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THE SUPREME COURT AND STATE RESTRAINTS ON CPA BUSINESS SOLICITATION

by

PETER E. MILLSPAUGH*

INTRODUCTION

Over the last two decades, the United States Supreme Court has ruled on a number of questions with a direct bearing on the accounting profession.¹ Extending this legacy, the High Court has once again entered the world of the practicing accountant to examine the Constitutional scope of State Boards of Accountancy to restrict direct, in-person, uninvited business solicitation within the profession. The High Court's findings and decision were delivered recently in the case styled *Edenfield v. Fane*,² which considered a sole practitioner's challenge to solicitation restrictions adopted by the state of Florida. This ruling carries some important implications for the rapidly evolving promotional and marketing aspects of the practice of accountancy today.

To position the *Edenfield* ruling in an historical perspective, the profession's efforts at self-regulation in the area of business solicitation over the years will be outlined first. This will entail tracing the evolution of the solicitation issue reflected in the actions of the early Council of the American Institute of Accountants, its successor the American Institute of Certified Public Accountants (hereafter the AICPA), and the numerous State CPA Societies throughout the country. In a like manner, the primary legal sources supporting contemporary governmental restraints emanating from the U.S. Constitution, along with certain federal and state dictates found in statute and regulation, will then also be examined. Against this background, the *Edenfield* case can then be dissected for the factual and legal parameters which it imposes on state authorities intent on exerting regulatory authority over various aspects of solicitations within the profession.³

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1. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985) (RICO Statute); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (criminal investigation by the IRS); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (action for damages against accounting firm under the Securities Exchange Act of 1934). See generally Louis A. Craco & Deborah E. Cooper, *The Institute As Amicus Curiae: The Key to the Courthouse*, J. ACCT., Nov. 1987, at 70.

2. 113 S. Ct. 1792 (1993).

3. The practice of advertising and the notion of competitive encroachment have long been linked to solicitation concerns by the profession. Herman J. Lowe, *Ethics In Our 100-Year History*, J. ACCT., May 1987, at 78, 82. Advertising and solicitation have come to be treated

I. PROFESSIONAL SELF-REGULATION

It is both interesting and instructive to appreciate at the outset, that the onus associated with business solicitation historically has been the cause of considerable discomfort within the accounting profession itself. Rules against solicitation were adopted by the early Scottish and English chartered accountants. Likewise, antisolicitation provisions were embraced from the beginnings of the organized profession in this country.⁴ A ban on client solicitation appeared in the American accounting profession's first formal Code of Professional Ethics becoming formally institutionalized under the Council of the American Institute of Accountants in the year 1917.⁵ Moving forward in time however, it becomes readily apparent that in response to attitudinal and legal pressures, the ban has substantially transmogrified under the auspices of the AICPA in the modern era.

A. *The American Institute of CPAs*

The first substantive rule change modifying solicitation policy occurred in 1948 when the AICPA membership voted to broaden the reach of the existing solicitation ban to include all potential clients rather than just those with existing professional commitments.⁶ Reflecting this change, the new rule stated:

A member shall not directly or indirectly solicit clients by circulars or advertising, nor by personal communication or interview not warranted by existing personal relations, and he shall not encroach upon the practice of another public accountant. A member may furnish service to those who request it.⁷

The rule remained essentially unaltered until 1962 when, largely as a matter of format alone, the ban on encroachment was separated from the ban on

today as often indistinguishable activities. *Id.* at 82-85. To the extent possible, this article will focus almost exclusively on that form of solicitation which is direct, personal and uninvited.

4. JOHN L. CAREY, *THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL* 85, 88-90 (1969).

5. Lowe, *supra* note 3, at 82 (the Code stated that "[n]o 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 such service and advice").

6. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *REPORT OF THE SPECIAL COMMITTEE ON SOLICITATION* (1981) [hereinafter *AICPA COMMITTEE REPORT*], *reprinted in* Joint Appendix at 29, 44, 113 S. Ct. 1792 (1993) (No. 91-1594). *See also* Lowe, *supra* note 3, at 82-85 (narrating a more detailed account of the evolution of solicitation rules).

7. PROFESSIONAL STANDARDS, Code of Professional Ethics Rule 8 (Am. Inst. of Certified Pub. Accts. 1948) [hereinafter *AICPA CODE OF PROFESSIONAL ETHICS*].

solicitation and placed in a different location within the code.⁸ The identical language as to both prohibitions however, was retained. A short two years later, the membership abruptly endorsed a proposal to outlaw all client solicitation.⁹ The new all-encompassing proscription stated succinctly:

A member or associate shall not endeavor, directly or indirectly, to obtain clients by solicitation.¹⁰

A series of further changes in the AICPA's solicitation ban occurred during the 1970s starting with the decision to define advertising as a form of solicitation and then specifically prohibit both under a single rule.¹¹ In 1973, the members adopted such a rule which read:

SOLICITATION AND ADVERTISING. A member shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited.¹²

That same year, the U.S. Department of Justice began a lengthy inquiry into the AICPA's rules concerning solicitation, advertisement, and encroachment with an eye to their potential anti-competitive affects. Two related Supreme Court rulings shortly thereafter, added further impetus to the government's concerns. In the case of *Goldfarb v. Virginia State Bar*,¹³ the High Court clearly rejected the contention that the learned professions should be exempt from the dictates of federal antitrust statutes.¹⁴ Shortly thereafter, the court in *Bates v. State Bar of Arizona*¹⁵ further complicated matters by placing commercial information concerning the nature, availability and price of professional services (the essence of solicitation), under First Amendment protections.¹⁶

In response, the AICPA rewrote its now controversial solicitation rule with membership approval in 1978 so that it read:¹⁷

ADVERTISING AND OTHER FORMS OF SOLICITATION: A member shall not seek to obtain clients in a manner that is false, misleading, or

8. AICPA COMMITTEE REPORT, *supra* note 6, at 44.

9. *Id.*

10. AICPA CODE OF PROFESSIONAL ETHICS (1964).

11. AICPA COMMITTEE REPORT, *supra* note 6, at 45.

12. AICPA CODE OF PROFESSIONAL ETHICS Rule 5.02 (1973).

13. 421 U.S. 773 (1975).

14. *Id.* at 793.

15. 433 U.S. 350 (1977).

16. *Id.* at 384.

17. AICPA COMMITTEE REPORT, *supra* note 6, at 45.

deceptive. A direct uninvited solicitation of a specific potential client is prohibited.¹⁸

The Department of Justice however took umbrage with the second part of the rule which banned all direct solicitation because it was not likewise limited to just solicitation which was false, misleading, or deceptive.¹⁹ When it appeared that the government was prepared to challenge the ban in litigation, the AICPA dropped that element of the rule in 1979 and adopted a slightly modified version which stated:²⁰

ADVERTISING AND OTHER FORMS OF SOLICITATION: A member shall not seek to obtain clients in a manner that is false, misleading, or deceptive.²¹

Although removal of the ban satisfied the government's objections at the time, the profession soon became concerned that new promotional practices utilized by accountants may be harming both the profession and the general public,²² and furthermore, that various Boards of Accountancy and State Societies had nonetheless retained similar prohibitions on direct, uninvited solicitation themselves.²³ These concerns were reflected in the resolution adopted by the membership at the AICPA's annual meeting in 1980 which established a special committee to examine "the ramifications of the present status of rules pertaining to direct uninvited solicitation and the legality of such rules."²⁴ After an extensive study, the committee concluded that the previous, broad, general prohibition on such solicitation could not be restored, but that the AICPA was within its rights to ban certain specific undesirable forms of solicitation.²⁵ Thus Rule 502 was modified in 1983 by adding the sentence: "Solicitation by the use of coercion, overreaching or harassing conduct is prohibited."²⁶

B. State CPA Societies

The AICPA Special Committee on Solicitation conducted a number of illuminating surveys in connection with their study. As a result, some very

18. AICPA CODE OF PROFESSIONAL ETHICS Rule 5.02 (1978).

19. AICPA COMMITTEE REPORT, *supra* note 6, at 45.

20. *Id.* at 45-46.

21. AICPA CODE OF PROFESSIONAL ETHICS Rule 5.02 (1978).

22. Lowe, *supra* note 3, at 85.

23. AICPA COMMITTEE REPORT, *supra* note 6, at 30.

24. *Id.*

25. *Id.* at 34-40 (citing Recommendations No. 1 and 2).

26. Lowe, *supra* note 3, at 85.

basic and vital data was accumulated which reflected how direct uninvited solicitation was viewed and treated by those within the accounting profession and by those imposing regulatory controls from outside. The data obtained from the state CPA societies provides a case in point.

Seeking to establish the presence, location, and enforcement status of solicitation prohibitions within the state CPA society community, the Committee reached out to fifty-three societies which included those from the District of Columbia, Guam, Puerto Rico and the Virgin Islands as well.²⁷ Forty-six of the societies responded. An analysis of these responses to the committee's survey questionnaire provided some very instructive data.

Of particular relevance was the finding that all forty-six responding societies had banned direct uninvited solicitation at some point in time, but that forty-one had subsequently lifted the ban by the time of the survey.²⁸ Some societies eliminated the ban through membership referendum. In others, the ban was automatically lifted by society bylaws which called for the mandatory adoption of any rule changes approved in the AICPA Code at the national level.²⁹ In sum, only five of forty-six societies had maintained the prohibition. Further, one of these five indicated to the committee that although it had retained the ban, the ban was not being enforced on the advice of legal counsel.³⁰

In retrospect then, it is clear that the organized profession has viewed direct uninvited solicitation with some repugnance from the beginning. The tradition of professional self-regulation pertaining to solicitation first established in the English and Scottish charters was readily embraced and perpetuated in this country by the AICPA and its predecessors. A dramatic turnabout underway over the last two decades however, is now about to be finalized. Under pressure from federal regulatory authorities, the organized accounting profession was forced to abandon its traditional broad, self-imposed prohibition against direct uninvited solicitation. The legal foundation upon which these new-found governmental restraints on professional self-regulation are based will be examined next.

II. CONTEMPORARY GOVERNMENTAL REGULATION

The legal entanglements which have enveloped the question of CPA solicitation in recent years have taken two distinct and separate forms. It is

27. AICPA COMMITTEE REPORT, *supra* note 6, at 30.

28. *Id.* at 47.

29. *Id.* The AICPA dropped its ban in 1979. See *supra* notes 20-21 and accompanying text.

30. AICPA COMMITTEE REPORT, *supra* note 6, at 47.

important that the reader bear in mind that the legal rationale behind the federal government's objection to the profession's ban is to be distinguished from that supporting its attack on State imposed bans. The legal underpinnings supporting the government's assault on a self-imposed professional ban is considered first.

A. Self-Regulation: Antitrust and Consumer Protection Concerns

Over the last two decades, AICPA rules have been eyed with suspicion by the Antitrust Division of the Justice Department and the Federal Trade Commission. Both organizations share overlapping antitrust jurisdiction in certain areas, with the FTC's interest in the consumer protection aspects well defined dating from the 1960s. Almost by definition, the act of solicitation imparts information which in theory is market sensitive to the rational consumer. Any curtailment of the free flow of price, quality, convenience, and other information necessary to evaluate the offered service, therefore, can be viewed as inherently anticompetitive. Further, to prohibit members from "encroaching" on each other's clients as the AICPA Code did for so many years, arguably contains the ingredients of a market division conspiracy. The act of solicitation itself can also be viewed as a form of competition and therefore a practice to be protected and encouraged rather than banned.

It was the antitrust and consumer protection concerns such as these which drew attention from federal authorities in recent years. As previously chronicled, the AICPA came under strong pressure from the regulators during the 1970s to remove this impediment to direct uninvited business solicitation long institutionalized in its Code of Professional Ethics.³¹ Against strong inclinations to the contrary, the AICPA and its members nonetheless formally dropped the prohibition to avoid an open confrontation with federal authorities.³² Following the AICPA's lead, state CPA Society rules and procedures soon began to reflect this national policy change at the state level as well.³³ Vestiges of the solicitation ban could still be found however, in a number of state statutes and regulations. This was soon to raise legal questions of a different nature.

31. See *supra* notes 11-21 and accompanying text.

32. Lowe, *supra* note 3, at 84-85. In recommending against a confrontation, the Special Committee on Solicitation cited anticipated legal costs in excess of \$1 million, the probability of an unsuccessful outcome, and the subsequent damage to the profession's prestige. AICPA COMMITTEE REPORT, *supra* note 6, at 34-38.

33. See *supra* notes 27-30 and accompanying text.

B. State Regulation: Antitrust and Constitutional Concerns

In 1977, the National Association of State Boards of Accountancy (hereafter NASBA) promulgated a Model Code of Professional Conduct for the guidance of the fifty-four Boards which comprise its membership.³⁴ Among its recommended model rules was a prohibition pertaining to solicitation which read:

A licensee shall not by any direct personal communication solicit an engagement to perform professional services (a) if the communication would violate Rule 403 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexations or harassing conduct; or (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 communication or is seeking to secure the performance of professional services and has not yet engaged another to perform them.³⁵

Surveyed in 1980, of the fifty-one Boards of Accountancy responding, twenty-eight indicated they either had no solicitation ban at all, or a narrow prohibition which applied only to false, misleading, or coercive statements.³⁶ From among all Boards which had adopted some form of the ban, a majority had adopted the full rule recommended in the NASBA Model Code.³⁷

It soon became apparent that this Model Code rule was of questionable legality. By 1980, there were objections from the Attorneys General in at least three states where the full rule had been placed in effect.³⁸ Further, the anti-trust implications specifically of part (c) of the rule became of concern to the Department of Justice.³⁹ Some years later, the Federal Trade Commission pointedly advised NASBA to also delete part (b) of the rule, arguing that a ban on overreaching or coercive solicitation practices was sufficiently ambiguous to permit the imposition of restrictions “under circumstances that pose no danger of harm to consumers.”⁴⁰ As a result, NASBA amended its Model Code in 1988 to accommodate these objections.⁴¹

34. AICPA COMMITTEE REPORT, *supra* note 6, at 47-48.

35. MODEL CODE OF PROFESSIONAL CONDUCT Rule 404 (Nat'l Ass'n of State Bd. of Acct. 1977).

36. AICPA COMMITTEE REPORT, *supra* note 6, at 47.

37. *Id.*

38. *Id.* at 48.

39. The Department's concern surfaced first in a letter to the Vermont state legislature which was then considering legislation in this area in 1979. *Id.*

40. Brief of Respondent at 24 n.10, *Edenfield v. Fane*, 113 S. Ct 1792 (1993) (No. 91-1594).

41. *Id.*

By 1991, the Accounting Boards of sixteen states, however, still contained prohibitions against in-person solicitation.⁴² In four of those sixteen states, Florida,⁴³ Louisiana,⁴⁴ Georgia,⁴⁵ and Texas,⁴⁶ the ban had also been enacted into state statutes.⁴⁷ The validity of Accounting Board bans, particularly in those states with no authorizing state statute, has been seriously questioned under federal antitrust laws.⁴⁸ A striking extension of Constitutional jurisprudence, however, now appears to present the most threatening challenge to government imposed solicitation restrictions affecting the accounting profession. This was confirmed by the Supreme Court in its recent *Edenfield* ruling, which will be examined next.

III. SUPREME COURT SCRUTINY OF CPA SOLICITATION

The events which ultimately led to the High Court's *Edenfield* decision were set in motion in August, 1988 when Mr. Scott Fane filed a formal complaint against Mr. Fred Edenfield and his fellow members of the Florida Board of Accountancy in the federal Court for the Northern District of Florida.⁴⁹ The complaint was based on Fane's objection to the Board's ban on direct, in-person, uninvited solicitation.

Fane was a fully credentialed and certified CPA, possessed of a B.S. in Accounting, a Masters Degree in Taxation, and CPA certified and licensed in the State of New Jersey.⁵⁰ Beginning in 1977, he was employed respectively by Gulf and Western Corporation, Touche Ross & Company, and Deloitte, Haskins & Sells, before he founded his own New Jersey practice in late 1984. In 1985, Fane moved to Florida, became licensed as a CPA, and set out to establish an accountancy practice there.

42. See *Fane v. Edenfield*, 945 F.2d 1514, 1516 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1792 (1993).

43. FLORIDA STAT. ANN. § 473.323 (1)(1) (West 1991).

44. LA. REV. STAT. § 37.75(B); La. Adm. Code 46: XIX.507(D)(Supp 1988).

45. GA. CODE ANN. § 43-3-35(i) (1988).

46. TEXAS REV. CIV. STAT. ANN. art. 41-a, § 6(a)(2) (West 1991).

47. *Fane v. Edenfield*, 945 F.2d 1514, 1516 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1792 (1993).

48. See letter from FTC to Florida State Senator, Apr. 28, 1987 (cited as Exh. D). *Id. Compare Rhode Island Bd. of Accountancy*, 107 F.T.C. 293 (1986), and *U.S. v. State Board of CPAs of Louisiana*, No. 83-1947, 187 WL 7905 (E.D. La. Mar. 11, 1987).

49. Complaint For Injunctive And Declaratory Relief, *Fane v. Edenfield*, No. TCA 88-40264-MMP (N.D. Fla. Sept. 13, 1990), *reprinted in* Joint Appendix at 1, *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (No. 91-1594).

50. See Affidavit Of Scott Fane, *Fane v. Edenfield*, No. TCA 88-40-264-MMP (N.D. Fla. Sept. 13, 1990), *reprinted in* Joint Appendix at 9, *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (No. 91-1594).

A. Fane v. Edenfield: *The Facts and Law*

The formal complaint lodged by Fane in the summer of 1988 centered specifically on Florida Statute §473.323 (1)(1) which provides that CPAs “engaging in direct, in-person, uninvited solicitation of a specific potential client. . .” may be subject to disciplinary action.⁵¹ The complaint also attacked Florida Administrative Code Rule 21A-24.00(2)(3), promulgated under the Florida Statute which defines direct, in-person, uninvited solicitation as “any communication which directly or implicitly requests an immediate oral response from the recipient,” and pointedly prohibits “uninvited, in-person visits or conversations or telephone calls to a specific potential client. . .”⁵² Fane contended that these restrictions seriously hampered his efforts to develop a clientele of small to mid-size businesses. He pointed out to the court the importance of being able to meet directly with those who own or manage such businesses so that the services offered, their price, his professional experience and qualifications, and his willingness to tailor services to the client’s needs, could be fully communicated and explained.⁵³ Under Florida’s legal restriction Fane argued, he was denied the opportunity to both, (1) communicate this information to potential clients personally, and, (2) to compete equally with other CPAs and accountants who are not affected by these restrictions.⁵⁴

To support his contentions, Fane invoked First Amendment free speech protection, and the Fourteenth Amendment equal protection clause. Simply stated, his position was that truthful and accurate information concerning the availability and terms of accounting services was a form of communication protected by the First Amendment from government restriction such as those imposed under Florida law.⁵⁵ He further argued that the Florida restrictions failed to pass Constitutional muster under the equal protection clause of the Fourteenth Amendment because CPAs as a class are singled out for restriction, while all others providing accounting and accounting-related services are excluded without justifying such discriminatory treatment by relating it to a legitimate governmental interest.⁵⁶ Accordingly, the complaint asked for

51. Complaint For Injunctive And Declaratory Relief, *supra* note 49, at 2-3.

52. *Id.* at 3.

53. *Id.* at 3-4.

54. *Id.* at 4 (stating that it was not affected because the attest function was not performed in the course of their practices).

55. *Id.* at 4-5.

56. *Id.* at 5. Since complainants’ First Amendment position alone satisfied the 11th Circuit Court of Appeals, and subsequently the Supreme Court, the equal protection grounds were never adjudicated. See *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *aff’d*, 113 S. Ct. 1792 (1993).

relief in the form of a court injunction against state enforcement of the solicitation restrictions, and a declaration that the restrictions in question were in violation of the Constitution.⁵⁷

In support of its answer denying the Fane complaint, the Florida Board of Accountancy submitted an affidavit from one Mr. Louis W. Dooner to place the solicitation ban in some historical perspective and articulate the basic public policy objectives it seeks to attain.⁵⁸ The Dooner justifications for Florida's ban were then rebutted by Fane in a supplemental affidavit.⁵⁹ This exchange provided a rare insight into the competing practical interests pertaining to professional solicitation which lay beneath the legal issues.

Dooner argued that the only reason for the existence of a regulated public accounting profession is to protect the independence of the "attest" function, whereby the CPA renders an opinion on the financial statements of others based on a professional audit in accordance with Generally Accepted Auditing Standards.⁶⁰ This independence is compromised by solicitation because the professional thereby becomes beholden to the client.⁶¹ The ban on solicitation, Dooner contended, was not designed to protect the public from solicitors, but rather to protect the users of CPA financial statements.⁶² To illustrate, he emphasized how narrowly tailored the ban was, and cited some common forms of solicitation that were still permitted under its provisions.⁶³ The only type of solicitation prohibited by the state, Dooner argued, is that which places the potential client in a position of having to make an immediate oral response.⁶⁴ Such a situation is undesirable, he explained, because it invites

57. Complaint For Injunctive And Declaratory Relief, *supra* note 49, at 5.

58. See Affidavit Of Louis W. Dooner, Fane v. Edenfield, No. TCA 88-40264-MMP (N.D. Fla. Sept. 13, 1990), *reprinted in*, Joint Appendix at 16, Edenfield v. Fane, 113 S. Ct. 1792 (1993) (No. 91-1594). Mr. Dooner's distinguished career encompassed leadership roles in AICPA, NASBA, and the Florida State Board of Accountancy as its chairman. *Id.* at 16-17.

59. Supplemental Affidavit Of Scott Fane, Fane v. Edenfield, No. TCA 88-40264-MMP (N.D. Fla. Sept. 13, 1990), *reprinted in*, Joint Appendix at 25, Edenfield v. Fane, 113 S. Ct. 1792 (1993) (No. 91-1594).

60. Affidavit of Louis N. Dooner, *supra* note 58, at 19.

61. *Id.*

62. *Id.* at 20.

63. (1) May a CPA attend trade shows, luncheon clubs and other such meetings and engage in direct, in-person, solicitation? Yes, because those in attendance by their presence, have issued an invitation to be solicited. (2) May a CPA send a personal letter to a potential client requesting an appointment to discuss his qualifications to render services? Yes, because the decision to enter into the conversation rest[s] with the potential client. (3) May a CPA send brochures and other advertising material to a particular member of management of a potential client? Yes, this activity . . . places responsibility for initiating personal contact with the potential client.

Id. at 22-23.

64. *Id.* at 20.

“overreaching and vexatious” conduct by the CPA, and also places him in a compromising position wherein he may be willing to “bend the rules” in order to secure business.⁶⁵

Fane countered first with the observation that a large percentage of practicing CPAs today never exercise the attest function.⁶⁶ This is particularly apt for that growing segment of the profession with specialties in areas such as tax, financial planning, employee benefits, management information systems, estate planning, and litigation support.⁶⁷ Furthermore, he noted that there were other factors, perhaps more important than the attest function, which distinguish CPAs from accountants and other financial professionals.⁶⁸ Among these, are the fact that CPAs alone must demonstrate their educational background, competence, expertise and good moral character through a licensure process, that they are required to maintain their professionalism through continuing education, and that under Florida law, certain communications between only CPAs and their clients are protected as to their confidentiality.⁶⁹

Pertaining to the notion that direct, uninvited solicitation places the CPA in a compromising position, Fane retorted that the scenario was “inherently implausible” based on his own professional experience with solicitation as a sole practitioner and as a CPA with two major national firms.⁷⁰ Any temptation to bend the rules, he argued, is deterred by the certain knowledge that such conduct can result in a practitioner’s loss of license, incarceration, and financial ruin.⁷¹ Furthermore, he noted, professionals should be expected to recognize that any businessman interested in an undeserved “clean” financial opinion, is certainly not a promising long-term client.⁷²

Following a full hearing, the U.S. District Court found the Florida ban to be unconstitutional, granted Fane’s motion for a summary judgement, and enjoined the Board of Accountancy from enforcing the ban as to “CPAs who seek clients through in-person, direct, uninvited solicitation in the business context.”⁷³ The decision was then appealed and accepted for review by the

65. *Id.* at 23.

66. Supplemental Affidavit Of Scott Fane, *supra* note 59, at 25-26.

67. *Id.*

68. *Id.* at 26.

69. *Id.*

70. *Id.* at 27.

71. *Id.*

72. *Id.*

73. Fane v. Edenfield, No. TCA 88-40264-MMP (N.D. Fla. Sept. 13, 1990); *reprinted in*, Joint Appendix at 78, Edenfield v. Fane, 113 S. Ct. 1792 (1993) (No. 91-1594), *aff'd*, 945 F.2d 1514 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1792 (1993).

U.S. Court of Appeals, Eleventh Circuit. Applying its own analysis as to the constitutionality of the ban, the Appeals Court affirmed the District Court's ruling.⁷⁴ Responding to an appeal from the Circuit Court ruling, the U.S. Supreme Court heard oral arguments in December, 1992, deciding the case in April the following year.⁷⁵

B. High Court Analysis and Ruling

The starting point for the Supreme Court's analysis was to emphasize the societal value which solicitation can provide in a business context. Through solicitation, the seller can "educate the market and stimulate demand" while efficiently targeting only the most likely consumers.⁷⁶ Likewise the buyer is afforded the opportunity to meet and evaluate the solicitor, and to compare in detail the offered product or service with available alternatives. For both parties, solicitation allows for a personal interchange amenable to formulating "the desired form for the transaction or professional relationship."⁷⁷ It was emphasized also that these benefits are particularly significant pertaining to products such as professional services offered by a CPA, which are not uniform or standard.⁷⁸ The Court concluded that First Amendment protections apply to this type of commercial expression.⁷⁹ It was observed that to deny CPAs and their clients these benefits would threaten the larger societal interests in broad access to complete and accurate commercial information.⁸⁰ The Court emphasized that it is primarily for the speaker and the audience to assess the value of information in the marketplace, not the government.⁸¹

For the government to ban personal solicitation by CPAs such as Fane, the justices felt it must be demonstrated first that Florida's interests in regulating this form of commercial speech are substantial, and second, that the ban "advances these interests in a direct and material way."⁸² The Court agreed

74. *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *aff'd*, 113 S. Ct. 1792 (1993).

75. *Edenfield v. Fane*, 113 S. Ct. 1792 (1993).

76. *Id.* at 1797.

77. *Id.* at 1798.

78. *Id.*

79. *Id.* (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

80. *Id.* (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 377-78 (1977), and *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561-562 (1980)).

81. *Id.*

82. *Id.* The Court applied the test developed in the case of *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). *Id.* at 1798-1802. The third element of this test, never reached by the *Fane* Court, requires the restriction on commercial speech to be in reasonable proportion to the government interests sought to be

with the Florida Board's contention that one of the substantial government interests at play was to insure that consumers were protected from fraudulent or deceptive speech citing that fact that some 25 states and the District of Columbia presently ban CPA solicitation which falls into those categories.⁸³ Likewise, the Court acknowledged that solicitation "may be pressed with such frequency or vehemence as to intimidate, vex, or harass"⁸⁴ which gives rise to another substantial state interest in regulation, i.e. that of protecting the privacy of potential clients at the receiving end of such solicitation.⁸⁵

The Court also found itself in agreement with the other substantial interest claimed by the Florida Board.⁸⁶ The Board argued that both perceived and actual CPA independence in performing the audit and attest functions is a proper subject of state regulation. Personal, uninvited solicitation is undesirable because it invites ethical lapses and undermines public confidence largely by virtue of its commercial rather than professional character.⁸⁷ Noting its previous approval of state-imposed ethical standards in other licensed professions,⁸⁸ the Court likewise endorsed the legitimacy of Florida's interest in maintaining CPA independence and protecting against conflicts of interest in the accounting profession.⁸⁹

Satisfied that the Florida Board had met the "substantial interest" test, the Court then turned to the second requirement necessary for the ban to meet Constitutional muster, i.e., that it directly and materially advance the state's interest.⁹⁰ Searching for evidence that might support this requirement, the Court came up short. Citing a series of previous cases, the Court explained that Florida must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."⁹¹ In the absence

served. *Id.* at 1798.

83. *Id.* at 1799.

84. *Id.*

85. *Id.* (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978)).

86. *Id.* at 1799-1800.

87. *Id.* at 1799.

88. *Id.* (citing to *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978), *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976) and *Nat'l Soc'y of Professional Engineers v. U.S.*, 435 U.S. 679, 696 (1978)).

89. *Id.* (quoting *U.S. v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984) that CPAs must "maintain total independence" and act with "complete fidelity to the public trust" in performing their auditing function).

90. See *supra* note 82 and accompanying text. In corollary form, the Court stated the "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* at 1800.

91. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) (citing to *Zauder v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-649 (1985); *Bolger v.*

of studies or even anecdotal evidence which demonstrates that a ban on direct, uninvited CPA business solicitation somehow actually engenders fraud, overreaching or compromised independence, the Court felt that the Florida Board had failed to satisfy this requirement.⁹²

Further undermining the Florida Board's contention that the ban was effective to achieve the state's interest were some contradictory conclusions drawn by the AICPA's Special Committee on Solicitation which did not escape the Court's attention.⁹³ Reinforcing the skepticism of the Justices, the AICPA Committee reported that it was "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."⁹⁴ In sum, the report cited a lack of evidence that a CPA who engages in personal solicitation is somehow more inclined to sacrifice his professional standards in doing so than those who routinely solicit by mail or advertising.⁹⁵

On this same point, the Court also surveyed the recent scholarly literature pertaining to the accounting profession for illumination. There, it discovered commentary to the effect that it is the CPA relationship, too dependent upon or involved with a long-standing client, that presents the main threat to professional independence.⁹⁶ The business executive seeking an unjustified audit opinion is "less likely to turn to a stranger who has solicited him than to pressure his existing CPA, with whom he has our ongoing, personal relation and over whom he may also have some financial leverage."⁹⁷ For a lack of sufficient evidence from any source than that the Board's claim that its solicitation ban directly and materially advanced the state's interest in guarding the independence and integrity of its licensed CPAs, the second element of the *Central Hudson* test⁹⁸ was not met. The Court therefore rejected the Board's

Youngs Drug Products Corp., 463 U.S. 60, 71 n.20 (1983); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977)).

92. *Id.* The Court implied that the need to establish these assertions was perhaps of increased importance in light of the fact that 21 states placed no restrictions of any kind on CPA solicitation. *Id.*

93. *Id.* at 1801 (stating that "The Report contradicts rather than strengthens the Board's submissions").

94. AICPA COMMITTEE REPORT, *supra* note 6, at 38.

95. *Edenfield v. Fane*, 113 S. Ct. 1792, 1801 (1993).

96. *Id.* at 1801 (citing PHILLIP G. COTTELL & TERRY M. PERLIN, ACCOUNTING ETHICS 39-40 (1990) and GARY J. PREVITS, THE SCOPE OF CPA SERVICES: A STUDY OF THE DEVELOPMENT OF THE CONCEPT OF INDEPENDENCE AND THE PROFESSION'S ROLE IN SOCIETY 142 (1985)).

97. *Id.* at 1801.

98. *See supra* note 82 and accompanying text.

theory that its ban was a constitutionally permitted restriction on CPA commercial speech.

Two additional theories of lesser force were advanced by the state in attempting to establish the constitutionality of Florida's CPA solicitation ban. Both met unsympathetic receptions. The first was the contention that the Florida ban was not designed to restrict the content of CPA speech, but merely restrict it to a reasonable time, place and manner which had been deemed constitutionally acceptable under an earlier ruling by the Court.⁹⁹ Even though the ban might touch on expression involving a particular subject, i.e., solicitation of business, only its time, place, and manner were of regulatory concern.¹⁰⁰ Passing over this proposition as "open to serious doubt," the *Edenfield* Court noted that even such content-neutral restrictions as the Board claimed its ban to be, must still be demonstrated to further the state's interest in "a direct and effective way."¹⁰¹ Having failed to meet this burden earlier under the main theory of its case, the Court likewise rejected this subsequent contention.

Finally, the Florida Board argued that its broad ban was justified because the situation requires a "prophylactic" rule.¹⁰² Such a rule is necessary, the Board contended, since direct, verbal solicitation cannot be regulated otherwise in light of the fact that "the regulator cannot know what was in fact said, or the tone and manner in which the statement was delivered."¹⁰³ Furthermore, it is in the state's interest to prevent the fraud, overreaching or misrepresentation that can flow from direct solicitation before it occurs.¹⁰⁴ Summarizing this theoretical position, the Board argued the State's "inherent inability to regulate such solicitation and the profound potential for abuse outweigh the CPA's interest in the potential employment that may be gained. . . ."¹⁰⁵

In response, the Court reiterated the longstanding admonition that "broad prophylactic rules in the area of free expression are suspect."¹⁰⁶ It then

99. *Id.* This argument is fully developed as applied to the solicitation ban in question in Petitioners' Brief On The Merits, *supra* note at 33-42, *Fane v. Edenfield*, No. TCA 88-40264-MMP (N.D. Fla. Sept. 13, 1990).

100. *See Id.* at 1801 (citing *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 544-45 (1980)).

101. *Edenfield v. Fane*, 113 S. Ct. 1792, 1801 (1993) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

102. Petitioners' Brief On The Merits, *supra* note 99, at 23-25.

103. *Id.* at 23-24.

104. *Id.* at 24.

105. *Id.* at 25.

106. *Edenfield v. Fane*, 113 S. Ct. 1792, 1803 (1993) (stating "Precision of regulation must

challenged the analogy drawn by the Board between its ban and the state of Ohio's ban which prohibits direct solicitation by its attorneys.¹⁰⁷ The attorney ban was held to be constitutional by the Court in the case of *Ohralik v. Ohio State Bar Association*.¹⁰⁸ Noting that the constitutionality of such bans depends on who the parties are and the circumstances of the solicitation on a case-by-case basis, the Court stressed that its *Ohralik* ruling made clear that broad prophylactic rules were permissible only in situations "inherently conducive to overreaching and other forms of misconduct."¹⁰⁹ Differentiations between *Ohralik* and *Edenfield* were then drawn based on the disparity between the fact situations in the two cases, and the dissimilarity as to the function performed by the two different professions. Because the attorney is "trained in the art of persuasion" and can solicit "unsophisticated, injured, or distressed lay persons"¹¹⁰ the Court argued, the potential is greater for overreaching than in the case of a CPA whose training emphasizes independence and objectivity,¹¹¹ and whose solicitation is directed at sophisticated, experienced business executives.¹¹² Not only did this theory fall short in the eyes of the Court as inapplicable to accountant solicitation, even prophylactic rules must be shown to advance protection against real dangers, a burden the Florida Board was not able to establish to the Court's satisfaction from the beginning.¹¹³

be touchstone in an area so closely touching our most precious freedoms" and citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

107. *Id.* at 1802-03.

108. 436 U.S. 447 (1978).

109. *Edenfield v. Fane*, 113 S. Ct. 1792, 1802 (1993).

110. *Id.* at 1802.

111. *Id.* at 1802-03 (citing H. MAGILL AND GERY PREVITS, PROFESSIONAL RESPONSIBILITIES: AN INTRODUCTION 105-08 (1991)).

112. *Id.* at 1803. "The manner in which a CPA like Fane solicits business is conducive to rational and considered decision-making by the prospective client, in sharp contrast to the 'uninformed acquiescence' to which the accident victims in *Ohralik* were prone". *Id.* For the possible impact of the *Edenfield* ruling on the extent to which states may regulate attorney in-person solicitation, see J. Fisher, *Justices Revisit the Solicitation Question*, NAT'L L.J., Sept. 27, 1993, at 38.

113. *Edenfield v. Fane*, 113 S. Ct. 1792, 1804 (1993) (J. O'Connor dissenting). As the lone dissent in the *Edenfield* decision, Justice O'Connor would have applied the precedent established in *Ohralik* because she could see no "constitutional difference" between an in-person solicitation ban applicable to attorneys, and the same ban applicable to CPAs. *Id.* Critical of the majority's approach as too narrow, Justice O'Connor argued that the States have the authority to limit CPA solicitation even though it is not harmful to the listener, if it is "inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large." *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 676-77 (1985)).

IV. IMPLICATIONS FOR ACCOUNTING PRACTICE

The accounting profession has been no more successful in staving off the inexorable march of commercialization than have the legal, medical, and most other learned professions. As the practice of accounting gradually moved away from its traditional professional moorings toward a more modern business footing, changes ensued. One of the most dramatic changes to emerge during this transition was the transformation of client solicitation from its early status as something akin to unprofessional pandering, to an indispensable marketing tool.

Looking back, it is now apparent that the first public policy breakthrough with direct impact on this transformation was the Supreme Court 1975 *Goldfarb* ruling, which for the first time viewed the learned professions as business enterprises and therefore subject to federal antitrust statutes.¹¹⁴ Pressure from federal regulatory officials shortly thereafter caused the organized accounting profession to essentially drop its longstanding ban on direct uninvited solicitation due to the anticompetitive implications flowing from the rule. In line with the trend which was then becoming clear, the National Association of State Boards of Accountancy soon amended its model code to eliminate a recommended solicitation ban as well. Some states however, have continued to carry such bans into the 1990s.

Once again, recent Supreme Court concerns further altered the public policy status of CPA solicitation in the recent *Edenfield* ruling. Now the object of First Amendment analysis, CPA solicitation for the first time gained High Court recognition as a form of commercial speech. With this new status came significant Constitutional protection against governmental restrictions. Indeed, it is this very protection, the *Edenfield* court instructs us, that the Florida restriction was unable to overcome.

The implications of the High Court's *Edenfield* decision are both legal and practical. From a legal point of view, the vestiges of broad state prohibitions against CPA solicitation so common in the past, can be expected to disappear. Through either legal challenge, nonenforcement, or statutory amendment, the clear intent of the *Edenfield* ruling must eventually be given full force and effect nation-wide.

On the practical side, the ruling reinforces shifting CPA attitudes and removes a broad area of modern accountant promotional activity from governmental regulation. In connection with the work of the AICPA Special Committee on Solicitation, and attitudinal survey of its members was con-

114. See *supra* note 13 and accompanying text.

ducted in 1981.¹¹⁵ Although in the aggregate, a majority of members still favored the traditional ban at that point in time, it was clear that the younger generation of practitioners with fewer years of practice were more permissive in their attitudes toward the appropriateness of CPA direct, uninvited solicitation.¹¹⁶ In part, this is no doubt attributable to the mounting competitive pressures and changing nature of today's accounting practice.

The promotion and marketing of accounting services has become indispensable by virtue of the commercial demands of a successful accounting practice. Personal direct contact is particularly well suited to the promoting of accounting services for a number of important reasons. In the first instance, the market for accounting products itself is relatively small and passive. Furthermore, the complexity of such services places a disproportionate emphasis on the need to explain and clarify the product to potential users. And finally, the force of personal persuasion is often required to attract the new client away from his current provider.¹¹⁷ With its practical importance on the rise, the High Court's *Edenfield* ruling clears the way for direct, uninvited client solicitation to assume its natural place in the competition to provide quality accounting services unrestricted to any significant degree by state regulation.

115. AICPA COMMITTEE REPORT, *supra* note 6, at 48-49. The survey went out to a random sample of 2,519 AICPA members stratified according to types of employment such as national CPA firms, medium-sized or local firms, industry, government, education, and other. *Id.*

116. *Id.* at 49.

117. G.M. Dupuy, *Practitioners Forum: The Direct Solicitation Issue*, J. ACCT., Oct. 1980, at 87.