IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 74,479



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

THE FLORIDA BAR STANDING COMMITTEE
ON THE UNLICENSED PRACTICE OF LAW

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

Date: October 2, 1989
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## STATEMENT OF THE CASE AND OF THE FACTS

### A. Interest of William M. Mercer-Meidinger-Hansen, Inc. and Towers Perrin Forster & Crosby, Inc.

William M. Mercer-Meidinger-Hansen, Inc. ("Mercer"), a wholly-owned subsidiary of Marsh & McLennan Companies, Inc., is a professional services firm providing clients with analysis and advice in the field of employee benefits. Towers Perrin Forster & Crosby, Inc. ("Towers Perrin") is a management consulting firm with an extensive practice in the employee benefits field. Mercer and Towers Perrin, the two largest benefits service firms in the United States, provide extensive employee benefits services to Florida employers from offices in Florida and throughout the United States.

Representing a vast array of academic disciplines and experiences, the employees of Mercer and Towers Perrin are their greatest resources. To maintain the highest standards of competency, both firms conduct rigorous programs of professional development, continuing education, and peer review. As many of the consultants in the benefits practice are lawyers, enrolled actuaries and certified public accountants ("CPAs") intimately familiar with ERISA and authorized to practice before the regulating agencies, the firms are able to offer a broad spectrum of benefits services. Areas of expertise in which Mercer and Towers Perrin provide

benefits services include plan design, plan administration, financial analysis, union negotiation, human resources, mergers and acquisitions, and employee communications.

Mercer and Towers Perrin are concerned that should the Proposed Advisory Opinion ("Proposed Opinion")[1] issued by the Standing Committee on the Unlicensed Practice of Law ("UPL Committee") be adopted, the valuable multi-disciplinary services performed by benefits consulting firms will no longer be available to Florida employers seeking to implement and maintain pension plans qualified under the Employee Retirement Income Security Act of 1974 ("ERISA"). Moreover, the procedures proposed by The Florida Bar ("Bar") would result in unnecessary duplication of efforts by lawyers and consultants. As a result, the significantly increased costs associated with the establishment and operation of pension plans could force employers to reduce or eliminate employer-financed benefits, thereby frustrating one of Congress' primary goals in enacting ERISA.

**B.** Issue To Be Decided

The issue presented for review is whether this Court should adopt, modify, or disapprove a proposed advisory opinion

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1 A copy of the Proposed Opinion is attached hereto as Appendix 1.

on nonlawyer preparation of pension plans2 submitted by the Standing Committee on the Unlicensed Practice of Law of The Florida Bar.

*C.* **Procedural History**

On July 2, **1988,** the Executive Council of the Tax Section of The Florida Bar ("Tax Section") adopted a resolution requesting that the UPL Committee investigate nonattorneys whose activities may or do constitute the unlicensed practice of law in the provision of legal advice and drafting of qualified retirement plans. Notice was published on four days in December **1988,** in The Florida Bar News and The Tallahassee Democrat respecting the impending hearing and comment period. See Proposed Op. at **1**.

The UPL Committee held a single day of hearings on January 12, **1989** on the request for an investigation and advisory opinion. The hearing record was opened for written comments from January **12, 1989,** until January **31, 1989,** and again from March **1, 1989,** until March **21, 1989.** The Tax Section, which had originally requested the investigation, stated that it had not formed a complete opinion on the unlicensed practice of law in the employee benefits area. See

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2 **As** used herein, the term "pension plan," consistent with the Proposed Opinion, shall mean "all qualified retirement plans, including, but not limited to, pension plans, profit sharing plans, target benefit plans, cash or deferred plans and employee stock ownership plans," Proposed Op. at **3** n.2.

Written Testimony of Edward Heilbronner, Esq., at 1 (Jan. 12, 1989). The Record is devoid of comments submitted by any national benefits services firm. On July 28, 1989, the UPL Committee issued its Proposed Opinion.

**D.** Summary of the Proposed Opinion

In its Proposed Opinion, the Bar asserts that clarification of the Court's decision in The Florida Bar v. Turner[3] is necessary in light of the enactment of ERISA[4], in order to serve the public interest and to respond to claims of public harm from nonlawyers practicing in the employee benefits field.[5] Specifically, the Bar responds to a request from the Tax Section for a formal advisory opinion on the following question: "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." Proposed Op. at 1. In its Proposed Opinion, the Bar recognizes that the pension plan area is governed by ERISA and involves interpretation of the Internal Revenue Code ("IRC"), Revenue Rulings of the Internal Revenue Service ("IRS"), Department of

3 355 So.2d 766 (Fla. 1978).

4 As recognized by the Bar, "The facts which formed the basis of the Turner opinion occurred in 1973 -- prior to the passage of ERISA.'' Proposed Op. at 7.

5 "[T]he Standing Committee, [however,] did not receive a great deal of testimony on the issue of public harm . . . ." Proposed Op. at 4.

Labor ('IDOL")opinions, and other statutory, regulatory and judicial pronouncements. Id. at 3.

The Florida Bar expresses two concerns with nonlawyers designing and drafting pension plans. One concern is that nonlawyers "are often motivated by the sale of a product or service other than the plan itself." Id. at 4. What is necessarily lacking, declares the Bar, "is the independent professional judgment the attorney is required to provide by the Rules of Professional Conduct as part of the attorney-client relationship." Id. at 4-5. The second concern expressed is "the nonlawyer's failure to consider the effect of the pension plan on other areas of the law or the employer's business," such as the interplay of tax consequences arising from the plan. Id. at 5. The Proposed Opinion does reflect, however, the Bar's recognition that "there are areas in the pension field where nonlawyers perform a valuable service." Id. In this regard, the Bar recognized "[t]he witnesses agreed that the client is best served if the attorney and layman work together to formulate and implement a pension plan. Just as the attorney practicing in the pension area has expertise in the law, the nonlawyer working in this field has his own area of expertise." Id.

As a framework for analysis, the Proposed Opinion divides the process of establishing and administering a pension

plan into eight steps.[6] Following on this theme of cooperation between the lawyer and nonlawyer, the Proposed Opinion holds that a pension consultant may (i) "motivate" the employer to implement a pension plan (id. at 9); (ii) discuss with the employer the various types of plans available and outline the options (id. at 10); (iii) assemble employer information (size of the workforce, financial resources, etc.) necessary to develop and implement the plan (id. at 11); and (iv) discuss generally with the employer use of a master or prototype plan and explain its structure and process. Id. at 10-11.

Once the nonlawyer has motivated the employer and gathered the client information, "an attorney of the employer's choosing must become involved in the [pension planning] process." Id. at 12. According to the Bar, the plan process thereafter -- choosing the appropriate plan, drafting, and submitting the plan to the IRS for qualification -- involves the analysis and application of specific employer information to determine the best plan for the employer's needs. Moreover, practice during these stages, whether for customized plans or

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6 The Proposed Opinion, which follows the Turner formulation, structures the process of establishing and administering a pension plan as follows: (1) promoting, marketing and selling the plan; (2) explaining alternatives generally available to the public; (3) gathering client information; (4) analyzing client information and deciding on the type of plan, and selecting the plan provisions; (5) drafting plan documents; (6) qualification of the plan; (7) administering the plan and dealing with regulators; and (8) termination of the plan. Proposed Op. at 8.

master and prototype plans, also requires the ability to consider the other aspects of the employer's needs. Id. As a result, the Bar determines these latter services involve the practice of law necessarily requiring the participation of a lawyer. Id. at **12-22**. Accordingly, under the Proposed Opinion, a Florida Bar member working for a consulting firm (the "nonlawyer") may not draft "an individually designed plan or select the options of a plan for the nonlawyer company to sell to the employer." Id. at 16.

The Proposed Opinion does recognize that certain professionals are permitted by regulation to submit pension plans to the IRS for qualification and that the opinion should not be read "to prohibit a nonlawyer from practicing his profession or engaging in activities which federal rules or regulations specifically state may be conducted by a nonlawyer, nor to allow an attorney to engage in a profession in which he is not licensed." Id. at **22**.[7] The Proposed Opinion, however, does not explain or discuss how its prohibition against nonlawyers engaging in specific activities can be reconciled with the authority granted pension plan consultants to practice before the IRS, DOL, and the Pension Benefit Guaranty Corporation ("PBGC").

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**7** The Bar does not preclude "the attorney from seeking the services of a nonlawyer to assist the attorney in drafting the plan documents." Id. at **17** n.6.

## *SUMMARY* OF THE ARGUMENT

In its Proposed Opinion, The Florida Bar attempts to provide nonlawyers working in the employee benefits field with clarifying standards to guide the conduct of their businesses. The Proposed Opinion would preclude nonlawyers from providing specific design advice to clients, and from drafting plan documents (including master or prototype plans) and summary plan descriptions ("SPDs"). In making this recommendation, the Proposed Opinion improperly seeks to limit the federal grant of authority permitting lawyers, enrolled actuaries and CPAs to practice before the IRS, the DOL, and the PBGC.

This Court should not adopt the prohibitions on practice by benefits consultants recommended by the Bar in the Proposed Opinion. In considering the proposed restrictions on the pension practice by nonlawyers, this Court should employ the least restrictive means available in balancing the competing interests. The restrictions recommended by the Bar fail in this regard as they are overbroad and unjustified where they do not consider the qualifications and capabilities of consultants to practice in the employee benefits field. Further, the Bar ignores the significant impact on Florida employers who are largely deprived of the consultant'svaluable services under the Proposed Opinion.

The Florida Bar also fails to recognize that lawmaking in this area is precluded by the preemption provisions of ERISA. That Act is a comprehensive and reticulated statute

that expressly preempts all state laws that relate to employee benefit plans, with certain exceptions not applicable to the Proposed Opinion.

In light of these deficiencies, Mercer and Towers Perrin respectfully request that the Court reject the Proposed Opinion in its entirety. In the alternative, Petitioners respectfully request that the Court appoint an ad hoc committee to study further the issues and make recommendations to this Court.

## ARGUMENT

### I. THE FLORIDA BAR MAY NOT CONSTITUTIONALLY RESTRICT THE SCOPE OF THE PRACTICE: OF PENSION PLAN CONSULTANTS AUTHORIZED TO PRACTICE: BEFORE THE IRS, DOL AND PBGC.

Pursuant to authority granted by Congress, lawyers, enrolled actuaries, CPAs, and other nonlawyers are authorized to practice before the IRS, DOL, and PBGC. In its decision, State ex rel. The Florida Bar v. Sperry,[8] this Court established the scope of practice for Florida nonlawyers practicing before a federal agency. As this Court recognized, practice before a federal agency necessarily includes "advising, assisting and representing applicants," and "rendering opinions." 159 So.2d at 230. In its Proposed Opinion, however, the Bar unduly narrows the scope of practice permitted under Sperry, thereby limiting competition in the

8 159 So.2d 229 (Fla. 1963).

delivery of legal services.[9] Thus, to the extent the Proposed Opinion seeks to circumscribe improperly the federal license to practice before federal agencies, it is an unconstitutional exercise of state regulatory powers.

It is well-established that federal law is the final arbiter of who is eligible to practice before federal agencies. See Sperry v. State ex rel. The Florida Bar, 373 U.S. 379 (1963). The Florida Supreme Court and the United States Supreme Court have previously faced the issues attending the interaction of federal statutes and the regulation of the unlicensed practice of law. State ex rel. The Florida Bar v. Sperry, 140 So.2d 587, 588 (Fla. 1962), vacated, 373 U.S. 379 (1963). In Sperry, The Florida Bar sought a declaration that the activities of an agent licensed by the United States Patent Office constituted the unlicensed practice of law. This Court concluded that Sperry's conduct constituted the unauthorized practice of law that Florida could properly prohibit. Further, this Court ruled that neither federal statute nor the Constitution of the United States empowered any federal body to

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9 This Court has recognized "the natural tendency of all professions to act in their own self-interest . . . " The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1189 (Fla. 1978). As the necessary effect of the Proposed Opinion would be to carve out a large section of the pension plan practice for lawyers only, it is important for this Court to observe its own guideline and "closely scrutinize all regulations tending to limit competition in the delivery of legal services to the public, and determine whether or not such regulations are truly in the public interest." Id.

authorize such conduct within Florida's borders. Sperry, 140 So. 2d at 595. As such, the agent was enjoined from, inter alia, "preparing, drafting and construing legal documents"; and preparing and prosecuting applications for letters patent. Id. at 596. The agent petitioned for a writ of certiorari seeking to attack the Court's injunction prohibiting him from exercising his federal license before the Patent Office. 373 U.S. at 382.

The United States Supreme Court did not question the Florida Supreme Court's determination that, in Florida, the preparation and prosecution of patent applications for others constitutes the practice of law. Id. at 383. The Supreme Court observed, however, that the enabling statute expressly permits the Commissioner to authorize practice before the Patent Office by nonlawyers and that the Commissioner has explicitly exercised that authority. Id. at 385. The Supreme Court concluded that a State cannot "'hinder or obstruct the free use of a license granted under an act of Congress.'" Id. (quoting Pennsylvania v. Wheeling & B. Bridge Co., 54 U.S. 518 (1851)). Central to the Supreme Court's analysis was that "[t]he rights conferred by the issuance of letters patent are federal rights." 373 U.S. at 382. The Court remanded the case for this Court to determine the scope of permissible conduct "incident to the preparation and prosecution of patent applications before the Patent Office." Id. at 404.

On remand, this Court recognized that the scope of practice before the Patent Office involves more than appearing in administrative proceedings. Sperry, 159 So.2d. at 230. Consequently, this Court modified its injunction

> so as not to prevent the respondent Sperry from (a) advising, assisting, and representing applicants before the United States Patent Office in the preparation and prosecution of their applications for patents, and performing and doing all acts and things to the full extent permitted to be done by registered agents as provided under the Rules of Practice of the United States Patent Office in patent cases; (b) rendering opinions as to patentability insofar as the giving of such opinions may be necessary to advise and assist applicants in the preparation and prosecution of patent applications and amendments thereto; and (c) holding himself out to the public as qualified to perform the acts set forth in (a) and (b) above.

Id. Under this Court's holding in Sperry, therefore, The Florida Bar may not restrict the authority of Petitioners' consultants -- licensed lawyers, enrolled actuaries, CPAs, and other nonlawyers -- to practice to the full extent provided in Sperry before the IRS, DOL and PBGC where such authority is granted by Congress or federal regulation.

Lawyers, enrolled actuaries, CPAs, and other nonlawyers are authorized by federal statute and regulation to perform the very acts the Proposed Opinion characterizes as the unlicensed practice of law. Under federal law, attorneys and CPAs, by virtue of their professional qualifications, are deemed eligible to represent others before the IRS. 5 U.S.C.

§ 500 (1977).[10] Further, the Secretary of the Treasury is authorized to qualify other nonlawyers or nonaccountants to practice before the IRS. 31 U.S.C. § 330 (1983). Thus, for example, in the area of pension plans, enrolled actuaries are specifically authorized to practice before the IRS.[11] See Treas. Circular 230, 31 C.F.R. pt. 10 (1988). As provided by

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[10] 5 U.S.C. § 500 provides in relevant part:

> (b) An individual who is a member in good standing of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.
>
> (c) An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service of the Treasury Department on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

It should be highlighted that a lawyer need not be employed by a law firm in order to practice before the IRS. Licensed attorneys who are employees of consulting firms are permitted to practice before that agency.

[11] Enrolled actuaries may engage in practice before the IRS with respect to the following Internal Revenue Code (Title 26 U.S.C. (1988)) sections: 401 (qualification of employee plans); 403(a) (relating to whether an annuity plan meets the requirements of section 404(a)(2); 404 (deductibility of employer contributions); 405 (qualification of bond purchase plans); 412 (funding requirements for certain employee plans); 413 (application of qualification requirements to collectively bargained plans and to plans maintained by more than one employer); 414 (containing definitions and special rules relating to the employee plan area); 4971

(Footnote continued on page 14)

regulation, practice before the IRS entails a broad spectrum of activities:

> Practice before the Internal Revenue Service comprehends all matters connected with presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service and the representation of the client at conferences, hearings, and meetings.

31 C.F.R. § 10.2(a) (1988). The DOL and PBGC have granted similar authority to nonlawyers.[12]

Significantly, the authority granted to lawyers, enrolled actuaries and CPAs includes the authority to prepare and file

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11 (Footnote continued)

(relating to excise taxes payable as a result of an accumulated funding deficiency under section 412); 6057 (annual registration of plans); 6058 (information required in connection with certain plans of deferred compensation); 6059 (periodic report of actuary); 6652(e) (failure to file annual registration and other notifications by pension plan); 6652(f) (failure to file information required in connection with certain plans of deferred compensation); 6692 (failure to file actuarial report); 7805(b) (relating to the extent, if any, to which an Internal Revenue Service ruling or determination letter coming under the herein listed statutory provisions shall be applied without retroactive effect); and 29 U.S.C. 1083 (1985) (relating to waiver of funding for nonqualified plans). See 29 C.F.R. § 10.3(d) (1988).

12 See 29 C.F.R. § 2606.6 (1988) (authorization to represent others before PGC); ERISA Proc. 75-1, 40 Fed. Reg. 18471 (Apr. 28, 1975) (CPA specifically authorized to represent clients requesting prohibited transaction exemptions from the DOL); ERISA Proc, 76-1, 41 Fed. Reg. 39271 (Aug. 27, 1976) (authorizing nonlawyers to represent others before the DOL with respect to requests for information letters and advisory opinions).

"necessary documents" on "all matters relating to a client's rights, privileges, or liabilities under laws . . . administered by the Internal Revenue Service." Id. These documents in the pension area must of necessity include the pension plan documents, since the requirements for such plans are governed primarily by the Code. Indeed, the IRS recently authorized 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 prototypes to its clients. Rev. Proc. **89-13 § 4.03,** I.R.B. **1989-7** (Feb. **13, 1989).**[13] The Proposed Opinion, however, plainly seeks to limit this broad license to draft plans and related documents for presentation **to** the IRS. **As** such, it is unconstitutional and invalid because it "obstruct[s] the free use of a [federal] license" granted under ERISA. Sperry, **373** U.S. at **385.**

**11. EVEN IF THE FLORIDA BAR MAY CONSTITUTIONALLY ACT TO REGULATE THE PRACTICE OF PENSION PLAN CONSULTANTS, THIS COURT SHOULD REJECT THE PROPOSED OPINION WHERE IT IS OVERBROAD.**

**A. The Court Should Adopt the Least Restrictive Method of Achieving The Goals Underlying The Prohibition Against the Unlicensed Practice of Law.**

Even if this Court should determine that adoption of the Proposed Opinion is not an unconstitutional exercise of

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13 In contrast to the Proposed Opinion, Revenue Procedure **89-13** expressly permits lawyers employed by a consulting firm to complete regional master or prototype plans and file for notification letters from the IRS. Rev. Proc. **89-13** was issued between the time that the Bar held its hearing on this issue and the time it issued the Proposed Opinion. This illustrates the danger in attempting to restrict practice in an area of exclusive federal jurisdiction.

state regulation of activities permitted by federal agencies, the Proposed Opinion should be reformulated to accommodate ERISA, antitrust and First Amendment principles by employing the least restrictive alternatives in protecting the public interest.

### 1. In Determining What Constitutes the Unlicensed Practice of Law, the Court Should Accommodate the Purposes of ERISA.

In determining the scope of the practice of consultants and lawyers in the employee benefits field, this Court should "closely scrutinize all regulations tending to limit competition in the delivery of legal services to the public and determine whether or not such regulations are truly in the public interest." The Florida Bar v. Brumbaugh, 355 So.2d. at **1180, 1189** (Fla. **1978).** This Court has observed that "it is somewhat difficult to define exactly what constitutes the practice of law in all instances." Id. at **1191.** "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 ever changing business and social order.'" Id. (quoting State Bar v. Cramer, **399** Mich. **116, 249** N.W.2d **1, 7 (1976)).** Nonetheless, it is clear that in determining whether a particular act constitutes the practice of law, the "single most important concern . . . is the protection of the public from incompetent, unethical, or

irresponsible representation." Florida Bar v. Moses, 380 So.2d 412, 416 (Fla. 1980); see Brumbaugh, 355 So.2d at 1191-92.

In light of the difficulty in determining specifically what constitutes the practice of law, this Court generally focuses on whether the advice given affects "important rights" and, if so, whether the "reasonable protection" of those advised demands a knowledge of the law "greater than that possessed by the average citizen." Moses, 380 So.2d at 414. Significantly, this Court has recognized that implicit in its power to define, regulate and prohibit the practice of law, "is the ability to authorize the practice of law by lay representatives. The unauthorized practice of law and the practice of law by nonlawyers are not synonymous." Id. at 417 (emphasis added). There is no doubt, therefore, that one does not need to be a Florida lawyer to engage lawfully in conduct that constitutes the practice of law. See In re Advisory Opinion HRS Nonlawyer Counselor, 518 So.2d 1270, 1272 (Fla. 1988) (although "HRS lay counselors are engaged in practice of law," the Court was "not convinced that such practice is the cause of the alleged harm, or that enjoining this practice is the most effective solution to this complex problem"; ad hoc committee to study situation ordered), rev'd on other grounds 547 So.2d 909 (Fla. 1989).

In accommodating the protection of the public interests, this Court should recognize that Congress enacted ERISA as a comprehensive, legislative remedial scheme to resolve recognized problems in the private employee benefit plan field. 29 U.S.C. §§ 1001(a), (b) (1985). ERISA is "designed to provide safeguards with respect to the establishment, operation and administration" of employee benefit plans. Fine v. Semet, 514 F. Supp. 34, 41 (S.D. Fla. 1981), aff'd, 699 F.2d 1091 (11th Cir. 1983). Moreover, through ERISA, Congress strove "to increase the number of individuals in employer-financed benefit plans . . . ." Id.; see In re C.D. Moyer Co. Trust Fund, 441 F. Supp. 1128, 1131 (E.D. Pa. 1977), aff'd, 582 F.2d 1273 (3d Cir. 1978). Thus, this Court needs to consider Congress' goals of protecting benefit expectations while increasing the number of employer-financed benefit plans.

In determining what constitutes the unlicensed practice of law in the pension plan field, this Court should accommodate competing -- yet reconcilable -- policies. See Brumbaugh, 355 So.2d at 1191-93. Essentially, this Court should provide reasonable protection to the public while preserving employee benefit expectations and fostering an environment for expanding employer-financed plans. Thus, the process of analysis should initially focus on whether the conduct at issue constitutes the practice of law. If the Court determines the activity constitutes the practice of law, it

becomes necessary to consider the underlying policy reasons for enforcement in order to determine whether the conduct in a particular instance should be prohibited. The Proposed Opinion is inadequate, therefore, where it fails to conduct this policy analysis.

### 2. It Is Incumbent on the Court To Conduct A Critical Examination To Determine Whether There Exist Less Anticompetitive Alternatives To Achieving Its Goals.

As stated, in evaluating whether certain conduct should constitute the unlicensed practice of law, the public interest is paramount. See Moses, 380 So.2d at 416. In numerous contexts, the courts have held that the "public interest" includes deference to the procompetitive policies of the antitrust laws where these policies can be applied without supplanting other equally desirable public goals.[14] At the very least, this means that in the present context the Court should adopt the least anticompetitive alternative to achieving the ethical goals supporting the prohibition against the unauthorized practice of law. See Brumbaugh, 355 So.2d at 1192. "Otherwise the benefits of competition, acknowledged by Congress, would be sacrificed needlessly." United States v.

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14 See, e.g., Gulf States Utilities Co. v. FPC, 411 U.S. 747, 759 (1973); FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968); FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953); McLean Trucking Co. v. United States, 321 U.S. 67, 80 (1944); Denver & R.G.W.R.Co. v. United States, 387 U.S. 485, 492-93 (1967).

Third Nat'l Bank, 390 U.S. 171, 189 (1968); cf. White Motor Co. v. United States, 372 U.S. 253 (1963) (Brennan, J. concurring) ("The problem is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in the light of the extenuating interests.").

Understandably, the United States Supreme Court has been chary of claims that unduly restrictive policies are necessary to promote otherwise laudable ethical goals. Physicians,[15] dentists,[16] lawyers,[17] real estate brokers,[18] and engineers[19] have, on various occasions in the past, all sought to justify unduly anticompetitive restraints on the ground that they were necessary to accomplish certain legitimate ethical goals. In these cases the Supreme Court has, by and large, rejected such claims, not because the goals were not laudable, but because there was no showing that alternative methods could not have accomplished the same purposes.

In commenting on the weight to be given ethical considerations in circumstances involving the professions, the

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15 United States v. American Medical Ass'n, 317 U.S. 519 (1943).

16 FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

17 Goldfarb v. Virginia State Bar, 421 U.S. 772 (1975).

18 United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950).

19 National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

Supreme Court in National Society of Professional Engineers v. United States, 435 U.S. 679, 696 (1978), stated:

> Ethical norms may serve to regulate and promote . . . competition, and this falls within the Rule of Reason. But the . . . argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception . . . is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason . . . for doing away with competition.

435 U.S. at 696. In United States v. American Medical Association, the Court hinted that reasonable methods for promoting ethical goals should be given weight. (CITE) However, as Professional Engineers made clear, there must be a critical examination as to whether the goals cannot be achieved by some alternative means less destructive of competition. 435 U.S. at 696. This approach is no more than that followed by the courts in the more general antitrust context where an examination of alternatives is required in order to determine whether the restraint, in fact, is necessary to achieve the stated goal. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979) (agreement between corporations having market power should be reasonable in light of least restrictive alternatives); see also Wilk v. American Medical Ass'n, 671 F. Supp. 1465, 1483 (N.D.Ill. 1987) (a boycott of chiropractors

by an association of physicians who argued that they were only acting in the interests of patient care was declared illegal because the association could have adopted less restrictive means to promote adequate patient care).

The lesson of these cases is clear: the prohibitions on engaging in certain activities by nonlawyers must be evaluated in light of the goals to be advanced by prohibiting the unauthorized practice of law and to the extent that such goals can be accomplished by other means, a total ban on such activities by nonlawyers should not be countenanced. Otherwise, the judiciary would be unjustifiably protecting the public against the alleged harms associated with the activities of nonlawyers "by conferring monopoly privileges" on lawyers. Professional Engineers, 435 U.S. at 696.

It was unreasonable for The Florida Bar to assume that all lawyers practicing in the employee benefits area will necessarily be more qualified than consultants. For example, it is inconceivable that a lawyer fresh out of law school, who may not even have taken a course in ERISA, would be more qualified than a consultant who has spent years evaluating pension plans, to engage in the activities at issue herein.[20] Notably, courts have rejected restrictions on the practice of professionals that fail to consider the realities of such

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20 Indeed, an experienced lawyer stated in the Record that it takes several years for a lawyer to even "become familiar" with the pension field. See Testimony of Sharon Quinn Dixon, R. at 82.

practice. See Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 485 (4th Cir. 1980) (court rejected claims that psychologists should be compensated independently of a supervising physician having no special expertise for giving advice on nervous and mental disorders, pointing out that a general practitioner is certainly less qualified than a clinical psychologist to give such advice), cert. denied, 450 U.S. 916 (1981).

As is demonstrated below there are a number of less anticompetitive alternatives available to protect the public that are less anticompetitive than the prohibitions proposed. It is not necessary to confer "monopoly privileges" on lawyers to accomplish these legitimate goals. At the very least, the Court should require the Bar to demonstrate, by convincing evidence, that the alternatives are unworkable. Since the Bar has not yet done so, the Proposed Opinion should be rejected.

### 3. This Court Should Strive to Accommodate Important First Amendment Interests in Applying the Least Restrictive Alternatives.

In restricting the right of consultants to practice, the Proposed Opinion impinges on important First Amendment rights to speak and print what one chooses -- even in a commercial context. See Brumbaugh, 355 So.2d at 1192. As a result, in order to pass constitutional muster, the restriction on First Amendment freedom must be no greater than necessary to achieve a substantial state interest.

In commercial speech cases, a four-part analysis has been developed to determine whether commercial speech has been unlawfully restrained by a governmental restriction. In Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980), the Court structured the analysis as follows:

> 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. Next we ask whether the asserted governmental interest is substantial. If both yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. The Court has averred that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity . . . . If the communication is neither misleading nor related to unlawful activity, [however] the government's power is more circumscribed." Id. at 563-564.

Recognizing that the Proposed Opinion seeks to restrict "commercial speech"[21] and there exists a

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21 See Central Hudson Gas, 447 U.S. at 561; NAACP v. Button, 371 U.S. 415 (1963) (NAACP brought suit to restrain the enforcement of a Virginia statute that prohibited the NAACP from advising an individual that his rights had been infringed; referring him to a particular attorney for assistance; and giving legal assistance to the person referred. The Court held that the statute restricts the NAACP's freedom of expression and thereby violates the First Amendment.).

countervailing "substantial state interest," the Court's examination should focus on whether the First Amendment restraint advances the government's interest in the least restrictive manner. See Central Hudson Gas, 447 U.S. at 570 (interest was not advanced in the least restrictive manner since the restriction reached all promotional advertising); Bates v. State Bar, 433 U.S. 350 (1977) (a state may not prevent the publication of a lawyer's truthful advertisement since presumably such speech serves individual and societal interests in assuring informed and reliable decisionmaking). As demonstrated below, the Bar failed to consider this significant issue. Moreover, there exist less restrictive alternatives to achieving the protection of the public interest.

B. There Exist Less Restrictive Alternatives Available To Protect the Public Interest.

In attempting to provide guidance to "conscientious nonlawyers" practicing in the pension field, the Bar's Proposed Opinion fails to tailor its restrictions to the least restrictive alternatives necessary to protect the public interest. The Proposed Opinion, therefore, should be reformulated to satisfy competitive and First Amendment principles, and to avoid frustrating Congress' goal in enacting ERISA of encouraging employer-financed benefit plans. Although not sufficiently broad, a less restrictive model for this Court may be found in the American Bar Association's Informative Opinion A on the Unauthorized Practice of Law in the field of

employee benefit planning ("ABA Opinion"), issued May 1, 1977.[22]

In order to effectuate the policies and goals of ERISA and to protect the public from the unlicensed practice of law in the least restrictive manner, this Court should permit efficient means of establishing and operating pension plans without sacrificing the quality of professional services. Pension consultant participation in the design, drafting and termination of pension plans beyond that provided in the Proposed Opinion will serve to fulfill the goals of ERISA while protecting the public from inadequate representation.

1. Pension Consultants Should Be Permitted to Recommend a Particular Plan Structure for an Employer.

Under the Proposed Opinion, analyzing employer information and determining which plan structure is best "affects important legal rights of the employer and employees and involves an analysis of legal principles and a skill and

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22 On May 1, 1977, the American Bar Association Standing Committee on the Unauthorized Practice of Law ("Standing Committee") issued Informative Opinion A on practice by nonlawyers in the employee benefits field. The Standing Committee recognized "that practical cooperation among all those who participate in the creation and administration of employee benefit plans is . . . critical if ERISA's policy goals are not to be frustrated by the financial burden of necessary professional services." ABA Op. at 2. Thus, the ABA has recognized the need to balance the protection of the public interest with the effectuation of Congress' goals in enacting ERISA of promoting employer-financed retirement plans. (A copy of the ABA Opinion is attached hereto as Appendix 2.)

knowledge of the law greater than that possessed by the average citizen." Proposed Op. at 12. As such, according to the Bar, the analysis and recommendations constitute the practice of law and must be performed by a lawyer. The Bar's syllogistic reasoning is seriously flawed, however, where it fails to proceed further -- as it must -- to consider policy reasons to determine whether the particular conduct should be prohibited. See Brumbaugh, 355 So.2d at 1191-92; ABA Op. at 2, 9.

In its summary conclusion that only lawyers are qualified to recommend a plan design, the Bar completely failed to conduct any examination into whether the public interest may be served through the provision of a consultant's services. It is evident that the designing of a particular pension plan involves legal considerations. As such, knowledge of pension law "greater than that possessed by the average citizen" is required. This fact, however, does not necessarily restrict the designing of pension plans only to lawyers. Indeed, as discussed above, the employees of Mercer and Towers Perrin possess the requisite education and training to offer accurate design advice to employers on a cost-effective basis. Moreover, with a greater availability of less-expensive pension plan services, more employers may be inclined to establish benefit plans, thus fulfilling one of ERISA's primary goals.

The design of a particular qualified pension plan also involves the consideration of economic and administrative issues. As a result of these considerations, the Bar suggests

that only the lawyer is qualified "to consider the other aspects of the employer's needs . . . ." Id. The lawyer, however, is not trained to advise the client on critical economic issues -- such as the annual contribution required to fund a particular defined benefit plan or the additional cost of amendments increasing benefits. Only an enrolled actuary can advise the client, after analyzing the requirements of section 412 of the IRC. As shown above, the diversity of employee disciplines and practice areas of the major consulting firms makes them especially qualified to perceive how the pension plan may affect the employer's business. In addition, with their long-standing business relationships with an employer and their on-going involvement in the administration of the employer's plans, consultants are in a unique position to appreciate, from a historical perspective, how the pension plan may impact on the direction of the company. Thus, the consultant is integral to a complete analysis of the effect of the plan and its subsequent design.

2. Pension Consultants Should Be Permitted to Draft Plan Documents for Review by Counsel.

In its Proposed Opinion, the Bar summarily declares that the drafting of plan documents constitutes the practice of law and "[t]herefore, a nonlawyer engages in the unlicensed practice of law when he prepares or amends a pension plan . . . and any other materials that comprise a plan or are required for its installation." Proposed Op. at 13. As with the Bar's

analysis under the design of pension plans, the Proposed Opinion fails to move beyond the finding of "the practice of law" into an analysis of the underlying policy considerations. In brief, the Bar fails to observe this Court's admonition that "the unlicensed practice of law and the practice of law by nonlawyers are not synonymous." Moses, 380 S.2d at 417.

A careful balancing of the relevant interests addresses the need to provide "reasonable protection" for the employees' benefits while applying the least restrictive means available. The logical solution rests in the drafting of pension plan documents by pension consultants for review by counsel.[23] As demonstrated above, consultants authorized to practice before the IRS possess the requisite ERISA expertise to accurately draft the documents necessary to establish the pension plan.[24] Moreover, the protection of the public

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23 This solution is equally applicable to the drafting of the documents necessary to effectuate the termination of a plan, especially where a consultant is authorized to practice before the PBGC. See 29 C.F.R. § 2606.6 (1988).

A concern was raised before the Bar where the nonlawyer drafts the plan and the attorney provides only a cursory review. The logical solution to this perfunctory review by lawyers, however, does not lie in restricting the practice of nonlawyers in this area but in providing stricter guidelines for attorneys practicing in the pension field in accordance with their code of professional responsibility.

24 As with law firms, this is equally true where work performed by an employee who is not authorized to practice before the IRS is supervised by a member of the consulting firm who is a licensed lawyer, enrolled actuary or CPA.

interest will result through review by a lawyer. In this manner, the greater availability of less-costly services to establish pension plans should encourage the growth of employer-financed plans.

Although not sufficiently broad, the ABA Opinion takes a more acceptable approach to the drafting of plan documents by consultants than the Proposed Opinion. The ABA Opinion realistically recognizes that the preparation and drafting of the plan documents will entail detailed consultation with nonlawyers who are engaged in plan design and administration. ABA Op. at 13. The ABA Standing Committee further recognized that this consultation may involve "the preparation of legal memoranda or analyses, the submission of draft or suggested documents or provisions and the preparation of supporting documents or provisions and the preparation of supporting memoranda schedules, etc. by the nonlawyers. [The consultation1 may also involve a review of the documents proposed by the lawyer." Id. In addition, under the ABA Opinion, a nonlawyer may deliver specimen documents to an employer "provided a statement is prominently displayed on such documents to the effect that the documents are important legal instruments in the legal and tax implications and should be reviewed by the employer's lawyer." Id. at 13. n.10. Thus, it is evident the ABA Opinion at least strives to balance the competing interests in a manner consistent with the goals of ERISA and the protection of the public from inadequate advice.

### 3. Pension Consultants Should Be Permitted to Complete the Master and Prototype Plans.

The principle in the Proposed Opinion that legal documents be drafted only by the employer's lawyer particularly lacks support when extended to a master or prototype plan for which a favorable determination letter has been obtained from the IRS. Under the Proposed Opinion, the nonlawyer may explain generally the master or prototype plan process and indicate that such plan may be qualified under the Code. See Proposed Op. at 10. The pension consultant, however, may not state "that the plan is suitable for the employer's particular needs, give advice as to the specific consequences of the tax laws or other laws as they relate to the employer's situation, or render an opinion that the particular plan . . . will qualify for tax benefits . . . ." Id. at 11. Moreover, the Proposed Opinion precludes the consultant from completing the adoption or joinder agreement employed to install a master or prototype plan. Id. at 15. The conclusions of the Bar, however, were reached with little record evidence of the details of master or prototype plans. Such a discussion will reveal the generally nonlegal nature of the employer decisions associated with the adoption of a master or prototype plan.

A master plan is a plan that has been pre-approved by the IRS as to form and which when adopted by an employer is

subject to simplified determination procedures at the local IRS district level with respect to the application of the pre-approved firm to the employer's specific employee group. The funding vehicle is specified by the plan sponsor, not the employer. A prototype plan is basically the same as a master plan except that the employer chooses the plan's funding medium.[25] To simplify the master and prototype process, the IRS permits a sponsor to obtain approval of a single plan with multiple adoption agreements rather than having to draft separate plans for each basic variation. See Rev. Proc. 89-9 and 89-13.

In purpose, these pre-approved plans provide an economically feasible method of providing qualified pension benefits for employees of small employers who cannot afford or are unwilling to pay for drafting of an individually-designed plan. To effectuate this purpose, qualified master and prototype plans restrict the employer to pre-approved options that provide qualified benefits. As such, a consultant assisting the employer in designing the pension plan is unlikely to offer legal advice or engage in an improper practice of law. More specifically, as the employer's choices

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25 In practice, both master and prototype plans are subject to two IRS determination letters: (i) the request by the plan's sponsor that the form of the plan meets the requirements of the Code; and (ii) the adopting employer's request that the application of the plan to his employee group is acceptable. See Rev. Proc. 89-9 and 89-13.

are limited essentially to economic and employee-relations issues, the consultant is eminently qualified to assist the employer in completing the requisite master or prototype plan documents, including the adoption agreement. Thus, the public interest will be best served, and the purpose of the master and prototype plans effectuated, where consultants are permitted to assist employers in completing the adoption agreements for such plans.[26]

Where a member of the consulting firm is a lawyer, CPA or enrolled actuary who actively participates in the establishment of the plan, the firm should be permitted to advise the client as to the specific consequences of the tax laws as they relate to the employer's situation. In the same scenario, the firm also should be permitted to advise the client that the particular plan will qualify for tax benefits or be in compliance with the Code. Permitting such advice by consultants will best balance the interests of providing independent advice to employers with the ERISA policy of maximizing the number of employees under the qualified employer-financed benefit plan.

Certain conditions are applicable, however, when consultants so function in the master and prototype field.

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26 It should be noted that lawyers, enrolled actuaries, CPAs and enrolled agents licensed to practice before the IRS have specific authority to prepare regional master or prototype plans for use by clients of the consulting firm. See Rev. Proc. 89-13, discussed supra.

First, since these documents are substitutes for individually-designed and drafted plans, the independent professional judgment of the employer's lawyer is still highly desirable, although not mandatory. Consultants should recommend the use of legal counsel when master and prototype plans are involved. In addition, employers should be made aware of the significant legal obligations and responsibilities being created by the adoption of a master or prototype plan. The consultant should bring this to the attention of the employer, preferably by a bold-faced legend on any documents to be signed, stating that the contract and related documents are important instruments with legal and tax implications for which neither the consultant nor its agents are responsible, and that therefore the employer should consult legal counsel.

**4. Pension Consultants Should Be Permitted to Draft Summary Plan Descriptions.**

Under the Proposed Opinion, a nonlawyer would engage in the unlicensed practice of law when he drafts or amends SPDs or employee handbooks. Proposed Op. at 18. In reaching this result, the Bar sub silentio determined that such conduct constituted the practice of law and therefore concluded without analysis that it must be performed by a lawyer. Id. Such a mechanical approach is inadequate where it fails to consider the nonlegal elements of the SPD, the qualifications of consultants, and the competing interests. The better approach,

adopted by the **ABA**, would permit consultants to draft **SPDs** or employee handbooks. See **ABA** Op. at 16.

In order to properly analyze whether the **SPD** may be produced by a **CPA**, it is necessary to understand the nature of the document and the type of information contained therein. The **SPD** is a written summary of the contents of a plan that is required to be distributed to plan participants and beneficiaries. **ERISA** requires that the **SPD** "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 **U.S.C. § 1022(a)(1)** (1985). Although a specific form for the **SPD** is not required, the **DOL** has issued optional model language for certain required statements pertaining to participants' and beneficiaries' rights under **ERISA**. See 29 **C.F.R. §§** 2520.102-3(m), (t) **(1988)**.

In brief, through the **SPD**, a nonlegal description of the plan, its benefits, and its administration must be conveyed to participants. It cannot reasonably be asserted that plan consultants are not as qualified as lawyers to convey nonlegal information in a manner calculated to be understood by the average participant. Thus, the better approach is to follow the lead of the **ABA** and permit the consultant to draft the summary plan description. See **ABA** Op. at 16.

## III. ADOPTION OF THE PROPOSED OPINION IS PRECLUDED BY ERISA's BROAD PREEMPTION.

As recognized by The Florida Bar, the facts that formed the basis for Turner occurred prior to the passage of ERISA. Proposed Op. at 7. Since Turner, this Court has not addressed the issue of ERISA preemption.[27] As such, the issue of ERISA preemption in this proceeding is a matter of first impression for the Court.

In its attempt to provide guidance to nonlawyers practicing in the employee benefits field, the Proposed Opinion fails to acknowledge its encroachment into areas undeniably reserved by Congress for federal regulation under ERISA. This is not surprising, though, where the Record before the UPL Committee is devoid of any significant discussion of the issue of ERISA preemption.[28] Examination of the language of ERISA

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[27] Indeed, Turner has been cited only once, in The Florida Bar v. Moses, which sanctions certain administrative conduct by qualified nonlawyers. 380 So.2d at 417-18.

[28] Sharon Quinn Dixon, a Florida lawyer with over six years experience in the employee benefits field, was the only witness at the January 12, 1989 hearing to mention preemption. Ms. Dixon, who admitted it requires several years to become familiar with the pension practice field, stated:

> And I know of nothing, Mr. Chairman, about the issue of whether any other law takes precedence, the preemption issue. I don't know if there's any antitrust violation, any of those considerations.

Testimony of Sharon Quinn Dixon, R. at 87.

The lack of any significant preemption analysis in the

(Footnote continued on page 37)

and the judicial interlineation, however, reveals that Congress enacted a statute that preempts all related state laws. To the extent, therefore, the Proposed Opinion attempts to delimit the practice of pension consultants respecting qualified plans under ERISA, it is an improper exercise of state regulatory power.

### A. ERISA Preempts All State Laws Regulating Employee Benefit Plans.

In order to establish national uniformity, Congress legislated that ERISA, with stated exceptions not applicable here, "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1985). This provision is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'"[29] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987); see Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98-99 (1983); Davidian v. Southern California Meat Cutters Union, 859 F.2d 134, 135 (9th Cir.

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28 (Footnote continued)

Proposed Opinion is surprising, especially where the Chairman of the UPL Committee twice requested submissions on that very issue during the January 12, 1989 hearing. R. at 81, 93.

29 The United States Supreme Court has recognized repeatedly that ERISA is a "comprehensive and reticulated" statute. See, e.g., Firestone Tire and Rubbert Co. v. Bruch, ____ U.S. ____, 109 S.Ct. 948, 953 (1989); Connolly v. PBGC, 475 U.S. 211, 214 (1986); PBGC v. R.A. Gray & Co., 467 U.S. 717, 720 (1984); Nachman Corp. v. PBGC, 446 U.S. 359, 362 (1980).

1988); Johnson v. Dist. 2 Marine Eng'r Beneficial Ass'n, 857 F.2d 514, 517 (9th Cir. 1988).

ERISA and the caselaw reveal that this Court's adoption of the Proposed Opinion would constitute a preempted "state law" under ERISA. ERISA § 514(c) provides:

> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 U.S.C. § 1144(c) (1985) (emphasis added). This Court has recognized that it plays an active role in regulating the practice of law and acts as a policymaker in such area, with the Bar as its agent. See Brumbaugh, 355 So.2d at 1189. Thus, under the express language of the Act, an adoption of the Proposed Opinion constitutes a "state law" for ERISA purposes. This conclusion is supported by the United States Supreme Court's observation that "even indirect state action bearing on private pensions may encroach upon the area of exclusive Federal concern.'' Alessi v. Raybestos-Manhattan Inc., 451 U.S. 504, 525 (1981) (offsets in pension benefits for workers compensation awards held lawful under ERISA; state law forbidding such offsets held preempted). Thus, ERISA preempts decisions of a state court that indirectly affect employee

pension plans. See Helms v. Monsanto, 728 F.2d 1416, 1419-20 (11th Cir. 1984).

As a further consideration, preemption occurs only if the State's action "relate[s] to" an employee benefit plan. ERISA § 514(a) has been broadly interpreted by the United States Supreme Court. A State law "relates to" an ERISA plan if it "has a connection with or reference to such a plan." Pilot Life Ins. Co., 481 U.S. at 47. The United States Supreme Court has reaffirmed consistently the broad scope of ERISA preemption. See e.g., Mackey v. Lanier Collections Agency, ___ U.S. ___, 108 S.Ct. 2182, 2185-87 (1988) (Georgia statute that singled out ERISA benefit plan for different treatment than non-ERISA plan under state garnishment procedures preempted where it expressly references ERISA plans; fact the statute enacted to effectuate ERISA's underlying purpose is insufficient to avoid preemption); Pilot Life Ins. Co., 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). Thus, the Proposed Opinion "relates to" employee benefit plans where it specifically references ERISA as the controlling statute and directly bears upon the unlicensed practice of law with respect to the preparation and administration of qualified plans. See Proposed Op. at 3.

Finally, preemption of the Proposed Opinion would be consistent with the Congressional goal of eliminating

inconsistent regulations. With preemption, Congressional intent is the ultimate touchstone. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985). The United States Supreme Court has "not hesitated to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements,"[30] Fort Halifax Packing Company Inc. v. Coyne, 482 U.S. 1, 10 (1987); see also Alessi, 451 U.S. at 523 (1981) ("Congress meant to establish pension plan regulation as exclusively a federal concern.").

In sum, ERISA is a carefully reticulated statute, designed to provide regulatory consistency of qualified retirement plans among the States. Adoption of the Proposed Opinion, therefore, would conflict with the intent of ERISA by establishing Florida as the only state with the particular

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30 As the Fort Halifax Court stated:

> It is . . . clear that ERISA's preemption provision was prompted by a recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Preemption ensures that the administrative practices of a benefit plan will be governed by a single set of regulations.

Fort Halifax, 482 U.S. at 11.

limitations and restrictions propounded in the Proposed Opinion. This would create the beginnings of a "patchwork scheme of regulation" that would permit a consultant to perform certain functions in one state, while precluding the same practices in another.[31]

### B. The Proposed Opinion Does Not Constitute A "Generally Applicable Criminal Law" Exempt From ERISA Preemption.

ERISA exempts from preemption, ~~inter alia~~, "generally applicable criminal law[~]of a state." 29 U.S.C. § 1144(b)(2)(B)(4) (1985). In Florida, "Any person not licensed or otherwise authorized by the Supreme Court of Florida who shall practice law . . . shall be guilty of a misdemeanor of the first degree . . . ." Fla. Stat. § 454.23 (1989). Petitioners anticipate that as the Proposed Opinion

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[31] See Fort Halifax, 482 U.S. at 11. For example, the Virginia State Bar has issued an unathorized practice of law opinion that would permit a Virginia plan administrator to perform significantly more plan services than a Florida plan administrator. Under the Virginia opinion,

> It is not the unauthorized practice of law for a pension plan administrator to offer the legal services of preparing, amending and submitting pension plans to the IRS where such activities are in association with the administrator's primary business of administering individually-tailored plans and administration of such plans constitutes a primary and lawful function of the administrator.

Virginia State Bar UPL Op. 77, Pension Funds Administrator Preparing Plan for IRS (June 11, 1985).

relates to this Florida criminal unlicensed practice of law statute, Respondent may assert the Proposed Opinion is exempt from preemption as a "generally applicable criminal law." As demonstrated below, this argument lacks merit.

Although ERISA does not define the phrase "generally applicable," courts have agreed on the scope of the exception. For example, in New Jersey v. Burten, 530 A.2d 363 (N.J. 1986), the company's officers were charged with failing to contribute to the union's pension fund. In examining whether the relevant criminal statute was "generally applicable" within the meaning of ERISA § 514(b)(4), the New Jersey court recognized that a criminal law that is "generally applicable" is one that has been enacted by a state "with the intention that it apply to conduct generally rather than to an activity specifically related to employee benefit plans . . . ." Id. at 368. The court observed further that because Congress saved only "generally applicable" state criminal laws from preemption, "it is fair to conclude that it did not want the states to subject other activities related to employee benefit plans to criminal sanctions, or to increase the sanctions that ERISA provides, unless the particular act constitutes a crime under a state law not specifically aimed at benefit plans." Id. at 368.

Under this standard, it is clear the Proposed Opinion is not exempt from ERISA preemption. Like the Burten statute, and unlike the Florida unlicensed practice of law statute, the Proposed Opinion is intended to apply specifically to the

regulation of nonlawyers in their practice with qualified plans under ERISA. See Proposed Op. at 2, 8, 11, 14, 15. Thus, any reliance by Respondent on this exemption would be misplaced.

## CONCLUSION

Petitioners respectfully request the Court to reject in its entirety the Proposed Opinion as it relates to pension consultants' activities with respect to ERISA plans. In the alternative, if the Court determines pension consultants should be covered by the Proposed Opinion, Petitioners respectfully request the Court to appoint an ad hoc committee to further study the issues and make recommendations to this Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing 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 2d day of October, 1989.

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