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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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

Appellant/Cross Appellee,

v.

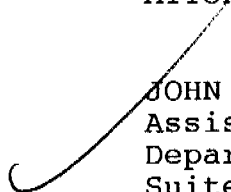
CASE NO. 79,371

RICHARD RAMPELL,

Appellee/Cross Appellant.

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

<u>CASES:</u>	<u>PAGE(S)</u>
<u>Corn v. State</u> , 332 So.2d 4 (Fla. 1st DCA 1976)	8
<u>Department of Legal Affairs v. Rogers</u> , 329 So.2d 357 (Fla. 1st DCA 1976)	8
<u>Douglas v. Noble</u> , 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923)	3
<u>Lowe v. SEC</u> , 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985)	3
<u>R.A.V. v. City of St. Paul, Minnesota</u> , 60 U.S.L.W. 4667,4671 (U.S. June 22, 1992)	6,7
<u>Semler v. Oregon State Board of Dental Examiners</u> , 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935)	3
<u>Williamson v. Lee Optical of Oklahoma</u> , 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)	3
 FLORIDA STATUTES:	
§ 458.331(1)(i)	5
§ 459.015(1)(j)	5
§ 460.413(1)(k)	5
§ 461.013(1)(j)	5
§ 465.185	5
§ 470.033	5
§ 470.035	5
§ 473.317	3,4
§ 473.319	4,9
§ 473.3205	4
§ 475.453	5

(Continued)

RULES:

Florida Bar Rules of Professional Conduct

Rule 4-1.5 4

Chapter 4-7 4

Florida Administrative Code (F.A.C.)

21A-24.003 9

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STATE OF FLORIDA, DEPARTMENT
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Appellant/Cross Appellee,

v.

CASE NO. 79,371

RICHARD RAMPELL,

Appellee/Cross Appellant.

PRELIMINARY STATEMENT

Appellant/Cross Appellee relies on the Preliminary Statement set forth in the Initial Brief.

STATEMENTS OF THE CASE AND FACTS

Appellant relies on the statement of the case and facts set forth in the Initial Brief.

SUMMARY OF ARGUMENT

Appellant relies on the summary of argument set forth in the Initial Brief.

ARGUMENT

Appellee Rampell asserts at pp. 22-23 of his brief that Section 473.317 (prohibiting certain pricing information of his answer brief involving attest functions of CPAs) cannot be a restriction on the "conduct" of a profession, a matter which is clearly within the authority of the State to regulate, see Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923), Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), and Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935), but rather involves a direct regulation on speech itself. Nothing could be further from the truth. The conduct being regulated by the statute in question is nothing more or less than the manner by which a CPA may enter into a contract with a prospective client to perform an attest engagement. As was stated in Low v. SEC, 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985), White, J., concurring:

Just as an offer and acceptance are communications incidental to the regulable transaction called a "contract," the professional speech is incidental to the conduct of the profession.

While Low related to regulations involving entry into a profession, it stands for the proposition that the State may regulate conduct of professionals even though that regulation of conduct may have an incidental impact upon the professional's speech. For example, the Florida Bar has

enacted numerous regulations which limit an attorney's ability to enter into certain contracts with clients or to even engage in negotiations regarding such contracts, see Rule 4-1.5, Florida Bar Rules of Professional Conduct (dealing with fees for legal services) and Chapter 4-7, regulating advertising information about legal services. Similarly, in the profession of public accounting, in addition to Section 473.317, F.S., prohibiting certain forms of competitive bidding as they relate to the attest function, the Florida Legislature has prohibited other activities of CPAs surrounding the manner in which they may enter into contracts to perform accounting services. Section 473.319, F.S., prohibits the acceptance of contingent fees by CPAs, except in certain narrow circumstances. Section 473.3205, F.S., prohibits the acceptance of commissions by CPAs while providing their accounting services to the public. Each of these limitations results in a lessening of the regulated professional's "freedom of speech" to state that he wants to enter into various types of contracts with a client on whatever terms he may wish. Nevertheless, it is the "contract" between the CPA and the client which is being regulated and the impact upon the "speech" of the CPA who may wish to enter into such a contract is clearly incidental to the regulable "conduct" which may result in a contract to perform either legal or accounting services.

Similarly, members of the health care professions are prohibited from engaging in any contract involving commissions, kickbacks or split-fee arrangements relating to the referral either to or from another agency or person or patients, see Section 458.331(1)(i), F.S., (medical doctors), Section 459.015(1)(j), F.S., (osteopaths), Section 460.413(1)(k), (chiropractors), Section 461.013(1)(j), F.S., (podiatrists), Section 465.185, F.S., (pharmacists). In addition, other professions place regulations or prohibitions as to the sale of merchandise; see for example Sections 470.033, 470.035, F.S., (funeral directors), and Section 475.453, F.S., (real estate brokers) requiring that contracts contain a provision for partial deposit repayment to prospective tenants, if rental does not occur. All of the foregoing clearly set forth restrictions upon professional contracts and place requirements on the manner in which professionals may practice their profession vis-a-vis their prospective clients. The statutes thus restrict to some extent the "speech" of these professionals. Nevertheless, it is the conduct of the professional in the negotiations leading up to the entry into an employment contract as well as the manner in which the contract shall be executed, which is being regulated. It is this conduct and not speech which is the primary interest of the State, both in the instant cause as well as those set forth above.

Just as has recently been noted by the United States Supreme Court in the case of R.A.V. v. City of St. Paul, Minnesota, 60 U.S.L.W. 4667,4671 (U.S. June 22, 1992), "a particular content-based subcategory of a prescribable class of speech can be swept up incidently within the reach of a statute directed at conduct rather than speech." In the instant cause, the prescribable or regulable speech at issue is the commercial speech of a CPA seeking to enter into a contract with a prospective client to perform an attest engagement. The state has simply determined, in regulating the manner in which a CPA may enter into such a contract, that a certain manner of speech, i.e., the submission of a basis of fee to the client, is to be permitted only under certain circumstances and pursuant to the statutory requirements. As such therefore, since the statute is directed at the conduct of a CPA engaged in seeking to provide his services to a client on an attest engagement, it only incidently restricts the words a CPA may say to that prospective client. Of course, a rule such as the Florida Bar's rule mandating certain fee restrictions likewise impacts the attorney's ability to speak certain words when seeking to enter into a contract to perform legal services for a prospective client. It is the conduct that is being regulated however, and the impact on speech is only incidental to that regulation.

Even if the Court determines that the statute in question herein is a content-based regulation on a certain form of commercial speech, it is apparent, as is noted in the Board's Initial Brief, that the statute passes constitutional muster. Once again, in R.A.V. v. City of St. Paul Minnesota, at 60 U.S.L.W. 4670, citing Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 at 771-772, (1976), "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection, . . . is in its view greater there." Here the State has simply determined, as a matter of law, that the risk of sub-standard audits is greater if competitive bidding is permitted to CPAs as opposed to its being regulated in the manner set forth in the statute. Since there is more than sufficient information in the record, see CPA Audit Quality--A Framework for Procuring Audit Services (Report by the General Accounting Office (AGO)), which shows that when price becomes a major factor in the choosing of an auditor, the quality of the audit is dramatically lessened, it is obvious that the State has simply exercised a legitimate choice in placing limited regulations upon the disclosure of price information to prospective clients. For the reasons set forth in the Board's Initial Brief, it appears

that the appropriate U.S. Supreme Court test for such content-based commercial speech regulation has been met.


Finally, it should be noted that there is no evidence whatsoever that the statute in question was enacted for improper motives. Despite the finding of the trial court at R-80,81, and the assertion of Rampell that the statute in question was enacted for pretextual reasons, i.e., the protection of CPAs from competition, (a position not relied upon by the Fourth District Court of Appeal in its opinion), there is no evidence to support such an assertion. The Legislature of the State of Florida and the Board of Accountancy as an agency of the State of Florida are both presumed to have acted for proper motives in the absence of clear and convincing evidence to the contrary, none of which has been presented in the instant cause, see Department of Legal Affairs v. Rogers, 329 So.2d 357 (Fla. 1st DCA 1976), Corn v. State, 332 So.2d 4 (Fla. 1st DCA 1976).

CONCLUSION

Based on the foregoing argument and the authorities cited herein, and in the Initial Brief of Appellant, Appellant (Cross/Appellee) respectfully requests that this Honorable Court reverse the decision of the Fourth District Court of Appeal finding Section 473.317, F.S., and Rule 21A-24.003, F.A.C., unconstitutional, and reinstate the statute and rule involved herein as constitutional enactments of the State of Florida.

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 **LISA NELSON, COUNSEL**, Department of Professional Regulation, Legal Office, Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida, 32399-0750 on this 10th day of July, 1992.



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