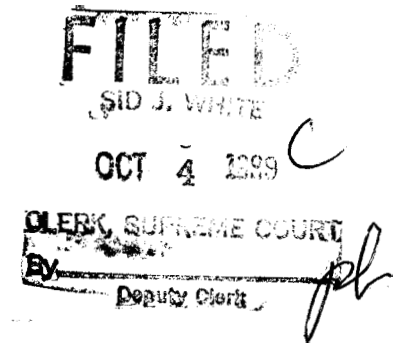
IN THE SUPREME COURT OF THE
STATE OF FLORIDA



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 OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

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STATEMENT OF THE CASE AND OF THE FACTS

A. THE INTERESTS OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

The American Institute of Certified Public Accountants (hereinafter the "AICPA") is the only national association whose membership is limited to certified public accountants (hereinafter "CPAs"). Its service to the public spans over one hundred years. Today its membership consists of over 286,000 members, more than 14,000 of whom reside in Florida.

Among the AICPA's purposes are the promotion and maintenance of high professional standards of practice. Since its founding, the AICPA has been a principal force in developing accounting and auditing standards, providing guidance to CPAs in their tax practice, sponsoring educational programs, and issuing professional publications to improve the quality of services provided by CPAs. In particular, the AICPA is the national self-regulatory body for certified public accountants. Also, the AICPA promulgates a Code of Professional Conduct for accountants and enforces that code through disciplinary proceedings administered jointly by the AICPA and state associations including the Florida Institute of Certified Public Accountants.

The AICPA is interested in ensuring that the services of its members will continue to be available to employers seeking to implement or administer pension plans qualified under the Employee Retirement Income Security Act (hereinafter

"ERISA"). The AICPA is further interested in ensuring that the authority of its members to practice before the Internal Revenue Service (hereinafter "IRS") and other federal administrative agencies is not improperly circumscribed.

B. ISSUE TO BE DECIDED

This matter is an original proceeding in this Court pursuant to Rule **10.7** of the Rules Regulating The Florida Bar. The issue presented for consideration is whether the Court should approve, modify, or disapprove a proposed advisory opinion on the role of nonlawyers in the creation, administration and termination of pension plans submitted by the Standing Committee on the Unlicensed Practice of Law of The Florida Bar (hereinafter the "Proposed Opinion" or "Proposed Op.").[1]

C. PROCEDURAL HISTORY

On July 2, **1988,** the Executive Council of the Tax Section of The Florida Bar adopted a resolution requesting the Standing Committee on the Unlicensed Practice of Law of The Florida Bar (hereinafter the "UPL Committee") to "investigate non-attorneys whose activities may or do constitute the unlicensed practice of law by providing legal advice and drafting qualified retirement plans" and if the UPL Committee

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

determined that unlicensed practice of law was occurring, the Tax Section "request[ed] an advisory opinion on the matter."[2]

On January 12, 1989, the UPL Committee held a hearing on the request for an investigation and advisory opinion. (A transcript of the hearing appears as Record Tab 2.) The hearing record was left open for written comments from January 12, 1989 until January 31, 1989 and was opened again from March 1, 1989 until March 21, 1989.

On August 1, 1989, The Florida Bar published a Notice of Filing of the Proposed Advisory Opinion.

On August 25, 1989, the AICPA filed a Petition for Leave to File a Brief and Reply Brief Regarding Proposed Advisory Opinion on the Unlicensed Practice of Law. That Petition sought leave to file a brief and reply brief and an enlargement of time up to and including October 2, 1989 for the service of the initial brief. By an order dated August 25, 1989, the AICPA's Petition was granted in all respects.

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2 Letter dated July 27, 1987 from Leslie J. Barnett, Chairman of the Tax Section of The Florida Bar to Joseph R. Boyd, Chairman of the Standing Committee on the Unlicensed Practice of Law (Pursuant to Rule 10-7.1(g)(1) of the Rules Regulating The Florida Bar. The materials considered by the UPL Committee were submitted in a filing captioned "Materials Considered By The Standing Committee In Adopting The Opinion" (hereinafter "Record"). A copy of this letter appears at Record Tab 1.)

D. SUMMARY OF THE PROPOSED OPINION

The Proposed Opinion divides the process of developing and administering a pension plan into eight steps. Those steps are: promoting, marketing and selling the plan; explaining alternatives generally available to the public; gathering client information; analyzing client information, deciding on the type of plan, and selecting the plan provisions; drafting plan documents; qualification of the plan; administering the plan and dealing with regulators; and termination of the plan. The Proposed Opinion analyzes each of these steps and sets forth specifically those activities which the UPL Committee believes are the unlicensed practice of law.

The Proposed Opinion permits nonlawyers to engage in certain activity related to pension plans. The Proposed Opinion permits a nonlawyer, during the initial stages of the professional engagement, to motivate an employer to implement a pension plan, review different products that may be used as investments in the plan, and engage in a general discussion to familiarize the employer with pension plans. Proposed Op. at 9. Thereafter, a nonlawyer could discuss with the employer the various types of plans available and may outline general options. Id. at 10-11. As part of this process, the nonlawyer may gather certain client information and, if consulted by the employer's attorney, assist in the development of the plan. Proposed Op. at 11-12.

However, the Proposed Opinion would prohibit certain activities of nonlawyers. A nonlawyer could not have

discussions with an employer that involve specific legal advice concerning particular plans, their suitability to the employer, or their eligibility under the tax laws. Id. at 10. Accordingly, although providing recommendations concerning the basic economic structure of the plan is permitted, a nonlawyer could not state that a plan is suitable for an employer's particular needs, give advice as to specific tax consequences, or render an opinion that the plan, once adopted, will be in compliance with ERISA or the Internal Revenue Code (hereinafter "IRC" or "Code"). Id. at 11. In sum, a nonlawyer could not analyze client information and determine which plan would be best for the employer. Id. at 12.

The Proposed Opinion distinguishes the role of lawyers and nonlawyers in the preparation of documents necessary for the administration, termination and qualification of pension plans. A nonlawyer may prepare: annual returns or reports; summary annual reports; elections, consents, and waivers used in the administration of the plan; the materials required by the Internal Revenue Service and Pension Benefit Guaranty Corporation for plan termination; "and any other documents which federal rules state may be completed by a nonlawyer." Id. at 18. A nonlawyer, however, would engage in the unlicensed practice of law in the drafting of the pension plan, amendments to the plan, corporate documents and resolutions adopting the plan or amendments, trust agreements, the summary plan description, "and any other materials that comprise a plan

or are required for its installation.[3] & at 13-14, 18. In addition, a nonlawyer, unless specifically authorized by a federal rule or regulation, may not obtain or maintain plan qualification, or prepare the corporate resolutions, plan amendments, and determination letter application required to terminate the plan. Id. at 19-21. Nevertheless, the Proposed Opinion observes that nonlawyer involvement is "essential" to the termination process with respect to the "administrative" aspects. Id. at 21-22.

The Proposed Opinion recognizes the widespread use of master and prototype plans and provides particular guidance for the development and maintenance of those plans.[4] The Proposed Opinion permits a nonlawyer to discuss the use of a master or prototype plan, explain the nature of the instrument, and state that such a plan generally is qualified under the IRC. Id. at 10-11. The nonlawyer, however, may not provide specific advice as to the tax laws or state the plan is suitable for the employer in all respects. Id. The nonlawyer is not permitted

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3 It is also impermissible under the Proposed Opinion for the nonlawyer to draft the plan for review of counsel as a cursory review by a lawyer will not "cleanse" the document of the unlicensed practice of law. Id. at 18.

4 Master and prototype plans are designed to assist small employers unable to bear the expense of an individually designed plan. The Internal Revenue Service (hereinafter "IRS") preapproves the form of the plan and multiple employers may implement the plan by executing individualized adoption agreements.

to complete the adoption agreement employed to install the master or prototype plan. Id. at 15.

SUMMARY OF *ARGUMENT*

The Proposed Opinion attempts to regulate conduct specifically permitted by federal statute and by rules of practice issued by the relevant federal agencies. These issues are not new; the United States Supreme Court and this Court have each addressed these issues in contexts closely analogous to the instant matter as well as in broader spheres. In the face of that clear body of law, the limitations proposed by The Florida Bar, as applied to CPAs, are manifestly overreaching, do not fairly state the boundaries of the authority of certified public accountants before the IRS, and improperly seek to limit the role of CPAs authorized to practice by the federal government in an area of exclusive federal jurisdiction.

The broad preemption provisions of ERISA prevent a State from regulating the qualifications of persons concerned with the establishment and operation of ERISA plans. ERISA expressly provides that all "state laws" that "relate to" employee benefit plans are preempted. Under the express language of the statute and decisions of the United States Supreme Court, this Court's adoption of the Proposed Opinion would constitute a "state law" that "relates to" employee benefit plans and is, therefore, preempted. Moreover, preemption is necessary in the instant case to avoid

inconsistent regulation of a "comprehensive and reticulated" statute that is decidedly federal in nature. The exceptions to preemption under ERISA are inapplicable to this case where this Court's adoption of the Proposed Opinion would not constitute a "generally applicable criminal law."

In striving to provide those "conscientious nonlawyers" working in the employee benefits field with standards to guide the conduct of their businesses, the Bar improperly disregards the abilities and qualifications of CPAs to practice in the employee benefits field and, consequently, impedes the establishment and operation of employee benefit plans by removing CPAs from a practice area expressly authorized by the federal government. Thus, the Bar fails to meet its own goals of clarifying the standards set forth in Florida Bar v. Turner, 355 So.2d 766 (Fla. 1978) (identifying practices in the pension planning field as the unauthorized practice of law).

The AICPA respectfully requests the Court reject the Proposed Opinion as it relates to CPAs' activities with respect to qualified pension plans. If the Court is of the opinion that any specific actvity performed by CPAs in the pension field is prohibited, the AICPA respectfully requests remand of the Proposed Advisory Opinion for further development of the record on that point.

ARGUMENT

I. AS A MATTER OF FUNDAMENTAL CONSTITUTIONAL LAW, STATES MAY NOT REGULATE IN AREAS THAT THE FEDERAL GOVERNMENT HAS RESERVED TO ITSELF.

The Proposed Opinion raises issues which are central to this Nation's federal system. The Proposed Opinion seeks to regulate persons granted authorization by the federal government to practice before its agencies on the subject of a comprehensive federal statute. Under our constitutional system, such State regulation is impermissible. U.S. Const. art. VI cl. 2; Gibbons v. Ogden, 22 U.S. 1, 6 L. Ed. 23 (1824).

The Proposed Opinion intrudes impermissibly into areas reserved by the federal government. The Congress of the United States has authorized specified professionals to practice before federal agencies; the Proposed Opinion seeks to limit that authority. The Congress has also enacted a comprehensive statute that preempts all contrary State laws; the Proposed Opinion seeks to constrain the operation of that statute. To the extent the Proposed Opinion circumscribes the practice of professionals authorized by federal law or the carefully planned regulatory regime set forth in federal statute, it is an unconstitutional exercise of State regulation.

A. FLORIDA MAY NOT RESTRICT THE RIGHT OF CERTIFIED PUBLIC ACCOUNTANTS TO PRACTICE BEFORE THE FEDERAL ADMINISTRATIVE AGENCIES.

Federal law is the final arbiter of who is eligible to practice before federal agencies. Sperry v. State ex rel. Florida Bar, 373 U.S. 379, 85 S. Ct. 1322, 10 L. Ed.2d 428

(1963). Pension plans, the subject of the Proposed Opinion, are exclusively governed by ERISA.

The administration of ERISA is conferred upon three separate federal entities exclusively: the Internal Revenue Service, the Department of Labor and the Pension Benefit Guaranty Corporation. That exclusive authority extends to the determination of which professionals are permitted to advise employers about the establishment, maintenance, and termination of the plans.

This Court and the United States Supreme Court have previously faced the interaction of federal statutes and the regulation of the unlicensed practice of law. Sperry v. State ex rel. Florida Bar, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed.2d 428, on remand, 159 So.2d 229 (Fla. 1963). In Sperry, The Florida Bar brought an original proceeding before this Court to require Sperry, an agent licensed by the United States Patent Office, to show cause why he should not be held in contempt of this Court for, inter alia, rendering legal opinions regarding patentability and preparing documents regarding patent applications without having first been admitted to practice law in Florida. State ex rel. Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), vacated, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed.2d 428 (1963).

As part of its petition, the Bar sought a declaration that Sperry's activities were the practice of law. 140 So.2d at 588. This Court concluded that Sperry's conduct constituted

the unauthorized practice of law which Florida, acting under its police power, could properly prohibit. Further, this Court ruled that neither federal statute nor the Constitution of the United States empowered any federal body to authorize such conduct within Florida's borders. Id. at **595**. Sperry was enjoined from, inter alia, "rendering legal opinions, including opinions as to patentability or infringement on patent rights"; "preparing, drafting and construing legal documents"; and preparing and prosecuting applications for letters patent. Id. at 596.

The United States Supreme Court did not question this Court's finding that, in Florida, the preparation and prosecution of patent applications for others constitutes the practice of law. **373** U.S. at **383**. The Supreme Court did note, however, that the Congress had specifically provided that the Commissioner of Patents could "prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office." Id. at **384**. Moreover, the Supreme Court observed that the 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, by virtue of the Supremacy Clause of the United States Constitution, "a State may not enforce licensing requirements which, though valid in

the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination that a person or agency is qualified to perform certain functions.'" Id, (footnote omitted). In other words, a State cannot "'hinder or obstruct the free use of a license granted under an act of Congress.'" Id. at 385 (quoting Pennsylvania v. Wheeling & B. Bridge Co., 54 U.S. 518, 14 L. Ed. 249 (1851)). Central to the Supreme Court's analysis was that "[t]he rights conferred by the issuance of letters patent are federal rights." Id. at 401.

The Supreme Court noted that the review of the injunction did not require a determination of "what functions are reasonably within the scope of the practice authorized by the Patent Office." 373 U.S. at 402 n.47. The Supreme Court suggested that the scope of that practice could have been better ascertained had the Commissioner of Patents issued regulations touching upon the point. Id. Nevertheless, the Supreme Court observed that, at the very least, the scope of practice must include the preparation of patent applications and rendering of opinions as to patentability. The Supreme Court concluded this Court's injunction "must be vacated since it prohibits [Sperryl from performing tasks which are incident to the preparation and prosecution of patent applications before the Patent Office." 373 U.S. at 404.

On remand, this Court recognized that the scope of practice before the Patent Office encompasses more than

appearing before an agency in administrative proceedings. Consequently, this Court modified its injunction as follows:

> the opinion and decision of this Court is vacated and its effect modified 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.

State ex rel. The Florida Bar v. Sperry, 159 So.2d 229, 230 (Fla. 1963).

The parallels between the Sperry case and the instant proceeding are readily apparent. As more fully described below, CPAs, like patent agents, are specifically authorized to practice before the relevant administrative agencies. See, e.g., 5 U.S.C. § 500 (1977). The rights conferred by ERISA, like patent rights, are federal rights. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522-23 (1981). See also, Turner v. Leesona Corp., 673 F. Supp. 67, 69 (D.R.I. 1987). Moreover, the action contemplated by the Bar would certainly prohibit activities that are "incident to" the preparation and qualification of pension plans -- an

impermissible restriction on CPAs' federally granted license.[5] Sperry, as recognized by this Court on remand, bars such prohibitions.

Federal statutes and implementing regulations provide express authorization, consistent with the principles enunciated in Sperry, for CPAs to represent others before federal agencies. 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). In addition, the Secretary of the Treasury is authorized to qualify other nonlawyers or nonaccountants to practice before the IRS. 31 U.S.C. § 330 (1983).[6]

CPAs are authorized by federal statute to perform virtually all the acts that the Proposed Opinion characterizes

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5 On May 1, 1977, the American Bar Association Standing Committee on the Unauthorized Practice of Law (hereinafter "Standing Committee") issued Informative Opinion A on practice by nonlawyers in the employee benefits field (hereinafter "ABA Opinion"). 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. Moreover, the Standing Committee expressly recognized "the legal right of certified public accountants to represent others in matters before the Internal Revenue Service." Id. at 16.

6 Thus, for example, in the area of pension plans, enrolled actuaries have been specifically authorized to practice before the IRS. See Treas. Circular 230, 31 C.F.R. pt. 10 (1988).

as the unlicensed practice of law. Specifically, the Administrative Procedure Act provides:

> 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.

5 U.S.C. § 500 (1977). The Florida Bar in its Proposed Opinion recognizes that this Court cannot circumscribe CPAs' authority to practice before the IRS, but limits such practice to the qualification of pension plans before the IRS. Proposed Op. at 19. In contrast, however, federal statute grants CPAs' broad authority to "represent a person before the Internal Revenue Service." As this Court has indicated, practice before an agency involves "advising [and] assisting" clients and "rendering opinions," as well as appearing with clients at proceedings before an agency. Sperry, 159 So.2d at 230.

As part of his duties to regulate who may practice before the IRS, the Secretary of the Treasury has promulgated "rules relating to authority to practice before the Internal Revenue Service" that govern the recognition of attorneys, CPAs, enrolled agents and other persons representing clients before the IRS. 31 C.F.R. § 10.0 (1988). As part of that authority, the Secretary has undertaken to define what constitutes "practice before the IRS":

> '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).[7]

Significantly, the authority granted to CPAs includes the authority to prepare and file "necessary documents" on "all matters relating to a client's rights, privileges, or liabilities under laws . . . administered by the Internal Revenue Service." Id.[8] In the pension area, "necessary documents" must include the plan document, the substance of

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7 CPAs, upon successful completion of an examination, may also be authorized to represent others before the United States Tax Court. Rule 200, Rules of the United States Tax Court (1989).

8 The DOL and the PBGC have by regulation granted similar authority to nonlawyers. See 29 C.F.R. § 2606.6 (1988) (authorization to represent others before PBGC); 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. 30281 (Aug. 27, 1976) (authorizing nonlawyers to represent others before the DOL with respect to requests for information letters and advisory opinions). Moreover, nonlawyers are permitted to represent others in proceedings before the United States Tax Court. See 26 U.S.C. § 7452 (1989).

which is governed primarily by the Code.[9] In this respect, pension plan documents differ from wills and corporate documents, which have important tax implications but are primarily legal documents governed by state law.

Thus, unlike Sperry, there has been an administrative determination of what constitutes "practice" before the agency; the Secretary of the Treasury has determined that "practice" includes the authority to prepare and file "necessary documents" on "all matters relating to a client's rights, privileges, or liabilities under laws . . . administered by the Internal Revenue Service." 31 C.F.R. § 10.2(a) (1988) (emphasis added).

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9 In 1976, the Department of Justice submitted comments to the IRS Chief Counsel's Advisory Committee on Rules of Professional Conduct which was formed to develop recommendations for Rules of Professional Conduct before the IRS. Justice Department Comments on Report of IRS Chief Counsel's Advisory Committee on Rules of Professional Conduct In Representation of Taxpayers Before IRS (December 10, 1976) reprinted in BNA Daily Tax Reporter No. 241, J-1, J-3 (December 14, 1976) (hereinafter "DOJ Comments"). Those comments observed, ~~inter alia~~:

- A stipulation that CPAs are laymen in the IRS practice market "clearly contradicts the design of 5 U.S.C. § 500."
- As a matter of policy and tradition, "practice before the IRS appears to be a special, unitary service market, in which persons with differing professional training have similar, if not identical, professional abilities."

The comments concluded that the "IRS should promote, not discourage competition and should eliminate, not support unreasonable artificial restrictions." The Proposed Opinion would interfere with those goals.

Broader language than "all matters" is difficult to envision. The Proposed Opinion overreaches to the extent it can be read to prohibit CPAs from advising, assisting and representing clients before the IRS, DOL and PBGC in the preparation, qualification, administration and termination of employee benefit plans and performing other tasks authorized by federal law.

This Court has approved, in another context, the precise mechanism implemented by Congress and federal agencies administering ERISA for qualification of nonlawyers to practice before an administrative agency. Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). There, the Court found that the Florida Legislature or a Florida administrative agency could approve by law or by rule conduct in certain administrative fora which, in the absence of such authorization, would constitute the practice of law.[10] This Court recognized, in passing, that "federal

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10 This Court concluded, nonetheless, that the Florida Legislature, through delegation in Florida's Administrative Procedure Act, had ousted the Court's responsibility for determining whether representation before a Florida administrative agency constituted the unlicensed practice of law. Id. at 417-18. The Court based its conclusion in a separation of powers analysis, which the Court described as a "corollary" of preemption of state regulation by federal statute. Id. at 417. Moreover, the Court's analysis recognized that "federal statutes . . . [may] . . . preempt state regulation of" practice before a federal administrative agency. Id. The Court held petitioner Moses' conduct the unauthorized practice of law because the administrative agency empowered to authorize practice before it by nonlawyers had not properly exercised its delegated authority. In contrast, the federal administrative agencies at issue

(Footnote continued on page 19)

agencies promulgate rules and regulations governing the competence and conduct of persons practicing before them." Id. at 418.

In sum, by virtue of the express provision of 5 U.S.C. § 500 (1977), CPAs are authorized to represent others before the IRS. By virtue of the regulations promulgated by the IRS, CPAs' authorization extends to "all matters" within the competence of the agency. CPAs are also permitted to represent clients before the DOL and the PBGC. See note 8, supra. These statutory and administrative determinations are consistent with Sperry and bar adoption of the Proposed Opinion as it relates to CPAs. Moreover, this result is consistent with this Court's own ruling in Moses.

Thus, under federal law, a State may not prohibit CPAs from advising, assisting and representing employers before the IRS, DOL and PBGC in the preparation, qualification, administration and termination of employee benefit plans and performing other tasks authorized by federal law. See, Sperry, 159 So.2d at 230. To the extent the Proposed Opinion seeks to regulate these activities by CPAs, it is overreaching and should be rejected.

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10 (Footnote continued)

herein have expressly authorized nonlawyers to practice before them. The IRS has defined what shall constitute "practice," and federal statute and regulation set forth the qualifications required of nonlawyers.

B. ERISA'S BROAD PREEMPTION PROVISIONS PREVENT A STATE FROM REGULATING THE QUALIFICATIONS OF PERSONS WHO DEAL WITH ERISA PLANS.

If the Court adopts the view that the federal government's authorization of CPAs to practice before the agencies empowered to administer ERISA is, nevertheless, limited in some capacity, the AICPA respectfully suggests that ERISA precludes the adoption of the Proposed Opinion. ERISA preempts all state laws that relate to pension plans. The Proposed Opinion, by definition, relates to pension plans. No exception to ERISA's broad preemption is applicable. Accordingly, the Proposed Opinion, if adopted, would be preempted.

1. Congress Has Preempted State Regulation of Pension Plans.

Pursuant to the Supremacy Clause, Congress may preempt state law by expressing a clear intent to do *so* in a particular instance, see Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), or by legislating *so* comprehensively in a particular field of regulation as to leave no room for states to supplement federal law, see Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 230 (1947). In addition, a state statute violates the Supremacy Clause (1) when "compliance with both federal and state regulations is a physical impossibility," Florida Lime &

Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); (2) when "the purpose of the federal statute would to some extent be frustrated by the state statute," Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963); or (3) "where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"' Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (other citations omitted).

As the United States Supreme Court has recognized repeatedly, ERISA is a "comprehensive and reticulated" statute. See, e.g., PBGC v. R.A. Gray & Co., 467 U.S. 717, 720 (1984). Modification of any one part potentially upsets the balance of competing interests carefully reconciled by Congress. Cf., Nachman Corp. v. PBGC, 446 U.S. 359, 361-62 and n.1 (1980). In enacting ERISA, Congress made detailed findings that employee benefit plans "have become an important factor in commerce because of the interstate character of their activities. . . ." ERISA § 2(a), 29 U.S.C. § 1001(a) (1985) (emphasis added). As a result, ERISA provides comprehensive and exclusive rules protecting the benefit interests of

employees and their beneficiaries.[11] ERISA explicitly preempts all state laws that relate to employee benefit plans:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan as described in section 4(a) and not exempt under 4(b). . . .

29 U.S.C. § 1144(a) (1985). The plain language of the statute evidences broad preemption of state laws relating to employee benefit plans. Helms v. Monsanto, 728 F.2d 1416, 1419 (11th Cir. 1984). Indeed, ERISA has been called "the most sweeping federal preemption statute ever enacted by Congress." California Hosp. Ass'n v. Henning, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983). That preemption prohibits State regulation of persons who deal with ERISA plans.

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[11] Title I of ERISA, which is administered by the Department of Labor (hereinafter the "DOL"), requires administrators of all covered pension plans to file periodic reports with the Secretary of Labor; mandates minimum participation, vesting and funding schedules; establishes standards of fiduciary conduct for plan administrators; and provides for civil and criminal enforcement. 29 U.S.C. §§ 1001-1168 (1985). Title II of ERISA contains the provisions of the Act that amended the IRC, including amendments that mirror many of the provisions of Title I. Title III of the Act, 29 U.S.C. §§ 1201-48 (1985), contains provisions designed to coordinate enforcement efforts of different federal departments, and provides for further study of the field. Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (1985), governs the termination and insolvency of pension plans and creates the Pension Benefit Guaranty Corporation ("PBGC"), which guarantees benefits of pension plans that terminate without funds to pay such benefits in full.

ERISA's preemption is, however, contingent on several concerns: (i) whether the Proposed Opinion, if adopted by this Court, would be a "state law" within the meaning of ERISA; (ii) whether the Proposed Opinion "relate(s) to" employee benefit plans; and (iii) whether preemption of the Proposed Opinion furthers the Congressional intent behind the ERISA preemption provision. Analysis of these issues leads to the conclusion that the Proposed Opinion, if adopted, would, indeed, be preempted.

First, the 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, . . . or any instrumentality of . . . [the State1 . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans . . . .

29 U.S.C. § 1144(c) (1985) (emphasis added). Thus, the Court's adoption of the Proposed Opinion would clearly constitute "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, 451 U.S. at 525. Thus, ERISA preempts decisions of a state court which

indirectly affect employee pension plans. See Helms, 728 F.2d at 1419-1420.

Second, the United States Supreme Court has found that Congress intended ERISA's preemption provisions be given the broadest possible sweep in determining whether a State's action "relate(s) to''an employee benefit plan. The seminal case interpreting the phrase "relate to" is Shaw v. Delta Air Lines Inc., 463 U.S. 85 (1983). In Shaw, the key issue was "whether the Human Rights Law and Disability Benefits Law 'relate to' employee benefit plans within the meaning of ERISA § 514(a)." 463 U.S. at 96. The Supreme Court noted that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase if it has a connection with or reference to such a plan." 463 U.S. at 96-97. As further evidence of the scope of the phrase, the Supreme Court noted that the legislative history disclosed:

> Congress used the words 'relate to' in § 514(a) in their broadest sense. To interpret § 514(a) to preempt only state law specifically designed to affect employee benefit plans would be to ignore the remainder of § 514 . . . Nor, given the legislative history, can § 514(a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA -- reporting, disclosure, fiduciary responsibility and the like.

463 U.S. at 98 (emphasis added).

The Proposed Opinion certainly "relates to" employee benefit plans in any sense of the phrase since it refers to and bears upon the unlicensed practice of law with respect to the preparation and administration of ERISA qualified plans.

Further, the fact that Congress intended the words "relate to" to be used in their broadest sense to cover more than reporting, disclosure and fiduciary responsibilities establishes that the Proposed Opinion "relates to" employee benefit plans.

Finally, the Proposed Opinion is inconsistent with the Congressional goals of eliminating a hodgepodge of conflicting regulations. Indeed, 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." Fort Halifax Packing Company Inc. v. Coyne, **482** U.S. **1, 10 (1987).**

In providing **ERISA's** preemption provision, Congress "meant to establish pension plan regulation as exclusively a federal concern." Alessi, **451** U.S. at **523.** This general sentiment was repeated by the Supreme Court:

> It is . . . clear that ERISA's preemption provision was prompted by 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.**

The Proposed Opinion would conflict with the intent and operation of ERISA. Should the Court adopt the Proposed Opinion, only Florida would have the precise restrictions enunciated in the Proposed Opinion. These intra-state limitations form the material for a patchwork of regulation conceivably permitting a CPA to perform, while simultaneously barring the same CPA from performing, activities relating to the qualified pension plan of a multi-state employer -- precisely the outcome ERISA was designed to prevent. Concerns regarding the qualifications of professionals practicing in the ERISA field are to be resolved, as they have been, on the federal level by the promulgation of uniform standards. See, discussion in § I.B., supra.

2. None of The Exceptions to The ERISA Preemption Provision Apply to This Case.

The broad preemption embodied in ERISA is subject only to limitations found in ERISA itself; however, none of the exceptions to ERISA's broad preemption provision apply in this case. ERISA preserves from preemption, ~~inter alia,~~ "generally applicable criminal law[~]of a state." 29 U.S.C. § 1144(b)(2)(B)(4) (1985). Clearly, Florida has a generally applicable criminal statute which prohibits the unlicensed practice of law: "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). The Proposed

Opinion, however, is far narrower than the statute and is not "generally applicable."

Although ERISA does not define the phrase "generally applicable," courts have generally agreed on the scope of the exception. A recent illustrative case is New Jersey v. Burten, 530 A.2d 363 (N.J. 1986). In Burten, the administrator of trustees of a welfare fund of employers and union local filed municipal court complaints charging the company's officers with failing to contribute to the union's pension fund on behalf of employers. In examining whether the relevant criminal statute was "generally applicable" within the meaning of ERISA § 514(b)(4), the New Jersey court adopted the following analysis:

> Presumably, 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 . . . . The savings provision for state criminal law was needed to ensure that otherwise illegal activity does not escape prosecution because a state criminal law may 'relate to' an employee benefit plan. ERISA itself provides criminal sanctions for activity specifically related to employee benefit plans. Congress decided which of these activities it wished to subject to criminal sanctions and which penalties it wishes to attach to these activities. 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 369 (quoting Hutchinson & Ifshin, Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974, 46 U. Chi. L. Rev. 23, 72 (1978)). See also, Sforza v. Kenco Constructional Contracting Co., 629 F. Supp. 489 (D. Conn. 1986); Commonwealth v. Federico, 383 Mass. 485, 419 N.E.2d 1374 (Mass. 1981).

Under this standard, Florida's statute prohibiting the unlicensed practice of law is "generally applicable" and not preempted. The Proposed Opinion, in contrast, is not generally applicable -- it has a direct and substantial effect on ERISA pension plans. Indeed, the Proposed Opinion effectively would amend Florida's statute in a way which targets qualified employee benefit plans, rendering the Proposed Opinion not "generally applicable" and, therefore, preempted. See Proposed Op. at 3 n.2. Therefore, the Proposed Opinion, as judicial "gloss" on Florida's unlicensed practice statute, cannot possibly fall within the "generally applicable criminal law" exception of ERISA?

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12 The Bar suggests that a rationale for the Proposed Opinion is the need to avoid perceived public harm caused by unqualified practitioners in the pension field. The AICPA is similarly concerned with potential harm to the public caused by untrained pension "experts." Nevertheless, the AICPA recognizes that the constraints of the federal system make the policing of unqualified persons a federal concern in the first instance. In the unfortunate circumstances where actual criminality,

(Footnote continued on page 29)

11. EVEN IF THE STATE HAS THE AUTHORITY TO REGULATE CPAs IN THE PENSION AREA, THE PROPOSED OPINION FAILS TO MEET ITS OWN GOALS AND SHOULD BE REJECTED.

The Bar disregards the abilities and qualifications of CPAs to practice their profession in the employee benefits field; crafts an overbroad response to the harms it finds and consequently impedes unnecessarily the establishment and operation of employee benefit plans. Further, the Proposed Opinion fails to meet its own goals of providing "standards by which [nonlawyers] can confidently conduct their business without undue concern over the unlicensed practice of law." Proposed Op. at 8. The restrictions set forth in the Proposed Opinion contradict the license granted by federal law. Accordingly, the Proposed Opinion should be rejected.

If the Court adopts the view that the federal government has not preempted the field of ERISA entirely, the Court must undertake a careful review of the respective spheres of authority appropriately occupied by lawyers and CPAs. The Proposed Opinion correctly recognizes "there are areas in the pension field where nonlawyers perform a valuable service . . . [The] client is best served if the attorney and layman work together to formulate and implement a pension plan." Proposed

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12 (Footnote continued)

rather than incompetence, causes a loss, Florida's generally applicable criminal laws prohibiting theft, embezzlement and the like are the appropriate vehicle for protecting the public.

Op. at 5. The ABA and the Department of Justice have examined the issue and have concurred that CPAs are pension professionals who can contribute greatly to clients' interests. Cf., ABA Opinion at 16; DOJ Comments at J-3.

A. THE PROPOSED OPINION OVERREACHES ITS GOAL OF PROTECTING THE PUBLIC FROM INCOMPETENT REPRESENTATION.

"The single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical or irresponsible representation." Florida Bar v. Moses, 380 So.2d at 417. This Court's, and the Bar's, efforts are directed toward that goal; however, in the instant case, the Proposed Opinion overshoots the mark. The Proposed Opinion also prohibits the public from receiving competent, ethical and responsible representation by a group of highly trained experts in the employee benefits field.

In Florida Bar v. Moses, this Court examined whether lay representation before a Florida administrative agency constituted the practice of law, and, if so, whether, that conduct constituted the unauthorized practice of law. 380 So.2d at 413. This Court determined that representation of another in a contested hearing before a Florida administrative agency constitutes the practice of law. Id. at 416. The Court noted its primary concern of protecting the public from irresponsible representation and the role of standards for

attorney competence and ethical responsibility in meeting that concern. Id. at 417. The Court next noted an aspect of its power implicated here:

> Implicit in the power to define the practice of law, regulate those who may so practice and prohibit the unauthorized practice of law is the ability to authorize practice of law by lay representatives. The unauthorized practice of law and the practice of law by non-lawyers are not synonymous.

Id. (emphasis added).

This Court has, in the past, authorized the practice of law by nonlawyers. Cf., Ch. 11, Rules Regulating The Florida Bar (rules governing law school civil and criminal practice program). Where, as here, the Court's goals of competent, ethical and responsible representation are met, as recognized by federal statute and regulation, then the Court should not block the availability of that representation. To the extent that the activities described in the Proposed Opinion constitute the practice of law, those activities when performed by CPAs, should be authorized because the primary goal of the Court's regulation of the unauthorized practice of law -- protection of the public from irresponsible representation -- is satisfied. The Proposed Opinion should be rejected because it disregards the unique abilities of CPAs to meet the goal of competent, ethical and responsible representation in the employee benefits field.

1. The public is Equally Protected by the Professional Regulation and Competence of CPAs.

The Proposed Opinion implies that only an attorney can render "independent professional judgment" and that nonlawyers often lack the expertise to consider the interplay of pension plan decisions on other areas of the tax code. Proposed Op. at 5. With respect to CPAs, these concerns are misplaced. The Proposed Opinion's conclusions are not surprising, however, since the record underlying the Proposed Opinion is devoid of informed comments on the stringent educational requirements, licensing procedures, and disciplinary mechanisms that govern the qualification and practice of CPAs. In addition, the Bar did not have the benefit of a detailed discussion of the federal statutory and regulatory provisions governing the extensive practice of CPAs before the IRS and in the employee benefits field in general. In combination, the certification rules and regulations, and the federal statutes governing CPA practice ensure that CPAs practicing in the complex pension field will be competent, ethical and responsible representatives of their clients.

As recognized by the National Conference of Lawyers and Certified Public Accountants, a CPA is an individual "trained and expert [in] accounting who has passed a uniform examination and, by this demonstration of competency and by meeting other requirements, has been certified by a state board to express professional opinions on financial statements."

Lawyers and Certified Public Accountants: A Study of Interprofessional Relations at 5 (1981) (hereinafter the "Interprofessional Study").[13] In general, the services of CPAs extend from the traditional tax analysis, accounting, and auditing, to providing management advice on budgeting, cost control, profit planning, and miscellaneous project development. Id. at 5-7. In sum, as this Court has recognized, the services provided by nonlawyers, including accountants, have expanded to meet the "ever changing business and social order." Florida Bar v. Brumbaugh, 355 So.2d at 1186, 1192 (Fla. 1978).

In response to the public need for independent, objective and highly competent public accountants, each state has established rigorous educational and testing requirements for certification.[14] Subsequent to certification, Florida

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13 The National Conference of Lawyers and Certified Public Accountants consists of representatives appointed by the American Bar Association and the American Institute of Certified Public Accountants. For more than thirty-five years it has engaged in meetings and continuous communication for the purpose of promoting understanding between the two professional groups. Interprofessional Study at 1.

14 For example, to be a candidate for the Florida CPA licensure examination, a current applicant must be of good "moral character" and possess "a baccalaureate degree with a major in accounting or its equivalent plus at least 30 semester hours in excess of those required for a 4-year baccalaureate degree, with a concentration in accounting and business in the total educational program . . . ." Fla. Stat. §§ 473.306(2)(b)(2), 473.308

(Footnote continued on page 34)

requires the CPA to apply for a renewal of the license every two years, and to satisfy demanding continuing education requirements involving such areas as taxation, management advisory services, general business (including economics, business law, marketing and finance), oral and written communications, behavioral sciences, and managerial effectiveness.[15] In practice, the CPA is held to a high standard of competence.[16] Further, CPAs are governed by a detailed code of ethics.[17] This code of ethics is enforced

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14 (Footnote continued)

(1989); see also Rules of the Department of Professional Regulation of the Board of Accountancy, 21A-27.001, 21A-27,002, 21A-28.001-008 ("Department Rule"). The subjects in which candidates must demonstrate proficiency on the licensing examination include principles of tax law and general business law.

15 See Fla. Stat. §§ 455.203(1), 473.312 (1989); Department Rule 21A-33.003. In light of these educational requirements, it is not surprising the ABA Opinion expressly recognized that CPAs are knowledgable in tax matters. ABA Op. at 16.

16 A CPA "must exercise due professional care in the performance of an engagement" and "must adequately plan and supervise an engagement." Department Rule 21A-22.001.

17 Under the Florida statutes, a CPA "is not to undertake any engagement in the practice of public accounting which he or his firm cannot reasonably expect to complete with professional competence." Fla. Stat. § 473.315(2) (1989). In addition to requiring the "independence" of judgment of the CPA, see Department Rule 21A-21.001, the CPA also "must not knowingly misrepresent facts and shall not subordinate his judgment to others including but not limited to clients, employers or other third

(Footnote continued on page 35)

through a strict disciplinary mechanism.[18] In addition, membership in the AICPA is conditioned upon compliance with a detailed Code of Professional Conduct,[19] which is enforced through a joint program with state professional CPA

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17 (Footnote continued)

parties . . . ." Department Rule 21A-21.002. Moreover, communications between the client and accountant are privileged. See Fla. Stat. § 473.316 (1989).

18 The Florida Department of Professional Regulation is required to investigate any "sufficient" complaint and may continue any investigation after such complaint is withdrawn. See Fla. Stat. § 455.225 (1989). The Department Rules provide a detailed explanation of the grounds that may warrant discipline of CPAs plus the penalty range. For example, a CPA found guilty of negligence or misconduct in failing to maintain "independence" may receive a one year suspension. See Department Rule 21A-30.004(2)(i)(2). Further, a CPA found guilty of negligence or misconduct concerning the competency requirements may receive one year probation. Id. Rule 21A-36.004(1)(i)(1). As discussed supra, the Treasury Regulations provide a detailed mechanism to suspend CPAs from practicing before the IRS for "disreputable conduct." See 31 C.F.R. §§ 10.50-.76 (1989).

19 The AICPA's Code of Professional Conduct and Bylaws (hereinafter "AICPA Code," "AICPA Bylaws"), similar to the ABA's Code of Professional Responsibility, contains general principles of conduct and more specific rules of performance. For example, the AICPA Code provides for rules of CPA performance respecting, among other things, independence of judgment and client confidentiality. See AICPA Code R. 101, 301, 302, 502 (1988). Further the AICPA Bylaws provide disciplinary procedures including the termination of membership in the AICPA. See AICPA Bylaws § 7 (1988).

associations.[20] As is evident, CPAs possess the requisite education, independent professional judgment, and oversight and discipline to provide full services to employers in the pension plan field.

B. THE PROPOSED OPINION DISREGARDS THE QUALIFICATIONS OF CPAs IN THE DESIGN, DRAFTING *AND* TERMINATION OF PENSION PLANS AND MUST BE REJECTED.

In order to effectuate the goals of ERISA in the least restrictive manner and to protect the public from the unlicensed practice of law, this Court should permit efficient means of establishing and operating pension plans without sacrificing the quality of professional services. CPA involvement in the design, drafting and termination of pension plans beyond that scope allowed in the Proposed Opinion would properly balance the competing considerations without sacrificing public protection. In various specific areas, the Proposed Opinion overreaches with respect to CPAs because it fails to recognize their federally authorized role,

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[20] Through the Joint Ethics Enforcement Program (hereinafter "Joint Program"), the AICPA and the state CPA professional societies "promote and maintain high professional standards of practice by their members." Joint Program Manual of Procedures § 1.1 **(1987-1988).** The Joint Program provides an efficient mechanism for the enforcement of the AICPA Code and the AICPA Bylaws through provision of complaint, investigation and disciplinary procedures. Id. §§ **3.5, 3.12, 4.19-4.27.** The Florida Institute of Certified Public Accountants participates in the Joint Program.

their competence in the field, or the degree to which their activities are regulated by state and other agencies.

1. CPAs Are Qualified to Participate in the Design of Pension Plans.

The Proposed Opinion postulates that analyzing employer information and determining which plan structure is best "involves an analysis of legal principles and a skill and knowledge of the law greater than that possessed by the average citizen," meeting the test for the practice of law. Proposed Op. at 12.

Certainly the design of a particular pension plan involves many economic and legal considerations.[21] Consistent with the Proposed Opinion, knowledge of pension law "greater than that possessed by the average citizen" is demanded. This fact, however, does not perforce restrict the designing of pension plans to lawyers. The principal requirements for pension plans are found in the overarching tax provisions of the Internal Revenue Code -- the very area in which the federal

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21 For example, basic economic considerations in structuring a pension plan may include:

- Will plan financing be discretionary?
- Will the plan be contributory or noncontributory?
- Should the employer promise a set level of contributions or a set level of benefits?
- Should plan assets be invested in a trust or in insurance contracts?

government authorizes CPAs to practice and in which CPAs are extensively trained, tested and regulated. As such, CPAs possess the requisite knowledge greater than that possessed by the "average citizen" -- indeed, perhaps greater than that possessed by the average lawyer.[22] Accordingly, it is in the public interest to permit CPAs to make final recommendations in the design of pension plans.

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. As shown above, and recognized by Florida, the state of practice of the CPA has progressed beyond auditing and taxation to management consulting on a variety of topics. See Interprofessional Study at 5-7; Department Rule 21A-33.003 (approving CPA continuing

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22 The Proposed Opinion notes that a nonlawyer may not "render an opinion that the particular plan once adopted by the employer will qualify for tax benefits or be in compliance with the Code." Proposed Op. at 11. The professional standards of CPAs, however, state that "[t]he objective of auditing procedures applied with respect to the tax status of a plan is to permit the auditor to conclude . . . [w]hether a trust is qualified under the [IRC] as being exempt from federal income taxes and whether transactions or events have occurred that might affect the plan's qualified status." AICPA, Audits of Employee Benefit Plans § 11.4(a) at 78 (1983). Thus, in auditing a pension plan, a CPA must form his own opinion that the plan satisfies the qualification requirement of the Code. 1 AICPA Professional Standards: U.S. Auditing Standards §§ 9326.16-17 (1981).

professional education ranging from technical business studies such as economics, to behavior subjects such as management effectiveness). Thus, the CPA is qualified to recognize the impact that other nontax-related issues may have on the design of the pension plan.

One aspect of potential public harm identified by the Proposed Opinion is the fear of conflicting interests. Proposed Op. at 4. The only solution, contends the Bar, is for the plan to be designed by the lawyer who possesses "independence of judgment" and may be disciplined for conduct so lacking. This concern of public harm, however, is inapplicable to CPAs. As discussed above, the rules and regulations governing CPAs, similar to the code of professional responsibility for lawyers, demand such "independence" of judgment and provide potential discipline for improper conduct.[23]

Thus, the Proposed Opinion's prohibition on CPAs making final recommendations on the design of pension plans overreaches because it disregards the qualifications of CPAs to render economic, administrative and tax-related advice and disregards the independence required of CPAs. The Proposed Opinion must, therefore, be rejected.

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23 The objectivity of CPAs in rendering advice is enhanced by a statutory prohibition against the acceptance of "compensation for the sale of products . . . or for referral of products or services of others." Fla. Stat. § 473.3205 (effective date October 1, 1989).

2. CPAs Are Qualified to Draft Plan Documents for Submission to IRS.

In its Proposed Opinion, the Bar, citing Turner, 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. These documents, which under the Proposed Opinion should be prepared by counsel, include completion of the adoption agreement for master and protoptype plans.

As noted earlier, CPAs are competent to draft all plan documents necessary to receive a determination letter from the IRS or for purposes of filling with the DOL. Indeed, nonlawyer employees of the IRS perform the analysis of the plans for qualification. See Qualification Standards and Guidelines Handbook § 987.1 (1982). The Bar's conclusion that only lawyers may draft plan documents ignores this Court's admonition to balance competing public interests. Brumbaugh, 355 So.2d at 1189.[24]

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[24] It must be reemphasized that Congress balanced the public interests in permitting CPAs to practice before the Service. See 5 U.S.C.§ 500 (1977) (discussed supra). Moreover, the IRS has determined that an essential part of a CPA's presentation before it includes "the

(Footnote continued on page 41)

A careful balancing, as discussed above, addresses the need to provide "reasonable protection" to the public interest while meeting an ever-increasing demand for complex services. A reasonable balance rests in not restricting the drafting of pension plan documents by CPAs, with, at the option of the employer, review by counsel.[25] As demonstrated above, CPAs must undergo extensive testing, retesting, and continuing

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24 (Footnote continued)

preparation and filing of necessary documents". 31 CFR § 10.2(a) (1988). Thus in addition to these sound policy considerations, CPAs have the right to prepare plan-related documents (as well as the qualification documents) that must be submitted to the IRS for qualification of the plan. As discussed more fully below, the IRS has authorized CPAs to develop regional prototype plans for use by their clients.

25 Although not sufficiently broad, the ABA Opinion takes a more expansive approach to the drafting of plan documents by nonlawyers 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 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 memoranda schedules, etc. by the nonlawyers. [The consultation1 may also involve a review of the documents proposed by the lawyer." Id.

The ABA Opinion specifically addressed the use of specimen or sample documents. 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 with legal and tax implications and should be reviewed by the employer's lawyer." Id. at 13 n.10.

professional education in many subjects, especially the IRC. As such, in contrast to purely corporate or commercial legal documents, CPAs are qualified to draft the plan documents, the substance of which is grounded in the IRC.[26]

Concerns of potential public harm associated with the drafting of plans by nonlawyers are inapplicable when such plans are drafted by CPAs.[27] Like attorneys, CPAs provide professional services. No more conflict of interest exists, therefore, with CPAs than with attorneys that may interfere with the "independence of judgment." Moreover, due to the nature of their practices, CPAs are at least as familiar as the lawyer with the relationship between pension plans and other

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26 The distinction must be emphasized that corporate documents may have tax implications but are primarily legal documents governed by state law, whereas the pension plan documents are grounded in the IRC and are primarily tax documents. As such, the latter may be drafted by CPAs, for review by counsel.

27 A concern was raised before the Bar where the nonlawyer drafts the plan and the attorney provides only a "rubber stamp" review. Proposed Op. at 18. The logical solution to the "rubber-stamping" 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. Indeed, the ABA Opinion provides that the employer's lawyer must at all times exercise independent legal judgment on behalf of the client . . . [and] may not simply rely on the expertise of the nonlawyer consultants . . . ." ABA Op. at 13.

retirement and business concerns of the employer to recognize issues of concern.[28]

Similarly, under IRS Procedures, master or prototype plans may be drafted by CPAs.[29] 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 the technical assistance that might be needed in setting up an individually-designed plan. To effectuate this purpose, qualified master and prototype plans restrict the employer to pre-approved options that provide qualified benefits under the Code. Given the limited scope of the options, the employer's choices are governed primarily by economic and tax considerations on which the CPA is qualified to advise employers. Accordingly, where the Proposed Opinion prohibits CPAs from drafting plan

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28 Indeed, advice to an employer regarding the adoption and design of an employee benefit plan which takes into account all aspects of the business -- the tax effects, cash flow effects, and other general business concerns -- is the unique province of CPAs. This familiarity with business, as well as tax, considerations renders the CPA qualified to advise in this area.

29 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 form 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. See Rev. Proc. 89-9 § 3.01, 3.02.

documents, including master and prototype plans, it overreaches and should be rejected.

The IRS has recently issued a revenue procedure instituting "regional prototype defined contribution plans." Rev. Proc. **89-13**. These regional prototype plans are notable in two related respects. The regional plans are similar to master and prototype plans discussed above. The IRS has specifically authorized "sponsors" to make available to their clients regional prototype plans (Rev. Proc. **89-13, § 4.01)** and to submit adoption agreements to the IRS on behalf of employees who adopt the regional prototype plan. Id. at § **4.02**. "Sponsors" are "firms" with certain characteristics. Id. "Firms" are defined as "a partnership or corporation at least one of whose members or employees is authorized to practice before the Internal Revenue Service with respect to employee plan matters, or an individual who is so authorized." Id. at § 4.03.[30] The issuance of Rev. Proc. **89-13** is further evidence of the pace at which regulations governing procedures and

30 Rev. Proc. **89-13** should be compared to the now rescinded Rev. Proc. **76-15** which limited to law firms the ability to submit pattern plans to the IRS. Rev. Proc. **89-13** makes it clear that non-law firms are authorized to draft certain plans and adoption agreements for their clients. Moreover, it should be recognized that CPAs, in connection with the process of obtaining a determination letter, often must conduct negotiations with the IRS over particular plan terms. Thus, as a practical matter, CPAs must retain the authority to conduct these negotiations and redraft plan provisions in order to be able to practice effectively before the IRS.

practice before the IRS in the employee benefits field change and further evidence of the imprudence of state regulation of the employee benefits area.

3. CPAs Are Qualified to Draft Summary Plan Descriptions.

Under the Proposed Opinion, a nonlawyer engages in the unlicensed practice of law when he drafts or amends summary plan descriptions ("SPD") or employee handbooks.[31] Proposed Op. at **18**. This result is puzzling since the Bar concludes that other notice and disclosure requirements of ERISA come within the purview of the nonlawyer. See Proposed Op. at **14-15**.

The nature of the SPD and the type of information it contains confirm that the SPD may be produced by a CPA. The SPD is a written summary of the contents of a plan that is required to be distributed to plan participants and beneficiaries. It explains how the plan works, what benefits it provides, and how the benefits can be obtained.[32] ERISA requires that the SPD "be written in a manner calculated to be understood by the average plan participant, and . . . be sufficiently accurate and comprehensive to reasonably apprise

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31 In direct contrast to the Proposed Opinion, the ABA Opinion implicitly recognizes the nonlegal nature of the SPD and permits the drafting of the SPD by the nonlawyer. See ABA Op. at 16.

32 See **29** C.F.R. § 2520.102-3 (1988).

such participants and beneficiaries of their rights and obligations under the plan."[33] 29 U.S.C. § 1022(a) (1985).

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33 See 29 **C.F.R.** § 2520.102-2(a) (1988). In general, the SPD for all employee benefit plans contains factual information concerning the plan including the following:

(a) the official name of the plan;

(b) the name and address of the employer or employee organization maintaining the plan;

(c) the **IRS** employer identification number ("**EIN**");

(d) the plan number assigned to the plan;

(e) **a** description of what type of pension or welfare plan is involved;

(f) a description of how the plan is administered;

(g) the identity of the plan administrator and each trustee;

(h) a description and explanation of plan benefits;

(i) a statement of participant's rights under **ERISA** (the DOL regulations contain a model statement);

(j) a description of the requirements for eligibility for participation and benefits;

(k) a description of the circumstances which would result in a participant's disqualification or in the denial, loss or suspension of benefits;

(l) the procedure for presenting claims and appeals;

(m) the source of the contributions to the plan;

(n) a description and explanation of how the plan determines years of service for eligibility and vesting; and

(o) a summary of plan provisions relating to the termination of the plan.

See 29 **C.F.R.** § 2520.102-3 (1988).

Under federal regulations, the SPD must be clear, complete, easily understood and contain clarifying examples and illustrations.[34] 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, and as to whether benefits are covered by plan termination insurance.[35]

CPAs are well qualified to convey information about a plan "in a manner calculated to be understood by the average participant."[36] Like other notice and disclosure documents that may have legal consequences, the employer may wish to have the SPD reviewed by legal counsel. However, as the SPD is not primarily a legal document but primarily a disclosure document, the Proposed Opinion overreaches when it attempts to restrict the preparation of SPDs to attorneys and should be rejected.

4. CPAs Are Qualified to Assist Clients With Plan Terminations.

The Bar determined, without significant analysis, that because plan termination involves serious legal consequences, it is the practice of law, and only a lawyer may prepare the

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34 See 29 C.F.R. § 2520.102-2(a) (1988).

35 See 29 C.F.R. § 2520.102-3(m), (t) (1988).

36 Indeed, CPAs may be better qualified where their continuing professional education requirements permit coursework in oral and written communications. See Department Rule 21A - 33.003(2)(c)(1).

required corporate resolutions, relevant plan amendments, and the request to the IRS determination letter. Proposed Op. at 21-22. Although the Proposed Opinion is not clear, presumably this provision is not intended to prevent CPAs and other nonlawyers authorized to practice before the IRS and PBGC from preparing plan amendments, requesting a determination letter from the IRS and notifying the PBGC of the intent to terminate a plan. See 29 C.F.R. § 2606.6 (1988) (PBGC authorization); 31 C.F.R. § 10.3(b) (1988) (IRS authorization).

As accurately stated by the Bar, "the termination of a plan . . . necessitates the rendering of advice to the employer concerning the interpretation of complex statutory provisions and the Code . . ." Proposed Op. at 21. Knowledge of the law greater than the "average citizen" is demanded to advise in this area. As detailed above, however, lawyers do not possess a monopoly on knowledge of ERISA and the Code greater than the "average citizen." See Interprofessional Study at 14. Thus, a CPA is fuly qualified to draft plan amendments and other termination documents where the substance is derived from ERISA or the Code, and to submit the plan to the IRS for a determination letter.[37]

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37 CPAs generally do not prepare corporate documents, such as board of directors' resolutions, associated with plan termination.

C. THE PROPOSED OPINION CREATES, RATHER THAN REDUCES, CONFUSION.

One of the stated purposes of the Proposed Opinion is clarification "of confusion on the part of attorneys and laymen as to the exact boundaries of [Florida Bar v.] Turner." Proposed Op. at 4. The AICPA has identified repeated instances wherein the Proposed Opinion conflicts with authority granted pursuant to federal law or relies upon characterizations which are inaccurate as to CPAs. The AICPA respectfully suggests that greater confusion will result from the Proposed Opinion than from no opinion at all. Accordingly, the Proposed Opinion should be rejected.

CONCLUSION

The AICPA respectfully requests the Court reject the Proposed Opinion as it relates to CPAs' activities with respect to qualified pension plans. If the Court is of the opinion that any specific actvity performed by CPAs in the pension field is prohibited, the AICPA respectfully requests remand of the Proposed Advisory Opinion for further development of the record on that point.

Respectfully Submitted,

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