IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 74,479

**In re THE FLORIDA BAR:
PROPOSED ADVISORY OPINION
RELATING TO NONLAWYER
PREPARATION OF PENSION PLANS**

**BRIEF IN OPPOSITION TO
PROPOSED ADVISORY OPINION**

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INTRODUCTION

In today's market, employees work for more than a paycheck. The employer who needs to attract and to keep qualified and able workers must provide a panoply of fringe benefits once reserved for only the highest echelons of the most profitable and sophisticated firms. Nowhere is this more evident than in the area of pension and profit sharing plans. With public perception of the uncertain future of Social Security and with the high cost of individual investment and a societal disinclination to individual savings, today's work force looks upon employer-sponsored pension plans as the single most significant means of providing for a secure retirement.

Congress has recognized the social utility of such plans by providing favorable tax treatment for qualified pension and profit sharing plans. This tax benefit both permits and encourages employers to put aside a portion of business profits for the future benefit of the employee. Moreover, the requirements to qualify a plan make clear that Congress intended the benefits of pension and profit sharing plans to flow to employees at even the lowest levels. The tax benefits are denied to plans which serve only to enhance compensation and benefit packages for highly compensated personnel.

The reality of pension and profit sharing plan development, however, is that the cost of employing attorneys and actuaries to develop a plan is beyond the financial reach of most

small companies and individuals. At the same time, the economically realistic options available to relatively small companies and individuals with correspondingly small pension accounts were few and simple. Thus, a service industry grew up to meet the needs of the company which does not need and cannot afford an individually tailored plan. Banks and financial institutions in Florida have, for years, made standardized and non-standardized master plans available to their customers both safely and economically.

The object of a pension or profit sharing plan is to accumulate an individual's pre-tax money today to hold and invest it and distribute it to him or her later in life. Bankers play a vital role in this arrangement. Banks collect the money as trustees, hold it, invest it, and, at the appropriate time, distribute it. The banks' principal economic interest is the fees they receive as trustees and investment managers. Investment of funds and acting as corporate fiduciaries are basic elements of the business of banking. To the extent a bank officer assists a customer in adopting an I.R.S. approved master plan, that activity is incidental to the bank's fundamental business of acting as an asset manager and corporate trustee.

The Proposed Advisory Opinion would prohibit banks from continuing to provide this service in the present form, but no provision is made for servicing those customers for whom the additional cost of attorney review of prototype documents would

work an unnecessary hardship. Furthermore, the Proposed Advisory Opinion unduly restricts banks from enjoying one of their principal lines of business.

FBA would stress that banks and financial institutions do not draft individually tailored plans and do not seek to do so. The FBA files this brief in opposition to the Proposed Advisory Opinion to address only the practices of financial institutions in offering master plans. FBA urges the court to revise the Proposed Advisory Opinion to permit banks to continue to provide pension and profit sharing plans through the use of master plans. Historically, the provision of this service by banks has caused no injury to the public and to the extent this service involves the practice of law, such activities are incidental to the business of banking.

THE MASTER PLAN

One of the strengths of the American entrepreneurial system is that consumer needs trigger market responses. As the demand for pension plans grew, those in a position to provide the plans became aware of a market among employers which could not afford to hire lawyers, actuaries and other professionals to develop a tailored plans. As a result, prototype plans were developed by experts in the field, usually lawyers. These prototypes are pre-approved by the I.R.S. and then made available to employers and individuals through other institutions, such as banks, which provide them to customers as an ancillary service.

Additionally, some institutions developed their own prototypes either through their in-house legal staff or through outside counsel. As a threshhold matter, it is important to note that each prototype plan is drafted by or under the supervision of lawyers familiar with the law governing pension and profit sharing plans and pre-approved for tax benefits by the I.R.S.

A pension and/or profit sharing plan (hereinafter, "Plan") consists, initially, of a Plan Document setting forth the rights and responsibilities of the parties to the Plan, outlining the fiduciaries and their respective obligations. Most Plans call for the employer to establish a Plan Committee to oversee the in-house details of Plan administration. Investment of the Plan assets is most frequently managed by an outside fiduciary. An investment section sets forth and limits the type of investment choices available to the investment trustee. The document also sets forth reporting and accounting requirements of the Plan.

An integral part of the Plan is the Adoption Agreement (sometimes called the Adoptive Agreement) which permits the employer to designate specific terms and conditions of Plan funding, management and participation from a set menu of options. Areas covered in typical Adoption Agreements include how compensation is defined for Plan purposes, the date on which participants may enter the Plan, the hours of service necessary for participant eligibility, a definition of the taxable wage base, normal retirement eligibility, how contributions are made,

whether the employer's contribution is treated as integrated or non-integrated, whether a contribution is made in the last year the employee is with the employer, under what conditions accounts may be forfeited, whether other Plans are applicable, when and how the benefits vest, whether the employee, the employer or both have discretion concerning the account, whether hardship withdrawals are allowed, whether loans to participants are allowed, and whether insurance policies may be held as Plan assets. While each decision involved in the Adoption Agreement has legal components, these are primarily business decisions having more economic or management impact than legal repercussion.

These documents together constitute the Plan. In addition, the law requires that a Plan Summary Document be prepared and disseminated to inform the plan participants, in language intelligible to non-lawyers, of their benefits and responsibilities under the Plan.

Before a prototype Plan can be made available to a customer, it is reviewed and approved by the Internal Revenue Service. Some Plans are so simple, and the option are so restricted, that the IRS determines that no possible choice or combination of choices could disqualify the Plan. For these Plans, generally referred to as "Standardized **Plans,"** no further review is required.

Non-standard Plans, because they involve more options,

require a second review by IRS after the Adoption Agreement has been completed. Typically, the bank officer serving the customer prepares the letter of transmittal and delivers it to the employer for mailing to the IRS over the employer's signature. In the event that IRS disapproves the Plan as adopted, IRS indicates which portions require revision and suggests revisionary language. The process takes between three and six months.

Additional documentation required in implementing the Plan consists of the corporate resolution adopting the Plan, amendments to the Plan when required by changes in law, and Plan Termination Documents. These are also provided in prototypical form.

It must be noted that the prototype or master Plan contains specific language drafted to meet the requirements of governing law. The employer may select from a list of options, but the employer may not alter the language of the Plan or the Adoption Agreement in any manner. Any deviation from the language of a pre-approved Plan creates an individually tailored Plan, beyond the scope of services appropriately rendered by bank and trust companies.

THE BANK CONNECTION

Banks which have not had their own master Plans drafted by in-house or outside counsel subscribe to a Plan document service.

The three major Plan providers in this area are Corbel, located in Jacksonville, Florida; PPD (Pension Plans of Denver); and McKay, Barlow, of New Jersey. When the bank subscribes to the service, it receives a complete set of documents and instructions for implementing the Plan. But the Plan providers supply more than just the hard copy. They also provide training seminars to familiarize trust officers with the requirements of the Plan and the proper procedures for implementing the Plans. Additionally, the providers maintain "hot lines" for consultation whenever any problem arises in the course of preparing the Adoption Agreement, the transmittal letter or any phase of administering the Plan.

In most cases, the Plan provider will prepare the Summary Plan Document from the completed Adoption Agreement. Finally, the Plan provider constantly monitors changes in legislation and provides Plan Amendments whenever the law requires the existing Plans to be modified.

Some bank and trust companies do not charge for the Plan documents themselves. Others charge a fee which offsets a portion of the subscription costs. Plan administration, when the bank undertakes it, is provided at a base fee plus a per participant fee to cover the cost of reporting on the individual participant accounts.

However, banks and trust companies are involved in this field only as an ancillary to the business of managing trusts and investments. The bank or trust company obtains its profit from

this service through the investment management fees it charges for acting as a Plan investment fiduciary.

THE PROPOSED ADVISORY OPINI(

A prototype, or master, plan provides a package deal to allow an employer or an individual to establish a Plan. The benefit the employer reaps from establishing a Plan is the tax savings on profits invested in the employee benefit trust account. As the cost of establishing and maintaining the Plan approaches the total tax saving, the incentive for providing this benefit disappears.

The effect of the Proposed Advisory Opinion is to deny employers or individuals the opportunity to establish Plans unless they incur the cost of employing an ERISA attorney to review a lawyer-drafted, 1.R.S.-approved Plan. The effect is to eat away the economic advantage of Plans for small employers.

The Proposed Advisory Opinion addresses the entire field of providing pension and profit sharing plans without making distinctions between those practices which represent public threats and those which represent public benefit. FBA urges the Court to draw rational distinctions so as to protect the public weal without denying the public access to safe and economical Plan provision.

SUMMARY OF ARGUMENT

The definition of the practice of law set forth by this

Court in The Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962) is all-encompassing, embracing many socially and economically vital quasi-legal services provided by non-lawyers. The Court has recognized the tension between the definition of the practice of law and society's need for these services in the context of its obligation to regulate the practice of law for the benefit of the public at large. The Court has, where appropriate, authorized non-lawyers to provide services technically within the definition of the practice of law. Banks and trust companies are appropriate providers of pre-approved pension and profit sharing plan services even though these services may, in part, fall within the Sperry definition of the practice of law.

The Bar is not able, by itself, to meet the demand for services in this area. The vast majority of members of The Florida Bar are as ignorant of the law of pension and profit sharing plans as the average non-lawyer. On the other hand, bank trust officers providing these services are educated and experienced so as to provide a high level of competent service and advice. Moreover, the companies which develop the prototype documents keep abreast of developments in the law and update and amend the prototype plans as required. The public is also protected because the prototype plans are pre-approved by the I.R.S. and because the banks and trust companies must take financial responsibility for the services they provide.

In drawing the line between authorized and unauthorized practices in this area, the Court must balance the public's need to be protected from incompetent and economically deleterious Plan drafters and the public's need for economical and safe plan services. Where, as here, absolutely no evidence has been adduced to support any allegation that the provision of prototype plans by banks and trust companies has caused any harm to anyone at any time, the balance clearly weighs in favor of permitting banks and trust companies to provide pre-approved master plans.

ARGUMENT

The Proposed Advisory Opinion goes too far in its stated purpose of protecting the public and, as a result, it deprives a large segment of the public of access to the benefits of pension and profit sharing plans without offering a concomitant benefit. The record compiled by the Standing Committee on the Unauthorized Practice of Law is devoid of any statistical evidence of injury caused by a bank or trust company's providing prototype pension or profit sharing plans. More striking, there is not even any anecdotal evidence--not one horror story!--suggesting that the public or any employer has suffered because of this activity by banks and trust companies.

Because of the scope of the Opinion, those employers and individuals who cannot afford the services of a small and highly specialized (and correspondingly expensive) segment of the Bar

will be denied access to the tax and employee benefits enjoyed by the more affluent. This is contrary to public policy and the stated policy of this Court.

I. THE COURT CAN AND MUST AUTHORIZE THE PRACTICE OF LAW BY QUALIFIED NON-LAWYERS WHERE SOCIAL AND ECONOMIC FACTORS SO REQUIRE.

With all due respect for the integrity and social concern of the Tax Section of The Florida Bar, which provided the motive force for the Proposed Advisory Opinion, the rules against unauthorized practice of law serve primarily to protect the public, not to protect The Bar. FBA would concede at the outset that certain of the practices addressed in the Proposed Advisory Opinion, and in the record supporting it, appear to be a present threat to the public. However, the Opinion is not drawn so as to prevent the existing harm while preserving the existing benefits. This is due, in part, to the fact that the definition of the practice of law upon which the Proposed Advisory Opinion is founded is all-inclusive.

A. Virtually No Business Decision Can Be Made Without Considering the Legal Implications of the Proposed Action.

This Court defined the practice of law in The Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962):

> It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also

> includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured, or given away, although such matters may not then or ever be the subject of proceedings in a court.
>
> We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

The Court there recognized that even this attempt at defining the practice of law was limited and imprecise, but felt that it was adequate to test the acts before it in Sperry. Since the Sperry formulation, however, the phenomenon of advisory consultants has become an accepted adjunct to doing business. Whenever a body of regulatory or prescriptive law is promulgated, a corresponding body of consultants springs up to translate the law into appropriate corporate action. This trend is symptomatic of the fact that the line between the practice of law and the practice of business is no longer a bright one. No business

decision in today's climate can be undertaken without some concern as to the legal ramifications of the action. However, that concern is rarely answered in a context of pure law.

Each new government program and each new government regulation involves some application of law to business. While lawyers are integrally involved, non-legal entities are essential to assist businesses and individuals comply in an economically feasible fashion. For example, private, non-legal concerns advise companies as to compliance with the Occupational Safety and Health Act. Consultants review businesses for compliance with Equal Economic Opportunity Commission standards. Experienced, but non-lawyer, banking experts, many of whom who are former government regulators, review financial institutions' loans to see if they comply with Federal Deposit Insurance Corporation rules and regulations. Non-lawyer consultants advise individuals and companies about the application of government law and regulation to their particular situations or fields such as defense contracting, highway safety, airline operations, education, environmental matters, toxic waste, asbestos problems, medicare rules, nuclear power, safety standards, drug manufacture and approval. This list is as long as the list of government agencies, laws and regulations. The fact is that skilled lay people who deal on a day-to-day basis with the particular concerns of an agency or a law are essential to permitting

American enterprise to deal with the tangle of red tape and regulation it faces in a cost-effective and economical manner. These services by non-lawyers come into existence because there is a need for them which the legal profession has not filled (and probably cannot fill) in a manner that is satisfactory to the client.

Consultants in all these areas of government regulation are giving counsel as to legal rights and obligations, and giving such counsel requires greater knowledge of that particular body of law than is possessed by the average person. Each of these consultants is, according to the Sperry definition, practicing law--but all are performing services beyond the scope of expertise of the legal professional.

As this Court noted in The Florida Bar v. Moses, 380 So. 2d 412, 416 (Fla. 1980), "It is true that mere application of the Sperry definition will not suffice. The practice of law touches on virtually every economic or social facet of out lives today."

B. The Court Has Recognized Its Obligation to Exercise Its Power to Regulate the Practice of Law in the Interest of the Public Rather Than in the Interest of the Profession.

The purpose of regulating The Florida Bar is to benefit the public. There are, of course, benefits which flow to The Bar itself through the policing of the ranks of its membership and as a result of the proscriptions against the unauthorized practice

of law. However, the touchstone of regulation must be, as it has always been, whether the specific regulation under scrutiny is in the public's best interest.

> Because of the natural tendency of all professions to act in their own self interest, however, this Court must 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. Brumbaush, 355 So. 2d 1186, 1189 (Fla. 1978).

The concern raised by the Tax Section of The Florida Bar was that in the years since this Court decided The Florida Bar v. Turner, 355 So. 2d 766 (Fla. 1978), the laws governing Plans have changed and the mechanics of providing Plans have changed. Edward Heilbrenner, speaking on behalf of the Tax Section of The Florida Bar at the hearing conducted before the Standing Committee on the Unauthorized Practice of Law on January 12, 1989, specifically requested a revisitation of Turner, noting that, in addition to tax law changes, the development of Plan administration firms and firms which provide "highly qualified pension documents" as well as the growing use of paralegals in the field were developments occurring since Turner. Notably, the Tax Section itself, according to Heilbrenner, had "not, and I stress 'not,' investigated the entire issue sufficiently to

formulate a complete and determinative position with respect to the overall situation." (Transcript of Hearing at 15.)

What was clear, with respect to Mr. Heilbrenner's testimony on behalf of the Section and on his own behalf, was that the unauthorized practice of law as it affected the Tax Section was the central concern. Mr. Heilbrenner's individual concern, as shown in his testimony on his own behalf, was the division of labor. Not once in Mr. Heilbrenner's testimony either for the Tax Section or for himself did he allude to any injury being suffered by the public. Both Sharon Dixon and Donald Jaret, lawyers practicing in the pension plan field, referenced errors in plan design, implementation or administration which had created potentially adverse consequences for their clients. However, outside the anecdotal evidence of individual problems (not sufficiently identified to determine whether the problem is isolated or inherent in the process), no study has been undertaken to determine what the public interest truly is in this matter.

William O.E. Henry presented a statement both at the Hearing (through Robert Friedman) and later in written form which addresses this defect in the UPL proceedings. Mr. Henry pointed out that the underlying investigation required by the rules had not been undertaken--a fact acknowledged by Mr. Heilbrenner. But Mr. Henry went further, commenting that the true concern of the

Court, as it should be of The Bar, is the protection of the public. In that context, Mr. Henry also recognized the authority of the Supreme Court to authorize non-lawyers to provide legal services under specific circumstances.

C. The Court Recognizes That the Practice of Law by Non-lawyers is Not Necessarily the Unauthorized Practice of Law.

As Mr. Henry noted, the Court has the authority to determine which activities constituting the practice of law it will authorize, under what circumstance. As this Court itself explained in The Florida Bar v. Moses, 380 So. 2d at 417:

> 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 the practice of law by lay representatives. The unauthorized practice of law and the practice of law by non-lawyers are not synonymous.

In Moses, the Court recognized that under certain circumstances where appropriate standards for qualification have been established non-lawyers may represent entities in proceedings before agencies if the legislature so permits.

The authorized practice of law by non-lawyers is not a novelty. The Court has had occasion to address the completion by non-lawyers of standardized documents pre-approved by the IRS and has found no reason to enjoin such activity. In In re The Florida Bar and Raymond James and Associates, Inc., 215 So. 2d

613, 614 (Fla. 1968), the Court, at The Bar's request, authorized securities brokers, securities dealers, securities salesmen or licensed investment counsel to:

> complete or aid in the completion of standardized printed forms relating to the so-called "Keogh" self-employed retirement plans provided such forms are supplied by institutional trustees or custodians, or by life insurance or mutual fund companies and are prototype forms approved by the Internal Revenue Service and provided further that the third person is notified that legal and tax consequences in such plans vary in particular cases and the third person should consult his attorney.

In Florida, title insurance companies are authorized to perform legal services relating to the provision of title insurance.

> Title insurers are permitted to prepare deeds, mortgages, satisfactions and other documents affecting the legal title to be insured and perform other acts necessary to fulfill conditions described in commitments for title insurance issued by them. The preparation of these documents and other acts <u>normally constitute the practice of law and would be unauthorized if not done as a mere necessary incident to honor a title insurance commitment</u> and to issue a title policy or if a charge was made for such services separate and apart from the 'regular title insurance premium' which the insurer is authorized to charge.

<u>Preferred Title Services, Inc. v. Seven Seas Resort Condominium, Inc.</u>, 458 So. 2d 884 (Fla. 5th DCA 1984)(emphasis added).

Other areas in which the practice of law by non-lawyers has been permitted or recognized includes the completion of form contracts for purchase and sale by realtors--permitted so long as a pre-approved form contract is used--and the interpretation of tax laws by certified public accountants.

The common thread in all these examples is that the practice of law by non-lawyers may be authorized when the purpose of the practice is ancillary to the business being conducted by the non-lawyer and where the public is afforded adequate and appropriate protection. This protection has been recognized when it takes the form of pre-approval of authorized forms, as in the case of sales contracts executed by realtors or Keogh plans completed by stock brokers, where the authorized non-lawyer meets established standards for qualification, as in the case of the certified public accountant or the administrative representation contemplated in Moses, or where the consequences of improper provision of services will be the responsibility of the provider of the services, as in the case of title insurers.

FBA respectfully urges the Court to authorize the implementation of standardized and non-standardized master-plans by banks and trust companies as an activity ancillary to providing trust services where the public may be adequately protected.

II. THE COMPLETION OF PROTOTYPE PLANS BY BANK TRUST DEPARTMENT OFFICERS IS A RATIONAL AND APPROPRIATE AUTHORIZATION OF THE PRACTICE OF LAW.

The Court must balance its obligation to regulate the practice of law to protect the public with the public's demand for economical access to Plans. In considering whether to authorize a limited legal role for non-lawyers in this field, the Court should consider whether The Bar is willing or able to meet the public demand with any greater assurance of public safety. Moreover, the Court must inquire into the "quality control" standards for non-lawyers claiming expertise in this area.

A. The Public Demand for Pension and Profit Sharing Plans Exceeds the Ability of The Bar to Provide the Services.

The testimony presented before the Standing Committee on the Unauthorized Practice of Law on January 12, 1989, and the written submissions filed thereafter underscored the popularity and significance of the Plan as a fringe benefit for employees and a tax benefit for employers. (See, e.g., Written Testimony of Walter L. Ogle, Record, Tab 3.) What was less obvious is that there are relatively few members of The Florida Bar who are qualified to provide these services.

It would be a matter of professional irresponsibility for The Bar to claim that all Bar members are qualified to render advice and assistance in the pension and profit sharing field--and The Bar makes no such claim. The average member of the

Florida Bar is no more qualified to provide the needed services than is the lay person of average intelligence. As the evidence in the Record compiled by the Standing Committee unequivocally shows, lawyer and non-lawyer alike agree that this area is one of subtle complexity further complicated by frequent revisions of the laws and regulations governing it. To stay abreast of developments in the pension and profit sharing field requires a full-time commitment to its study and practice. The average Bar member who does not make that commitment is less qualified to provide these services than is an educated non-attorney professional in the area. Most metropolitan areas boast only a handful of competent ERISA practitioners. Few smaller communities would have access to even one specialist. The unfortunate side-effect of the Proposed Advisory Opinion is to require employers to consult attorneys having less competence in the field than the experienced non-lawyers.

It is also overreaching to assert that **no** non-lawyer is qualified to render advice and assistance in this area. Once again, FBA reiterates its position as spokesperson for the practices of banks and trust companies in administering pre-approved prototype plans. The experience of the banks and trust companies is that the Plan document services make the commitment to keep abreast of legal developments and to provide comprehensive training to the trust officers charged with responsibility for implementing Plans.

Additionally, certification is available to trust officers who complete advanced training in the field. The highest designation, Certified Employee Benefit Specialist (CEBS), is offered by The Wharton School of Economics of the University of Pennsylvania through cooperating institutes of higher learning. The designation of Certified Plan Consultant, although somewhat less rigorous in its requirements, is also a tested designation requiring both on-campus and home study. The professional who has earned a designation in the field is unarguably more knowledgeable about Plans and the requirements to implement them than is the typical member of The Florida Bar.

Where a need exists which The Bar cannot fulfill alone and where non-lawyer expertise is available to meet that need, it is in the public interest for the public to be granted access to all available resources.

Moreover, the requirement that the Plan sponsor incur legal expenses in addition to the cost of the Plan itself would make many of the Plans currently implemented by banks and trust companies economically unfeasable. To deny this segment of the public the benefits of pension and profit sharing plans, ostensibly for that segment's own good, does not reflect well on either the public service or the public interest of The Bar. As William O.E. Henry reminded the Standing Committee, quoting Professor Hyrne,

> In the long run the legal profession will not thrive and prosper by indicting, prosecuting, convicting, enjoining, and issuing orders to show cause to those laymen and lay organizations that, in their ordinary day-to-day business, are involved with people and the law. The legal profession will thrive and prosper if by its deed, it can cause a now skeptical public to believe that it has something more and better to offer than even the best-intentioned amateur.

Letter and enclosures of William O.E. Henry to Lori S. Holcomb, dated January 12, 1989. (Record, Tab 3.) What seems apparent is that lawyers are attempting to mandate by law use of their services -- services that the public has rejected because they can get the functional equivalent more cheaply, and as safely, elsewhere.

Where there is no finding of public injury occurring from the current delivery of the master-plan service by banks and trust companies and the effect of the Proposed Advisory Opinion is to benefit a small portion of The Bar, the legal profession holds itself out for criticism and scorn.

B. The Public is Protected.

As noted earlier, the Court has looked at three types of protection which, when available to the public, will support the Court's authorization of the practice of law by non-lawyers. All three forms of protection are available to employers implementing master-plan Plans with the assistance of banks and trust companies.

The first significant form of protection is the pre-approval of the legal document. As the Court recognized in In re The Florida Bar and Raymond James and Associates, Inc., and as is implicit in the collaboration of The Florida Bar and the Florida Realtors Association on the form contract for purchase and sale, pre-approval of a form document provides substantial assurance that the legal requirements have been met. In the case of prototype Plans, the Internal Revenue Service reviews the Plan documents to insure that the document satisfies the requirements necessary to confer tax benefits. If the Plan is such that the options available do not affect compliance with those requirements, the Internal Revenue Service issues a letter of approval upon which the employer may rely in implementing its Plan. If the selection of options may alter the Plan beyond the scope of the preapproval, the completed Adoption Agreement is submitted to the IRS for further approval. In either situation, no master plan may be implemented without being approved by the Internal Revenue Service.

Another form of protection acknowledged by the Court is the qualification of the professional. As has been set forth above, certification standards exist for the non-lawyer pension professional. It must be noted that no requirement for a specific certification has been established either by statute or by industry self-regulation. However, as a matter of basic qualification, the Plan document services provide competent and

comprehensive training in the implementation of their documents and are available for consultation at any time in the process.

Finally, in the case of title companies, the Court recognized that the title company was, in essence, insuring its own work and would have to stand behind the documents it drafted. In a very real sense, banks and trust companies stand behind their work, as well. The ultimate remedy to the injured recipient of legal advice, whether from a lawyer or from a non-lawyer, is legal action and execution against a judgment. In the case of pension-plan malpractice, the injury is purely economic. It is obvious that the bank or trust company is an available defendant -- and a defendant with pockets of adequate depth -- to compensate for that economic injury. But the real protection lies not in the actual litigation, but in the institution's awareness of the availability of that remedy. Because banks and trust companies are aware of their financial responsibility for the adequacy of the services they provide, they will undertake to police the credentials and performance of the trust officers they hold out to the public as pension plan professionals.

III. THE APPROPRIATE BALANCING TEST

Once it is recognized that the Sperry definition of the practice of law, taken literally, would require the involvement of an attorney in almost every business transaction and in the vast majority of personal decisions, the question facing the

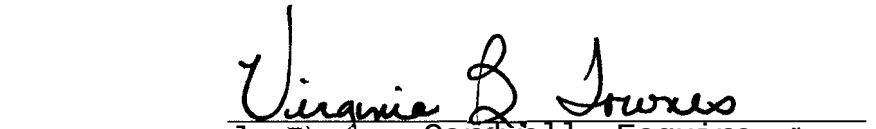
Court is how to fulfill its duty to authorize and oversee the practice of law without bringing social and economic commerce to a standstill. As is so often the case where rights and responsibilities are counterpoised, the Court must balance the competing interests.

The public has an interest in efficient and economical access to pension and profit sharing plans. The public also has to be protected from the consequences of ineptly drafted plans which fail to provide the bargained-for benefits. The Court must determine if there is a point at which the cost of absolute protection outweighs the benefit realized by such protection, thereby denying some of the public the benefit of the plans themselves? Conversely, is there an area of pension and profit sharing plan practice which poses so little risk that the cost of the cumbersome and expensive protective mechanism proposed by The Florida Bar is unnecessary for the protection of the public and becomes, instead, a protection for a limited segment of the profession?

The balancing test in this instance is clear. Where a prototype plan has been approved by the Internal Revenue Service, where the options available are limited and clearly understandable by an experienced, educated professional in a financially responsible setting, the risk is minimal and the public benefit is great.

CONCLUSION

For the foregoing reasons, the Florida Bankers Association respectfully requests the Court to modify the Proposed Advisory Opinion to permit banks and trust companies to continue offering pre-approved standardized and non-standardized master plan pension and profit sharing plans to customers without requiring the intervention and oversight of independent counsel. Banks and trust companies should be authorized to offer standardized and non-standardized master plans pre-approved by the I.R.S. and to obtain I.R.S. approval of Adoption Agreements for non-standardized Plans. Additionally, banks and trust companies should be authorized to provide form prototype documents including Plan Summary Documents, Corporate Resolution Amendments and Termination Documents by drafted by Plan Document Providers. Bank trust officers should be permitted to assist customers in completing the Adoption Agreement and to provide information to the Plan beneficiaries concerning their rights and responsibilities under the Plan.



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APPENDIX

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared **BETTY PEIRSOL,** who, after first being duly sworn, deposes and says:

1. I am over the age of eighteen (18) years.

2. I am currently employed as President and Chief Executive Officer of Key Trust Company of Florida, N.A., and have been active in the provision of pension and profit sharing plans for fifteen (15) years.

3. I have read and am familiar with the Proposed Advisory Opinion being considered by the Supreme Court of Florida.

4. I have specific knowledge of the customs and practices of my employer relative to offering pension and profit sharing plans, and, I am familiar with the general practice in the provision of such services throughout the banking industry.

5. Customers who seek pension and profit sharing plans through the prototype or master plan offered by banks and trust companies typically wish to establish plans with relatively limited assets. The cost of having attorney involvement as would be required by the Proposed Advisory Opinion would substantially erode the economic advantage of establishing the plan for the employer.

6. In our experience, attorneys for master plan customers typically rely on the expertise of the bank trust officer in completion of the adoption agreement and other areas of plan provision and management.

7. Most bank or trust companies subscribe to a plan document service which provides prototype documents. Among the best known of these plan document services are Corbel, McKay Barlow, and P.P.D. (Pension Plans of Denver); all of these are headed or supervised by lawyers expert in the area of pension and profit sharing plan development. These services draft the master plan documents, including the Plan, the Adoption Agreement, the Corporate Resolution, and the Plan Summary Document. Additionally, these services provide training to trust officers and a hotline service to provide answers for questions arising concerning specific plans.

8. Before a prototype or master plan can be made available to the public, the plan documents must be submitted to the Internal Revenue Service for pre-approval. Certain plans offer so few options that no choice or combination of choices could alter the tax consequences of the plan. These plans, usually referred to as standardized plans, require no further I.R.S. review after completion of the adoption agreement. Other prototype plans require that the completed adoption agreement be submitted to the I.R.S. to insure qualification for tax benefits. If the I.R.S. disapproves a non-standardized plan, it suggest modifications to the language which would qualify the plan.

9. The plan documents are a package which, when completed according to the instructions and training provided by the plan document service, safely and efficiently establishes a pension and profit sharing plan for the employer.

10. In my years of experience, none of my customers or my employers' customers have complained of any loss or injury arising from the establishment of a master pension or profit sharing plan. Neither am I aware of any such problems attributed to the services of any other bank or trust company.

11. Trust officers dealing with customers on establishing pension and profit sharing plans can receive training from the plan document service on a regular basis. Additional education is available to obtain the designation of Certified Employee Benefits Specialist, a program offered through the Wharton School of Economics at the University of Pennsylvania and taught locally at the University of Central Florida. Another designation, that of Certified Plan Specialist, is a tested designation which requires both classroom instruction and independent study.

12. Implementation of the Proposed Advisory Opinion would, in my opinion, be detrimental to many of the customers of banks and trust companies which offer pension and profit sharing master plans without increasing in any measurable degree the

level of safety or efficiency with which these plans are currently offered.

FURTHER AFFIANT SAYETH NAUGHT.

Betty Peirsol

BETTY PEIRSOL

Sworn To And Subscribed Before Me
This 29th Day of September, 1989.

Charlotte H. Palmer

NOTARY PUBLIC -

My Commission Expires: 3-20-1993

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MARCH 20, 1993
BONDED THRU HUCKLEBERRY & ASSOCIATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, **that a true and correct copy of the foregoing has been furnished by 1st class mail, postage pre-paid, this 2nd day of October, 1989, to all parties listed on the attached Service List.**

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J. Thomas Cardwell

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