IN THE SUPREME COURT OF FLORIDA

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

Case No. 74,479

BRIEF OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, INC. IN OPPOSITION TO THE ADOPTION OF THE PROPOSED ADVISORY OPINION

Stephen S. Cowen
Florida Bar #338087

STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorney for the Association of Private Pension and Welfare Plans, Inc.

Of Counsel:

Theodore E. Rhodes
Morgan D. Hodgson
Suzanne E. Meeker

STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

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STATEMENT OF INTEREST

The Association of Private Pension and Welfare Plans, Inc. ("APPWP") is a nonprofit organization founded in 1967 to protect and to foster the growth of this country's private employer-sponsored employee benefit system. The APPWP has over four hundred members, with at least 20 members located in or doing business in Florida. Its membership includes large and small pension plan sponsors,[1/] and such plan support and service organizations as investment firms, banks, insurers and their agents, actuarial firms, consulting firms, and other employee benefit professionals. The APPWP's members, lawyers and nonlawyers alike, have extensive collective experience in the design, installation, funding,

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1/ This brief follows the proposed advisory opinion of the Standing Committee on Unlicensed Practice of Law (the "proposed opinion" or "Prop. Op.") in using the term "pension plan" to refer to all retirement plans and trusts that are qualified under the provisions of I.R.C. §§ 401 et seq.. See Prop. Op. 3 n. 2.

administration, amendment, and termination of retirement benefit plans of all types.

As plan sponsors as well as employee benefit professionals, the APPWP's members have a vital interest in the proposed opinion. The APPWP is concerned, first, that the proposed opinion would so limit the permissible scope of nonlawyer activities that plan sponsors would be unable to secure the necessary services from the remaining qualified legal community or would be unable to secure such services in a timely fashion and at an affordable cost. Second, the APPWP believes that the proposed opinion would effectively deprive plan sponsors of a critical resource in adopting, maintaining, and administering plans, because nonlawyers engaged in providing plan advice have developed substantial and broad expertise in the diverse field of employee benefits. The breadth of the proposed opinion would inhibit nonlawyers from sharing such expertise for fear of engaging in the unlicensed practice of law. Finally, in the APPWP's view, the proposed opinion would adversely affect lawyers to the extent that they would be the only persons authorized to perform certain employee benefit services that lawyers generally are not trained to perform.

The APPWP timely sought leave to participate in this proceeding and was granted leave to file a brief and reply brief by Order of this Court dated August 30, 1989.

STATEMENT OF THE CASE

This proceeding arose on a petition from the Executive Council of the Tax Section of The Florida Bar pursuant to Rule 10-7.1 of the Rules Regulating the Florida Bar. On July 28, 1989, the Bar's Standing Committee on Unlicensed Practice of Law submitted a proposed advisory opinion to this Court, addressing the following issue:

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

The proposed opinion is now pending before this Court.

FACTUAL BACKGROUND

Proper consideration of the issue before this Court requires close attention to the realities of pension planning and administration, and to the participation of nonlawyers in that process. This section describes (A) the professional activities of nonlawyer employee benefit professionals;[2/] (B) plan sponsors' typical utilization of lawyer and nonlawyer services; and (C) the IRS's master and prototype plan program.

2/ Inasmuch as the specialized interests of enrolled actuaries and certified public accountants are being represented in this Court by their respective professional organizations, the APPWP will direct its discussion to the roles of other employee benefit professionals in pension planning.

A. Employee Benefit Planning by Nonlawyers

Nonlawyer employee benefit professionals -- e.g., insurance companies and their agents, consulting firms, banks, and regulated investment companies -- participate extensively in their various clients' pension planning activities, with the degree of involvement depending on individual clients' needs and desires. Focusing on the typical activities of these nonlawyer entities at each stage of the benefit planning process illustrates the substantial role played by nonlawyers, consistent with the dictates of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[3/]

Employer Motivation and Education. This stage of pension planning involves the communication of general information and the collection of financial, demographic, and other business-related information about the client-employer. A very large number of options are available to an employer that wishes to adopt and to maintain a pension plan for its employees. The basic options include defined benefit and defined contribution plans,[4/] but, within each of these general categories, there are many alternative plan designs.

3/ ERISA is codified at 29 U.S.C. §§ 1001-1461 and in the Internal Revenue Code. Its various provisions are administered by the Internal Revenue Service ("IRS"), United States Department of Labor ("DOL"), and Pension Benefit Guaranty Corporation ("PBGC").

4/ See ERISA § 3(34), (35), 29 U.S.C. § 1002(34), (35) (defining "defined contribution plan" and "defined benefit plan"); I.R.C. § 414(i), (j) (same).

For example, the general category of defined contribution plans includes all of the following types of plans: profit-sharing, stock bonus, money purchase, employee stock ownership, and cash or deferred/section 401(k) plans. Moreover, some types -- for example, defined benefit cash balance plans and defined contribution target benefit plans -- have some characteristics of both defined benefit and defined contribution plans. Assistance to an employer choosing among many of these options requires an understanding of actuarial principles.

The activities of nonlawyer benefit professionals thus include discussing with employers their needs and resources, the potential benefits of qualified plans (necessarily including describing the legal environment in which plans operate),[5/] and potential administrative and design problems. Specimen or sample plan documents may be provided to the employer as well, to illustrate the structures of different plan types. Because the nonlawyer

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5/ The Standing Committee heard testimony from James McGann, a national trustee of the National Association of Life Underwriters, on this point:

> [M]otivation requires a general discussion of the benefits which will accrue to employers and employees as well as general discussion of the laws, regulations and rules pertaining to the employee benefit plan since the -- often the benefits have their origin in the law.

Transcript of Hearing at 55-56, In re: FAO # 890001, Nonlawyer Drafting of Pension Plans (Jan. 12, 1989) [hereinafter "Tr. __].

cannot represent that a master, prototype or specimen plan is suitable in every and all respects for the employer, he should inform the employer that significant legal obligations and responsibilities are created by the adoption of a qualified plan, and must advise the employer to seek independent legal counsel. Nonlawyers typically place a legend on such documents stating that "the contract and related documents are important legal instruments with legal and tax implications for which neither the sponsor nor its agents are responsible and therefore the employer should consult independent legal counsel."

Plan Design and Drafting. Nonlawyer entities are involved in the plan design process in a number of ways. First, many nonlawyers sponsor master and/or prototype plans, which are standard plans that have been pre-approved by the IRS for adoption by individual employers. See pages 12-15, infra. These plans are designed, drafted, and submitted for qualification by counsel for the master or prototype plan sponsor. For reasons of cost, among others, many client-employers may elect to adopt such a standardized plan.

Second, where client-employers choose to adopt individually-designed plans, particularly defined benefit plans, nonlawyers such as actuaries, underwriters, and other financial professionals are required to develop appropriate plan benefit formulas in light of the employer's economic circumstances. Nonlegal expertise is needed, e.g., for the determination of compensation levels, testing of benefit

formulas that are integrated with Social Security benefits, computation of the maximum deductible amount, and testing for discrimination in the benefit formula.

Third, because nonlawyers generally have a substantial role in the administration and recordkeeping functions involved with maintaining a pension plan, they often are well-situated to assist the employer in designing and/or drafting required plan provisions. Finally, nonlawyer benefit professionals may provide draft or sample materials to client-employers, if requested to do so by the employer or employer's counsel, including samples of individually designed plans, plan amendments, trust or funding documents, and documents to assist in plan administration such as summary plan descriptions, notices, election forms, waivers, and documentation for plan loans and hardship withdrawals, if applicable.

Plan Qualification and Implementation. Nonlawyers assist employers in qualifying and implementing plans by supplying necessary materials for determination letter requests to the IRS,[6/] and by representing their clients, to the extent permitted by federal agency rules, before the IRS,

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6/ Because of the substantial tax implications involved in the adoption of pension plans that are intended to qualify for the advantageous tax incentives under the Internal Revenue Code, the IRS has established procedures for the issuance of determination letters as to the legal effect of plan and trust instruments, including the original plan and subsequent amendments. The receipt of a favorable determination letter is not a prerequisite to plan qualification, but does provide advance assurance to both the employer and its employees that a plan is tax-qualified.

DOL, and PBGC (in the case of plan terminations), as may be required. Nonlawyers typically prepare summary plan descriptions and other notices for distribution to plan participants by the employer. In addition, nonlawyers who are experts in communication assist employers in the development of integrated materials that describe the full array of employee benefits and compensation practices, including pension plans.

Plan Administration. Following the establishment of a pension plan, nonlawyer benefit professionals provide a wide range of services and products to their clients. Thus, entities such as insurers, banks, and investment companies sell annuity and investment contracts or other funding vehicles for plan liabilities; banks provide trust services, including sample trust documents, which the bank requires as part of its contract with the plan sponsor. Nonlawyers provide payor services for plan benefits; provide record-keeping, data collection, and testing services;[7/] provide actuarial and accounting services that are essential for determining annual contributions and filing annual reports; and assist employers to meet the information reporting requirements under Title I of ERISA, **see** 29 U.S.C. **§§ 1021-31**, and the Internal Revenue Code. They also discuss various

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7/ Qualified plans must be tested on an ongoing basis because they may not discriminate in operation in favor of employees who are "highly compensated" (within the meaning of I.R.C. § 414(q) and Temp. Treas. Reg. § **1.414(q)-1T**). **See** I.R.C. §§ 401(a)(4), 401(k)(3), 401(m).

plan administrative problems with employers. In carrying out many of these activities, nonlawyers need to understand fully, and be prepared to explain and discuss with their clients in general terms, the applicable laws and developments in the law.

Plan Termination. The termination of a qualified plan, particularly a defined benefit plan insured by the PBGC, requires that nonlawyer employee benefit professionals play a major role. With regard to plan termination, nonlawyers review and interpret plan documents in order to value plan assets and plan benefit liabilities; provide plan sponsors with necessary materials to request a determination upon termination from the **IRS** and, in the case of a PBGC-insured plan, to provide the required plan administrator and enrolled actuary certifications to the PBGC, see **ERISA** § 4041(b)(2), (c)(2), **29** U.S.C. § 1341(b)(2), (c)(2); assist plan sponsors to complete these materials, on the basis of financial, actuarial, and other plan data; and represent their clients, as permitted by agency rules, before the **IRS** and the PBGC.

B. Utilization of Nonlawyer Benefit Professionals by Plan Sponsors

Because of the diverse and important roles that nonlawyer benefit professionals play in the pension planning process, many employer plan sponsors have developed relationships with nonlawyer, as well as lawyer, service providers that over time have become critical to the maintenance of

their pension plans. See Sworn Statements of John F. Dodd, General Counsel, United Telecommunications, Inc. (Sept. 29, 1989); Michael D. Millhorn, Esq., Benefits Manager, Florida Power & Light (Sept. 27, 1989); Joseph G. Charles, Group Director, Government and Industry Relations, Ryder System, Inc. (Sept. 29, 1989); Jane W. Lohmeier, Manager, Employee Benefits, The Racal Corporation and Racal-Milgo (Sept. 29, 1989); Elmer Tracy, Trustee, Florida Millwrights, Piledrivers, Highway Contructors and Divers Pension Fund (Sept. 28, 1989); J. Larry Jones, Trustee, Carpenters Local 140 Pension Fund (Sept. 28, 1989); Joe Fernandez, Trustee, Florida West Coast Trowel Trades Pension Fund (Sept. 28, 1989) (attached as Appendix A) [hereinafter "Sworn Statements"]. Generally, plan sponsors rely upon nonlawyer benefit professionals for assistance in the areas of plan design, administration, and compliance with ERISA and other laws regulating employee benefit matters. Consultation with organizations of nonlawyer professionals makes available to plan sponsors an invaluable source of expertise, experience, and disciplines necessary to implement and to maintain pension plans.[8/] For example, the sponsor of a defined benefit pension plan requires the services of a benefit professional that has substantial expertise in the actuarial field. See pages 6-7, supra. The proper provision of such

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8/ See Sworn Statements of Joe Fernandez, J. Larry Jones and Elmer Tracy at ¶ 6 and Sworn Statements of John F. Dodd, Michael D. Millhorn and Joseph G. Charles at ¶ 7.

actuarial services, for example, in revising a plan's benefit formula in light of the recent change in the law relating to integration of plan and Social Security benefits, see I.R.C. § 401(l), requires nonlawyers to address both legal and nonlegal issues. See Sworn Statement of John F. Dodd, at ¶ 7.

Because many nonlawyer benefit professionals are qualified experts in matters relating to pension plans, they are able to provide necessary services at reasonable cost to plan sponsors. Sponsors therefore choose to depend, to varying degrees, on such nonlawyer benefit professionals for advice and assistance in complying with the relevant statutes, rules, and regulations. Without nonlawyer assistance, the cost of obtaining such services -- directly or indirectly -- from those lawyers who are qualified to provide them would be significantly increased. The result would be higher pension plan costs and the reduction, in many cases, of the future benefits available to plan participants.[9/] Moreover, such limitations on access to the technical capability and knowledge of the nonlawyer professional would jeopardize the ability of plans to comply with the requirements of ERISA. Id.

9/ See Sworn Statements of Joe Fernandez, J. Larry Jones and Elmer Tracy at ¶ 6 and Sworn Statements of John F. Dodd, Michael D. Millhorn and Joseph G. Charles at ¶ 7.

c. The Master and Prototype Plan Program

The IRS maintains the Master and Prototype Plan Program to facilitate standardized and well-designed qualified plans and to streamline the procedure for obtaining a favorable determination letter as to the tax-qualified status of a pension plan. The program, established in **1968,** responded to a constantly increasing volume of applications for determination letters during the **1960s** that had severely strained the agency's ability to review the plans at issue. See Rev. Proc. **68-45, 1968-2** C.B. **957.**

Development of the Master and Prototype Program.

The basic principle behind the master and prototype plan is that many plan provisions follow established patterns. By pre-approving a plan that employers subsequently can adopt in the exact form approved, the IRS considerably reduces the time necessary to process a case for a determination letter. Moreover, these group plans offer smaller employers an economically feasible method of providing pension benefits because the plans are designed and administered through large-scale operations. For instance, qualified sponsors of master and prototype plan includes insurance companies, banks, and regulated investment companies, each of which can combine its investment services with a pre-approved plan,

thereby reducing the cost to employers of establishing and maintaining a qualified plan.[10/]

The difference between a "master" and "prototype" plan generally relates to the means of funding the plan's benefits. In the case of a master plan, the funding organization is specified. Insurance companies that adopt a pre-approved plan frequently develop a master plan, naming the insurance company's products as the funding medium. A prototype plan, by contrast, is one in which the individual employer specifies the funding medium in its application for approval. Trade associations that adopt a pre-approved plan frequently develop a prototype plan, which the members of the trade association then subsequently adopt as their own.

Master and prototype plans are designed to permit adoption by an employer by simply completing a series of elections contained within an adoption or joinder agreement. Although significant legal obligations are created by the execution of the agreement, the elections typically are designed to permit an employer with no employee benefit experience to complete the document based on his knowledge of his workforce.

10/ For a general discussion of the need for the master and prototype program by a former Chief of the Pension Trust Branch of the IRS, see Goodman, "Streamlined Pension and Profit-sharing Tax Procedures," Taxes, May 1969, at 270. The record before this Court also highlights the importance of master and prototype plans to small employers, for whom the costs of an individually-designed plan are often prohibitive. See Tr. 61 (Statement of Stratton Smith, Esq.).

Employee Benefit Planning. Employee benefit planning activities related to the master and prototype program are quite similar to individually-designed plans. Thus, a plan document and corresponding trust document must be drafted, the concept must be promoted to employer sponsors, certain plan design issues must be resolved, and so forth. Significantly, however, the area of plan design and drafting offers much less flexibility with respect to master and prototype plans than with respect to individually-designed plans. At the same time, master and prototype plans generally offer small and medium-sized businesses a less expensive option for maintaining a tax-qualified retirement plan for their employees.

Plan Design and Drafting. Plan design involves many economic and administrative factors, as well as legal conclusions. In the case of a master or prototype plan, however, the sponsoring organization -- for example, a bank, insurance company, or trade association, -- will decide on plan design and drafting issues. The very nature of a master or prototype plan is to develop a single document that will be adopted by numerous employer plan sponsors for their employees, so the flexibility of plan design and drafting are generally minimized. Moreover, because the master or prototype plans are pre-approved, the IRS has developed sample language to be used in drafting master and prototype plans. While this sample language is not automatically required, sponsoring organizations are urged to use the

language as a guide in drafting plans. Thus, the master and prototype program serves the IRS as a means to standardize plans as well as expedite the determination letter process.

SUMMARY OF ARGUMENT

The proposed opinion seeks to apply the general principles set out in The Florida Bar v. Turner, 355 So. 2d 766 (Fla. 1978), a pre-ERISA decision, to the pension planning field as now comprehensively regulated by federal law, Prop. Op. 3, 6-7, and to remedy certain perceived public harms that, the proposed opinion asserts, may flow from the activities of nonlawyers in the pension planning field, id. at 3-4. Neither of these objectives, however, supports the adoption of the proposed opinion.

The proposed opinion is itself preempted by ERISA § 514, 29 U.S.C. § 1144. If adopted by this Court, the proposed opinion would constitute a state regulation, having the effect of law, that relates directly to employee benefit plans. Moreover, the proposed opinion does not fall within the narrow exception from section 514 preemption afforded to "generally applicable criminal laws," because it applies exclusively to benefit plan activities.

Even if the proposed opinion were not preempted by ERISA, it is not in the public interest, which is the paramount consideration in ruling on the unauthorized practice of law. The Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1189 (Fla. 1978) (per curiam). The general concerns

about public harm identified by the Standing Committee would not be remedied by adoption of the proposed opinion. At the same time, the proposed opinion would contravene the rights and interests of nonlawyer employee benefit professionals and of employer plan sponsors who depend on their services, with the potential result of increasing the cost of pension plans and decreasing future pension benefits. Under ERISA and to permit free and open trade in this field, nonlawyer benefit professionals should be permitted to pursue their occupations in all pension-related areas where lawyers do not have exclusive skills, and plan sponsors should be permitted access to the pension planning services of their choice.

ARGUMENT

I. The Proposed Opinion Is Preempted by ERISA.

With the passage of ERISA in 1974, pension plan regulation became "exclusively a federal concern." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). Congress's intent to occupy the field of employee benefit plan regulation is expressed in clear and unmistakable terms in the statute itself. Subject only to narrow exceptions, "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. ERISA § 514(a), 29 U.S.C. § 1144(a) (1982). This expansive preemptive effect was deemed by many to be ERISA's "crowning

achievement.', 120 Cong. Rec. **29,197 (1974)** (remarks of Rep. Dent).

Congress could not have been more emphatic in defining the broad sweep of ERISA's preemption provision. Senator Williams, Chairman of the Senate Labor Committee, indicated that the preemption provision had the farthest possible reach: "This principle [of preemption] is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." Id. at **29,933**. Any state law relating to employee benefit plans is preempted, even if it does not directly conflict with ERISA. Metropolitan Life Ins. Co. v. Massachusetts, **471** U.S. **724, 739 (1985)**. In fact, Congress explicitly rejected a preemption provision that would have ousted the states from only those areas specifically covered in ERISA in favor of the present language, whose "preemptive scope [is] as broad as its language." H.R. Conf. Rep. No. **1280, 93d** Cong., 2d Sess. **383 (1974)**. See also Shaw v. Delta Air Lines, Inc., **463** U.S. **85, 98 (1983)** (section 514(a) cannot "be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA -- reporting, disclosure, fiduciary responsibility, and the like").

Because the proposed opinion, if adopted, would be a state law that "relate[s] to" employee benefit plans and does not fall within one of the statutory exceptions to ERISA preemption, the opinion cannot stand.

A. The Proposed Opinion is a State Law that Relates to Employee Benefit Plans.

For purposes of ERISA preemption, "'State law' includes all laws, decisions, rules, regulations or other State action having the effect of law, of any State." ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1). Rule 10-7.1(g)(3) explicitly provides that an opinion issued as a result of judicial review of a proposed formal advisory opinion "ha[s] the force and effect of an Order of this Court." Rule 10-7.1(g)(3), Rules Regulating the Florida Bar. Under these definitions and standards, the proposed opinion, if adopted, would be "state law." See Juna v. FMC Corp., 755 F.2d 708, 714 (9th Cir. 1985) (ERISA preempts state statutory and decisional law relating to employee benefit plans); Helms v. Monsanto Co., 728 F.2d 1416, 1420 (11th Cir. 1984) (same).

According to the Supreme Court, "[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." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Given the requisite connection, even state laws that were not "specifically designed to affect employee benefit plans" are preempted by section 514(a). Id. at 98. The Court recently confirmed that "state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans." Mackey v. Lanier Collections Agency & Serv., 108 S. Ct. 2182, 2185 (1988).

Of course, the states, by virtue of section 514(a), are not totally powerless to act in ways that might affect pension plans only marginally. As the Supreme Court recognized, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n.21. Under this principle, courts have upheld state laws of general application which have some incidental effect on ERISA plans. E.g., Mackey, 108 S. Ct. 2182 (upholding Georgia's general garnishment statute); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (upholding a state law mandating lump sum severance payments upon plant closing); Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir. 1989) (upholding state escheat law).

By contrast, state laws which "refer specifically to ERISA plans and apply solely to them," Aetna, 869 F.2d at 146, have been held to "relate to" employee benefit plans. Mackey, 108 S. Ct. 2182 (statute exempting ERISA plans from the state's general garnishment law held preempted): Shaw, 463 U.S. 85 (statute prohibiting discrimination on the basis of pregnancy in employee benefit programs held preempted); National Carriers' Conference Committee v. Heffernan, 454 F. Supp. 914 (D. Conn. 1978) (tax specifically and exclusively directed at employee benefit plans held preempted). Under this authority, the proposed opinion, in its current form, unquestionably relates to ERISA plans.

The proposed opinion expressly refers to and applies only to employee benefit plans, as the very title of the proceeding, "Nonlawyer Preparation of Pension Plans," reveals. It purports to regulate who may perform the various aspects of plan preparation and administration required by ERISA. See, e.g., Prop. Op. at 13, 14, 15. Thus, the opinion purports to regulate the preparation of (1) plan documents, id. at 13; (2) summary plan descriptions, id. at 14; (3) annual reports filed with the IRS and DOL, id.; and (4) employee reports, id. at 15. The proposed opinion is not addressed to the unauthorized practice of law generally, but only in connection with ERISA plans. See National Carriers' Conference Committee v Heffernan, 454 F. Supp. 914, 915 (D. Conn. 1978) (state tax "specifically directed at [employee benefit] plans exclusively'' relates to ERISA-covered plans). The opinion thus is not a general measure that only incidentally and remotely affects ERISA plans.

Because the proposed opinion relates to employee benefit plans, it is preempted by ERISA, unless one of the exceptions in section 514(b) applies.

B. The Proposed Advisory Opinion Is Not a Generally Applicable Criminal Law of the State.

ERISA exempts from its expansive preemptive sweep, inter alia, "generally applicable criminal laws of a State." 29 U.S.C. § 1144(b)(4). Because the proposed opinion identifies certain activities as violations of a criminal

statute,= it is arguably part of the criminal law of the state. Nevertheless, because the proposed opinion is aimed specifically at employee benefit plans, it is not "generally applicable," and thus is preempted by ERISA. The analyses of numerous courts support this conclusion.

Several courts have held that ERISA preempts state laws that focus on activities specifically related to employee benefit plans. In that regard, state laws that penalize a failure to make contributions to employee benefit plans have been found to be preempted by ERISA notwithstanding their criminal nature.[12/] For example, in Commonwealth v. Federico, 419 N.E.2d 1374 (Mass. 1981), the Commonwealth argued that such a statute was generally applicable because it applied to all employers within the state who "fail to abide by their contractual obligations to make contributions to retirement benefit plans." Id. at 1377. The court rejected that argument, reasoning that "by limiting the . . . exception to criminal laws of seneral applicability, Consress apparently intended to preempt State criminal statutes aimed specifically at employee benefit

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11/ Fla. Stat. § 454.23 (1989).

12/ The Supreme Court in Massachusetts v. Morash, 109 S. Ct. 1668 (1989), was asked to consider, but did not reach, the question whether the state's wage payment statute was a "generally applicable criminal law of a State." See id. at 1676 n. 18. The Court concluded that the employer policy at issue in Morash was not an employee benefit plan within the meaning of ERISA.

plans." Id. at 1378 (emphasis added). The court further noted:

> The . . . exception from preemption for "generally applicable" State criminal laws appears designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity "relates to" an employee benefit plan. The exception seems directed toward criminal laws that are intended to apply to conduct generally -- criminal laws against larceny and embezzlement, for example.

Id. at 1377. See also Hutchinson & Ifshin, Federal Preemption of State Law Under the Employee Retirement Security Act of 1974, 46 U. Chi. L. Rev. 23, 72 (1978) (a generally applicable criminal law 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").

More recently, a New Jersey court held a similar state criminal statute preempted, reasoning much as the Massachusetts court did in Federico. State v. Burten, 530 A.2d 363 (N.J. Super. Ct. Law Div. 1986). The court pointed out that the phrase "relates to" in section 514(a) must extend to laws of general applicability; otherwise, the exception for generally applicable criminal laws would have been unnecessary. "[I]f the words 'generally applicable' contained in the exception are to mean anything, laws aimed specifically at benefit plans cannot stand." Burten, 530 A.2d at 369.

Other courts construing similar statutes have reached the same conclusion. Sforza v. Kenco Constructional Contracting, Inc., 674 F. Supp. 1493, 1495 (D. Conn. 1986); Trustees of Sheet Metal Workers' Int'l Assoc. Production Workers Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561, 563 (E.D.N.Y. 1983); Baker v. Caravan Movins Corp., 561 F. Supp. 337, 341-42 (N.D. Ill. 1983); People v. Art Steel Co., 133 Misc. 2d 1001, 509 N.Y.S.2d 715, 720 (N.Y. City Crim. Ct. 1986). Moreover, the Department of Labor consistently has taken the view that criminal laws applying primarily or exclusively to the conduct of those dealing with employee benefit plans are not "generally applicable" within the meaning of section 514(b)(4). ERISA Opinion No. 89-01A (Feb. 10, 1989); ERISA Opinion No. 87-11A (Nov. 25, 1987); ERISA Opinion No. 84-18A (Apr. 19, 1984); ERISA Opinion No. 79-35A (May 31, 1979) (available in Westlaw, FLB-ERISA database).

Despite the obvious soundness of these decisions, a few courts have concluded that criminal pension contribution statutes are within the section 514(b)(4) exception and thus are not preempted by ERISA. E.g., Upholsterer's Int'l Union Health & Welfare Fund Trustees v. Pontiac Furniture. Inc., 647 F. Supp. 1053, 1057 (C.D. Ill. 1986); Goldstein v. Mansano, 99 Misc. 2d 523, 417 N.Y.S.2d 368 (N.Y. Civ. Ct.

1978).[13/] These holdings, and the reasoning underlying them, are wrong. If "generally applicable" is defined, as it is in these cases, to include any criminal law that could apply to all employers in a state, then this exception to ERISA preemption destroys the general preemption principle. Under this construction, every criminal statute could be viewed as "generally applicable" and therefore saved from preemption.

This flawed reasoning has not gone undetected by the courts. In fact, a federal court considering the same New York statute held not preempted in Goldstein decisively rejected the Goldstein court's analysis and reached the opposite conclusion:

> The issue must, of course, be decided . . . by ascertaining what Congress' language means. One cannot fairly attribute to Congress the purpose in [section 514(b)(4)] to except from preemption all the criminal laws of the states. To do so would be to read out of the section the words "generally applicable." Every criminal law, if it is to be consistent with the Constitution, is "general" in the sense that it must apply not to specific acts of a specific individual but to some class of circumstances.

Trustees of Sheet Metal Workers' Int'l Assoc. Production Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561, 563 (E.D.N.Y. 1983)

13/ Accord Sasso v. Vachris, 116 Misc. 2d 797, 456 N.Y.S.2d 629 (Sup. Ct. 1982), modified, 106 A.D.2d 132, 482 N.Y.S.2d 875, rev'd on other grounds, 66 N.Y.2d 34, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985).

(emphasis added).[14] The court then concluded that to give effect to the "generally applicable" limitation in the statute, state criminal laws directed specifically at employee benefit plans cannot be excepted from preemption. Aberdeen Blower, 559 F. Supp. at 563.[15]

The Federico line of cases, which effectuate the letter and the spirit of section 514, is surely correct. Otherwise, "any time the State decided to regulate employee benefit plans, the Legislature could simply enact a statute imposing penal sanctions." Burten, 530 A.2d at 370.

Like the state statutes just discussed, the proposed opinion purports to regulate activities directly related to employee benefit plans -- specifically, the conduct of persons most intimately involved in pension planning and administration. The proposed opinion is a criminal law that applies only to such plans. Under the better reasoned view and under long-standing Department of Labor interpretation, such state action does not fall within

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14/ Accord Sforza v. Kenco Constructional Contractins. Inc., 674 F. Supp. 1493, 1495 (D. Conn. 1986); State v. Burten, 530 A.2d 363, 369 (N.Y. Super. Ct. Law Div. 1986).

15/ The remaining cases holding that criminal benefit plan contribution statutes are not preempted are similarly unpersuasive. The court in National Metalcrafters v. McNeil, 602 F. supp. 232, 237 (N.D. Ill. 1985), disposed of the issue in two sentences, relying exclusively on Sasso v. Vachris, which, in turn, merely adopted Goldstein's flawed analysis. National Metalcrafters was reversed on other grounds by the Seventh Circuit. The court of appeals expressly declined to address the issue of ERISA preemption. National Metalcrafters v. McNeil, 784 F.2d 817, 823 (7th Cir. 1986).

section 514(b)(4)'s exception for generally applicable criminal laws and is therefore preempted by ERISA.

c. The Proposed Opinion, if Adopted, Would Undermine Congress's Purpose in Preempting State Regulation of Employee Benefit Plans.

The Supreme Court has stated that "the purpose of Congress is the ultimate touchstone" in preemption analysis. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985). Following this mandate, the Court has "not hesitated to enforce ERISA's pre-emption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements." Fort Halifax Packing Co., 482 U.S. at 10 (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)). The proposed opinion raises the spector of precisely the kind of conflicting requirements that Congress hoped to avoid through preemption.

If the states were free to regulate the preparation of plan documents, each state might do so differently. Employers operating in several states would be forced to comply with each state's particular rules in this regard, which would dramatically increase such employers' administrative costs. As the Supreme Court indicated:

> It is . . . clear that ERISA's pre-emption 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.

Id. at 11. The proposed opinion, which would "introduce considerable inefficiencies in benefit program operation," threatens Congress's overriding purpose in preempting the states and, for this additional reason, should not be approved.

II. The Proposed Opinion Is Not In The Public Interest.

The Standing Committee identifies "a finding of public harm" as a major reason for its decision to issue the proposed opinion. Prop. Op. 4.[16/] However, while the proposed opinion acknowledges that pension planning involves not only the interpretation of the law, but also "the rendering of actuarial, accounting, economic, insurance and investment advice," Prop. Op. 3 (citing Turner, supra, 355 So.2d 766; see also id. at 5), it fails to consider the substantial public interest in having nonlawyer employee benefit professionals continue to perform pension planning services in all areas under ERISA where the required skills are not the exclusive province of lawyers. These areas include as least the following services that appear to be

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16/ The other stated reason was "confusion . . . as to the exact boundaries of Turner." Prop. Op. 4. In seeking to elaborate Turner, however, the Standing Committee failed to account for the preemptive effect of ERISA, as discussed in the preceding part of this brief.

foreclosed to nonlawyers under the proposed opinion: (1) drafting summary plan descriptions and related documents, Prop. Op. 14; (2) drafting sample and specimen documents, appropriately marked, for an employer plan sponsor or the employer's attorney, Prop. Op. 16-18; (3) drafting plan documents at the request of an employer for review by the employer's attorney, id.; (4) advising employers with respect to options available and installing a master and prototype plan, Prop. Op. 13, 15-16; (5) generally advising employers with respect to issues of interpretation that arise in the course of plan administration, Prop. Op. 20.[17/] Fuller consideration of the public interest, including the interests of plan sponsors and plan beneficiaries, leads to the conclusion that nonlawyers should be permitted to perform such services.

As this Court has emphasized, the public interest is the paramount consideration in the determination of what is unauthorized practice of law. Brumbaush, supra, 355 So. 2d at 1189 (per curiam); see also The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980) (unauthorized practice of law is not synonymous with the practice of law by nonlawyers). The record in this proceeding, however, does not point to areas of specific harm that would be remedied by additional

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17/ All of these services may be performed by nonlawyers under the standards set out in the Final Opinion on Employee Benefit Planning of the American Bar Association's Standing Committee on the Unauthorized Practice of Law, Pens. Rep. No. 159, at R-12 (Oct. 17, 1977) (the ABA opinion or "ABA Op."), at R-17 to -18.

restrictions on the activities of nonlawyers.[18] Instead, with respect to public harm, the Standing Committee's position apparently is predicated on two more general concerns: (1) nonlawyers are "often motivated by the sale of a product or service other than the plan itself," and (2) nonlawyers may fail "to consider the effect of the pension plan on other areas of the law or the employer's business." Prop. Op. 4-5.

To the extent that these general concerns reflect actual public harm, they are not remedied by the proposed opinion. The concerns are as applicable to lawyers as to nonlawyers. With respect to potential conflicts of interest, it is true that many nonlawyer benefit professionals have products or services to sell, for example, annuity contracts, trust services, or recordkeeping services. ERISA lawyers, however, are in much the same position, since it is obviously

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18/ The proposed opinion concedes that "the Standing Committee did not receive a great deal of testimony on the issue of public harm from the lay witnesses[.]" Rather, "the attorneys . . . relate[d] numerous instances where harm resulted to an employer or employee from the drafting of a pension plan by or pension advice received from a nonlawyer." Prop. Op. 4. Only two of the attorney-witnesses at the public hearing described specific incidents where clients were ill-served by nonlawyers. See Tr. 83-84 (Statement of Sharon Quinn Dixon, Esq.); id. at 99-101 (Statement of Don Jaret, Esq.). Other attorney-witnesses, however, spoke directly to the shortcomings of pension planning by lawyers who are not ERISA specialists. See Tr. 32-33 (Statement of James McNabb, Esq.) ("In all candor, I think I have seen as much garbage coming from lawyers who don't know what they're doing as I have from almost any other source."); id. at 62-63 (Statement of Stratton Smith, Esq.). Thus, there is no indication in the record that adoption of the proposed opinion would protect the public even from instances such as those identified by certain attorney-witnesses.

more lucrative for them to prepare individually-designed plans for clients than to recommend adoption of a master or prototype plan. Lawyers are not distinguishable from nonlawyer ERISA practitioners even on the ground that lawyers are subject to specific, professional standards of conduct. Not only are other professional groups including insurers, bankers, brokers, actuaries, and accountants subject to specific regulation, but ERISA itself incorporates comprehensive fiduciary standards that protect plan participants and beneficiaries against potential conflicts on the part of "parties in interest" with respect to a plan. ERISA § 406, 29 U.S.C. § 1106.[19/]

As to the asserted failure of nonlawyers to consider the effects of a pension plan on other aspects of the plan sponsor's business, it is obvious that lawyers do not possess any particular expertise in this area. Indeed, accountants and other financial and business consultants often are far better situated than most lawyers to analyze their clients' business concerns. See Tr. 62-63 (Statement of Stratton Smith, Esq.) (legally sufficient pension plan drafted by lawyer was financially disastrous for

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19/ "Parties in interest" include plan fiduciaries, counsel and employees; service providers; employer-sponsors of a plan; employee organizations whose members are covered by a plan; and individuals and organizations having certain ownership interests in any of the preceding categories. ERISA § 3(14), 29 U.S.C. § 1002(14). The Department of Labor may grant individual and class exemptions from the prohibited transaction rules where circumstances warrant. ERISA § 408, 29 U.S.C. § 1108.

corporation). Moreover, the proposed opinion focuses on the personal interest of the business owners, e.g., the interplay between the tax consequences arising from the pension plan and other tax ramifications such as estate tax or probate planning. While these may be issues in closely held businesses or professional corporations, such considerations are generally of little or no consequence to most companies when deciding whether to adopt a particular pension plan, since pension plans generally are intended as an employee benefit rather than as owner compensation.

While the asserted public harm identified by the Standing Committee does not withstand analysis, there are other salient public interests that the proposed opinion ignores. As this Court explained in Brumbaush, attempts to regulate legal practice affect various cognizable rights of the public:

> [A]ny limitations on the free practice of law by all persons necessarily affects important constitutional rights. Our decision here certainly affects the constitutional rights of Marilyn Brumbaugh to pursue a lawful occupation or business. Our decision also affects respondent's First Amendment rights to speak and print what she chooses. In addition, her customers and potential customers have the constitutional right of self representation . . . .

Brumbaush, supra, 355 So. 2d at 1192. These rights or interests -- in this case, of nonlawyer service providers and of the plan sponsors who are the consumers of their services -- militate against the adoption of the proposed opinion without modification.

Particularly in light of ERISA's complex regulation of pension planning, nonlawyer benefit professionals should be permitted to pursue their business in all of many pension-related areas where the lawyer does not have exclusive skills. In fact, the federal agencies that regulate the pension industry -- the IRS and DOL -- have recognized and even relied upon groups of nonlawyer benefit professionals to provide services or to assist in compliance with the laws regulating employee benefit plans. Thus, the IRS and DOL jointly administer a program to enroll actuaries to practice before both agencies. See ERISA § 3041, 29 U.S.C. § 1241; 20 C.F.R. §§ 900.1 et seq. Moreover, the IRS authorizes not only attorneys and enrolled actuaries, but also certified public accountants, IRS-enrolled agents, and taxpayers' designated representatives, to practice before the agency.20/ Finally, DOL has issued a number of class exemptions from the ERISA prohibited transaction rules, see note 19, supra, to the insurance industry, banks, and regulated investment companies that permit these groups to

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20/ Enrolled agents are persons who are not lawyers or certified public accounts and (1) have qualified to practice before the IRS by written examination or (2) are qualified former IRS employees. Circular No. 230, 31 C.F.R. § 10.4. Taxpayers may designate as their representatives before IRS District Offices (the offices that issue determination letters) "[a]ny individual who is not under disbarment or suspension from practice before the Internal Revenue Service or other practice of his profession by any other authority (in the case of attorneys, certified public accountants, and public accountants)[.]" Id. at § 10.7 (emphasis supplied); see also IRS Form 2848-D (Tax Information Authorization and Declaration of Representative).

continue to market their services to employee benefit plans. See, e.g., Prohibited Transaction Exemption 77-9, as amended, Pens. Plan Guide ¶ 16,607 (CCH); Prohibited Transaction Exemption 86-128, Pens. Plan Guide ¶ 16,631 (CCH).

The application of many federal requirements, from the inception to the termination of a pension plan, requires expertise in such nonlegal areas as employee communications and personnel relations, computerized recordkeeping, actuarial science, and accounting, as well as interpretation or application of the legal requirements. In such areas, not only is it unrealistic to instruct nonlawyers to perform their services without attention to the governing law, but it unnecessarily increases the cost of the services to require a plan sponsor to retain an attorney in addition to the nonlawyer specialist. Moreover, in the area of master and prototype plans, the proposed opinion entirely overlooks the important factual differences between these plans and individually-designed plans. Barring nonlawyer benefit professionals from installing such pre-approved plans at their clients' behest has the effect of thwarting the IRS's purpose in instituting the standardized plan program. It should be noted that the proposed opinion, in this regard, sharply conflicts with the ABA opinion. Compare Prop. Op. 15-16 with ABA Op. R-17 to -18 (Parts X and XII).

The rights and interests of plan sponsors are afforded virtually no attention by the proposed opinion. First, because plan sponsors, like all other individuals and

entities, have the right of self-representation, they should be permitted access to the pension planning services of their choice. The extensive use of nonlawyer benefit professionals by employers demonstrates that many employers want unrestricted access to those services, and, particularly in the case of small employers, need to be free not to incur the expenses associated with benefits counsel. In this regard, see Tr. 61 (except for prototype plans, pension plans are too expensive for small employers) (Statement of Stratton Smith, Esq.); ABA Op. R-17 (for some employers, master and prototype plans are "only economically feasible method" of providing pension benefits); id. at R-18 (recognizing employer's right of self-representation in the employee benefits field); Sworn Statements of John F. Dodd, Michael D. Millhorn and Joseph G. Charles at ¶ 7.

Second, precisely because of the additional expense that the proposed opinion could impose on those employers who thus far have elected not to seek benefits counsel for their pension plans,[21/] the result of the proposed opinion might be less, not more, expert guidance for some segments of the plan sponsor-employer community than is presently provided. For example, it appears that under the proposed opinion, an employer would have to retain a lawyer in order to obtain specimen plan documents or to adopt even a master and

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21/ A small employer's general counsel, whether inside or outside the firm, is unlikely to possess the requisite skills to provide meaningful representation with respect to pension planning. See note 18, supra.

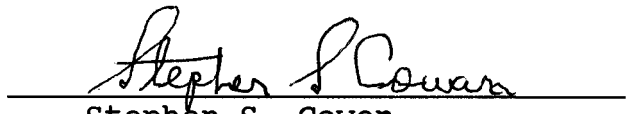
prototype plan (unless the employer purchased a "kit" and had no ongoing relationship with a nonlawyer benefits professional). In the event that employers exercised their right not to retain counsel, both employer-plan sponsors and plan participants and beneficiaries might be harmed.

Finally, the proposed opinion also contravenes the public interest by affording no attention to its obvious anticompetitive effects. Adoption of the opinion by this Court would substantially reduce the availability of the services of nonlawyer benefit professionals in the state. This Court has stated clearly that the potential anticompetitive effects of such an opinion must be considered prior to its adoption. "Because of the natural tendency of all professions to act in their own self interest, . . . 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." Brumbaush, supra, 355 So. 2d at 1189; see also Bates v. State Bar, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579, 584 (1976). In this case, the Standing Committee's general concerns about public harm are not remedied by the proposed opinion even to the extent that they may reflect actual public injuries. Accordingly, the proposed opinion as drafted cannot withstand close scrutiny of its anticompetitive effects, and, under Brumbaush, should not be adopted.

CONCLUSION

For the foregoing reasons, the APPWP urges this Court not to adopt the proposed opinion.

Respectfully submitted,



Stephen S. Cowen
Florida Bar #338087
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorney for the Association of Private Pension and Welfare Plans, Inc.

Of Counsel:

Theodore E. Rhodes
Morgan D. Hodgson
Suzanne E. Meeker
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

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