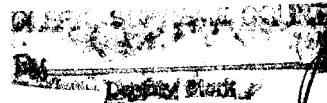


IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 74.479

JAN 10 1980



IN RE: FAO NO. 89001
NONLAWYER PREPARATION OF
PENSION PLANS

THE FLORIDA BAR STANDING COMMITTEE
ON THE UNLICENSED PRACTICE OF LAW

REPLY BRIEF FOR WILLIAM M. MERCER-MEIDINGER-HANSEN, INC.
AND TOWERS PERRIN FORSTER & CROSBY. INC.

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William M. Mercer-Meidinger-Hansen, Inc. ("Mercer") and Towers Perrin Forster & Crosby, Inc. ("Towers Perrin") submit this reply to the Responsive Brief of the Standing Committee on the Unlicensed Practice of Law ("Standing Committee"). As detailed herein, the assertions of the Standing Committee fail to overcome the arguments advanced in the initial Brief of Mercer and Towers Perrin ("Initial Brief") supporting the rejection of the Proposed Advisory Opinion ("Proposed Opinion") as preempted and contrary to public policy.

I. THE PROPOSED OPINION SHOULD BE REJECTED SINCE IT WAS NOT ISSUED IN ACCORDANCE WITH THE RULES REGULATING THE FLORIDA BAR AND IS BASED ON AN INADEQUATE RECORD.

The Standing Committee highlights the procedure and "extensive record" leading up to the Proposed Opinion. Responsive Br. at 2. In fact, the procedure was seriously flawed and the record is inadequate to establish a basis for the issuance of the Proposed Opinion.

In seeking to establish that the Proposed Opinion was issued in accordance with the Rules Regulating The Florida Bar ("Bar Rules"), the Standing Committee states that "[t]he question of nonlawyer participation in the pension area was brought before [it] as a request for a formal advisory opinion" Responsive Br. at 1. However, the Minutes of the Executive Council of the Tax Section of The Florida Bar

("Executive Council") reveal that on July 2, 1988, "Gregory Keane, Chairman [sic] of the Unauthorized Practice of Law Committee, reported that the Florida Bar Unauthorized Practice of Law Committee has asked the Tax Section for comments concerning the unauthorized practice of law in the pension and profit sharing area."¹ Thus, it appears the advisory opinion process was improperly initiated by a self-interested member of the Standing Committee, rather than by the Executive Council.

Moreover, the Bar Rules require that "requests from all persons and entities seeking advisory opinions . . . state in detail all operative facts upon which the request for opinion is based" Rule 10-7.1(b) of the Rules Regulating The Florida Bar (1989). The Executive Council, however, without providing any "operative facts," merely informed the Standing Committee that there is "probable cause to support the position that non-attorneys are involved in the unlicensed practice of

¹ **See** Minutes of the Executive Council of the Tax Section of The Florida Bar at 4 (July 2, 1988) ("Executive Council Minutes"). (A certified copy of the Executive Council Minutes is attached hereto as Appendix A.) Mr. Keane, a member of the Standing Committee who is a pension lawyer, recused his vote at the Public Hearing, but participated in the Standing Committee's deliberations. **See** Materials Considered By The Standing Committee In Adopting The Opinion ("Record"), tab 2, Standing Committee Hearing Transcript at 10 (Jan. 12, 1989).

The record of the Tax Section meeting does not reflect any discussion of specific instances of the alleged unlicensed practice of law or public harm resulting therefrom. **See** Executive Council Minutes at 4-5. At most, the record reveals that "in Miami several large pension firms handle most of the pension and profit sharing business and that lawyers generally do not wish to become involved in servicing that area." Id. at 4.

law."² Without the requisite "operative facts," the public's ability to provide substantive comment was improperly and unnecessarily constrained. Thus, the Standing Committee's Proposed Opinion is procedurally defective and should be rejected.

Although the Standing Committee asserts the Proposed Opinion was issued in response to a concern of "public harm" associated with nonlawyers drafting plans or providing pension advice, Proposed Op. at 4, the record evidence reveals at best only a handful of anecdotes, all of which appear to involve activities permitted under the Proposed Opinion.³ Indeed, the Tax Section was requested to prepare a position paper on the issue of public harm;⁴ however, no such document appears in the record. This Court has recognized that "[b]ecause of the natural tendency of all professions to act in their own self-interest, this Court must closely scrutinize all regulations tending to limit competition in the delivery of legal services to the public and determine whether or not such

2 See Record tab 1, Letter, L. Barnett (Chairman of the Tax Section) to J. Boyd (Chairman of the Standing Committee) (July 27, 1988).

3 See e.g. Record tab 3, Letter of Charles Sacher (employer prepared summary plan description improperly); Record tab 3, Letter of Alton Ward (inappropriate investment vehicle); Record tab 4, Letter of Donald Jaret and Sharon Quinn Dixon (fraudulent documents submitted to IRS); Record tab 4, Letter of James Davis (misrepresentation on forms filed with the Pension Benefit Guaranty Corporation).

4 See Record tab 3, Written Testimony of Edward Heilbronner.

regulations are truly in the public interest."⁵ The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1189 (Fla. 1978); see Initial Br. at 16-23. Based on the lack of evidence of public harm and the extent to which the Proposed Opinion encroaches on the legitimate activities of other professionals, such scrutiny should cause the Court to reject the Proposed Opinion as unnecessary and improper.

11. THE PROPOSED OPINION IMPERMISSIBLY REGULATES AREAS RESERVED TO THE FEDERAL GOVERNMENT.

A. The Proposed Opinion Conflicts With Federal Statutes And Regulations Governing Practice Before Federal Agencies.

Federal statutes and regulations authorize lawyers, enrolled actuaries, certified public accountants ("CPAs") and certain other nonlawyers to prepare "necessary documents" for presentation to the Internal Revenue Service ("IRS"). 31 C.F.R. § 10.2(a) (1988).⁶ The IRS recently has confirmed that this authority for pension consultants to prepare "necessary documents" encompasses the drafting of employee benefit plans, an activity proscribed by the Proposed Opinion.

⁵ The lack of record evidence of public harm additionally renders the Proposed Opinion unconstitutional under the Fourteenth Amendment as it deprives a class of persons of the right to practice an occupation in violation of well-recognized due process and equal protection principles. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); In re Florida Board of Examiners, 358 So.2d 7 (Fla. 1978).

⁶ The Secretary of the Treasury is authorized to qualify other nonlawyers or nonaccountants to practice before the IRS. See 31 U.S.C. § 330(a).

As observed in the Initial Brief, Revenue Procedure 89-13 authorizes nonlawyers licensed to practice before the IRS to sponsor regional master or prototype plans for clients. See Rev. Proc. 89-13 § 4.03, I.R.B. 1989-7; Initial Br. at 33 n. 26. The Standing Committee, however, could find "no specific authorization in 89-13 regarding drafting the plan." Responsive Br. at 17 n. 4. Subsequent to the filing of the Responsive Brief, the IRS clarified its authorization of nonlawyers to draft plans in announcing the availability of an IRS videotape on Revenue Procedure 89-13 "for practitioners who are drafting plans." IRS Announcement 89-157, I.R.B. 1989-51.⁷ That videotape provides that the regional prototype program "allows lawyers, actuaries, pension consultants and other practitioners to sponsor and market a prototype plan. A prototype plan is one that is drafted by . . . a practitioner who acts as sponsor of the plan." Transcript of IRS Videotape, "Cost Effective Retirement Plans" at 3-4 (1989) (emphasis added) ("IRS Videotape Transcript"). Thus, these recent IRS pronouncements support the assertion that pension plan consultants are authorized to draft plan documents, illustrate the danger of attempting to prohibit specific authorized conduct of pension consultants in a constantly evolving area, and demonstrate that the Proposed Opinion obstructs a federal program encouraged by the IRS.

⁷ A copy of IRS Announcement 89-157 and a certified transcript of the IRS Videotape, transcribed by an independent court reporting service, are attached hereto at Appendix B and Appendix C, respectively.

In arguing against preemption, the Standing Committee relies on Treasury Regulation **10.32**, which provides that "[n]othing in the regulations . . . shall be construed as authorizing persons not members of the bar to practice law." **31 C.F.R. § 10.32 (1989)**. The notion that such a general caveat can override federal regulations authorizing nonlawyers to practice before federal agencies was rejected by the United States Supreme Court in interpreting virtually identical language. See Sperry v. State ex rel. The Florida Bar, **373 U.S. 379 (1963)**. In Sperry, The Florida Bar sought to avoid the preemptive effect of federal regulations authorizing a nonlawyer to prepare and prosecute patent applications by relying on a regulation that provided that registration to practice before the United States Patent Office "shall not be construed as authorizing persons not members of the bar to practice law." Id. at **386**. In upholding the federal license for nonlawyers to practice before the agency, the Supreme Court opined that this language "was intended only to emphasize that registration in the Patent Office does not authorize the general practice of patent law, but sanctions only the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications." Id. (emphasis added).

Correspondingly, Treasury Regulation **10.32** should not be read to preclude the performance of services "reasonably necessary and incident to" the preparation of an application to the IRS for a determination that the plan is qualified. In the pension area, the most critical document prepared in connection

with such an application is the plan document, the terms of which are primarily governed by the Internal Revenue Code ("Code").⁸ The drafting of provisions to comply with the Code's requirements for submission to the IRS is within the authority granted to individuals who, through education, testing and certification, are authorized to practice before the IRS. The IRS has permitted nonlawyers to draft plan documents, see IRS Videotape Transcript at 3-4, refuting the Standing Committee's assertion that "the drafting of pension plans have [sic] nothing to do with the IRS." Responsive Br. at 21. Thus, Sperry is apposite to the instant proceeding and supports preemption of the Proposed Opinion.⁹

The Standing Committee acknowledges that preemption is appropriate where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Responsive Br. at 15 (quoting Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985)). In its argument, the Standing Committee merely focuses on IRS practice regulations in isolation. It is

⁸ ERISA created the Office of Employee Plans and Exempt Organizations within the IRS, which is responsible for determining that pension plans satisfy the requirements of the Code. See 26 U.S.C. § 7802(b).

⁹ The Standing Committee's assertion that Sperry is distinguishable because it focused on patent practice and the instant matter involves tax law, Responsive Br. at 20, is without merit. See Florida v. Anderson, 537 So.2d 1373 (Fla. 1989) (importance of analogous judicial interpretations); Pawley v. Pawley, 46 So.2d 464 (Fla.), cert. denied, 340 U.S. 866 (1950) (same).

well-recognized, however, that the Employee Retirement Income Security Act of 1974 ("ERISA") was enacted "to establish pension plan regulation as exclusively a federal concern." See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)). The Proposed Opinion is inconsistent with that goal and, under the standard of Hillsborough County urged by the Standing Committee, should be preempted.

B. The Proposed Opinion Is Preempted Under ERISA Section 514(a) Where It Relates To Employee Benefit Plans And Does Not Constitute A Generally Applicable Criminal Law.

In order to establish national uniformity, Congress provided that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a) (1985). It is well-settled that subsection 514(a) is deliberately expansive and designed to establish pension plan regulation as "exclusively a federal concern." Pilot Life Ins. Co., 481 U.S. at 46; see Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98-99 (1983). As such, ERISA preempts state laws that merely have "a connection with or reference to" employee benefit plans. See Pilot Life Ins. Co., 481 U.S. at 47; Shaw, 463 U.S. at 97.

Although the Proposed Opinion expressly recognizes that "the pension plan area is governed by [ERISA]," Responsive Br. at 3, the Standing Committee maintains that subsection 514(a) is not applicable because the Proposed Opinion does not affect "the

structure, administration or type of benefits provided under an ERISA plan." See Responsive Br. at 12. This characterization of subsection 514(a) improperly narrows the scope of ERISA's express preemption. The state law need not interfere with the "terms and conditions" of a pension plan, see Responsive Br. at 9, for ERISA's express preemption to apply. See Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146-147 (2d Cir. 1989) (analyzing a series of cases essentially identical to that examined by the Standing Committee, Responsive Br. at 10-12, and concluding that laws that "refer specifically to ERISA plans and apply solely to them" are preempted).

Assuming, arguendo, the Proposed Opinion only affects the professional who is drafting the plan and not the plan itself, as the Standing Committee argues, it is nonetheless preempted under subsection 514(a). See Responsive Br. at 10. Subsection 514(a) was designed to ensure that "employers establishing and maintaining employee benefit plans" would not confront a "patchwork scheme of regulation . . . which might lead those employers . . . without such plans to refrain from adopting them." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) (emphasis added). ERISA provides, and the regulations detail, that a plan fiduciary may make "reasonable arrangements with a [service provider for] . . . services necessary for the establishment and operation of the plan" 29 U.S.C. § 1108(b)(2) (1985) (emphasis added); 29 C.F.R. § 2550.408b-2 (1988). Adoption of the Proposed Opinion is likely to increase employers' costs of establishing pension plans by reducing

affordable alternatives. Moreover, ERISA created the Joint Board for the Enrollment of Actuaries, which certifies and disciplines enrolled actuaries, whose activities would be constrained by the Proposed Opinion. See 29 U.S.C. § 1241 (1985). Thus, the Proposed Opinion constitutes an impermissible intrusion into areas that Congress has regulated in ERISA and is therefore preempted by Section 514(a).

Finally, the Proposed Opinion does not constitute a "generally applicable criminal law" merely because it identifies conduct that "may form the basis for a criminal prosecution" for the unlicensed practice of law, as the Standing Committee propounds. Responsive Br. at 14; see 29 U.S.C. § 1144(b)(2)(B)(4) (1985). While the underlying Florida statute may be characterized as generally applicable, it defies logic to assert that a more specific application (such as the Proposed Opinion) of that statute directed towards the regulation of nonlawyers in their practice with ERISA plans nonetheless remains generally applicable.¹⁰

111. **EVEN IF THE FLORIDA BAR MAY ACT TO REGULATE THE PRACTICE OF PENSION CONSULTANTS, THE PROPOSED OPINION SHOULD BE REJECTED AS CONTRARY TO THE PUBLIC INTEREST.**

Failing to consider whether the Proposed Opinion's restrictive guidelines are in the public interest, the Standing

¹⁰ Contrary to the unsupported assertion of the Standing Committee, see Responsive Br. at 14, ERISA preemption extends to state decisional law as well as state statutes or regulations. See Simmons v. Diamond Shamrock Corp., 844 F.2d 517, 520 (8th Cir. 1988); Jung v. FMC Corp., 755 F.2d 708, 714 (9th Cir. 1985).

Committee asserts that the state action doctrine protects the Proposed Opinion from antitrust scrutiny. See Responsive Br. at 24-27. Although the state action doctrine may shield the Court from antitrust scrutiny in a federal court, the Proposed Opinion falls short of the Court's mandate to protect the public interest where it fails to consider the least anticompetitive alternatives for achieving its goal of preventing public harm.¹¹ See Proposed Op. at 4. Even if this Court decides to issue practice guidance, therefore, it should not adopt the Proposed Opinion but should appoint an ad hoc committee to study the matter further.

The Standing Committee intransigently asserts as its major premise that "the interested parties may not . . . engage in the practice of law." Responsive Br. at 27. In this assertion the Standing Committee disregards completely the analytical process established by this Court of balancing the competing interests and, where appropriate, "authorizing the practice of law by lay representatives . . . [because] [t]he unauthorized practice of law and the practice of law by nonlawyers are not **synonymous**."¹² The Florida Bar v. Moses, 380

¹¹ It is well-recognized that the public interest includes consideration of principles of competition. See Gulf States Utilities Co. v. FPC, 411 U.S. 747, 749 (1973); FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953).

¹² The Standing Committee's flawed premise permeates and discredits its public interest discussion. See Responsive Br. at 31 (design of pension plan; "legal advice must be rendered by an attorney"); id. at 34-35 (legal

(Footnote continued on page 12)

So.2d 412, 417 (Fla. 1980). This lack of analysis is illustrated well by the specific activities that the Proposed Opinion would prohibit:

Pension Plan Design. A comparison of the Proposed Opinion and the Responsive Brief illustrates the confusion that will result from the adoption of the Proposed Opinion. Under the Proposed Opinion, only an attorney may analyze client information and select the type of plan and plan options. See Proposed Op. at 12. In contrast, the Responsive Brief expansively provides that nonlawyers may analyze client data and make recommendations as to "which type of plan would be best for the employer from a financial standpoint and assist[] the employer in making any necessary business decisions." Responsive Br. at 31. Moreover, the Standing Committee requires attorney involvement in this early stage of plan development, rather than permitting the employer to consult the attorney as to legal implications only after the type of plan and options have been selected based on financial considerations. There appears to be no policy basis for this interjection of the attorney at the preliminary phases of plan design other than the concern that incompetent attorneys will merely "rubber stamp"

12 (Footnote continued)

characteristics of summary plan description preclude its drafting by nonlawyers); id. at 37-38 (legal significance of decisions associated with master or prototype plan precludes completion by pension consultant); id. at 41 (nonlawyers may continue to engage in their professions "so long as they do not engage in the practice of law").

the work of the nonlawyer. See Proposed Op. at 18. Such conduct by attorneys is clearly actionable under the Court's disciplinary rules and does not warrant unnecessary restrictions on nonlawyers.

Pension Plan Drafting. With respect to the drafting of plan documents, the Standing Committee permits the nonlawyer only to "prepare drafts of documents for the attorney and review documents prepared by the attorney." Responsive Br. at 33. The Standing Committee's discussion, however, ignores the diversity, education, and training of actuaries, CPAs, and other pension consultants who are authorized to practice before the IRS and employed by major consulting firms such as Mercer and Towers Perrin. See Initial Br. at 1-3, 26-30.¹³

Summary Plan Descriptions. The Standing Committee's single argument against pension consultants drafting summary plan descriptions ("SPDs") relies on the notion that there exist "legal requirements" with SPDs. Responsive Br. at 34-35. There are, however, legal requirements for other documents that the Standing Committee would permit nonlawyers to prepare (for example, annual reports and summary annual reports, see Proposed Op. at 15). Such mechanical reasoning, moreover, patently

13 Mercer and Towers Perrin acknowledge that as a matter of sound practice, attorney review of a plan drafted by a consultant is advisable. The obligations of the pension consultant, however, should extend only to informing the employer that a pension plan is an important legal document requiring scrutiny by an attorney. The subsequent decision as to whether to obtain review by counsel, therefore, remains the responsibility of the employer.

violates the process of analysis mandated by this Court. See Moses, 380 So.2d at 417.

Master and Prototype Plans. The Standing Committee proposes to prohibit consultants who market master and prototype plans from completing the associated adoption agreement. See Responsive Br. at 35-38. Since these plans have already been pre-approved by the IRS, the choices on the adoption agreement involve economic, rather than legal, decisions. See Initial Brief at 31-34. The IRS has expressly stated that pension consultants may draft the similar regional prototype plan documents and complete the adoption agreement with the employer.¹⁴ See IRS Videotape Transcript at 3-5.

The Proposed Opinion should be rejected because it fails in each of these instances to protect the public through the least restrictive means. In issuing the Proposed Opinion, the Standing Committee asserted it was concerned with "public harm." Proposed Op. at 14. As demonstrated above, the restrictive guidelines are unnecessary since the record lacks evidence of public harm. Thus, if the Court decides to issue practice guidance, the Proposed Opinion should be amended to incorporate the suggestions provided herein and in the Initial Brief.

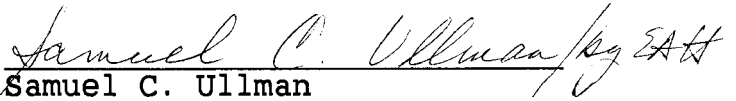
¹⁴ According to the IRS, the regional prototype plan document "was modeled closely after the . . . master and prototype . . . program." IRS Videotape Transcript at 9.


CONCLUSION

For the foregoing reasons, Mercer and Towers Perrin respectfully request this Court to reject the Proposed Opinion in its entirety or to appoint an ad hoc committee to study further the issues and make recommendations to this Court.

Respectfully submitted,

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I certify that a copy of the foregoing REPLY BRIEF FOR WILLIAM M. MERCER-MEIDINGER-HANSEN, INC. AND TOWERS PERRIN FORSTER & CROSBY, INC. has been furnished to the following attorneys of record by U.S. Mail, first class postage prepaid, this 12th day of January, 1990.

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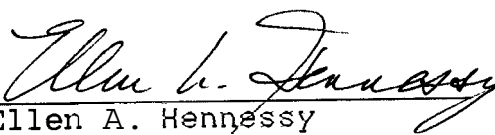
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