

# Supreme Court of Florida

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No. 79,371

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CORRECTED OPINION

DEPARTMENT OF PROFESSIONAL  
REGULATION, BOARD OF  
ACCOUNTANCY,  
Appellant/Cross-Appellee,

vs.

RICHARD RAMPELL,  
Appellee/Cross-Appellant.

[July 1, 1993]

GRIMES, J.

We review Department of Professional Regulation, Board of Accountancy v. Rampell, 589 So. 2d 1352 (Fla. 4th DCA 1991), to determine the validity of sections 473.323(1)(1) and 473.317(1), Florida Statutes (1989). We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

Richard Rampell is a certified public accountant (CPA). When he called two businesses to offer his accounting services, a competing CPA firm filed a complaint against him with the Department of Professional Regulation, Board of Accountancy (Department). Rampell then filed a declaratory judgment action, challenging the constitutionality of section 473.323(1)(1), Florida Statutes (1989), which prohibits CPAs from engaging in personal solicitation. He also challenged the constitutionality of section 473.317, Florida Statutes (1989), which bans certified public accountants from making "a competitive bid for a professional [attest] engagement." The statutory reference to the so-called "attest" function refers to the process by which only CPAs are permitted to audit financial statements and express opinions as to those financial statements.

The trial judge declared both statutes unconstitutional. The district court of appeal affirmed this ruling with respect to the competitive bidding statute but upheld the constitutionality of the solicitation statute.

#### I. SOLICITATION

Section 473.323(1)(1) prohibits CPAs from "[e]ngaging in direct, in person, uninvited solicitation of a specific potential client." Pursuant to this statute, the Board promulgated Florida Administrative Code Rule 21A-24.002 (1981) prohibiting:

any direct, in person, uninvited  
solicitation . . . [of] an engagement  
to perform public accounting services:

. . . (c) where the engagement would be for a person or entity not already a client of the [CPA].

Florida Administrative Code Rule 21A-24.002(3) defines a "direct, in person, uninvited solicitation" as "any communication [including uninvited visits, conversations, or telephone calls] which directly or implicitly requests an immediate oral response from the recipient."

While the case has been pending in this Court, the United States Supreme Court issued its opinion in Edenfield v. Fane, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993), which resolves the solicitation issue. The Court held Florida's Board of Accountancy Rule 21A-24.002, prohibiting solicitation, to be unconstitutional as a violation of the right to free speech.

## II. COMPETITIVE BIDDING

Section 473.317(1) provides as follows:

(1) A licensee 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.

A CPA may not quote a fee on any basis, including a minimum fee or an hourly rate. § 413.317(2), Fla. Stat. (1989); Fla. Admin. Code R. 21A-24.003.

The Legislature has provided a statutory procedure by which a client may select a CPA firm. § 473.317(5), Fla. Stat. (1989). Where more than one CPA firm is competing for an attest engagement, the potential client must rank the firms in order of preference before entering into negotiations with any firm. If negotiations with the highest ranked firm fail, "formal termination" is required before the client may enter into negotiations with the next ranked firm. "Formal termination" prohibits the client from entering into a contract with the terminated firm for that engagement. During the selection process, the client receives no price information until negotiations begin with a particular firm. The resulting effect is a complete ban on competitive bidding for private attest engagements.<sup>1</sup>

By prohibiting CPAs from competitive bidding, the Department restricts economic expression constituting commercial speech. Virginia State Bd. of Pharmacy v. Virginia Citizens

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<sup>1</sup> In the final judgment holding section 473.317 unconstitutional, the trial court stated:

Clients want to know what CPAs charge before they are hired. CPAs want to tell them, but the Florida Statutes say its a no-no. Department of Professional Regulations suggests that if price is mentioned or used as a criteria for hiring, the CPA's independence and integrity will be sacrificed. There was no evidence upon which to base such a fear.











