

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 74,479

FILED

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

"THE FLORIDA BAR STANDING COMMITTEE
ON THE UNLICENSED PRACTICE OF LAW

REPLY BRIEF OF THE AMERICAN INSTITUTE OF
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The American Institute of Certified Public Accountants ("AICPA") herewith respectfully submits its reply to the Responsive Brief of the Standing Committee on the Unlicensed Practice of Law ("Standing Committee") ("Responsive Brief"). In its Initial Brief ("AICPA Initial Brief"), the AICPA urged rejection of the Proposed Opinion because its adoption is preempted by federal law and would be inconsistent with sound public policy. The Standing Committee's characterization of the issue before the Court as one involving solely the unlicensed practice of law does not affect the AICPA's demonstration in its Initial Brief that the regulation of pension plans is an exclusively federal concern and that CPAs are fully authorized, consistent with federal authority and sound public policy, to practice in this area. Nothing advanced by the Standing Committee alters that conclusion. Contrary to the contention of the Standing Committee, the substantial level of interest in the instant proceeding does not so much show a need for "prompt guidance" as careful, well-reasoned review.

I. FEDERAL STATUTES AND REGULATIONS PREEMPT STATE LAWS REGARDING THE DESIGN AND DRAFTING OF EMPLOYEE BENEFIT PLANS.

The Standing Committee erroneously asserts that the Proposed Opinion does not restrict authorized practice before the federal government and is not expressly preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). Responsive Brief at 8-14. In fact, the Proposed Opinion would regulate the

establishment and operation of ERISA plans as an inevitable consequence of restricting CPAs in their authorized practice before federal agencies.

It is well established that in enacting ERISA, Congress intended federal regulation to occupy the field. See Helms v. Monsanto Co., Inc., 728 F.2d 1416, 1419 (11th Cir. 1984). The statutes and regulations reveal that the matter of CPAs practicing before the IRS concerning ERISA plans, including the drafting of such plans, is exclusively a federal concern.¹ Thus, regulation of the field of ERISA pension plan practice is a federal matter and any related state law should be preempted.

A. The Proposed Opinion Conflicts with Federal Regulatory Grants of Authority To CPAs.

Preemption applies equally to federal regulations, "which have no less pre-emptive effect than federal statutes." Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); see also Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985). As such, a state court may not usurp a function that Congress has assigned to a

¹ The Standing Committee also maintains there is a lack of a "dominant federal interest" in the regulation of the unlicensed practice of law. Responsive Brief at 17-18. The precise issue, however, concerns ERISA pension plan practice before federal agencies. 5 U.S.C. § 500(c) expressly authorizes CPAs to appear before the IRS. Thus, as demonstrated in the AICPA Initial Brief and the text, infra, pension plan practice regulation is plainly a federal concern. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987).

federal regulatory body. See Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 581-82 (1981).²

The Standing Committee erroneously asserts that an alleged lack of both specific regulation and federal interest prevents "implied preemption" of the Proposed Opinion. However, federal regulation and interpretations thereof, one released as recently as last month, are clear in their grant of authority to CPAs to practice, including the design and drafting of ERISA plans, in this area.

1. Federal Agencies Have Authorized CPAs To Draft Pension Plan Documents.

CPAs, by virtue of their professional qualifications, are authorized to represent others before the Internal Revenue Service ("IRS"). 5 U.S.C. § 500. Pursuant to statutory authority, the Secretary has undertaken to define what constitutes "practice before the IRS."³ Significantly, "practice" comprehends "all matters" connected with an IRS presentation, which includes "the

² Preemption of a state law "'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738 (1985) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

³ See 31 U.S.C. § 330; 31 C.F.R. §§ 10.0-10.101 (1988). The Department of Labor ("DOL") and the Pension Benefit Guaranty Corporation ("PBGC") have by regulation granted similar authority to nonlawyers. See 29 C.F.R. § 2606.6 (1988); ERISA Proc. 76-1, 41 Fed. Reg. 36,281 (1976).

preparation and filing of necessary documents."⁴ Id. (emphasis added). In the pension field, "necessary documents" perforce includes the pension plan, the substance of which is governed primarily by the Internal Revenue Code ("Code").

Revenue Procedure **89-13** and related **IRS** pronouncements amplify the IRS' grant of authority to practice before it. In Rev. Proc. **89-13**, the IRS authorized any "sponsor," defined to include any firm "at least one of whose members or employees is authorized to practice before the [IRS] with respect to employee plan matters," to provide regional prototype plans to its clients. See Rev. Proc. **89-13** § **4.03**, I.R.B. **1989-7** (Feb. **13**, **1989**). Significantly, this broadening of "sponsor" to include CPAs is a change from previous practice where the definition of "sponsor" was limited to law firms. See Rev. Proc. **76-15**, **1976-1** C.B. **553** (Mar. **17**, **1976**).

Similarly, a very recent announcement confirms the IRS' intent to allow CPAs to draft regional prototype plans and adoption agreements. See IRS Announcement **89-157**, I.R.B. **1989-51** (Dec. **18**, **1989**) (publicizing videotape available for "[l]aw firms, actuarial and accounting firms, and other practitioners" who are drafting plans). The IRS videotape defines a prototype plan **as** "one that is drafted by a practitioner who acts as a sponsor of a plan." See Transcript of IRS Videotape "Cost Effective Retirement

⁴ For a more detailed discussion of the relevant federal statutes and regulations, see AICPA Initial Brief at **14-18**.

Plans" at 3-4 (1989) (emphasis added) (annexed as Appendix A).

Thus, the IRS clearly recognizes CPAs as drafters.

In sum, federal regulation and IRS materials consistently confirm the IRS' intent to permit CPAs to draft pension plan documents, if they otherwise satisfy the conditions of Rev. Proc. 89-13.

2. Authority To Practice Before Federal Agencies
Is Not Equivalent To Authority To
Practice Law.

Throughout its Responsive Brief, the Standing Committee characterizes the issue before the Court as one involving the unauthorized practice of law, and contends that the power to authorize the practice of law is reserved to the States.

Responsive Brief at 15-16.

This characterization is immaterial, since principles of preemption are equally applicable to regulated matters involving the traditional police powers of a state.⁵ Nevertheless, the Standing Committee argues that Treas. Reg. § 10.32 ("nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law") reveals an express intent by the Treasury Department to permit the States to continue to regulate the unlicensed practice of law. Responsive

⁵ See Free v. Bland, 369 U.S. 663, 666 (1962); Sperry v. State ex rel. Florida Bar, 373 U.S. 379, 384 (1963) ("[t]he law of the State, though enacted in the exercise of powers not controverted, must yield when incompatible with federal legislation").

Brief at 16. An analogous argument has previously been rejected by the Supreme Court. In Sperry, the Florida Bar argued, inter alia, that this Court's injunction was not preempted because Patent Office regulations provided that practice before that office "shall not be construed as authorizing persons not members of the bar to practice law." Id. at 386. The Supreme Court stated that "the provision 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. Similarly, § 10.32 was intended only to emphasize that the regulations did not authorize the general practice of law. As such, consistent with Sperry, § 10.32 should not be construed as opening a door to state regulation of tax practice before a federal agency.⁶

⁶ State participation in the statutory process of determining who may practice before the IRS is expressly limited to determining who qualifies as a CPA. See 5 U.S.C. § 500(c). The legislative history of that subsection reveals that Congress was relying on the testing and monitoring mechanisms of the state associations of CPAs only for the determination of who qualifies as a CPA. See H.R. Rep. No. 1141, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S. Code Cong. & Admin. News 4170-74.

The Standing Committee also asserts that Sperry does not support nonlawyer drafting of pension plans.⁷ See Responsive Brief at 18-21. Even though the Patent Office regulations at issue in Sperry were much less specific than the authorizations to practice before federal agencies that are implicated here,⁸ the Sperry Court ruled that, although constituting the "practice of law," Sperry could not be enjoined from those activities "incident to" the federal license, including participation in the drafting of the specification and claims of the patent application, conceded to be one of the most difficult legal instruments to draw with accuracy. Sperry, 373 U.S. at 383. Similarly, as conduct "incident to" the more expansive license in the Treasury Regulations, Sperry teaches that CPAs should not be precluded by

7 The Standing Committee initially asserts that because Sperry involved patent practice, it is irrelevant. Responsive Brief at 20. Such a complete rejection of related case law has never been supported in this Court, which has long recognized the value of analogous judicial interpretations. See Gwin v. Tallahassee, 132 So. 2d 273 (Fla.), cert. denied, 340 U.S. 866 (1950); Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950); Hull v. State ex rel. Rollins, 11 So. 97 (Fla. 1892).

8 In Sperry, the authorizing regulations provided that "[a]n applicant for patent may be represented by an attorney or agent" in the "preparation and prosecution of applications for patent." Sperry, 373 U.S. at 384. In contrast, the instant Treasury Regulations provide for CPA practice before the IRS concerning "all matters" that are merely "connected" with "presentation to the [IRS]," including, inter alia, the "preparation and filing of necessary documents," clearly a broader mandate. 31 C.F.R. § 10.2 (1989) (emphasis added).

state law from drafting a pension plan.⁹ Cf., IRS Videotape Transcript at 3-4. Thus, the Proposed Opinion should be rejected insofar as it prohibits such conduct "incident to" the federal regulations that authorize the nonlawyer preparation and filing of pension plans.

The Standing Committee flatly asserts that nonlawyers cannot "give legal advice and draft legal documents." Responsive Brief at 30. This assertion is inconsistent with this Court's own conclusion in Sperry on remand. Florida Bar v. Sperry, 159 So. 2d 229 (1963). There, this Court recognized that the authority to practice granted to patent attorneys included the authority to give advice and render opinions as to patentability. Similarly, the authority granted to CPAs necessarily includes the authority to give advice and render opinions as to qualification of a pension plan -- a matter governed solely by the Code.

B. ERISA's Express Preemption Provisions Preclude State Regulation of Pension Plans.

ERISA's express preemption of all State laws that relate to pension plans requires rejection of the Proposed Opinion. See

9 The Standing Committee asserts that "the drafting of pension plans have nothing to do with the IRS." Responsive Brief at 21. This bald assertion completely ignores the fact that the provisions of pension plans must satisfy detailed requirements set forth in the Code and implementing regulations. See I.R.C. §§ 401-416; Treas. Reg. §§ 1.401-1.416. Far from being a document that merely has tax consequences, such as a petition for dissolution of marriage or a corporate charter, see Responsive Brief at 23, a pension plan document is a creature of the Code.

AICPA Initial Brief at 20-28. The Standing Committee argues that the Proposed Opinion does not "relate to" ERISA plans because it does not regulate the actual terms and conditions of such plans. From its caption through its text, the Proposed Opinion focuses on pension plans and "relates to" nothing else.

1. ERISA Expressly Preempts the Proposed Opinion Insofar As It Relates To Pension Plans.

ERISA "supersede(s) any and all State laws insofar as they . . . relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). The Standing Committee accurately recognizes that "not all state laws that have an impact on ERISA plans are preempted." Responsive Brief at 9. Nonetheless, as Congress intended the regulation of employee benefit plans to be exclusively a federal concern, the Supreme Court has broadly interpreted subsection 1144(a) to encompass any state laws that have a "connection with or reference to" pension plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983); see also Mackey v. Lanier Collections Agency & Service, Inc., 486 U.S. 825, _____, 108 S. Ct. 2182, 2185-87 (1988) (Georgia statute that singled out ERISA benefit plan for different treatment than non-ERISA plan preempted since it expressly references ERISA plans); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. at 47 (ERISA preempts state common law tort and contract actions asserting an insurer's improper processing of an employee's claim for disability benefits under an insured employee benefit plan).

The Standing Committee narrows the application of subsection 1144(a) to only State laws affecting "the structure, administration or type of benefits provided under the ERISA plan." See Responsive Brief at 10-12. The United States Court of Appeals for the Second Circuit analyzed a series of cases essentially similar to that cited by the Standing Committee in support of its argument for a narrowed scope of ERISA's express preemption and reached a conclusion contrary to the Standing Committee's: the Second Circuit held that State laws that "refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee" are preempted. Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146 (2d Cir. 1989) (emphasis added). See also Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 11 (1987) ("ERISA's preemption provision [relates to] employers establishing and maintaining employee benefit plans") (emphasis added).¹⁰

Thus, neither the Standing Committee's argument nor precedents suggest that the Supreme Court's pronouncements on the

10 Furthermore, the Standing Committee's conclusory arguments do not overcome the analysis in the AICPA Initial Brief revealing that the Proposed Opinion does not constitute a "generally applicable criminal law" exempt from preemption. See AICPA Initial Brief at 26-28. The Standing Committee's assertion that the adoption of the Proposed Opinion is not preempted "[j]ust as other case law is not preempted," is without merit. See Responsive Brief at 14. ERISA's preemptive effect extends to State decisional law as well as State statutes and 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).

expansive nature of ERISA preemption should be questioned. Even if the Proposed Opinion can accurately be described as concerning only the unlicensed practice of law with respect to the design and drafting of a pension plan, Responsive Brief at 10, the Proposed Opinion must still be rejected to the extent it expressly references and regulates ERISA plans.

11. **THE PROPOSED OPINION SHOULD BE REJECTED BECAUSE IT IS NOT IN THE PUBLIC INTEREST.**

As detailed in the AICPA Initial Brief, CPA involvement in the design and drafting of pension plans beyond the limited range that would be permitted by the Proposed Opinion would effectuate the goals of ERISA while protecting the public from the harm associated with the unlicensed practice of law. See AICPA Initial Brief at 29-49. Refusing to balance the competing interests, the Standing Committee flatly asserts that nonlawyers cannot "give legal advice and draft legal documents."¹¹ Responsive Brief at 30. The Proposed Opinion, therefore, should be rejected since it fails to consider and protect the public interest.

¹¹ In commencing its public policy analysis with this assertion, the Standing Committee forewarns this Court of its intention to ignore the Court's admonition in Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980), that "[t]he unauthorized practice of law and the practice of law by non-lawyers are not synonymous." 380 So. 2d at 417; see also Sperry, 373 U.S. at 383 (authorizing nonlawyer to perform what otherwise constituted the "practice of law" under Florida law). See also Keyes Co. v. Dade County Bar Ass'n, 46 So. 2d 605 (Fla. 1950) (nonlawyers may prepare real estate contracts).

A. The Public Interest Is Fully Protected By Permitting CPAs To Design And Draft Pension Plans.

The Standing Committee would limit the nonlawyer to providing only financial recommendations, permitting only a lawyer to advise on the terms of an ERISA plan.¹² See Responsive Brief at 31-32. Moreover, the Standing Committee would permit the nonlawyer to prepare only drafts of documents for review by an attorney.¹³ Responsive Brief at 32-33. In precluding CPAs from providing final design advice or final plan documents, the Standing Committee completely ignores the fact that the principal requirements for pension plans are found in the Code, the subject of which CPAs are extensively trained and tested in Florida, and

¹² The basic flaw in the Standing Committee's reasoning is illuminated by its assertion that "legal advice must be rendered by an attorney." Responsive Brief at 31. This statement disregards this Court's teachings in Moses and Sperry on remand. See supra n.11. It is for this improper reason, for example, that the Standing Committee would not permit CPAs to draft summary plan descriptions ("SPDs"). See Responsive Brief at 34-35. Significantly, only with respect to SPD drafting does the Standing Committee depart from its apparent acceptance of the guidelines propounded in Information Opinion A of the American Bar Association Standing Committee on the Unauthorized Practice of Law, issued May 1, 1977 ("ABA Opinion"). The ABA Opinion expressly authorizes the drafting of the SPD by a nonlawyer. See ABA Opinion at 16.

¹ The Standing Committee asserts that its position is consistent with the ABA Opinion. Responsive Br. at 33, 35. The Standing Committee's assertion is significantly less restrictive than the Proposed Opinion itself, which precludes the nonlawyer from drafting plan documents altogether. See Proposed Opinion at 13. At a minimum, the Proposed Opinion must be amended to reflect the modified position of the Standing Committee.

the field in which CPAs are authorized to practice before the IRS. See AICPA Initial Brief at 32-43.¹⁴ Thus, the Proposed Opinion should be rejected because it improperly disregards the qualifications of CPAs to provide final design recommendations and final plan documents.¹⁵

In delimiting the extent of nonlawyer practice concerning master or prototype plans, the Standing Committee would authorize the CPA to market such a plan, but would preclude the completion of the adoption agreement.¹⁶ See Responsive Brief at 35, 38. In

14 Nonetheless, the AICPA acknowledges that, as a matter of business practice only, review by an employer's inside or outside counsel of the nontax issues in a plan drafted by a CPA may be advisable. Although a CPA may suggest such review to an employer, this subsequent review by counsel should remain the responsibility of the employer, not the CPA.

15 The Proposed Opinion does not clearly allow for final nonlawyer recommendations concerning the financial design of a plan, as the Standing Committee would now permit according to its Responsive Brief. See Responsive Brief at 31-32. Accordingly, at a minimum, the Proposed Opinion must be modified to reflect this changed position.

16 The Simplified Employee Pension ("SEP") is another example of the inadequacy of the Proposed Opinion. A SEP provides a convenient manner for employers to contribute to an employee's retirement through Individual Retirement Accounts ("IRAs"). See 26 U.S.C. § 408(k). The SEP is established through the completion of a one-page IRS form providing very limited options for the employer. See IRS Form 5305-SEP (annexed as Appendix B). Although commonly completed at banks or similar institutions, the SEP forms fall within the scope of the Proposed Opinion, which would preclude advice by a nonlawyer regarding the decision to adopt and the adoption of a SEP. See Proposed Opinion at 10, 15. This significant impediment to the adoption of SEPs creates substantial practical problems that defeat the purpose of SEPs.

support, the Standing Committee focuses on the legal obligations . . . created by the execution of the [adoption] agreement." Id. at 36. The mere fact, however, that the adoption agreement creates legal obligations is insufficient to require its completion by an attorney.¹⁷ See Moses, 380 So. 2d at 417. A more complete balancing of the interests, including a detailed examination of the nature and purpose of the documents, leads to the conclusion that CPAs are qualified to draft master or prototype plans and complete the adoption agreement. See AICPA Initial Brief at 43-45. Indeed, it would be incongruous to permit CPAs to draft plans but not complete the adoption agreements.¹⁸ See IRS Videotape Transcript at 5. Thus, the Proposed Opinion should be rejected insofar as it fails to authorize CPAs to complete master and prototype documents, including the adoption agreement. Moreover, the "legal" decision in completing the adoption agreement involves the resulting plan's qualification under the Code -- an area clearly within the scope of the authority of CPAs to practice before the IRS. Cf., Sperry, 159 So. 2d 229.

¹⁷ As with the drafting of custom plans, as a matter of business practice -- and not as a requirement -- the CPA may recommend the employer retain legal counsel to review the master or prototype plans as drafted.

¹⁸ 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, the AICPA respectfully requests this Court to reject the Proposed Opinion as currently drafted, or remand this proceeding for further development of the record.

Respectfully Submitted,

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