IN THE SUPREME COURT
OF FLORIDA

CASE NO. 74,479

IN RE FAO # 89001
NON-LAWYER PREPARATION OF PENSION PLANS

AMICUS CURIAE BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar Standing Committee on the Unlicensed Practice of Law, in response to a request from the Executive Council of the Tax Section of the Florida Bar, filed its Proposed Advisory Opinion on the Nonlawyer Preparation of Pension Plans on July 28, 1989. The Advisory Opinion considered the issue of "whether it is the unlicensed practice of law for a nonlawyer to render advice as to the design of a pension plan and/or draft or amend a pension plan for another." This question was addressed by the Florida Supreme Court in In re The Florida Bar V. Turner, *355 So.* 2d *766* (Fla. 1978), but the Florida Bar believed that the matter should be reexamined in light of the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), since Turner involved activities which occurred prior to the enactment of ERISA.

The Advisory Opinion divides the implementation of a pension plan into eight distinct steps. The eight steps were described as follows:

1. Promoting, marketing and selling the plan;
2. Explaining alternatives generally available to the public;
3. Gathering information from the client;

4. Analyzing client information, deciding on the type of plan and selecting various optional plan provisions;

5. Drafting the plan documents;

6. Obtaining governmental qualification of the plan;

7. Administering the plan and dealing with the government regulators; and

8. Termination of the plan.

The Committee's Opinion determined generally that steps (4), (5), (6) and (8) constitute the practice of law. The Advisory Opinion acknowledged that the Supreme Court cannot enjoin an activity as the unlicensed practice of law if there exists a specific federal rule or regulation that allows a nonlawyer to engage in the activity.

Pursuant to Rule 10-7.1(g)(2), Rules Regulating the Florida Bar, American Council of Life Insurance applied for and was granted leave to file objections to the Advisory Opinion and to submit this Brief.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether it is the unlicensed practice of law for a nonlawyer to render advice as to the design of a pension plan and/or draft or amend a pension plan for another.

STATEMENT OF INTEREST OF AMICUS CURIAE

AMERICAN COUNCIL OF LIFE INSURANCE

The American Council of Life Insurance is vitally interested in the Advisory Opinion and this Court's review because it is a national life insurance trade association comprised of 615 member life insurance companies that account for ninety-two percent (92%) of life insurance in the United States. The American Council of Life Insurance actively participates in the National Conference of Lawyers and Life Insurance Companies, a conference which provides a forum for the discussion and resolution of interprofessional concerns in the public interest between representatives of the American Bar Association and the American Council of Life Insurance.

SUMMARY OF THE ARGUMENT

The Supreme Court should decline to adopt the Advisory Opinion as proposed by the Florida Bar because all the activities enumerated in the opinion do not in fact constitute the unauthorized practice of law. Specifically, the Advisory Opinion incorrectly treats certain activities relating to the implementation of master and prototype plans as the unauthorized practice of law, or unnecessarily restricts nonlawyer involvement in such plans.

Although the Florida Bar has purported to reexamine Turner in light of intervening federal statutory enactments, such as ERISA, the Advisory Opinion does not reflect the full significance of these changes, particularly the clear federal effort to facilitate the development of a private pension system through the promotion of master and prototype plans, adoption agreements and standardized forms. The Advisory Opinion fails in several respects to fully delineate the substantial difference between master and prototype plans, on the one hand, and individually-designed plans, on the other. Even if the activities enumerated in the Advisory Opinion were in fact the unauthorized practice of law in the area of individually designed plans, the same analysis, and the same rules, cannot apply to master and prototype plans. Amicus American Council of Life Insurance urges this Court to modify the advisory opinion to protect the development of this area of the private pension system which has been carefully constructed and regulated by federal law.

Similarly, the Advisory Opinion fails to acknowledge and accord the proper weight to an employer's right of self-representation, which is especially critical in light of the development of master and prototype plans. Amicus American Council of Life Insurance urges the Court to recognize this important right in this context.

Finally, the Advisory Opinion understates or unnecessarily restricts the well-established and distinctive status of

"Home Office Counsel" for a life insurance company in qualified benefit planning. Amicus American Council Life Insurance urges the Court to review and more definitively recognize the substantial contributions made in this area by Home Office Counsel for life insurance companies.

A R G U M E N T

I. The Advisory Opinion Erroneously Concludes That Certain Activities Involving The Implementation of Master And Prototype Plans, Constitutes The Unauthorized Practice of Law

The role of lawyers and lay persons in the qualified benefit planning process' is a matter of nationwide concern. In its proposed Advisory Opinion, the Standing Committee has failed to fully appreciate the nationwide or federal need for cooperation between lawyers, lay persons and employers in order to promote a voluntary private pension system. This lack of appreciation for the scope of private pension plan

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1 A qualified employee benefit plan is generally thought of as one described in Sections 401 through 405 of the Internal Revenue Code. These qualified plans - including pension and profit-sharing plans - offer the employer the advantage of a current income tax deduction for contributions to a pension plan, while postponing inclusion of the contribution, and its earnings, in the employee's income until the employee receives a distribution from the plan. Canan, Qualified Retirement Plans, CH. 1 p1.6 (1977).

options available to employers is particularly apparent in the Advisory Opinion's cursory treatment of the master and prototype plan opportunity.

The Florida Bar's proposed Advisory Opinion on the unauthorized practice of law would prohibit a nonlawyer from completing an adoption agreement or joinder agreement used to install a master or prototype plan. The Advisory Opinion states "[a]lthough a master or prototype plan is a standardized document, it falls within the Sperry definition and the requirements of Turner" and therefore concludes it must be completed by an attorney.

In The Florida Bar V. Sperry, 140 So. 2d 587 (Fla. 1962), this Court examined the actions of a nonlawyer who held himself out as a patent attorney. Although he was licensed to practice before the Patent Office, his preparation of patent applications and amendments was held by the court to have engaged in the unauthorized practice of law. Although the opinion describes the master or prototype plan as falling "within the Sperry definition," it is significant that the Court in Sperry specifically attempted to limit their definition of the practice of law. The opinion states:

> Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here. Rather we will do so only to the extent required to settle the issues [patent law] of this case.

Sperry, supra at 591.

The Advisory Opinion has purported to identify in Sperry an unchanging "definition" or "rule" describing the unlicensed practice of law which does not exist, a fact noted by this Court in The Florida Bar V. Brumbaugh, *355* So. 2d **1186** (Fla. **1978).** In limiting the so-called definition in Sperry, this Court stated:

> This definition is broad and is given content by this Court only as it applies to specific circumstances of each case. We agree that 'any attempt to formulate a lasting, all encompassing definition of practice of law is doomed to failure for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order.'" *355* So. 2d at 1192

Thus, the Advisory Opinion's reliance on a 27-year old rule developed in a case where the decisive issue was federal preemption, has foreclosed an analysis of the master and prototype plan areas that would more sensitively balance the interests involved and accommodate "the everchanging business and social order." The Advisory Opinion's analysis is further flawed, in the master and prototype plan area, by reliance on the rules purportedly developed in The Florida Bar v. Turner, *355* So. 2d **766** (Fla. **1978).**

Turner involved an individual enforcement action in which the Florida Bar sought to enjoin Mr. Turner's activities as the unauthorized practice of law. This Court reviewed a referee's report and "stipulation of facts and applicable law" to determine whether a life insurance agent

had engaged in the unauthorized practice of law. The Court, with two dissenters, simply accepted the referee's stipulation and did not develop its own opinion.

Mr. Turner had over a period of several years done business as the "Physician's Administrative Services." In this capacity he had provided legal forms with instructions, advice, and/or representations as to the completion of the forms in connection with the formation of corporate professional associations, pension plans, employment agreements, health plans and trust agreements. Clearly, Mr. Turner was engaged in a broad range of drafting and counseling activities with substantial client harm, and through the stipulation, the Florida Bar and Mr. Turner were able to agree as to what did and what did not constitute the unauthorized practice of law. The stipulated nature of the case in Turner -- with no input from other interested parties -- militates against its uncritical application to the issues in this case, which require more careful consideration of the current business economic and social climate. Furthermore, the Advisory Opinion's application of Turner to master and prototype plans is strained. The Advisory Opinion summarily concludes that a master or prototype plan comes "within" the requirements of Turner. However, the facts of Turner did not involve any master or prototype plans, and the stipulation between the Florida Bar and Mr. Turner did not mention such

plans.

Therefore, Amicus American Council of Life Insurance urges the Court to evaluate the issue of master and prototype plans in light of all the interests involved at the present time, and avoid simply expanding a 1978 case based on a stipulation to address current realities in the master and prototype plan areas.

Amicus American Council of Life Insurance agrees with the Advisory Opinion that the adoption of a master or prototype plan by an employer requires careful review and consideration. American Council of Life Insurance further agrees that the advice of an attorney in completing the document is highly desirable. However, the Advisory Opinion inappropriately mandates that the adoption agreement or joinder agreement "be completed by an attorney," without any regard for the effect of such a rule on the development of the master and prototype program as an integral part of the nationwide, voluntary pension system.

The master and prototype plan program has been established by the Internal Revenue Service as a method of standardizing well designed qualified pension and profit-sharing plans. The plans are designed to permit adoption by an employer by simply completing a series of elections contained within an adoption or joinder agreement. Although significant legal obligations are created by the execution of the agreement, the elections typically are designed to permit an

employer with no employee benefit experience to complete the document based on his knowledge of his workforce.

For example, two typical portions of the agreement are as follows:

> "Eligibility
>
> The age and service requirements for participation in the Plan shall be:
>
> (1) Attainment of age _____.
> (not to exceed 21)
>
> (2) No maximum age.
>
> (3) Completion of _____ Year(s) of Service.
> (Enter 0, 1, 2; no fractional years are permitted)
>
> Vesting
>
> Vesting Formula (Elect One). If 2 Years of Service is required to participate, (b) must be elected below:
>
> (a)( ) 20% after 2 Years of Service
>
> 40% after 3 Years of Service
> 60% after 4 Years of Service
> 80% after 5 Years of Service
> 100% after 6 Years of Service
>
> (b)( ) 100% after ____ Years of Service
> (Not to exceed 2 Years of Service)"

To further facilitate reliance upon the master and prototype program, the Internal Revenue Service has recently introduced the concept of the "Standardized Form" as one specific form of master or prototype plan. See IRS Rev. Proc. 89-9, 1989-6 I.R.B. 14; IRS Rev. Proc. 84-23, 1984-1,

C.B. 457. Adoption of a Standardized Form of a plan enables an employer to rely on an Opinion Letter issued by the Internal Revenue Service National Office to the financial institution sponsoring the plan. The standardized form obviates the necessity for the employer to submit his plan to the Internal Revenue Service to determine if it is tax qualified. The introduction of the "Standardized Form" concept by the Internal Revenue Service provides an employer the opportunity to adopt a qualified pension or profit-sharing plan with the assurance that the plan is tax qualified, without the employer expending the time and money involved in filing for a Determination Letter.

In summary, the principle that legal documents be drafted by the employer's lawyer should not extend to a master or prototype plan for which the insurer or sponsor has obtained, or is in the process of obtaining, a favorable letter of determination from the Internal Revenue Service. The function of these plans is to provide an economically feasible method of providing qualified pension benefits for employees of small employers who cannot afford or are unwilling to pay for all the technical help that might be needed to establish an individually-designed plan of their own.

The provision of prototypes and specimen documents (with appropriate caveats concerning the effect on legal rights and the advisability of obtaining an attorney) is critical to the correct and economical servicing of plans. Sponsoring

organizations provide sample documents which, generally, are compatible with their servicing arrangements. In this respect, not allowing specimen documents to be prepared would be a great disservice to the employer, and in many cases would actually create confusion, cost and misunderstanding with respect to plan servicing.

Rules concerning the unauthorized practice of law are meant to protect the public from harm. The Advisory Opinion candidly concedes that the Standing Committee "did not receive a great deal of testimony on the issue of public harm from the lay witnesses", but rather received such evidence from the attorney participants. However, the Advisory Opinion makes no effort to distinguish or describe the record, if any, concerning public harm involving the adoption of a well-designed and qualified master or prototype plan by an employer who chose not to retain an attorney. It is difficult to imagine any public harm that could result from employers completing the adoption agreement of a master or prototype plan when (1) options in the adoption agreement such as vesting schedules and eligibility requirements are well within the realm of an employer's understanding, (2) the master or prototype plan sponsor ensures that such plan is initially qualified and continually amended to remain qualified, (3) the Internal Revenue Service will not accept adoption agreements that do not meet qualification requirements, and (4) the master or prototype plan adoption

agreements must include the sponsoring organization's address and telephone number or a space for the address and telephone number of the sponsoring organization's authorized representative) for inquiries by adopting employers regarding adoption of the plan, the sponsoring organization's intended meaning of any plan provisions, or the effect of the opinion letter. See IRS Rev. Proc. 89-9.

11. The Advisory Opinion Improperly Ignores The Employer's Right Of Self-Representation By Mandating Attorney Review

The Advisory Opinion finds unacceptable the actions of a nonlawyer who "selects the options for the employer but informs the employer that he should have it reviewed by his attorney." Amicus American Council of Life Insurance agrees that a layman cannot under any circumstances represent that a master, prototype or specimen plan is suitable in every and all respects for the employer. In addition, the layman must clearly inform the employer that significant legal obligations and responsibilities are created by the adoption of a qualified plan and advise the employer to seek independent legal counsel to determine the plan's overall suitability for the employer.

It is common practice, in the area of master and prototype or specimen plans, for employers to be made aware of the significant legal obligations and responsibilities being created by the adoption of a master or prototype plan.

Typically, the master and prototype sponsor brings this to the attention of the employer through a bold-faced legend on any document to be signed. The legend generally states that "the contract and related documents are important legal instruments with legal and tax implications for which neither the sponsor nor its agents are responsible and therefore the employer should consult independent legal counsel". However, ultimately the decision whether to consult an attorney or not rests with the employer.

The Advisory Opinion disserves the private voluntary pension system by failing to recognize that employers may, at times, want or need to design, draft, qualify and administer an employee benefit plan without obtaining the professional judgment of a lawyer. The Advisory Opinion's lack of accommodation of employer self-representation, when such self-representation is deemed by the employer financially necessary in order to provide its employees with a pension benefit plan, is unfortunate. The Committee overlooked many opportunities within the Advisory Opinion to constructively address the issue of self-representation. Amicus American Council of Life Insurance urges the Court to fully examine this critical issue omitted in the Advisory Opinion.

This Court has recognized the importance of the principle of self-representation in evaluating unlicensed practice of law issues. In The Florida Bar v. Brumbaugh, supra, the Court, although restraining certain conduct of Mrs. Brumbaugh

in assisting clients with dissolutions of marriages and related legal documents, recognized that "her customers and potential customers have the constitutional right of self representation". Id at 1192. This Court noted that the United States Supreme Court has held that an individual's right to represent themsleves in court proceedings is a fundamental constitutional right. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). This fundamental right has been recognized in other Florida decisions in different contexts. See, e.g., Baker V. Grant, 497 So. 2d 895 (Fla. 5th DCA 1986) (court cannot prevent a civil litigant from representing himself). Carr v. Grace, 321 So. 2d 618 (Fla. 3d DCA 1975) (trial court erred in imposing condition that individual plaintiff be represented by counsel or be subject to dismissal of her cause).

111. The Advisory Opinion Understates Or Unnecessarily Restricts The Role Of The Home Office Counsel Of Life Insurance Companies

One dimension of the issue of unauthorized practice of law in qualified benefit planning which is not adequately discussed in the Advisory Opinion is the somewhat distinctive status that has been accorded to the "Home Office Counsel" of a life insurance company.[2] This status has been recognized for almost forty years.

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2 105 ABA Rep. 291, 376 (1980).

A. Background

Briefly recapitulating this history, in 1952 the National Conference of Lawyers and Life Insurance Companies (hereinafter "National Conference") was created by the ABA and its Unauthorized Practice of Law Committee on the one hand and by the joint committee on the practice of law, formed the two life insurance associations then existent, the American Life Convention and the Life Insurance Association of America, on the other. 77 ABA Rep. 437 and 569 (1952).

The National Conference prepared the "Conference Report on the Function of Home Office Counsel'' on May 23, 1953, which was approved by the ABA on August 24, 1953. 78 ABA Rep. 124 and 284 (1953). The Report covered the function of Home Office Counsel with regard to the disseminating of legal information and specimen legal documents, the provision of legal information to policyholders and prospective policyholders and consultation with the lawyer for a policyholder or a prospective policyholder.

After these principles were agreed to by the organized bar and the life insurance industry, the National Conference

published several articles based on these principles for the benefit of all concerned.[3]

In **1980** the ABA, while rescinding many national conferences because of their somewhat haphazard pattern, specifically reestablished (among others) the National Conference of Lawyers and Life Insurance Companies. 105 ABA Rep. **291** and **376 (1980).** The purpose given was "fostering excellence in professional performance in the public interest and making of recommendations regarding the resolution of public issues or professional concern.''

B. Specific Functions Authorized For Home Office Counsel

Among other functions of Home Office Counsel authorized by the Conference Report (based on counsel's unique position and training) were the following:

1. Drafting specimen agreements primarily for the benefit of the policyholder's lawyer;[4]

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3 National Conference of Lawyers and Life Insurance Companies, Conference Report on Functions of Home Office Counsel §2(a) **(1981).**

4 Id.

2. Preparing legal documents to which the insurance company is a party and interpreting such documents;[5]

3. Advising as to the tax and legal consequences of transactions, such as an assignment or policy exchange, but not as to the appropriateness of the assignment or exchange for the particular policyholder;[6]

4. Preparing and distributing bulletins providing information concerning recent legal and tax developments;[7]

5. Providing advice concerning the tax consequences of policy or contractual provisions or regarding

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5 Model Rules of Professional Conduct, Rule 1.7, 52 U.S.L.W. 1 (August 16, 1983) relating to the avoidance of conflicts of interest. See ~~also~~ People v. People's Trust Co., 180 A.D. 494, 167 N.Y.S. 767 (1917); Opinion of Justices, 289 Mass. 607, 194 N.E. 313 (1935).

6 National Conference of Lawyers and Life Insurance Companies, Conference Report on Functions of Home Office Counsel §2(a) (1981).

7 The practice of law necessarily involves the existence of a "client". Providing general background information would seem to be equivalent to publishing an information bulletin. See National Conference of Lawyers and Life Insurance Companies, Conference Report on Functions of Home Office Counsel, §1(a) (1981). See also, New York County Lawyers' Association V. Dacey, 28 A.D.2d 161, 283 N.Y.S.2d 984 (Steven J. dis.), ~~rev'd~~ ~~and~~ dissenting opinion adopted, 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967); Oregon v. Gilchrist, 272 Or. 552, 538 P.2d 913 (1975).

given courses of conduct intrinsically related to the purchase of insurance;[8]

6. Advising a policyholder concerning the life insurance company's reporting and withholding responsibilities;[9] and

7. Preparing proposed will or trust language for the policyholder's lawyer.[10]

C. Application of Principles to Standing Committee's Proposed Advisory Opinion

The role of Home Office Counsel may have been understated by the Standing Committee and should be clarified by the Court, in the following areas:

1. The advice that can be given in connection with master and prototype plans (Advisory Opinion p. 13). Thus, insofar as advice as to suitability is requested,

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8 National Conference of Lawyers and Life Insurance Companies, Conference Report on Functions of Home Office Counsel §2(a) (1981).

9 Home Office Counsel may, of course, exercise professional legal judgment only on behalf of their employer, not on behalf of their employer's clients or customers.

10 See Green V. Ohio Huntington Nat'l Bank, 4 Ohio St.2d 78, 212 N.E.2d 585 (1965); See, e.g., Distributions of Variable Annuities by Insurance Companies: Broker-Dealer Registration and Regulation Problems Under the Exchange Act of 1934, Rel. No. 34-8389 (Sept. 13, 1968), [1985] 3 Fed. Sec. L. Rep. (CCH) paragraph 25,008.

considerable assistance can be rendered by Home Office Counsel (short of a final decision) in this area, since such advice is incident to the Company's own plans without becoming the unauthorized practice of law;

2. The limitations on the role of nonlawyers relating to materials required for a plan's installation (Advisory Opinion p. 13). Thus, summary plan descriptions, notices to interested parties and employee communication materials appear appropriate for the assistance of Home Office Counsel;

3. The Home Office Counsel's preparation of a summary plan description (Advisory Opinion p. 14), a document that requires clarity and comprehensibility as well as legal refinement;

4. The Home Office Counsel's assistance in the preparation of master and prototype adoption agreements (Advisory Opinion pp. 15-16); and

5. The impact of a "cursory" review by an attorney (Advisory Opinion p. 13). Unless the outside attorney is acting in a sham capacity, it is inappropriate to require the Home Office Counsel, in effect, to determine the proper extent of the outside attorney's efforts, especially if the Home Office Counsel has given knowledgeable help in the installation of the master, prototype or specimen plan.

CONCLUSION

Amicus American Council of Life Insurance respectfully requests that the Court decline to adopt The Florida Bar's Advisory Opinion as filed in this case. Rather, the Court should modify the Advisory Opinion, in the areas of master and prototype plans and the involvement of Home Office Counsel, to more correctly reflect the interests of the employers interested in implementing pension plans and the sponsors of master and prototype plans, including life insurance companies. Additionally, the Advisory Opinion should be modified by the Court to recognize the development and federal regulation of the master and prototype plan opportunity, and avoid a ruling that unnecessarily restricts non-lawyer participation in this area. More specifically, the Court should:

1. Modify the Advisory Opinion to permit qualified non-lawyers to assist employers in the completion of adoption agreements, or other documents necessary for the implementation of a master or prototype plan.
2. Affirm an employer's right of self-representation and modify the Advisory Opinion to eliminate any

requirement, or suggestion, that an employer must retain an attorney to prepare adoption agreements, or other documents, for the implementation of a master or prototype plan.

3. Modify the Advisory Opinion to clarify and provide greater scope to the role of Home Office Counsel in the entire pension plan process.

Respectfully submitted,

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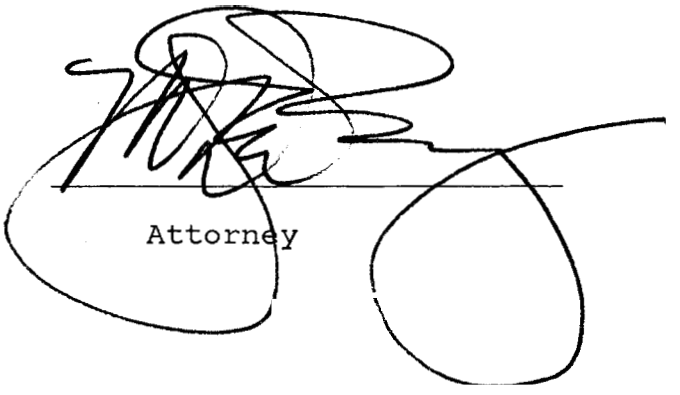
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of October, 1989, a copy of the foregoing Amicus Curiae Brief of American Council of Life Insurance was furnished to Lon S. Holcomb, Assistant UPL Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and to all parties listed on the attached Service List by U. S. Mail.



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