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FILED
SID J. WHITE
OCT 28 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

THE FLORIDABAR)
RE: ADVISORY OPINION)
NONLAWYER PREPARATION OF)
LIVING TRUSTS)

CASE NO: 78,358

INITIAL BRIEF OF RESPONDENTS
AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS;
FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS;
ARTHUR ANDERSEN & CO.; COOPERS & LYBRAND;
DELOITTE & TOUCHE; ERNST & YOUNG;
KPMG PEAT MARWICK; and PRICE WATERHOUSE

Original Proceeding
Commenced by The Florida Bar
Standing Committee on the
Unlicensed Practice of Law

Kenneth R. Hart, Esq.
Fla. Bar No. 0192580
Ausley, McMullen, McGehee
Carothers & Proctor
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

Counsel for the Florida
Institute of Certified
Public Accountants

✓ Arthur J. England, Jr., Esq.
Fla. Bar No. 022370
Fine Jacobson Schwartz Nash
Block & England
One CenTrust Financial Center
100 Southeast Second Street
Miami, Florida 33131-2130
(305) 577-4075

Counsel for the Respondents

Fine Jacobson Schwartz Nash Block & England

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Statement of the Case and Facts

This proceeding commenced when the Standing Committee on the Unlicensed Practice of Law filed with the Court on August 1 a proposed advisory opinion addressing the following question:

Whether it constitutes the unlicensed practice of law for a corporation or other nonlawyer to draft living trusts and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer and the completed documents are reviewed by a member of The Florida Bar prior to execution.

By order entered on August 2, the Court opened the proceedings to interested parties,

On September 29, the following parties were granted leave to appear by brief and at oral argument:

American Institute of Certified Public Accountants;
Florida Institute of Certified Public Accountants;
Arthur Andersen & Co.;
Coopers & Lybrand;
Deloitte & Touche;
Ernst & Young;
KPMG Peat Marwick; and
Price Waterhouse.

On October 10, these respondents (collectively called "the CPAs") joined with the Standing Committee in filing a Stipulation to amend the pending proposed advisory opinion with regard to certified public accountants. A copy of the Stipulation is appended to this brief.

Summary of the Argument

The practice of public accountancy is a learned profession subject to strict regulation. The activities involved in this practice often overlap the activities of lawyers. The Court should therefore avoid any implication that the Standing Committee's five-step process, its analysis, or its conclusion concerning living trusts, are applicable in any way to the activities of the CPAs. A Stipulation filed by the Standing Committee and the CPAs provides language to include in the Court's decision in order to avoid any inadvertent implications.

Argument

In its proposed advisory opinion, the Standing Committee has concluded that the practice of preparing living trusts constitutes the practice of law as defined by the Court in *State v. Sperry*, 140 So.2d 587 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963). According to the Standing Committee, the creation of a living trust involves five interrelated steps, each of which falls within the *Sperry* definition: (1) the gathering of the necessary information; (2) the assembly of the document; (3) review with the client; (4) the document's proper execution; and (5) the funding of the trust document.

As the Court has recognized, "the *Sperry* definition was broad and is given content by this Court only as it applies to the specific circumstances of each case." *The Florida Bar re: Advisory Opinion--Nonlawyer Preparation of Notice to Owner and Notice to Contractor*, 544 So.2d 1013, 1016 (Fla. 1989), following the rationale of *The Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1191-92 (Fla. 1978). Any attempt to formulate a lasting, all encompassing definition of "practice of law" is doomed to failure. *Id.*

In cases involving an overlap of professional disciplines, it is especially important to avoid arbitrary classifications, and to focus instead on the public's realistic need for protection and regulation. *The Florida Bar re: Advisory Opinion--Nonlawyer Preparation of Pension Plans*, 571 So.2d 430, 433 (Fla. 1990) (hereafter "*Pension Plans*"). Indeed, the Court has stated that the single most important concern in defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible behavior. *The Florida Bar v. Moses*, 380 So.2d 412, 417 (Fla. 1980). For at least two reasons, the Court should avoid any implication that the Standing Committee's five-step analysis and conclusion concerning living trusts are applicable in any way to the legitimate activities of the CPAs when they are engaged in the practice of public accountancy, as defined in section 473.302(4), Florida Statutes (1989).

First, the public has no need for additional protection and regulation of these activities, because CPAs are subject to stringent regulatory requirements under chapter 473, Florida Statutes, and chapter 21A, Fla. Admin. Code. *Cf. In the Matter of the Application of the New Jersey Society of Public Accountants*, 507 A.2d 711, 716-17 (N.J. 1986) ("New Jersey Society").

No person may engage in the practice of public accountancy unless the person is licensed by the State of Florida as a certified public accountant. See sections 473.302(3), 473.302(4), and 473.322(1)(a), Florida Statutes (1989). In order to receive a license as a certified public accountant, an applicant must meet strict requirements concerning moral character, education, and accounting experience, and **the** applicant must **pass** a difficult licensure examination. *See* sections 473.306 through 473.308, Florida Statutes (1989). Each CPA must also satisfy continuing education requirements. See section 473.312, Florida Statutes (1989). Significantly, CPAs are bound by standards of practice, including independence, competence, and technical standards, and are subject to disciplinary actions before the Board of Accountancy. See sections 473.315 and 473.323, Florida Statutes (1989).

Second, the practice of law and the practice of public accountancy overlap in many areas, and in some subject areas -- most notably tax planning and estate planning -- the legal and accounting aspects are "so interrelated, interdependent and overlapping that they are difficult to distinguish." Statements on Practice in the Field of Federal Income Taxation and Estate Planning, published by the National Conference of Lawyers and Certified Public Accountants, *reprinted in* 36 Tax Lawyer No. 1, 25, **33** (1982) [hereafter cited as the Statements]. *And see New Jersey Society*, 507 A.2d at **716**.

According to the Statements, the accounting services of CPAs include "the development and analysis of data, the testing of their validity and relevance, and the interpretation and communication of the resulting information to intended users." 36 Tax Lawyer at 29. CPAs also "review many aspects of an organization's activities and procedures," "make constructive suggestions on financial, tax, and other

operating matters, "provide objective advice and consultation on various management problems," and "assist in the development and implementation of programs approved by management." *Id.* at 29.

All of these activities by CPAs are closely related to the five-step process identified by the Standing Committee, but none is ordinarily regarded as the practice of law. In certain circumstances, CPA's may even prepare and draft documents that have legal consequences, or undertake to answer questions that have legal ramifications, without running afoul of prohibitions relating to the practice of law. *See, e.g., Pension Plans*, 571 So.2d at 433; *Waugh v. Kelley*, 555 N.E.2d 857, 859 (Ind. App. 4th Dist. 1990); *Grace v. Allen*, 407 S.W.2d 321, 323-24 (Tex. Civ. App. Dallas 1966); *Application of New York Lawyers Ass'n*, 78 N.Y.2d 209 (Sup. Ct. App. Div. 1948); *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951); *Agran v. Shapiro*, 273 P.2d 619 (Cal. Sup. Ct. App. Div. 1954); *Lowell Bar Ass'n v. Loeb*, 52 N.E.2d 27, (Mass. 1943).

In connection with the Court's review of the proposed advisory opinion, it is unnecessary to explicate a demarcation between the practice of law and the practice of public accountancy, even if it were possible to do so in any generalized way. The Standing Committee did not consider or have any information regarding the practice of public accountancy. See Appendix. It is important that the Court declare the non-applicability of the proposed advisory opinion to CPAs, in whatever form an opinion is ultimately adopted. To that end, and as an amendment to the proposed advisory opinion, the stipulation of the Standing Committee and the CPA contains language to be inserted in the Court's decision in **this** case.

Conclusion

Based on the amendment furnished by the Standing Committee as part of the Stipulation between the Committee and the CPAs, the CPAs respectfully request that the Court incorporate in its opinion the following text:

In considering the questions presented in this proceeding, the Standing Committee did not consider or have any information regarding the practice of public accountancy as defined in section 473.102(4), Florida Statutes (1989). Consequently, the analysis and conclusion of the proposed advisory opinion does not apply to and is not intended to apply to the practice of public accountancy as so defined, and that practice is not implicated by the Court's opinion.

Respectfully submitted,

Kenneth R. Hart
Post Office **Box** 391
Tallahassee, Florida 32302
(904) 226-9115
Fla. Bar #0192580
Counsel for **FICPA**

Arthur J. England, Jr.
One CenTrust Financial Center
100 Southeast **2nd Street**
Miami, Florida 33131
(305) 577-4000
Fla. Bar #022730

Counsel for **AICPA**,
Arthur Andersen & Co.
Coopers & Lybrand,
Deloitte & Touche,
Ernst & Young,
KPMG **Peat** Marwick, and
Price Waterhouse

Certificate of Service

I certify that a true copy of this brief was mailed on October 25, 1991, to the following counsel:

J. Robert McClure, Jr., Esq.
P. O. Box 190
Tallahassee, Florida 32302

James C. Konarske, Esq.
P. O. Box 1166
Zephyrhills, Florida 33539

Deborah M. Chalfie, Esq.
1319 F. Street, Northwest
Suite 300
Washington, D.C. 20004

Kyle A. Silverman, Esq.
1300 North Federal Highway
Suite 213
Boca Raton, Florida 33432

Rohan Kelley, Esq.
3365 Galt Ocean Drive
Fort Lauderdale, Florida 33308

Joseph W. Fleece, Jr., Esq.
P. O. Box 330
St. Petersburg, Florida 33731

David R. McCallister, Esq.
P. O. Box 7343
Wesley Chapel, Florida 33543

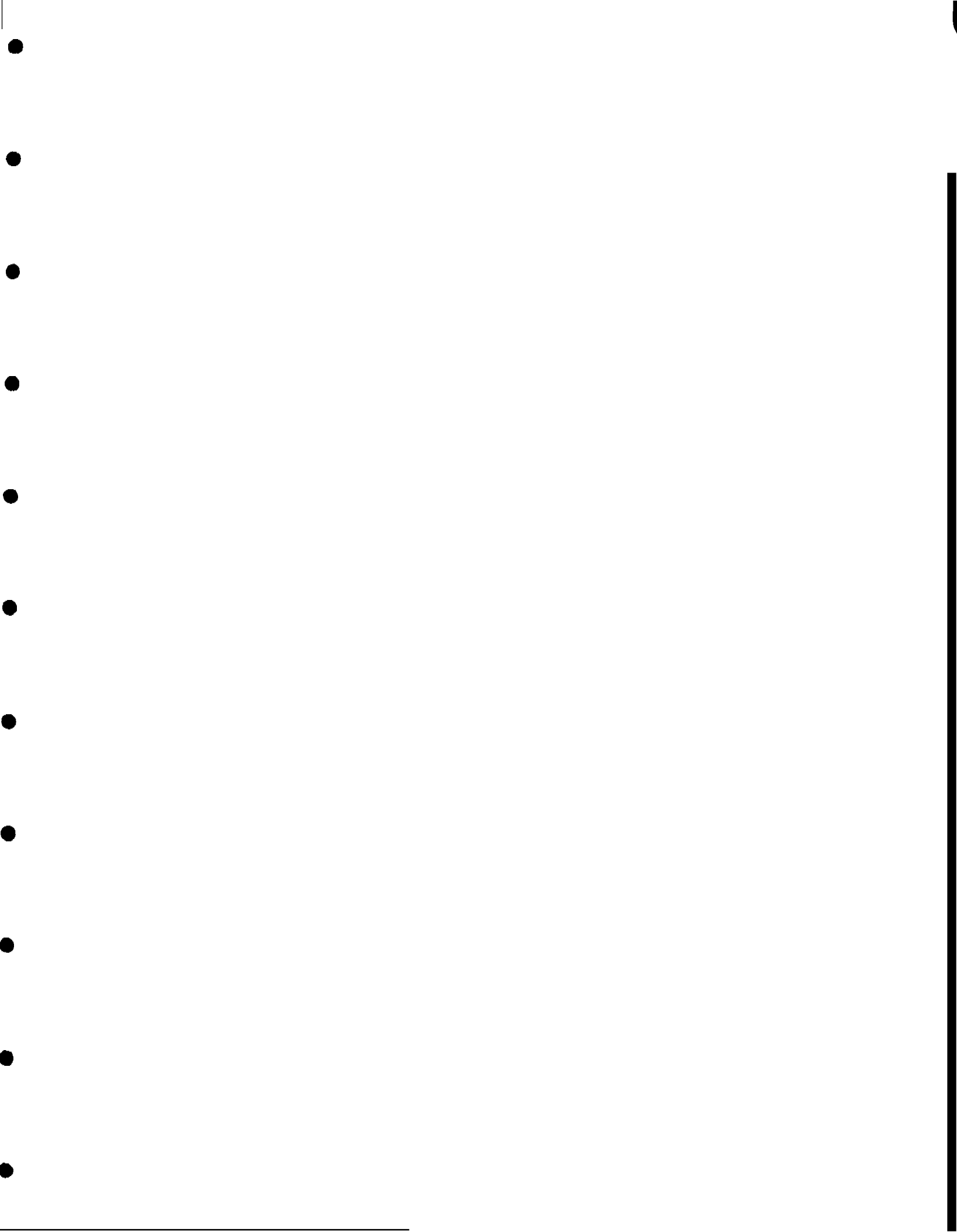
Lori S. Holcomb, Esq.
650 Apalachee Parkway
Tallahassee, FL 32399-2300

William H. Halker, Jr., Esq.
8925 Folsom Blvd.
Suite M
Sacramento, California 95826

J. Thomas Cardwell, Esq.
Post Office Box 330
St. Petersburg, FL 33731



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The analysis and conclusion in the proposed advisory opinion does not apply and is not intended to apply to the practice of public accountancy as set forth and defined in section 473.302(4), Florida Statutes (1989). The activities of that form of practice are not implicated by the opinion, as there was nothing before the Standing Committee involving or questioning the activities of certified public accountants working within the guidelines of the Florida Statutes and the rules of the Board of Accountancy.

Agreement Among the Parties

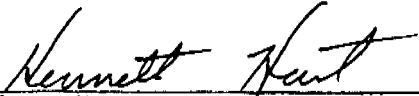
The Standing Committee and the CPAs stipulate:

1. that the proposed advisory opinion does not relate in any way to the practice of public accountancy as defined in section 473.302(4), Florida Statutes (1989);
2. that the proposed advisory opinion should be amended in the manner designated below;
3. that the CPAs shall maintain their right to file briefs as authorized by the Court; and
4. that the Court is specifically requested to incorporate in its opinion the following text:

In considering the questions presented in this proceeding, the Standing Committee did not consider or have any information regarding the practice of public accountancy

as defined in section 473.302(4), Florida Statutes (1989). Consequently, the analysis and conclusion of the proposed advisory opinion does not apply to and is not intended to apply to the practice of public accountancy as so defined, and that practice is not implicated by the Court's opinion.

Respectfully submitted,



Kenneth R. Hart
Post Office Box 391
Tallahassee, Florida 32302
(904) 226-9115
Fla. Bar #0192580
Counsel for FICPA



Lori S. Holcomb
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5839
Fla. Bar #0501018
Counsel for Standing
Committee on UPL



Arthur J. England, Jr.
One CentTrust-Financial Center
100 Southeast 2nd Street
Miami, Florida 33131
(305) 577-4000
Fla. Bar #022730

Counsel for AICPA,
Arthur Andersen,
Coopers & Lybrand,
Deloitte & Touche,
Ernst & Young,
KPMG Peat Markwick, and
Price Waterhouse

Certificate of Service

I certify that a true copy of the foregoing was mailed on October 10, 1991, to counsel listed on the attached Exhibit A, all of whom have appeared in the proceeding.

Kenneth Hart

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