

CONSTITUTIONAL PROTECTIONS  
FOR  
DOOR-TO-DOOR  
SOLICITATION  
IN THE UNITED STATES

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To Whom It May Concern:

As you probably know, door-to-door solicitation and sales have long been a part of our country's commerce. The companies that commissioned this report have built reputations for honesty, integrity and customer service. The faithful commitment to these principles has resulted in successful organizations that travel around the United States selling products door-to-door.

One consequence of traveling around the country is encountering varied rules and regulations, often in every municipality in which these solicitors travel. Although municipalities may regulate door-to-door solicitations, such rights must be exercised reasonably and without impeding commercial speech nor destroying these companies's opportunity to do business. While it is all of the companies' practice to comply with any and all legal restrictions on their trade, it is often impracticable if not impossible to comply with ordinances that violate the companies' rights protected by the First Amendment, Commerce Clause, Fourteenth Amendment (Due Process and Equal Protections) and Fifth Amendment (Due Process) provisions of state and federal constitutions.

Enclosed is a summary of the law and most relevant court decisions regarding door-to-door solicitations. We are hopeful this information will assist you in reviewing the appropriateness of your ordinance governing their trade.

## I.

### INTRODUCTION

While the current door-to-door sales industry is mindful of concerns related to door-to-door solicitation, Constitutional protections of this trade cannot be ignored.

Prior to 1933, few municipalities restricted door-to-door solicitors. In 1933, however, the U.S. Supreme Court of Appeals for the Tenth Circuit upheld the validity of an ordinance declaring “the Practice of giving in and upon private residences by solicitors for the purpose of soliciting to be a Nuisance and punishable as a misdemeanor.” (*Town of Green River v. Fuller Brush Co.* (1933) 65 F.2d 112) in response, many municipalities around the country adopted ordinances similar to Green River’s to regulate solicitors within their municipalities.

Many of these ordinances were grounded on a distinction between commercial and non-commercial speech, based on court rulings that non-commercial solicitation generally involved the promotion of religious or political ideas and was therefore protected by the First Amendment to the U.S. Constitution. In contrast, courts historically had refused to extend First Amendment protection to commercial speech since it was viewed as merely promoting a business objective. (*Breard v. City of Alexandria* (1925) 341 U.S. 622 (71 S.Ct. 920), *Valentine v. Chrestenen* (1942) 316 U.S. 52 (62 S.Ct. 920).)

In recent years, however, the U.S. Supreme Court has extended First Amendment protection to commercial speech. For example, in 1976, the U.S. Supreme Court held that even speech that “does no more than propose a commercial transaction” is protected by the First Amendment. (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748 (96 S.Ct. 1817).)

Since 1976, the U.S. Supreme Court and all other courts in the country have protected commercial speech. For example, the Seventh Circuit of Appeals invalidated a City of Kenosha

ordinance, which prohibited door-to-door canvassing after 8:00 p.m. (Wisconsin Action Coalition v. City of Kenosha (1985) 767 F.2d 1248.) Although the court said that protecting municipal residents' Privacy and crime prevention are legitimate and important government interests, the court held that the city ordinance violated the First Amendment. The court held that the city failed to show that solicitation constituted a threat to privacy not posed by other permitted door-to-door activities, that any less restrictive means would not adequately serve the legitimate purpose of protecting residents' privacy, or that hours in which solicitations was permitted were ample and adequate alternatives for solicitations activities. In part, the court reasoned that persons who wish to maintain their privacy from door-to-door canvassers may do so by less restrictive means, such as posting "no solicitation" signs and enforcing trespass laws.

Using this same logic, the court in City of Watseka v. Illinois Public Action Council (1987) 479 U.S. 1048 invalidated an ordinance that limited door-to-door soliciting to the hours between 9:00 a.m. and 5:00 p.m. The court concluded that the city failed to show that the time period limitation was narrowly tailored to achieve either the city's crime prevention objective or its interest in protecting the privacy of its citizens.

More recently, on November 3, 2000, a U.S. District Court Judge issued an order enjoining the City of Medina in the State of Washington from enforcing its regulation requiring all solicitors and peddlers to register with the local police department and submit to a criminal records check. In the words of the court, "the relevant portions of the Medina Municipal Code constitute an improper prior restraint on speech protected by the First Amendment, and are impermissibly overboard and vague, chilling constitutionally protected speech." (Peace Action Coalition v. City of Medina West. Dist. Washington, Case No. C00-1811C.)

Although municipalities may regulate door-to-door solicitations, it is now clear that these Ordinances must meet certain criteria in order to be valid. In addition to complying with the

First Amendment protections of commerce speech, ordinances must also comply with the interstate commerce provisions of Article I, Section 8 of the U.S. Constitution and both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This document examines the most relevant court decisions regarding solicitation to allow officials to reexamine their ordinances in order to bring them into compliance with the U.S. Constitution.

## II.

### **DETERMINING THE CONSTITUTIONALITY OF THE REGULATION OF DOOR-TO-DOOR SALES PROFESSIONALS**

#### A. First Amendment

In Central Hudson Gas & Electric Corp v. Public Service Comm. (1980) 447 U.S. 557, (100 S.Ct. 2343)

the Supreme Court established a four-prong test for determining the constitutionality of a regulation imposed on commercial speech:

1. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.
  2. Next, we ask whether the assertive governmental interest is substantial. If both inquiries positive answers,
  3. We must determine whether the regulation directly advances the governmental interest asserted, and
  4. Whether or not it is more extensive than is necessary to serve that interest.
- (Id. 100 S.Ct. at 2351).

The Central Hudson test has been applied to invalidate impermissible restrictions on door-to-door sales (Project 80's, Inc. v. City of Pocatello (9<sup>th</sup> Cir. 1991) 942 F. 2d 635).

1. **Door-to-Door Sales of Goods Is Protected Speech**

As discussed above, commercial speech is unprotected by the First Amendment only if it is Misleading or proposes an illegal transaction. (Edenfield v. Fane: Project 80's Inc. v. Cit of Pocatello (1988) 876 F.2d 711.) Therefore, door-to-door sales constitute protected speech.

2. **It is the Government's Burden to Justify the Regulation**

**Of Commercial Speech With a Substantial Interest**

According to Central Hudson, the government has a duty of proving that the restriction imposed Upon commercial speech serves a substantial government interest (Central Hudson 100 S.Ct. at 2351.)

**3.The Ordinance Must Directly Advance The Claimed Interest**

Many ordinances fail this prong of the Central Hudson test dues to lack of evidence that the Ordinance directly advances the claimed interest. In particular, the Ninth Circuit has held that Restrictions that limit commercial door-to-door salespeople without regulation non-commercial Solicitors are particularly suspect. (Project 80's Inc. v. City of Pocatello). The court went on to criticize the ordinances of Pocatello and Idaho Falls, Idaho for seeking to make the choice for the resident.

The failure of an ordinance to directly advance a legitimate governmental interest was the basis Upon which the District Court Judge for the Central District of California struck down the County of Santa Barbara's Solicitors and Peddlers Ordinance.

The Court held that the ordinance in question did not directly advance the claimed governmental interest of protecting the privacy and safety of residents. The court held the evidence produced by the County of Santa Barbara insufficient because it was "Less than a detailed study in support of its restriction on commercial speech.... County cannot rely on judicial consensus in support of the Ordinance. Thus, it must provide some evidence. How much? The court finds that the burden upon the County is fairly heavy."

#### **4. The Ordinance Must be Narrowly-Tailored and**

#### **The Least Restrictive Alternative to Serve the Interests**

Even if the ordinance materially advances a legitimate state interest, the ordinance may fail under the fourth prong of the Central Hudson test. As mentioned above, this prong requires that the ordinance not be “more extensive than necessary” to serve the government’s claimed interest. (Central Hudson 100 S.Ct. at 2351.) This “least restrictive alternative” requirement has been used to strike down many ordinances. For example, in Project 80’s the court noted that residents who want privacy can post a notice to that effect and the requiring solicitors to register with the city can prevent crime. The court concluded that less restrictive means were clearly available to the cities and both cities’ ordinances had swept too broadly in attempting to protect privacy for either one to satisfy the fourth requirement under Central Hudson.

Furthermore, the Supreme Court has expanded this fourth prong of the Central Hudson test by requiring that there be “fit” between the ends of the regulation and the means chosen to accomplish these ends. (Board of Trustees of State University of New York v. Fox (1989) 492 U.S. 469, (109 S.Ct. 3018).) As the court explained in Fox the fit must be more than is required under normal judicial scrutiny. According to the court:

“We reject the contention that the test we have described is overly permissive. It is far different, of course, from the rational basis test .... there it suffices if the law could be thought to further a legitimate government goal, without reference to whether it does so at inordinate cost. Here we require the governmental goal to be substantial, and the cost to be carefully calculated. Moreover, since the state bears the burden of justifying its restrictions, ... it must

affirmatively establish the reasonable fit we require.”

(Id., 492 U.S. at 480.)

This language requires that the scope of the regulation be proportionate to the interest served and “narrowly tailored to achieve the desired objective.” (Board of Trustees v. Fox 109 S.Ct. at 3035.)

Under this test, ordinances that involve lengthy waiting periods are probably an unconstitutional regulation of commercial speech. This is especially true when the length of the waiting period is unclear and often extends significantly.

#### B. Interstate Commerce

The U.S. Supreme Court has declared that state and local laws are unconstitutional if they place an undue burden on interstate commerce. The key question in this analysis is whether the state or local law treats in-staters and out-of-staters alike.

In general, the court uses a balancing test in such cases and invalidates a state or local law under the Commerce Clause if its burden on interstate commerce exceeds its benefits.

(Pike v. Bruce Church, Inc. (1970) 397 U.S. 137, 142 (90 S.Ct. 844).) Specifically, the court had indicated that such laws will be allowed only if they are necessary to achieve an important government purpose.

(Fort Gratiot Sanitary Landfill Inc. v. Michigan Dept. of Natural Resources (1992) 504 U.S. 353, 359, (112 S. Ct. 2019). Since Gibbons v. Ogden, the court has broadly defined the scope of commerce among the states for the purpose of Commerce Clause analysis. For example, in City of Philadelphia v. New Jersey (1978) 437 U.S. 617, 662 (98 S.Ct. 2531), the court expansively declared that, “all objectives of interstate commerce merit commerce clause protection.”

The balancing approach is not the same in all Commerce Clause cases. Instead, it varies depending on whether the state or local law discriminates against out-of-staters or treats in-staters and out-of-staters alike. If the court concludes that a state is discriminating against out-of-staters then there is a strong presumption against the law and it will be upheld only if it is necessary to

achieve an important purpose. In contrast, if the court concluded that the law is nondiscriminatory, then the presumption is in favor of upholding the law and it will be invalidated only if it shows that the laws burdens on interstate commerce outweigh its benefits.

First, state or local laws that expressly draw a distinction between in-staters and out-of-staters are likely to be held to be discriminatory. For example, in Hyde v. Reynoldsville Casket Co. (1995) 115 S.Ct. 1475, the court declared unconstitutional a state law that allowed a larger tolling period for the Statute of limitations for suits against out-of-staters than for suits against in-staters.

Second, facially neutral laws that in their terms treat in-staters and out-of-staters alike but have the purpose and/or effect of discriminating against out-of-staters may also be held to be discriminatory. (C & A Carbone, Inc. v. Town of Clarkstown, N.Y. (1994) 114 S.Ct. 1677.) In many cases, the court has found that proof of a discriminatory impact against out-of-staters is sufficient for a law to be regarded as discriminatory. (Hunt v. Washington State Apple Advertising Com'n (1977) 432 U.S. 333 (97 S.Ct. 2434).) In this case, a North Carolina law required that all closed containers of apples sold or shipped in to the state bear, "no grade other than the applicable U.S. grade or Standard." Although the law was facially neutral in that all apples sold in the state, whether produced in-state or out-state, had to comply with this rule, the court found that the law should be treated as discriminatory because its effect on the sale of Washington apples. (Washington had a system of grading apples that was different and more stringent than the federal standard.)

Third, a law is likely to be held to discriminate if it imposes costs on out-of-staters that in-staters would not have to bear. In Hunt the court emphasized the costs imposed on Washington apple producers compared to the North Carolina apple industry.

Lastly, the court is more likely to find discrimination if it believes that a law is motivated by a protectionist purpose like helping in-staters at the expense of out-of-staters.

(H.P. Hood and Sons v. DuMond (1949) 336 U.S. 525, 533, 538 (69 S.Ct. 657).)

In sum, a law will be found discriminatory either if it facially discriminates against out-staters Or if it is facially neutral and is deemed to have a discriminatory purpose and/or impact.

C. **Due Process**

Procedural due process refers to the procedures that the government must follow before It deprives a person of life, liberty, or property. Substantive due process asks whether the government Has an adequate reason for taking away a person’s life, liberty, or property. Restrictions on door-to-door sales people will be held unconstitutional if they deprive the merchants of the liberty and/or property without due process.

The Supreme Court has held that an intentional or reckless government action is sufficient to Prove deprivation. (Daniels v. Williams (1986) 474 U.S. 327 (106 S.Ct. 677), Davidson v. Cannon (1986) 474 U.S. 344 (106 S.Ct. 668).) Therefore, any regulation depriving door-to-door merchants of property or liberty must fulfill the due process requirements of the 14<sup>th</sup> Amendment.

The Supreme Court has defined property interests to include all those things to which people have a right. (Albright v. Oliver (1994) 114 S.Ct. 807, 818-819.) Given that door-to-door solicitation is a right protected by the First Amendment, solicitors are deprived of property when their right to solicit is denied.

Furthermore, the U.S. Supreme Court defined “liberty” in Board of Regents of State College v. Roth 408 U.S. at 572 (92 S.Ct. 2701) , as follows:

While this court has not attempted to define with  
Exactness the liberty .... guaranteed (by the Fifth  
And Fourteenth Amendment), the term denotes not  
merely freedom from bodily constraint but also the  
right of the individual to contract, to engage in any  
of the common occupations of life, to acquire useful

knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In the constitution for a free people, there can be not doubt that the meaning of “liberty” must be broad indeed” (Id. at 572)

This language included such liberties as the ability of door-to-door solicitors to engage in such common occupations of life as employment and free market sales.

In determining whether a city or state has met constitutional due process requirements in depriving door-to-door solicitors of property and liberty, courts must follow the balancing test articulated by the U.S. Supreme Court. As the Court stated in Mathews v. Eldridge (1976) 424 U.S. 319, 334 (96 S.Ct. 893), the three factors that should be balanced are:

First, the private interest that will be affected by the official action, second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedure safeguards; and finally, the government’s interest, and including the function involved and the fiscal and administrative burdens that the additional or substitute procedure requirements would entail. (Id., at 335.)

Given that door-to-door solicitors have a strong private interest in soliciting and that the risk of erroneous deprivation of such an interest is a violation of a First Amendment right, courts are likely to require significant procedural safeguards.

In sum, restrictions on door-to-door sales people will be held unconstitutional if they deprive the merchants of the liberty and/or property without due process. In making this determination, courts will follow the three part balancing test articulated by the Supreme Court in Mathews.

#### D. **Equal Protection**

According to the Fourteenth Amendment, “no state shall ..... deny to any person within its jurisdiction the equal protection of the laws.” Any laws or government actions challenged based on equal protection hinge on whether the government can identify a sufficiently objective for its discrimination. Under rational basis review, a law will only be upheld if it is rationally related to legitimate government purpose. (Pennell v. City of San Jose (1988) 485 U.S. 1, 14 (108 S.Ct. 849). The Supreme Court declared that under rational basis review a court must decide, “whether the classification is drawn in a statute are reasonable in light of its purpose.” (McLaughlin v. Florida (1964) 379U.S. 184, 191, (85 S.Ct. 283).

For example, ordinances held to be arbitrary and unreasonably are unconstitutional. In City of Cleburne, Texas v. Cleburne Living Center, Inc. (1985) 473 U.S. 432 (105 S.Ct. 3249), the Supreme Court declared unconstitutional a city ordinance that required a special permit for the operation of a group home for the mentally disabled. Despite the fact that the city offered a number of justifications for the law, the court concluded either that they were not legitimate purposes or that the ordinance was not a reasonable way of accomplishing the goals. The court held that these justifications were based on prejudices against the mentally disabled and that indulging such private biases is not legitimate government purpose. (Id. at 448-449).

Following this logic, ordinances based on prejudices against door-to-door solicitors probably

have no legitimate government purpose. Therefore, such ordinances are probably unconstitutional.

### III.

#### CONSTITUTIONAL LIMITATIONS ON ORDINANCES GOVERNING DOOR-TO-DOOR SOLICITATION

As mentioned above, courts recognize substantial constitutional protection for door-to-door solicitors.

(Martin v. City of Struthers (1943) 319 U.S. 141,)

Specifically, the First Amendment requires that time, place and manner restrictions be narrowly tailored to serve a significant government interest and provide alternative channels of communication.

(Perry Education Association v. Perry Local Educators' Association (1983) 460 U.S. 37 (103 S.Ct. 948).

In order to be valid, a solicitation ordinance must limit itself to placing reasonable time, place and manner restrictions on solicitors. These restrictions must:

1. Be content – neutral;
2. Serve a legitimate governmental objective;
3. Leave open ample alternative channels of communication; and
4. Be narrowly tailored to serve the governmental objective.

(City of Watseka v. Illinois Public Action Council (1987) 796 F. 2d 1547, 1552, aff'd., (1987) 107 S.Ct.

919.) In addition, ordinances must not place an undue burden on interstate commerce nor deprive Solicitors of constitutionally mandated due process or equal protection.

#### **A. Restrictions on Time**

Courts often hold restrictions on the time when solicitors can engage in their trade invalid. As mentioned above, the Seventh Circuit invalidated a city ordinance prohibiting charitable, religious and political solicitation between 8:00 p.m. and 8:00 a.m. in Wisconsin Action Coalition v. City of Kenosha (1987) 479 U.S. 1048.) Although the court said that protecting the privacy of municipal residents and crime prevention are legitimate and important interests, the court held that the city

ordinance violated the First Amendment.

Also, in Watseka v. Illinois, supra 479 U.S. 1048, the U.S. Supreme Court affirmed a Seventh Circuit ruling which held that a city ordinance limiting door-to-door soliciting to the hours between 9:00 a.m. and 5:00 p.m., Monday through Saturday, violated the First Amendment. The Seventh Circuit held that the ordinance was not narrowly tailored to achieve a legitimate municipal interest in preventing fraud and protecting the privacy of residents. The court held that the municipality could prevent fraud by licensing solicitors and prevent privacy by having homeowners post signs outside their homes stating that they did not wish to be disturbed. Also, the court ruled that the ban on solicitation during the hours from 5:00 p.m. to 9:00 p.m., which was the time period requested by the solicitors, was not sufficiently connected to the city's interest in preventing crime.

The U.S. Supreme Court found that by being more restrictive than the legitimate privacy and Quiet enjoyment concerns of its citizens demanded, the municipality had suppressed the protected speech of the solicitors. Further, the court concluded that the city had subordinated the First Amendments rights of those residents who would be willing recipients of the solicitors' message during evening hours to the nuisance concerns of residents who did not wish to be disturbed during the same hours. In voiding the ordinance, the court ruled that "(even Girl Scouts will have a difficult time selling their cookies by 5:00 p.m.". The court also reasoned that the city failed to offer evidence that its other legitimate objective, crime prevention, could not have been satisfactorily served by enforcing laws against trespass, fraud, burglary, etc., or by merely enforcing the registration for solicitors that the city had already adopted.

Ordinances restricting the time solicitors can be active must be supported by compelling evidence that the time restrictions are needed to prevent criminal activity by persons claiming to be solicitors. Officials must be careful to make sure that the time restrictions they place on solicitors are valid under circumstances. Courts have held that ordinances that fail to permit some evening

activity by solicitors are not sufficient tailored to serve municipal interests. (Association of Community Organizations for Reform Now v. City of Frontenac (1983) 714 F. 2d 813.)

#### **B. Restrictions on Place**

In addition to time restrictions, cities may also, within reason, use their police power to decide where solicitors and peddlers may carry out their sales activities. Such regulations receive a higher degree of judicial scrutiny if they seek to restrict solicitation or peddling in a public forum than if they attempt to do so in a private forum. Thus, a question arises as to which areas are generally considered public forums and which are not. Some courts that have ruled in cases involving canvassers and solicitors have found public forums to include airports (Fernandes v. Limmer (1981) 663 F. 2d. 619), and the sidewalks or parking lots or hospitals, (Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital Dist. (1982) 670 F. 2d. 629).

Therefore, government regulation of solicitation on sidewalks, in front of business, in railroad Stations, in airports and in other public places, must not unreasonably infringe on First Amendment rights. (Heffron v. International Society for Krishna Consciousness, Inc (1981) 452 U.S. 640; (International Society for Krishna Consciousness of Western Pa. v. Griffin (1977) 437 F. Supp. 666; Slater v. City El Paso Texas (Tex. Civ App. 1951) 244 S.W. 2d 927; Wade v. City and County of San Francisco (1947) 186 P. 2d 181.) Moreover, a blanket restriction on sales to people in their homes has likewise been struck down as unreasonable infringements on First Amendment rights. (Bantam Books, Inc. v. Sullivan (1963) 83 S. Ct. 631.)

#### **C. Restrictions on the Manner of Soliciting and Licensing**

Municipalities are also limited as to the restrictions that they may impose on the manner in which soliciting activities are conducted. Specifically, the First Amendment mandates that ordinances requiring persons to obtain a permit or license before engaging in business activities within local jurisdiction be reasonable. (Borough of Collingswood v. Ringgold (1975) 331 A. 2d 262, cert, denies,

426 U.S. 901 (1976) (96 S.Ct. 22201.)

Clearly, a solicitation ordinance drafted so as to allow a city to use its licensing power to prohibit certain solicitors based upon the content of their message would violate the First Amendment. (Carey v. Brown (1980) 447 U.S. 455 (100 S.Ct. 2286.) Therefore, a city must treat all persons going door-to-door alike and in a non discriminatory fashion. (International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, Texas (1982) 689 F. 2d. 541.)

Furthermore, ordinances cannot vest overly broad discretion in licensing officials to issue Or deny a solicitation permit. (Schneider v. State of New Jersey, Town of Irvington (1939) 308 U.S. 147 (60 S.Ct. 146.) An administrative official may not be empowered with unbridled discretion to determine, for example, the validity of a solicitor's message and use that determination as a basis for exercising prior restraint on the solicitation by arbitrarily denying a permit. (Largent v. Texas (1943) 318U.S. 418 (63 S.Ct. 667); Cantwell v. State of Connecticut (1940) 310 U.S. 296 (60 S.Ct. 900).)

The issue of unbridled discretion is not the only relevant consideration for the drafter in putting together the licensing provisions of a solicitation ordinance. Other significant items to consider are:

1. License Fees

License fees cannot be excessive. Fees charged cannot be prohibitive or confiscatory. Otherwise, fees place an undue burden on interstate commerce and deprive solicitors of their First Amendment right to solicit without due process. (Moyany v. Borough of Paramus (1959) 154 A. 2d 9; Shapiro v. City of Newark (1957) 130 A. 2d 907.) Lastly, any fees imposed on solicitors Based on the content of their message may be held unconstitutional under the Equal Protection Clause of the 14<sup>th</sup> Amendment.

## **2. Use of Funds**

Courts generally disfavor ordinances that specify the use of solicited funds as a condition for granting a permit. For example, in Village of Schaumburg v. Citizens for a Better Environment (1980) 444 U.S. 620 (100 S.Ct. 826), the Supreme Court struck down an ordinance requiring that at least 75 percent of the receipts from charitable solicitations be used only for charitable purposes as unconstitutionally restrictive under the First Amendment. The Court held that less restrictive alternatives could be used to achieve the government's legitimate interest in preventing fraud and deceptive practices.

## **3. Bond Requirements**

Like any other provision in a solicitation ordinance, bonding requirements must be reasonable and comply with state law. (Citizens for a Better Environment v. City of Chicago Heights (1979) 480 F. Supp. 188; Holy Spirit Association for the Unification of World Christianity v. Hodge (1984) 582 F. Supp. 592.) In a New Jersey case, for example, an ordinance requiring a surety bond in the amount of \$1000 was found to bear no reasonable relation to the amount of business done and thus unconstitutional under the First Amendment. (Moyant v. Borough supra. 154 A. 2d. 9.)

## **4. Discriminatory Exemptions**

Many ordinances contain provisions exempting certain types of solicitors from licensing requirements altogether. While some earlier rulings upheld these exemptions, later decisions have held most of these exemption clauses to be unconstitutional. For example, the Washington State Supreme Court struck down a licensing exemption for honorably discharged war veterans as a violation of the Equal Protection Clause of the Fourteenth Amendment in Larson v. City of Shelton (1950) 224 P. 2d 1067). That court also viewed the exemption as a grant of special privileges and immunities. Every drafter of a solicitation ordinance should consider the possibility that selecting particular types of solicitors for exemptions may subject the municipality to Equal Protection,

First Amendment, and other types of constitutional challenges.

#### IV.

### **CONSEQUENCES MUNICIPALITIES FACE WHEN THEIR ORDINANCES ARE DECLARED UNCONSTITUTIONAL**

Given their interest in protecting commercial speech, courts often declare municipal Ordinances regulating door-to-door sales unconstitutional and impose significant cost on the Municipalities.

#### **A. Temporary Restraining Orders and Preliminary Injunctions**

First, courts often issue a temporary restraining order to free those practicing the door-to-door sales trade from the regulations of an unconstitutional ordinance. Courts so hold because a temporary restraining order will lie where the constitutionality of a statute is challenged. (Pictorial Review Co. v. City of Alexandria (1930) 46 F. 2d. 337, 338.) (Lisner v. New York Telephone Co. (1973) 358 F. Supp. 359, 369; Fortune Society v. McGinnis (1970) 319 F. Supp. 901,903.) Furthermore, when a violation of a constitutionally protected right is shown, most courts hold no further showing of irreparable injury is required. (Associated General Contractors of California v. Coalition for Economic Equity, at 1412.) Notably, the presumption of irreparable injury is particularly strong in cases involving Infringement of the First Amendment rights. (Elrod v. Burns (1976) 427 U.S. 347, 373; 96 S.Ct. 2673, 2673; Topanga Press, Inc. v. City of Los Angeles (1994) 114 S.Ct. 1537, 1528-1529.) This is so because “the loss of First Amendment freedom, for even minimal periods of time, unquestionably constitutes irreparable injury.” (Elrod v. Burns, supra, at 2689-2690; Topanga Press v. City of Los Angeles, supra, at 1528-1529.)

After applying the constitutional tests, courts often declare ordinances permanently invalid by issuing a preliminary injunction. In addition to voiding the ordinance’s limitation on door-to-door solicitors, such a declaration will probably result in the municipality having to pay the party who

challenged the regulation for their monetary losses and attorney's fees.

**B. Damages and Attorney's Fees**

Once an ordinance is held unconstitutional under the four prong test of Central Hudson Gas v. Public Service Com. *supra*, 447 U.S. 557, the issue of damages and attorney's fees remain. Should a court find that the government entity deprived the plaintiff of its first amendment right to free speech, and in doing so, was acting under color of state law, plaintiff is entitled to its reasonable attorney's fees pursuant to 42 U.S. C. 1988. Additionally, as a matter of right, plaintiff may be entitled to a jury trial to determine its compensatory damages under 42 U.S.C. 1983.

Cities, counties and other municipal corporations organized and existing by virtue of the laws of a particular state's law when they deprive door-to-door solicitors of their constitutional rights. (Monell v. Department of Social Services Of City of New York (1978) 46 U.S. 658 (98 S.Ct. 2018.)

As the prevailing party, the door-to-door solicitor will be entitled to attorney's fees from the municipality or county. 42 U.S.C. 1988 allows a prevailing party to collect its reasonable attorney's fees for enforcing the provisions of 42 U.S.C. 1988. A plaintiff is considered to be a prevailing party if it succeeds on "any significant issue" in litigation which achieves some of the benefits the party sought in bringing the lawsuit and a alternation of the legal relationship of the parties. (Texas State Teachers Association v. Garland Independent School District (1989) 874 F. 2d 242; Hensley v. Eckerhart (1983) 461 U.S. 424, 433 (10 S.Ct. 1933).) holding that this standard is meant to be a "generous formulation".

A prevailing party status does not depend on the timing for the request for fees: " a prevailing party must be one who has successes on any significant claim affording it some of the relief sought, either pendent lite or at the conclusion of litigation." (Texas State Teachers Association, *supra* 489 U.S. at 79; see also, EWAP, Inc. v. City of Ontario (1986) 177 Cal App. 3d 1108 (223 Cal Rptr. 422), where After an ordinance was declared unconstitutional and a permanent injunction was granted on summary

Judgment, a plaintiff was the prevailing party and entitled to attorney's fees.)

Based on this, door-to-door solicitors whose constitutional rights have been violated may request: (1) damages according to proof, (2) an award of attorney's fees, (3) cost of suit incurred and (4) such other and further relief as the court deems just and proper.