate review of credentials, a CPA who will be best capable of performing the best audit,..." (Appellant's Brief p.25). In fact, as noted previously, the statute does not force the client to consider the quality of the CPA or the audit, nor to engage in a dispassionate review of credentials. All the statute provides is that the client is to determine a preference for the CPA's who submitted proposals, without any restriction on the criteria for that preference.

The United States Supreme Court has held on numerous occasions that restrictions on the flow of truthful information do not directly advance the governmental interest in the quality of professional conduct. In VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC., 425 U.S. 748 (1976), a state statute subjected licensed pharmacists to discipline if they published or advertised the price, fee, or credit terms for prescription drugs. The pharmacists could respond to an inquiry of a customer, but was not allowed to publish or advertise the information. The State Board of Pharmacy justified the restriction as necessary to prevent lower standards of performance by the pharmacist. The rationale was that if the price information was published, customers

would buy prescription drugs based solely on price and, thereby, destroy the stable pharmacist/customer relationship.

After noting that the "free flow of commercial information is indispensable" in our economy, the Court found that despite the significant state interest in maintaining professional standards, the regulation violated the First Amendment. The Court stated (425 U.S. at 769, 773):

> [O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance....[Emphasis supplied.]
>
> * * * *
>
> What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.

The Court reiterated this concern in BATES v. STATE OF ARIZONA, 433 U.S. 350 (1977), where it struck down a ban on lawyer advertising, stating (433 U.S. at 374-75):

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative - the prohibition of advertising - serves only to restrict the information that flows to consumers...In any event, we

> view as dubious any justification that is based on the benefits of public ignorance. [Footnote deleted. Citation omitted.]

The Court again emphasized that restrictions on commercial speech do not directly advance the governmental interest of promoting high professional standards (433 U.S. at 378-79):

> 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 in advertising.

In THE FLORIDA BAR v. BRUMBAUGH, 355 So.2d 1186 (Fla. 1978), this Court ruled that a non-lawyer was entitled to sell printed materials purporting to explain legal practice and procedure to the public in general, as well as sample legal forms, without violating the prohibition against the practice of law by non-lawyers. This Court based its ruling on the First Amendment analysis of the United States Supreme Court in BATES v. STATE BAR OF ARIZONA, <u>supra</u>, and stated (355 So.2d at 1193):

> The court [in BATES] said that the choice between the dangers of suppressing information and the dangers arising from its free flow is precisely the choice that the First Amendment makes for us.

While the prohibition at issue in this case is not advertising, but rather competitive bidding, the same rationale applies. The Board's contention that the BATES decision was limited to standardized services is unpersuasive. The basic principle is that absent proof of its effectiveness, a regulation that imposes ignorance on the public as a means to ensure professional standards will not survive scrutiny since it does not directly advance the government's interest.

The Board also contends that the prohibition on competitive bidding is a permissible "time, place or manner" regulation, <u>citing</u> CITY OF RENTON v. PLAYTIME THEATERS, INC., 475 U.S. 41 (1986); METROMEDIA, INC. v. CITY OF SAN DIEGO, 453 U.S. 490 (1981); BARNES v. GLEN THEATRE, INC., 111 S.Ct.

2456 (1991). In BARNES, Justice Rehnquist stated that the "time, place, or manner" test was "developed for evaluating restrictions on expression taking place on public property which had been dedicated as a 'public forum'" [Citations omitted.]. That analysis is obviously inappropriate to this type of regulation, since it does not involve governmental control of property.

CITY OF RENTON v. PLAYTIME THEATRE, supra, which is the only case applying the "time, place, and manner" analysis to private property, involved a municipal zoning ordinance which restricted the location of adult theaters, but did not prohibit them. The Court noted that time, place, and manner regulations are acceptable "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication," 475 U.S. at 47 [Citations omitted]. The Court found that the ordinance was a valid governmental response to the serious problem created by adult theaters, and noted that the municipality had not used the power to zone as a pretext for suppressing expression, 475 U.S. at 54.

Even assuming arguendo that the analysis applies, the prohibition against competitive bidding is not a valid "time, place, and manner" regulation since there is no alternative avenue of communication for the information permitted. Put another way, there is no "time, place and manner" in which the client and CPAs can engage in competitive bidding. Furthermore, as noted in METROMEDIA v. CITY OF SAN DIEGO, supra, 453 U.S. at 516, time, place, and manner restrictions are only permissible if they are justified without reference to the content of the regulated speech. In the case sub judice, the restrictions relate solely to the content of the regulated speech, i.e., the communication of information regarding the basis of a proposed fee for attest functions.

The Fourth District properly determined that the fourth prong of the CENTRAL HUDSON test was not satisfied by the state in that the statute and regulations prohibiting competitive bidding did not constitute a reasonable "fit" between the government's ends and the means chosen to accomplish those ends, see BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK v. FOX, 492 U.S. 469 (1989). The Fourth District stated (589 So.2d at 1360):

> The prohibition of price competition is not a means narrowly tailored to achieve the desired result of quality audits.

As noted in BOARD OF TRUSTEES v. FOX, supra, 109 S.Ct. at 3035, the state bears the burden of justifying its restrictions and affirmatively establishing the reasonable "fit" of the regulations. The Board has not satisfied that burden in this case, since it has not shown any correlation between competitive bidding and the quality of audits. For these reasons, the Fourth District properly determined that the prohibition against competitive bidding contained in Fla. Stat. §473.317 is unconstitutional.[12]

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[12]/The Amicus contends that this Court should reverse the Fourth District to the extent that its holding invalidates Subsection (5)(b) of Fla. Stat. §473.317, which permits governmental entities to reopen formal negotiations with prospective CPAs. This issue has not been raised by the parties and, therefore, is not appropriately considered when raised only by an Amicus, ACTON v. FORT LAUDERDALE HOSPITAL, 418 So.2d 1099 (Fla. 1st DCA 1982), aff'd, 440 So.2d 1282 (Fla. 1983). Moreover, it should be noted that this case has been argued solely in the context of the constitutional free speech rights of CPAs, and the government's authority to regulate its agencies procurement policies has never been an issue.

POINTS ON CROSS-APPEAL

POINT I

THE FOURTH DISTRICT ERRED IN REVERSING THE TRIAL COURT'S CONCLUSION THAT THE PROHIBITION AGAINST DIRECT, UNINVITED SOLICITATION WAS UNCONSTITUTIONAL.

POINT II

THE FOURTH DISTRICT ERRED IN REVERSING, SUB SILENTIO, THE TRIAL COURT'S RULING THAT THE PROHIBITION AGAINST DIRECT, IN-PERSON, UNINVITED SOLICITATION WAS UNCONSTITUTIONALLY VAGUE.

ARGUMENT

POINT I

THE FOURTH DISTRICT ERRED IN REVERSING THE TRIAL COURT'S CONCLUSION THAT THE PROHIBITION AGAINST DIRECT, UNINVITED SOLICITATION WAS UNCONSTITUTIONAL.

The Fourth District described the dispositive question with regard to the solicitation issue as being whether "in-person solicitation of clients by CPAs is 'inherently misleading' within the meaning of OHRALIK [v. OHIO BAR ASSOCIATION, 436 U.S. 447 (1978)] and IN RE R.M.J., 455 U.S. 191 (1982), so as to justify the outright prophylactic ban on such conduct," 589 So.2d at 1356. While characterizing that as the dispositive question, the Fourth District never determined whether such solicitation was misleading in any respect, but rather justified the prophylactic ban because of the possibility of harm or abuse, 589 So.2d at 1357. The

Fourth District erred since it never resolved the dispositive question, and the mere possibility of harm is insufficient to justify the prohibition.

In IN RE R.M.J., supra, after discussing, inter alia, OHRALICK, supra, the United States Supreme Court summarized the state of the law as follows (455 U.S. at 203):

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions.

Additionally, the state has the burden of proof to justify its restriction on free speech, BOARD OF TRUSTEES v. FOX, supra, 109 S.Ct. at 3035; FANE v. EDENFIELD, 945 F.2d 1514 (11th Cir. 1991), reh. den., 952 F.2d 413 (11th Cir. 1991), pet. for cert. granted, 60 U.S.L.W. 3719 (May 30, 1992).

In this case, the Board never argued, let alone satisfied its burden of proof, that solicitation by CPAs is inherently misleading. Moreover, as the Board's experts both admitted, there is no empirical evidence that solicitation by CPAs has been subject to abuse.

The Board's argument in the trial court and in the Fourth District was limited to the contention that the ban on direct, in-person, uninvited solicitation was necessary to protect the independence of CPAs and to avoid the appearance of impropriety. The Fourth District did not accept that argument, but rather based its decision on the State's right to prevent vexatious conduct and intrusions on the privacy of both individuals and businesses, 589 So.2d at 1357. The court erred in so ruling, and in relieving the Board of its burden of proof.

The Fourth District's reasoning was based heavily on THE FLORIDA BAR v. SCHREIBER, 407 So.2d 595 (Fla. 1981), opinion vacated, 420 So.2d 599 (Fla. 1982). The original decision in SCHREIBER, which prohibited direct mail solicitation by attorneys, was vacated after IN RE R.M.J., supra, was decided. Thus, the opinion is not appropriate precedent as it was vacated on its merits. Moreover, to the extent the Fourth District relies on the SCHREIBER analysis regarding the constitutional right to privacy embodied in Article I, §23 of the Florida Constitution, the court's reasoning is erroneous.

Article I, §23 of the Florida Constitution provides:

> Right of privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. [Emphasis supplied.]

That provision addresses only an individual's right to be free from "governmental intrusion," and has been so construed by this Court, see WINFIELD v. DIVISION OF PARI-MUTUEL WAGERING, 477 So.2d 544 (Fla. 1985).

In SCHREIBER, the court relied on Article I, §23 as supporting its analysis that direct mail solicitation by attorneys could be prohibited. After quoting the language of that provision, the court stated in a footnote (407 So.2d at 598, fn.6), "As officers of the court, attorneys carry some hue of governmental color." Obviously, this Court found it necessary that there be some nexus with the government in order for the right of privacy to be applicable. In WINFIELD, the court stated (477 So.2d at 547):

> Heretofore, we have not enunciated the appropriate standard of review in assessing a claim of unconstitutional governmental intrusion into one's privacy rights under article I, section 23. Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The

> right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. [Emphasis supplied. Citations omitted.]

Only because attorneys are officers of the court did the SCHREIBER opinion conclude that that constitutional provision was relevant to the determination regarding whether direct mail solicitation by attorneys was constitutionally protected.

The Fourth District's decision directly conflicts with STATE v. NELSON, 553 So.2d 195 (Fla. 5th DCA 1989). In that case, the Fourth District held that a complete ban of solicitation for sale or rental of off-beach goods or services contained in a county ordinance was unconstitutional as violative of the First Amendment. The court also ruled that the prohibition could not be supported on the basis of protecting the privacy of the members of the public.

The right to privacy contained in Article I, §23 of the Florida Constitution is limited to governmental intrusion and cannot properly be construed as relevant to an issue regarding commercial solicitation by CPAs. In fact, the Board never argued in the trial court or the Fourth District, that the right to privacy was relevant. While many members of the public may find solicitation intrusive, the public has never expressed the need for such privacy protection in a constitutional provision, nor any statute.

The record in this case reveals that the only complaints regarding solicitation come from CPAs when other accountants encroach on their practice. There was no evidence presented of any complaints reported to the Florida State Board of Accountancy from members of the public. Dooner, one of the Board's experts, specifically testified that the prohibition against solicitation was not enacted to

protect the public from solicitors (Dooner Dep. p.66). The Board's counsel reiterated that position before the trial court (SR110). Additionally, Rule 21A-24.002(2)(b) prohibits a CPA from soliciting through the use of intimidation, or vexatious and harassing conduct. Thus, the Fourth District's extension of Article I, §23 to apply to non-governmental entities, i.e., accountants, is not supported by the language of the amendment, the case law interpreting it, nor the record in this case.

The Fourth District relied on OHRALIK v. OHIO STATE BAR ASSOCIATION, 436 U.S. 447 (1978), to support its position that the prophylactic ban on all direct, in-person, uninvited solicitation by accountants is constitutional. However, OHRALICK is easily distinguishable from the case sub judice. The most obvious distinction is that the Board in this case has failed to present any evidence of harm resulting from direct, in-person, uninvited solicitation by CPAs. This is important when one considers the Supreme Court's characterization of its holding in OHRALIK (436 U.S. at 449):

> Today we...hold that the state - or the bar acting with state authorization - constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose danger that the state has a right to prevent. [Emphasis supplied.]

There is no evidence in this case that solicitation creates any dangers such as those in OHRALIK.

In OHRALIK, the attorney solicited two uneducated, 18 year old women who were recent victims of a traumatic automobile accident, visiting one in the hospital and the other at her home. The lawyer secretly tape recorded the conversations, attempted to represent both women even though their interests conflicted. In addition to the obvious improprieties involved in his solicitation, Ohralik conceded "that certain types of in-person solicitation are inherently injurious," (436 U.S. at

466, fn. 27). Additionally, the Court noted the many "substantive evils of solicitation" by attorneys, including the stirring up of litigation, assertion of fraudulent claims, overreaching, and that the lawyer's exercise of judgment on behalf of the client can be adversely affected by his own self-interest, 436 U.S. at 461. OHRALIK conceded that the state had legitimate interest in preventing those aspects of solicitation, 436 U.S. at 462.

In the case sub judice, the Board never argued that the prohibition against solicitation is justified in order to avoid undue influence or overreaching by the CPA. The Board's attorney stated at the September 25, 1989, hearing (SR110):

> It's not so much the concern that we have in some other professions that the client will be browbeaten into hiring the wrong lawyer. It's a situation where, in our opinion, the problem that can occur is that the client and the CPA may enter into agreements, may enter into unknown or undiscussed or uncommunicated communications [?] which can result in the users of the financial statement being harmed and as a result the ultimate integrity of the attest function being undermined.

Indeed, common sense compels the conclusion that the "audience" to whom a CPA would approach consist of knowledgeable business people who are unlikely to be unduly influenced or misled regarding their business options. This distinguishes this case from OHRALIK, where the Court noted that (436 U.S. at 465):

> The potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence.

The type of solicitation at issue here involves a sophisticated audience, and consideration of that factor is necessary in order to determine the claim that that form of advertising can be deceptive, see BATES, supra, 433 U.S. at 383, fn. 37:

> The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. [Citation omitted.] Thus, different degrees of regulation may be appropriate in different areas.

In FANE v. EDENFIELD, supra, the Eleventh Circuit ruled that the solicitation ban at issue in this case is unconstitutional as being violative of the First Amendment. The court noted that the Board had failed to produce any evidence of a connection between in-person solicitation and dishonest or oppressive conduct by CPAs. The court stated:

> The possibilities for overreaching, invasion of privacy, exercising undue influence, and outright fraud that the Supreme Court found were cause for concern if lawyers were allowed to solicit in-person are remote in the accounting profession. See OHRALIK, 486 U.S. at 464-66, 98 S.Ct. at 1922-24. Solicitation by a CPA does not entail the "coercive force of the personal presence of a trained advocate." ZAUDERER, 471 U.S. at 642, 105 S.Ct. at 2277. Likewise, the solicitation of a business person by an accountant is in no way comparable to the intrusive solicitation of a family member by a salesperson of funeral services at a time of emotional vulnerability. See NATIONAL FUNERAL SERVICES, 870 F.2d at 142-45.

Additionally, the FTC, noting the OHRALIK decision, stated that abuses of direct, uninvited solicitation by accountants practicing before the IRS are "not likely" because, "These services do not emanate from disastrous scenes or emergency rooms where consumers may be under physical or mental disabilities," (Plaintiff's Exh. #10, p.19).

The Fourth District's conclusion that the possibility of harmful solicitation and abuse is sufficient to permit the State to enact a blanket ban of such conduct is inconsistent with SHAPIRO v. KENTUCKY BAR ASSOCIATION, 108 S.Ct. 1916 (1988). In that case, the United States Supreme Court ruled that a state could not categorically prohibit lawyers from soliciting business by sending letters to potential clients known to face particular legal problems. The Court stated (108 S.Ct. at 1923):

> Merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protective commercial speech.

Similarly, in PEEL v. ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS, 110 S.Ct. 2281, 2292, Justice Stevens, speaking for the plurality, stated:

> The presumption favoring disclosure over concealment is fortified in this case by the separate presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients. As we noted in BATES v. STATE BAR OF ARIZONA, 433 U.S. 350, 379, "It is at least somewhat incongruous for the opponents of advertising to extoll the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.

The Fourth District expressed concern that a CPA, while not trained in the art of persuasion, can use his or her superior knowledge of taxes and financial statements to take advantage of a potential client through solicitation. As noted previously, the Board never suggested that as a justification for the prohibition against solicitation. Clearly, the State did not consider that to be a basis for the legislation since there is no similar provisions preventing non-CPA accountants from engaging in direct, in-person, uninvited solicitation. Thus, while non-CPA accountants also have superior knowledge of taxes and financial statements, but are presumeably less qualified than CPAs, the State has not seen fit to prohibit them from engaging in any form of solicitation. To accept the Fourth District's rationale would mean that the State is willing to accept the possibility of harm and abuse resulting from solicitation by less qualified accountants.[13] Obviously, this logical

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[13]/As noted previously, the Board argued in the trial court and in the Fourth District that the prohibition against direct, in-person, uninvited solicitation was designed to protect the integrity of the attest function. This position was clearly mandated by the fact that there is no prohibition against non-CPA accountants, who (continued...)

flaw demonstrates that the legislative intent could not have been to protect the public from solicitation by CPAs.

In summary, the Fourth District erred in relieving the Board of its burden of providing some evidence that direct, in-person, uninvited solicitation by CPAs was inherently misleading, or had been subject to abuse. The Board never argued those contentions before the trial court or the Fourth District, and presented no evidence supporting them. The situation is easily distinguishable from solicitation by attorneys which has, over the ages, been known to result in various abuses because of the nature of the attorney/client relationship. However, there is no such historical data, or any evidence in this record to support the same conclusion as to CPAs. Therefore, the Fourth District erred in concluding that the prohibition against direct, in-person, uninvited solicitation by accountants was unconstitutional.

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[13](...continued) are not authorized to perform the attest function, from engaging in any form of solicitation.

POINT II

THE FOURTH DISTRICT ERRED IN REVERSING, SUB SILENTIO, THE TRIAL COURT'S RULING THAT THE PROHIBITION AGAINST DIRECT, IN-PERSON, UNINVITED SOLICITATION WAS UNCONSTITUTIONALLY VAGUE.

The trial court determined that the prohibition against direct, in-person, uninvited solicitation is impermissibly vague and, therefore, unconstitutional. The trial court specifically noted the ambiguity of the terms "uninvited solicitation," and "specific potential client" (R80). There was extensive evidence presented to the trial judge, much of it from the Board's own witnesses, that supported this determination. The Fourth District failed to address this determination of the trial court.

The standard for determining whether a statute is unconstitutionally vague is whether the language does not convey sufficient definite warnings of the prescribed conduct when measured by common understanding and practice, ROTH v. UNITED STATES, 354 U.S. 476 (1957); D'ALEMBERTE v. ANDERSON, 349 So.2d 164 (Fla. 1977). However, a more stringent vagueness test is utilized when First Amendment conduct is regulated, HYNES v. MAYOR OF ORADELL, 425 U.S. 610, 620 (1976). This is based on the greater potential for harm such statutes create (M.S. NEWS CO. v. CASADO, 721 F.2d 1281, 1290 (10th Cir. 1983)):

> In the First Amendment area vague laws offend three important values. First, they do not give individuals fair warning of what is prohibited. Second, lack of precise standards permits arbitrary and discriminatory enforcement. Finally, vague statutes encroach upon First Amendment freedoms by causing citizens to forsake activity protected by the First Amendment for fear it may be prohibited. [Citing, *inter alia*, HYNES v. MAYOR OF ORADELL, *supra*.]

There was ample evidence presented below that the phrase "direct, in-person, uninvited solicitation" was impermissibly vague. The Board's own witness, Dooner,

provided extensive evidence on this point. For example, he stated at the AICPA convention that there was a difficulty in defining "direct, uninvited solicitation" and told the assembled members that if they were to be asked they would probably come up with at least "20 different definitions," (Plaintiff's Exh. #2, p.194).

The term "uninvited" in this context is clearly vague, and results in arbitrary enforcement as demonstrated by the Board's advisory opinions. The Board has ruled that accountants can directly solicit clients all they want at breakfast clubs, civic organizations, and country clubs, because in that context it is deemed that such solicitation is "invited." However, when asked whether the same would apply to an opera board, Dooner testified that it would not (Plaintiff's Exh. #1, p.72). Another advisory opinion allows direct, in-person solicitation at trade shows. The Board's attempt to define "direct, in-person, uninvited solicitation" as "any communication which directly or implicitly requests an immediate oral response from the recipient" is also fraught with ambiguity.

Additionally, Dooner, the Board's expert, admitted difficulty applying the phrase to a simple hypothetical. The hypothetical consisted of these facts: An accountant calls a businessman's secretary, states his vocation and indicates a desire to talk with the businessman; the businessman then accepts the call (Plaintiff's Exh. #1, p.79). When asked whether the CPA's conduct was punishable, Dooner first indicated that the businessman had put himself in a position to be solicited, which apparently indicated that the solicitation was invited (Dooner Dep. p.79). Dooner then changed his mind, stating that the CPA's conduct was not permissible because it was initiated by the CPA (Dooner Dep. p.80). When asked how the situation differed from the social club scenario where solicitation is permitted, Dooner testified (Dooner Dep. p.81):

> As I said, it's a very gray area. I'd have to think about it long and hard before I make a decision.

The Board's own counsel represented to the trial court that the application of the prohibition was a "gray area," and that he believed the Supreme Court "would accept the fact that solicitation is a gray area," (Plaintiff's Exh. #2, p.141-42). He also argued to the trial court that the prohibition only applied to one-on-one encounters between the CPA and a client. The basis for that interpretation was never presented.

The fact that the prohibition in issue is not criminal, but only involves civil sanctions, does not justify ignoring the vagueness challenge. This contention was rejected by this Court in D'ALEMBERTE v. ANDERSON, supra, 349 So.2d at 168. In that case, the statute prohibited public officials from accepting gifts "that would cause a reasonably prudent person to be influenced in the discharge of official duties." While noting that the statute was not criminal, the court determined that the sanctions, suspension, removal from office, or civil fines were, nonetheless, "significant and substantial" to the public officials, (Ibid). The court also rejected the contention that the vagueness of the statute was cured by the provision giving public officials an opportunity to obtain advisory opinions from the Ethics Commission.

The evidence presented to the trial court in this case clearly supported its conclusion that the prohibition against solicitation was impermissibly vague. The Board's own evidence demonstrated that the determination of what constituted "direct, in-person, uninvited solicitation" was a "gray area," and its arbitrary interpretation of the ordinance supports that conclusion. Under the evidence presented and the controlling case law, the trial court properly determined that the statute was impermissibly vague. The Fourth District's sub silentio reversal of that ruling was erroneous and should be vacated by this Court.

CONCLUSION

For the reasons stated above, this Court should affirm the Fourth District's determination that the prohibition against competitive bidding is unconstitutional, and quash that portion of that Fourth District's Order that holds that the prohibition against direct, in-person, uninvited solicitation is constitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to JOHN J. RIMES, III, ESQ., Dept. of Legal Affairs, Ste. LL04, The Capitol, Tallahassee, FL 32399-1050; KEN EASLEY, ESQ., 1940 N. Monroe St., Ste. 60, Tallahassee, FL 32399-0792; and KENNETH R. HART, ESQ., 227 S. Calhoun St., Tallahassee, FL 32302, by mail, this 17th day of June, 1992.

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