Constitutional Law—Commercial Speech—Face-to-Face Solicitation by Certified Public Accountants (but Not Attorneys?) Is Protected Speech under the First Amendment

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CONSTITUTIONAL LAW—COMMERCIAL SPEECH—FACE-TO-FACE SOLICITATION BY CERTIFIED PUBLIC ACCOUNTANTS (BUT NOT ATTORNEYS?) IS PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

I. INTRODUCTION

*Edenfield v. Fane* marks a recent Supreme Court attempt to define the evolving commercial speech doctrine. In *Edenfield*, the Court found a Florida law prohibiting face-to-face solicitation by certified public accountants violative of the Free Speech Clause of the First Amendment by applying the commercial speech test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*. The Court reasoned that the Florida law failed the third prong of the *Central Hudson* test—the law did not directly advance the state’s asserted interest.

This note will retrace the facts and procedural history of the *Edenfield* decision, briefly describe the development of commercial speech as a constitutional doctrine, and analyze the reasoning of the Supreme Court decision. Particular emphasis will be placed on solicitation and its treatment within the commercial speech doctrine. *Ohralik v. Ohio State Bar Ass’n*, the landmark solicitation case prior to *Edenfield*, will be examined in detail. Finally, the effect of the judicial treatment of solicitation will be examined for its potential impact not only on certified public accountants, but other professions as well, most notably the profession of law.

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1. 113 S. Ct. 1792 (1993).
2. *Id.* at 1798. The four-pronged *Central Hudson* test asks these questions of a regulation restricting commercial speech: (1) is the speech misleading or does it concern unlawful activity; (2) is the asserted governmental interest substantial; (3) does the regulation directly and materially advance the state interest; and (4) is the regulation more extensive than necessary to serve the interest? The first and second prongs must be answered affirmatively before applying prongs three and four. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980).
5. The juxtaposition of the *Edenfield* and *Ohralik* holdings suggests a hypothetical in which an accountant and an attorney have a chance meeting. If, during their encounter, the CPA offers his accounting services to the attorney, the *Edenfield* holding seems to clearly protect this form of speech. If, on the other hand, the attorney makes an unsolicited offer of his legal services to the accountant, neither *Edenfield* nor *Ohralik* appears to protect the attorney’s speech. In fact, such an offer from the attorney appears to fall squarely within the prohibited conduct of Rule 7 of the Rules of Professional Conduct. *Arkansas Rules of Professional*
II. FACTS

Scott Fane is a certified public accountant (CPA) who moved from New Jersey to Florida in 1985.6 He was certified as a CPA in both states.7 While practicing in New Jersey, Fane specialized in tax services to small and medium-sized businesses. He often sought new business by making permitted, unsolicited telephone calls to potential clients.8

After moving to Florida, however, Fane found that such solicitation was prohibited by Florida law.9 The law, a rule promulgated by the Florida Board of Accountancy, specifically forbade both uninvited visits and telephone calls if the recipient was not already a client and had not initiated the contact with the CPA.10 Because he was unable to seek business as he had done in New Jersey, Fane filed suit in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief.11

Fane argued that the Board of Accountancy’s anti-solicitation rule violated the First and Fourteenth Amendments.12 He asserted that his ability to offer services at prices lower than the prevailing market was severely restrained.13 He also claimed that existing relationships between accountants and clients were seldom, if ever,

CONDUCT Rule 7.3(a) (1990). Rule 7.3 of the Arkansas Rules was adopted without revision from the ABA Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (1991) (The Arkansas Rules were taken from the 1983 version of the Model Rules. The Model Rules were amended in 1991.). Arkansas Rule 7.3(a) states in pertinent part, "A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." ARKANSAS RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (1990).

6. 113 S. Ct. at 1796.
7. Fane v. Edenfield, 945 F.2d 1514, 1516 (Eleventh Cir. 1991). The Eleventh Circuit decision, also decided in favor of Fane, was a 2-1 decision. Id. at 1514.
8. 113 S. Ct. at 1796.
9. FLA. ADMIN. CODE ANN. r. 21A-24.002(2)-(3) (1992). The code states in relevant part that a licensed accountant "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited." Id.
10. Id. at r. 21A-24.002(2).
11. 113 S. Ct. at 1797.
12. Id. The Supreme Court opinion discusses only the First Amendment free speech argument; thus, this note will be similarly limited to that issue only. The Board of Accountancy did make an argument based on a time, place, and manner restriction, but the Court summarily dismissed the argument. See infra text accompanying notes 121-22.
13. 113 S. Ct. at 1797 (citing Plaintiff’s Complaint, paragraphs 9-11 (App. 3-4)).
severed, especially if other accountants were denied the opportunity to initiate business discussions.\textsuperscript{14} Thus, under Florida rule, an accountant like Fane would find it particularly difficult to attract new clients or start business in a new area.\textsuperscript{15} It should be noted that Fane never actually violated the Florida anti-solicitation rule; instead, he sued prospectively, alleging that but for the rule he would solicit clients in Florida as he had in New Jersey.\textsuperscript{16}

The Board of Accountancy argued that the rule served the dual purpose of: (1) "protecting consumers from fraud or overreaching" and (2) maintaining the independence of CPAs to perform correctly their audit and attest functions.\textsuperscript{17} The Board hoped to extend the Court's reasoning from the \textit{Ohralik} case where a similar prophylactic rule against attorney solicitation was permitted to stand.\textsuperscript{18}

The district court granted summary judgment in favor of Fane.\textsuperscript{19} The anti-solicitation rule was enjoined to the extent that it applied to CPAs who engage in "in-person, direct, uninvited solicitation in the business context."\textsuperscript{20} A panel of the United States Court of Appeals for the Eleventh Circuit affirmed in a 2-1 decision.\textsuperscript{21} The Supreme Court, in an 8-1 decision, also affirmed.\textsuperscript{22} Writing for the Court, Justice Kennedy distinguished not only the \textit{Ohralik} holding, but also the practice of law.\textsuperscript{23} The Court held that a prophylactic anti-solicitation rule might be appropriate to prevent overreaching by attorneys, but the Florida rule for accountants does not satisfy First Amendment requirements.\textsuperscript{24} In particular, the Court found that

\begin{itemize}
  \item \textsuperscript{14} 113 S. Ct. at 1796 (citing Plaintiff's Affidavit, paragraphs 7 and 11 (App. 11, 15)).
  \item \textsuperscript{15} 113 S. Ct. at 1796.
  \item \textsuperscript{16} \textit{Id.} (citing Plaintiff's Complaint, paragraphs 9-11 (App. 3-4)).
  \item \textsuperscript{17} 113 S. Ct. at 1799. The Court agreed with the Board that consumer protection and CPA independence were indeed "substantial" state interests for purposes of constitutional analysis. \textit{Id.}
  \item \textsuperscript{18} 113 S. Ct. at 1802; see also \textit{Ohralik} v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978). For a more detailed discussion of \textit{Ohralik}, see infra text accompanying notes 82-101.
  \item \textsuperscript{19} 113 S. Ct. at 1797.
  \item \textsuperscript{20} \textit{Id.} (citing the district court case Civ. Case No. 88-40264-MNP (N.D. Fla., Sept. 13, 1990)).
  \item \textsuperscript{21} 945 F.2d 1514 (11th Cir. 1991).
  \item \textsuperscript{22} 113 S. Ct. at 1796. Justice Blackmun filed a concurring opinion while Justice O'Connor filed the lone dissent. \textit{Id.} at 1804.
  \item \textsuperscript{23} \textit{Id.} at 1802-03. Justice Kennedy wrote, "The solicitation here poses none of the same dangers [as in \textit{Ohralik}]. Unlike a lawyer, a CPA is not 'a professional trained in the art of persuasion.'" \textit{Id.} at 1802 (quoting 436 U.S. at 465); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 n.25 (1976) (drawing distinctions between different types of professions and their constitutional treatment).
  \item \textsuperscript{24} 113 S. Ct. at 1802.
\end{itemize}
the Florida Board of Accountancy offered no evidence whatsoever to show that the rule advanced the asserted state interests in any direct and material way.  

III. BACKGROUND

A. A Brief History of Commercial Speech Jurisprudence

Despite the constitutional precept that "Congress shall make no law . . . abridging the freedom of speech . . . ," speech uttered in the commercial context has always drawn somewhat different constitutional treatment than other forms of speech. As a constitutional doctrine, the concept of commercial speech is a relatively recent judicial creation. The doctrine can be traced from *Valentine v. Chrestensen*, a 1942 case regarding handbill distribution in New York City, to its current status embodied in the four-part test from the *Central Hudson* case of 1980. Its development has, at times, been uneven, but most commentators today recognize at least four landmark decisions that mark the development of commercial speech.

Scholars note *Valentine v. Chrestensen* because of what it failed to do rather than what it did for commercial speech. The *Valentine* Court created what has come to be known as the "commercial speech exception" to the First Amendment right of free speech when it refused to enjoin enforcement of a New York City code prohibiting the distribution of handbills that contained both commercial and political information. The Court pointed out

25. *Id.* at 1800. The Court was very specific in pointing out that the Board had failed to come up with any studies, anecdotal evidence, or even conduct of Fane himself that might have supported the suggestion that a prophylactic anti-solicitation rule would deter the unscrupulous CPA. *Id.* at 1800-01; cf. 436 U.S. at 463 (pointing to attorney Ohralik's unsavory conduct as the focus of the case).


28. 316 U.S. 52 (1942); see also ROME & ROBERTS, supra note 27.

29. 447 U.S. 557 (1980); see the *Central Hudson* test appearing supra note 2.


31. 316 U.S. 52 (1942).

32. *Id.* at 54-55; see also ROME & ROBERTS, supra note 27, at 4.
that, although political speech must not be stifled by governmental interference, commercial speech must give way to overriding public needs when legislatures think it appropriate. In other words, commercial speech was excepted from First Amendment safeguards. Valentine gave commercial speech some constitutional recognition, but failed to extend it any constitutional protection.

The Court’s attitude toward commercial speech remained unchanged for the next thirty years. Finally in 1973, in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, the Court showed subtle movement away from the commercial speech exception and toward a more recognizable commercial speech doctrine. Subsequently, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court left little doubt that some commercial speech invoked the protection of the First Amendment. The Supreme Court struck down a Virginia law that prohibited pharmacists from advertising drug prices by noting a poor nexus between the rule and the state’s interest in maintaining the professionalism of licensed pharmacists. In addition, the holding in the Virginia Pharmacy case states that it might be necessary to analyze various professions differently for constitutional purposes. The free speech rights of one who wishes to speak about business must now be weighed against the interests of the state in regulating the speech. Thus, the commercial speech doctrine was born.

The fourth and perhaps most pivotal case in the constitutional development of commercial speech is Central Hudson Gas & Electric Corp. v. Public Service Commission. The four-part test of the

33. 316 U.S. at 54.
34. ROME & ROBERTS, supra note 27; see generally Rowan v. Postmaster, 397 U.S. 728 (1970) (upholding the constitutionality of “stop-mail” procedure); United States v. O’Brien, 391 U.S. 367 (1968) (upholding law forbidding burning of draft cards); Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974) (upholding law prohibiting “for sale” signs because they cause white flight).
36. 413 U.S. at 391. The Court held that although a newspaper’s want ads segregated by gender are commercial speech and thus not entitled to First Amendment protection, in another context such commercial speech might command some protection. Mauro, supra note 30, at 1935.
38. Id. at 770.
39. Id.
40. Id. at 755-56.
41. Id. at 770.
42. See ROME & ROBERTS, supra note 27, at 4; see also Mauro, supra note 30, at 1931-37. If Virginia Pharmacy was not clearly the birth of the commercial speech doctrine, it was at least the unmistakeable death of the commercial speech exception.
43. 447 U.S. 557 (1980).
Central Hudson case has become the centerpiece of commercial speech analysis. The facts of Central Hudson parallel many commercial speech cases. Central Hudson involved a law that proscribed advertising by an electric utility. The New York electric company challenged the complete ban on advertising by a utility and ultimately won. The anti-advertising law was struck down because the state failed to show a clear connection between the law and its asserted interest in maintaining an equitable rate structure for electricity.

Central Hudson's legacy is the four-part test for commercial speech application. The test, followed closely in Edenfield, asks four questions before a regulation prohibiting some form of commercial speech can be upheld: (1) is the speech misleading or does it concern illegal activity; (2) is the state interest substantial; (3) does the regulation directly advance the state interest; and (4) is the regulation more extensive than necessary to serve the state interest?

Justice Powell, the author of the Central Hudson decision, anticipated that some might interpret the test as reflecting a content-based suppression of free speech. To justify the Court's now-settled position concerning First Amendment protection for commercial speech, Powell offered two reasons. First, commercial speakers ought to be uniquely positioned to evaluate the truthfulness and lawfulness of their speech. Second, "commercial speech, the offspring of economic self-interest, is a hardy breed of expression." Powell's justification won acceptance, it seems, because no subsequent opinions have successfully challenged the Central Hudson test as a suppression of free speech based on content.

In the late 1980s, two cases appeared to reverse the trend leading up to Central Hudson and hinted at a movement toward lesser protection for commercial speech. In Posadas de Puerto Rico

44. Id. at 564.
45. Id. at 558-60.
46. Id. at 561.
47. Id. at 569.
48. Id. at 564.
49. Id. at 564 n.6.
50. Id.
51. Id.
Associates v. Tourism Co., the Supreme Court allowed the restriction of casino advertising targeted only to native Puerto Ricans. If the underlying activity (here, gambling) could be proscribed by the legislature, the Court reasoned, so could the advertisement of such activity. Then in 1989, in Board of Trustees of State University v. Fox, when Justice Scalia undertook to modify the fourth prong of the Central Hudson test, the result suggested a further diminution of First Amendment protection for commercial speech. Scalia replaced the Central Hudson least restrictive means test for commercial speech analysis with a reasonable fit test giving more deference to legislative bodies. The Court in Fox remanded on the issue of whether a New York law could constitutionally prevent the sale of Tupperware-type products at parties held in state university dorm rooms. Nevertheless, the message to the lower court was clear; commercial speech need only be defined as speech which “proposes a commercial transaction,” and once the speech is so classified, any law threatening it need only be subjected to a reasonable fit analysis. Scalia hastened to add that this new test was not reduced to the level of rational scrutiny applied in Fourteenth Amendment equal protection analysis. Here, unlike rational scrutiny, the government interest must be substantial, the cost must be carefully calculated, and the government must justify its commercial speech restrictions.

54. Id. at 336.
55. Id. at 345.
57. Id. at 480; see also Paul B. Blechner, First Amendment: Supreme Court Rejection of the Least Restrictive Alternative Test, 1990 Ann. Surv. Am. L. 331 (1991) (comparing the post-Fox state of commercial speech jurisprudence to that even before Virginia Pharmacy). Blechner attributes this First Amendment diminution not only to the Fox holding but also to Ward v. Rock Against Racism, 491 U.S. 781 (1989).
58. 492 U.S. at 480. Scalia wrote, “What our decisions require is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served. . . .’” Id.
59. Id. at 486.
60. Id. at 482.
61. Id. at 480.
62. Id. Traditional equal protection rational scrutiny involves only a reasonable fit between means and ends. The standard is relatively low and is based on “‘practical considerations.’” Railway Express Agency, Inc. v. New York, 336 U.S. 106, 108 (1949).
63. 492 U.S. at 480.
The commercial speech pendulum, however, appears to have swung back again in the early 1990s. In a foreshadowing of *Edenfield* in 1993, *Cincinnati v. Discovery Network*[^64] shifted the balance of commercial speech jurisprudence back toward the First Amendment.[^65] In a narrow holding,[^66] the Court voted 6-3 to strike down a Cincinnati city ordinance that purported to advance the safety and aesthetics of the city streets by prohibiting newsracks that contained commercial handbills.[^67] Writing for the majority, Justice Stevens reasoned that the ordinance lacked the necessary means-to-ends fit required by the fourth prong of the *Central Hudson* test as modified by *Fox*.[^68] A distinction between commercial and non-commercial newsracks might have meaning in another context, the Court said, but as a means of enhancing street safety and beauty, it bore no relation whatsoever.[^69]

### B. Solicitation as a Form of Commercial Speech

Even before the emergence of commercial speech as a constitutionally discrete form of communication, solicitation had never fit easily into broad categories of accepted speech.[^70] Historically within the legal profession, for example, solicitation of any kind was considered inappropriate and distasteful.[^71] In the English Inns of Court, young lawyers generally came from well-to-do families, therefore the practice of law was often not necessary for their livelihoods.[^72] Not coincidentally, lawyers comprised a tight-knit homogeneous group within which competition for clients was neither cultivated nor required.[^73] Since many early American lawyers were

[^64]: 113 S. Ct. 1505 (1993).
[^65]: Id. at 1516-17.
[^66]: Id. at 1516. "Our holding, however, is narrow," wrote Justice Stevens for the Court. "Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the 'fit'. . . ." Id.
[^67]: Id. at 1507. Cincinnati city ordinances sections 714-1-C and 714.23 define handbills and prohibit their distribution on public property. Id. at 1508 nn.2-3.
[^68]: 113 S. Ct. at 1516.
[^69]: Id.
[^70]: HARRY J. HAYNSWORTH, *Marketing and Legal Ethics: The Rules and Risks*, 1990 A.B.A. SEC. L. PRAC. MGMT. 42-45. Although advertising has made great strides towards acceptance, even in the legal community, solicitation has yet to escape its past. Drawing a precise line between permissible solicitation and other means of advertising is the hard question for legislatures, law firms, and individual attorneys. Id.
[^72]: Id. at 395.
[^73]: Id. Hill also characterized the early practice of law as a calling or public service. Id.
trained in the British tradition, if not in Britain, the old-world sense of ethics and its laissez-faire attitude toward business development took hold in America.\textsuperscript{74} The first American legal code of ethics in 1887 specifically forbade solicitation.\textsuperscript{75} The ABA’s Canons of Professional Ethics in 1908 referred to solicitation by circular or other written advertisement or by personal communications as simply “unprofessional.”\textsuperscript{76} Even if solicitation was discouraged in other licensed professions in the past, the trend in today’s courts is to allow this type of commercial speech. Financial advisors,\textsuperscript{77} dentists,\textsuperscript{78} pharmacists,\textsuperscript{79} attorneys,\textsuperscript{80} and now, after Edenfield, accountants\textsuperscript{81} have all received favorable decisions with regard to advertising and, in some cases, direct solicitation.

Nevertheless, the Ohralik\textsuperscript{82} decision, cited repeatedly in Edenfield, stands alone in this line of cases. Ohralik, an attorney in Ohio, was suspended from the Ohio bar as a result of his actions in attempting to represent two car accident victims.\textsuperscript{83} Ohralik visited one victim in the hospital\textsuperscript{84} and visited another at home after her discharge from the hospital.\textsuperscript{85} He recorded representation agreements using a concealed tape recorder\textsuperscript{86} and continued his representation after one

\begin{itemize}
\item \textsuperscript{74} Id. at 395-96. "Let business seek the young attorney." Id. at 397 n.36 (quoting G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS, 55, 131 (Philadelphia, 5th ed. 1897)).
\item \textsuperscript{75} Id. at 397. Alabama was the first state to enact a code of ethics for lawyers.
\item \textsuperscript{76} Id. at 398.
\item \textsuperscript{77} See Lowe v. SEC, 472 U.S. 181 (1985) (holding that even an unregistered financial advisor can publish an investment newsletter not targeted to individual clients).
\item \textsuperscript{78} See Ardt v. Department of Professional Regulation, 607 N.E.2d 1226 (Ill. 1993) (overturning a ban on the term “family dentistry” in dental advertisements).
\item \textsuperscript{79} Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); see supra notes 36-40 and accompanying text.
\item \textsuperscript{80} With the exception of direct, face-to-face solicitation prohibited by Ohralik, a host of recent cases have upheld an attorney’s free speech right to solicit clients in almost every other conceivable way. See Bates v. State Bar, 433 U.S. 350 (1977) (allowing the advertisement of routine legal services); In re R.M.J., 455 U.S. 191 (1982) (allowing advertising of legal services not specifically prohibited by state ethical rules); Zauderer v. Office of Disciplinary Counsel of the Sup. Ct., 471 U.S. 626 (1985) (allowing advertisement including an actual drawing of an IUD); Shapero v. Kentucky Bar Ass’n, 486 U.S. 466 (1988) (allowing targeted direct-mail advertising).
\item \textsuperscript{81} Edenfield v. Fane, 113 S. Ct. 1792 (1993).
\item \textsuperscript{82} 436 U.S. 447 (1978).
\item \textsuperscript{83} Id. at 453-54.
\item \textsuperscript{84} Id. at 450.
\item \textsuperscript{85} Id. at 451.
\item \textsuperscript{86} Id. at 450-51.
\end{itemize}
of the victims discharged him as her attorney.87 Both victims filed complaints,88 and the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio found that Ohralik had violated disciplinary rules 2-103 (A) and 2-104 (A) of the Ohio Code of Professional Responsibility.89 Ohralik's defense included a commercial speech argument that was rejected at each court level, including the U.S. Supreme Court.90 The express purpose of the Ohralik holding, according to the Court, was to answer, at least partially, a question reserved from Bates91: What should be the scope of regulation of in-person solicitation of clients by lawyers?92 Ohralik holds that a state may constitutionally use a prophylactic rule forbidding solicitation and, if needed, "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."93

However, Ohralik left several questions unanswered. The most obvious one was in what "circumstances" and in order to forestall which "dangers" would constitutional lines be drawn to allow the control of solicitation without offending commercial speech protections. Because the overreaching of Ohralik was so extreme,94 the question of Ohralik's limited precedential value was raised by Justice Marshall in his concurring opinion.95 In his concurrence, Justice Marshall compared Ohralik with In re Primus,96 a companion case handed down the same day. Primus involved solicitation by an attorney working for the American Civil Liberties Union who offered free legal services to a Medicaid patient who had been sterilized.97 The Court found Primus's speech was protected by the First Amendment, since it involved both political expression and the absence of remuneration for the attorney.98 Marshall viewed the fact

87. Id. at 452.
88. Id.
89. Id. at 452-53. These Disciplinary Rules of the Code of Professional Responsibility utilize language very similar to Rule 7.3 of the Model Rules of Professional Conduct to forbid attorney solicitation. See supra note 5.
90. 436 U.S. at 452-54. The Court noted, "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." Id. at 459.
91. Id. at 449. See supra text accompanying note 17.
92. 436 U.S. at 448-49.
93. Id. at 449, 467.
94. Id. at 468.
95. Id. at 469-70 (Marshall, J., concurring).
97. Id. at 415.
98. Id. at 431.
situations of these two cases as polar opposites on the constitutional spectrum and attempted to offer guidance for the numerous intermediate fact situations that would fall in between.\textsuperscript{99} The intermediate situation most problematic to Marshall was what he termed "benign" solicitation of clients by attorneys.\textsuperscript{100} Justice Marshall would have limited the state's interests to only the substantive evils inherent in solicitation such as "actual fraud, overreaching, deception, and misrepresentation."\textsuperscript{101} To date, the Court has not refined its stance on attorney solicitation as Marshall suggested in \textit{Ohralik}.

Solicitation by accountants had received little judicial attention before \textit{Edenfield}. The rules of ethics for accountants, like those for attorneys, ban only solicitation that is false, misleading, deceptive or accompanied by coercion, overreaching, or harassing conduct.\textsuperscript{102} Other than Florida's law, implicated in \textit{Edenfield}, only three states at the time of the decision had banned CPA solicitation by statute.\textsuperscript{103} Although Louisiana's law withstood antitrust challenge from the United States in 1987,\textsuperscript{104} \textit{Edenfield} represented the first time such a law was subjected to First Amendment constitutional challenge before the Supreme Court.\textsuperscript{105}

\textsuperscript{99} \textit{Id.} at 471-73 (Justice Marshall, J., concurring). Marshall advocated adherence to the \textit{Bates} standard for such intermediate situations. \textit{Id.} at 472. In \textit{Bates}, truthful print advertising of routine legal services was deemed constitutionally protected commercial speech. \textit{Id.}

\textsuperscript{100} \textit{Id.} at 472 n.3 (Marshall, J., concurring). Marshall explained:

By "benign" commercial solicitation, I mean solicitation by advice and information that is truthful and that is presented in a noncoercive, non-deceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.

\textit{Id.}

\textsuperscript{101} \textit{Id.} at 472-73 (Marshall, J., concurring).

\textsuperscript{102} AICPA \textsc{Code of Professional Conduct} Rule 502 (1988).

\textsuperscript{103} 113 S. Ct. at 1800. According to the Supreme Court opinion, the three states were Louisiana (\textsc{La. Admin. Code} tit. 46, section XIX.507(D)(1)(c) (Supp. 1988)), Minnesota (\textsc{Minn. R.} 110.6100 (1991), and Texas (\textsc{Tex. Admin. Code} tit. 22, section 501.44 (Supp. 1992)). 113 S. Ct. at 1800. Interestingly, the Eleventh Circuit's opinion in \textit{Edenfield}, omits Minnesota and cites Georgia (\textsc{Ga. Code Ann. section} 43-3-35(i) (Michie 1988)) instead. Fane v. Edenfield, 945 F.2d 1514, 1516 n.2 (11th Cir. 1991). The reason for the discrepancy is not clear.


\textsuperscript{105} 113 S. Ct. at 1796.
IV. REASONING OF THE COURT

Throughout the opinion, the Edenfield Court rested its reasoning on a narrowing of the Ohralik holding. Writing for the Court, Justice Kennedy noted at the outset that not all personal solicitation is harmful and devoid of First Amendment protection, and Ohralik should not be read to suggest such a notion. In fact, within a commercial setting, solicitation can be of great value to both buyer and seller, especially when the product being solicited is, like accounting services, something nonstandard. Speech that does no more than propose a commercial transaction is deserving of First Amendment protection, the Court announced.

Nevertheless, the Court added that a state is left with some power to regulate, since the commercial speech is "linked inextricably" to the commercial arrangement it proposes. By comparing the competing interests of society and the state in commercial speech, the Court laid the groundwork in Part II of the opinion for the intermediate scrutiny analysis, as set forth in Central Hudson and modified by Fox, to be applied in Part III. The Court even cited the phrase "tailored in a reasonable manner" to describe the less strict nexus required from Fox.

The Court then proceeded through the four-part Central Hudson test. First, the Court disposed of the first prong of the test by noting that there was little doubt that any solicitation by Fane would have been both truthful and lawful. Second, the Court determined that the state interests seeking protection under the anti-solicitation rule were indeed substantial. Third, the court was required to find
that the rule in question advanced the state interests in a direct and material way. At this third prong of the analysis, the Florida CPA anti-solicitation law ran afoul of the *Central Hudson* test.

The penultimate prong of the test requires that a regulation restricting commercial speech "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose." By quoting this language directly from *Central Hudson*, the Court underscored the precise point at which the Florida law failed. The *Edenfield* Court reiterated that the burden of proving this direct and material relationship between means and ends falls upon the State. According to the Court, not only did Florida fail to show a direct relationship, it failed to show any relationship. The Court criticized the absence of any studies, anecdotal evidence, or even conduct on Fane’s part to support the state’s contention that CPA solicitation creates harm.

The Court further distinguished *Ohralik* by focusing on the professional differences between CPAs and attorneys. The Court held that "*Ohralik* does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional in all circumstances." Quoting *Virginia Pharmacy*, the

interests: (1) protecting consumers from unscrupulous CPAs and (2) maintaining the necessary independence of CPAs to perform the audit and attest functions. The first interest included the lesser interests of protection against fraud as well as protection of privacy. *Id.* at 1799-1800.

116. *Id.* at 1800-01.

117. *Id.* The Court never reached the fourth prong analysis as it did in *Discovery Network*. See *supra* text accompanying notes 64-69. The distinction between the third prong (speech restriction directly and materially advancing the state interest) and the fourth prong (reasonable fit between speech restriction and state interest) is subtle. *See* 113 S. Ct. at 1798. Nevertheless, the Court found a distinction between the Florida solicitation law and the Cincinnati newsrack law as applied to First Amendment analysis. Had the Board of Accountancy been able to prove a direct and material connection to the state interests, it is debatable whether the Florida law would have survived the reasonableness test of the fourth prong.


119. *Id.* at 1800 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983)).

120. *Id.* at 1800-01.

121. *Id.* at 1800. The Court expressed incredulity that such evidence was lacking even though 21 states have no restriction of any kind on CPA solicitation. *Id.*

122. *Id.* at 1801-02.

123. *Id.* at 1802-03.

124. *Id.* at 1802.
Court added, "the distinctions, historical and functional, between professions, may require consideration of quite different factors." The Court also looked to differences between the clients of these professions and specifically noted the danger of "uninformed acquiescence," a term taken from Ohralik. Uninformed acquiescence refers to the relatively high state of vulnerability under which a lawyer, but not a CPA, would likely find a potential client. The Edenfield Court envisioned markedly different circumstances surrounding the solicitation of CPA clients as compared to the solicitation of attorney clients and concluded that the former posed none of the dangers of the latter.

The Court concluded with a primer on prophylactic rules and their correct application in commercial speech cases. Although Ohralik allowed the existence of a prophylactic rule in the case of attorney solicitation, Ohralik did not relieve the state of its obligation to create rules that must have a direct effect on its stated objectives. Broad prophylactic rules applied to commercial speech are suspect, the Court held; consequently, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

In her dissent, Justice O'Connor failed to see the professional distinction between CPAs and lawyers. For purposes of constitutional analysis, she observed that CPAs and lawyers are very similar in the sense that they both solicit from positions of power derived from professional expertise, not from over-developed persuasive skills. O'Connor went on to say that continued commercialization of the learned professions through increased advertising will have detrimental effects on professional culture. Finally, Justice O'Connor stated that the majority never truly applied the Central Hudson.

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125. Id. (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 n.25 (1976)).
126. Id. at 1802-03 (quoting Ohralik v. Ohio State Bar Ass’n., 436 U.S. 447, 465-66 (1978)).
127. Id.
128. Id. at 1802-03. The Court went into great detail to describe the typical sophisticated client of a CPA as compared to the often confused and vulnerable client of a lawyer and concluded that it was not unreasonable for a state to presume that lawyer solicitation will more often than not be injurious to a potential client. Id. (quoting 436 U.S. at 465-66).
129. Id. at 1803.
130. Id.
131. Id. at 1803-04 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
132. Id. at 1805 (O'Connor, J., dissenting).
133. Id. (O'Connor, J., dissenting).
134. Id. at 1804 (O'Connor, J., dissenting).
test to the Florida antisolicitation law. If it had, she argued, it would have discovered that the law could pass constitutional muster and would have upheld the law as originally legislated.

V. SIGNIFICANCE

After Edenfield, it seems clear that in-person solicitation by an accountant is protected under the commercial speech doctrine of the First Amendment. Beyond that, many questions remain. One question still left unanswered after Edenfield and Ohralik is whether lawyer solicitation in a business context, with sophisticated clients, under circumstances not likely to pose the dangers so vividly highlighted in Ohralik, might be constitutionally protected commercial speech. As the hypothetical introducing this note asked, if an accountant unwittingly explains his legal problem to an attorney in casual conversation, and the attorney offers his business card in return, has anything unethical or unlawful taken place? Such a scenario may illustrate the "benign" solicitation that the late Justice Marshall contemplated in his concurring opinion in Ohralik. Marshall's term did not appear in Edenfield, but Edenfield's unquestionably narrow interpretation of the Ohralik holding may have, in effect, created a wider constitutional gulf between the two cases into which benign solicitation by attorneys may now fit. Some observers see Edenfield as opening the door for attorney solicitation. On its face, however, Edenfield does very little to resolve the tension that still exists between Ohralik and Rule 7.3 of the Rules of Professional Conduct.

The significance of Edenfield must also be measured in terms of its stabilizing effect on the Central Hudson test. Edenfield should reassure those who feared that the Central Hudson test had devolved from intermediate to mere rational scrutiny in the wake of the

135. Id. at 1805 (O'Connor, J., dissenting).
136. Id. at 1806 (O'Connor, J., dissenting).
137. Id. at 1796.
138. See supra note 5.
139. 436 U.S. at 472 n.3 (Marshall, J., concurring).
140. See supra note 106.
141. James Podgers, Image Problem, A.B.A. J., Feb. 1994, at 66, 70-72. Florida Bar President Patricia A. Seitz predicts solicitation will now be allowed where the client is not in an "emotional state." Id. at 72. This seems to comport with the basic rule of Ohralik. See supra note 93 and accompanying text.
142. See supra note 5. The tension results from the fact that because Ohralik's facts fit so squarely into Rule 7.3's prohibition, the case is of virtually no help in defining the margins of the Rule. See supra notes 82-87 and accompanying text.
Posadas and Fox holdings. Although Fox dilates the fourth prong somewhat, the Central Hudson test has survived essentially intact. In addition, it is now clear that parties seeking to restrict commercial speech bear the burden of proving the necessity of their restriction. Interestingly, the opinions in both Edenfield and Discovery Network, Inc. imply that the laws at issue in each case were not unconstitutional per se; rather, the governmental entities seeking the speech restriction simply did not make their case. Had the state of Florida and the city of Cincinnati been able to gather more evidence to connect their laws to their substantial interests, the outcomes of both cases might have been different. Viewed in this light, Edenfield and Discovery Network, Inc. may tell us more about poor lawyering than they do about the limits of the commercial speech doctrine.

Finally, Edenfield is significant because it raises a fundamental question about how we, as a society, view certain professions and their function within the marketplace. At the simplest level, the Edenfield decision holds that accountants may solicit because they are not lawyers. The Ohralik decision holds that lawyers may not solicit precisely because they are lawyers. Thus, the Court in both cases adopted a functional approach to resolve the commercial speech question at issue; that is, the Court looked to the professional distinctions between accountants, attorneys, and other vocations as


144. See supra notes 56-63 and accompanying text.


146. Id. at 1800. The Court said, "The Board has not demonstrated that . . . the ban on CPA solicitation advances its asserted interests in any direct and material way. It presents no studies . . . [t]he record does not disclose any anecdotal evidence . . . [n]ot even Fane's own conduct suggests that the Board's concerns are justified."

Id.

147. Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516 (1983). The Court held, "Our holding, however, is narrow . . . we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing."

Id.

148. 113 S. Ct. at 1802. Said the Edenfield Court, "The solicitation here poses none of the same dangers. Unlike a lawyer, a CPA is not a professional trained in the art of persuasion." Id. (emphasis added).

149. 436 U.S. at 464-65. The Ohralik Court stressed, "It hardly need be said that 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." Id.
a basis for its holding. In contrast, most commercial speech cases leading up to *Edenfield* focused on the intended information to be transferred by the questionable speech, not the speaker. Justice Marshall's concurrence in *Ohralik* is a good example of this informational approach. In a sense, the functional approach reflects our traditional view of licensed professions as a calling rather than a job, and concomitant with the calling a higher standard of commercial ethics is assumed. *Edenfield*, seen through this functional model, represents at one level a regression to the pre-*Bates* attitude toward commercial speech, where lawyers are a unique profession commanding discrete judicial treatment. At another level, *Edenfield* can be interpreted as a harbinger of the end of such discrete treatment, at least as it relates to solicitation. The *Edenfield* majority devoted much of its attention to limiting *Ohralik* to its facts. This treatment of the *Ohralik* holding may well have narrowed it out of significance for future commercial speech cases, especially those relating to attorneys. This application of the functional model would still impose somewhat different judicial treatment to lawyers as a professional group, but it would recognize the *Ohralik* holding as an anomaly due to its extreme fact situation.

Legal advertising, including solicitation and other marketing forms, has generated renewed discussion within the organized bar. A recent ABA Journal-Gallup Poll revealed that 87% of attorneys said advertising had a negative effect on the image of their profession. The same poll indicated that 61% worked in firms that advertise, and 79% of the partners polled planned to continue advertising. The notion that lawyers, accountants, or any of the

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151. See supra notes 96-101 and accompanying text. Marshall argued: "Like rules against advertising, rules against solicitation substantially impede the flow of important information to consumers . . . . The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial and they are entitled to as much protection as the interests we found to be protected in *Bates*.”


152. See Hill, supra note 71.


154. 113 S. Ct. at 1796-1804. The *Edenfield* Court cited *Ohralik* no less than 25 times, most of which were for purposes of contrast. *Id.*

155. See supra notes 88-103 and accompanying text.

156. Podgers, supra note 141, at 72.

157. Podgers, supra note 141, at 73.
licensed professions are in some way "above trade" appears to be a thing of the past.\textsuperscript{158} Economic forces will likely force many professions into more aggressive means to transmit information about their services.\textsuperscript{159} If the Court follows the societal trend, \textit{Edenfield} may mark the beginning of the end for prohibitions on business solicitation.

\textit{L. Kyle Heffley}

\textsuperscript{158} Podgers, \textit{supra} note 141, at 70.
\textsuperscript{159} Podgers, \textit{supra} note 141, at 70.