IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 74,479

FAO #89001, NONLAWYER
PREPARATION OF PENSION PLANS

a

INITIAL BRIEF OF COOPERS & LYBRAND

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS iii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. THE PROPOSED ADVISORY OPINION, WHICH WOULD SEVERELY RESTRICT THE PARTICIPATION OF CPAs AND ENROLLED ACTUARIES IN PENSION PLANNING, IS IN CONTRAVENTION OF FEDERAL LAW AND, THEWFOW, SHOULD NOT BE ADOPTED 6

A. The provisions of the Employee Retirement Income Security Act of 1974 as well as applicable Treasury Department and Department of Labor regulations establish federal intent to allow CPAs and enrolled actuaries to participate fully in the designing and implementing of pension plans and Florida may not proscribe such activity 9

II. PENSION PLANNING BY PROFESSIONALS SUCH AS CPAs AND ENROLLED ACTUARIES DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW 15

A. CPAs and enrolled actuaries are professionals whose specialized training in their respective areas of expertise qualifies them to provide pension planning services 17

B. The designing and implementing of pension plans under the Employee Retirement Income Security Act of 1974 require consideration of complex financial, actuarial and administrative matters which various nonlawyer professionals are qualified to provide and it is, therefore, inappropriate as well as against the public interest to prohibit nonlawyer professionals from engaging in the designing and implementing of pension plans 21

Page

C. Nonlawyer professionals such as CPAs and enrolled actuaries should be permitted to participate in drafting plan documents.............................. 27

D. Adoption of the proposed advisory opinion will not serve the public interest because it will create unnecessary commercial restraints on trade............... 34

CONCLUSION.. 36

1097L/VOL3/3

TABLE OF CITATIONS

Page

Cases

Gibbons v. Ogden,
9 Wheat. 1, 6 L.Ed. 23 7

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 34

Sperry v. State of Florida ex rel.
The Florida Bar, 373 U.S. 379 (1963) 6, 7, 8, 8, 12, 15

The Florida Bar v. Brumbaugh,
355 So.2d 1186 (Fla. 1978) 16

The Florida Bar v. Sperry,
140 So.2d 587 (Fla. 1962) 6, 15, 16

Statutes

26 U.S.C. S401 .... 9, 10, 12
26 U.S.C. §403(a) 12
26 U.S.C. §404 24
26 U.S.C. §404(a)(2) 12
26 U.S.C. 5411 .... 23, 25
26 U.S.C. S412 .... 12, 24
26 U.S.C. 5413 12
26 U.S.C. §414(e) 25
26 U.S.C. §415 25
26 U.S.C. §4975(c)(1) 13
29 U.S.C. §§1001-1461 9
29 U.S.C. §1023(d) 10
29 U.S.C. §1023(a)(4)(B) 10
29 U.S.C. §§1081-1086 9
29 U.S.C. 51106 13
29 U.S.C. §§1106-1107 9
29 U.S.C. §1107(a) 13
29 U.S.C. §1108 13
29 U.S.C. §1131-1145 9
29 U.S.C. §1201 31
29 U.S.C. §1241-1242 .... 10, 18
29 U.S.C. 51242 10
29 U.S.C. §§1301-1307 9
Fla. Stat. §473.301 (1987) 17
Fla. Stat. §473.312 (1987) 19
Fla. Stat. §473.315 (1987) 19
Fla. Stat. §473.315(1) (1987) 20
Fla. Stat. §473.322 (1987) 19
Fla. Stat. §473.323 (1987) 20

Page

Regulations

20 C.F.R.§ 901.20(a) (1987).................. 19, 20
20 C.F.R. § 901.20(b) (1987).................... 19
20 C.F.R.§ 901.20(d) (1987).................... 19
20 C.F.R.§ 901.11 (1987)..................... 19
20 C.F.R.§ 901.31 (1987)..................... 20
29 C.F.R.§ 2570.30 (1987).................... 13
29 C.F.R.§ 2520.102-2 (1987).................. 29
31 C.F.R. §10.2 (1987)....................... 11, 31
31 C.F.R. §10.3 (1987)....................... 11, 12
Fla. Admin. Code Rule 21A-21.001................ 20
Fla. Admin. Code Rule 21A-21.003................ 20
Fla. Admin. Code Rules 21A-21.001(1)........... 19
Fla. Admin. Code Rules 21A-21.001(4)(a)(b)...... 19
Fla. Admin. Code Rules 21A-21.002.............. 19
Fla. Admin. Code Rules 21A-21.003.............. 20
Fla. Admin. Code Rule 21A-22.001................ 19
Fla. Admin. Code Rule 21A-33.001................ 19
Fla. Admin. Code Rule 21A-36.001................ 20
Fla. Admin. Code Rule 21A-36.004................ 20
Rev. Proc. 83-36, 1983-20 I.R.B.72............. 13
ERISA Proc. 75-1............................... 13
ERISA Proc. 76-1.............................. 13

Miscellaneous

ABA Standing Committee on the Unauthorized Practice of Law, Employee Benefit Planning Informative Opinion A of 1977.......... 32, 33

Bernard Wolfman and James P. Holden, Ethical Problems in Federal Tax Practice (2d ed. 1985)................................. 12, 17, 35

Fla. Bar Rule 10-7.1(g)(2.................... 2

Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, (1981)............. 26

STATEMENT OF THE ISSUE

WHETHER THIS COURT SHOULD ADOPT A PROPOSED ADVISORY OPINION WHICH WOULD SEVERELY RESTRICT THE PARTICIPATION OF PROFESSIONALS SUCH AS CERTIFIED PUBLIC ACCOUNTANTS AND ENROLLED ACTUARIES IN THE DESIGNING AND IMPLEMENTING OF PENSION PLANS ESTABLISHED UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 WHERE:

a. FEDERAL LAW PERMITS AND, IN *MANY* INSTANCES, REQUIRES THEIR INVOLVEMENT IN PENSION PLANNING, AND

b. THESE PROFESSIONALS ARE UNIQUELY QUALIFIED TO PRACTICE IN THE AREA OF PENSION PLANNING.

STATEMENT OF THE CASE AND FACTS

On July 28, 1989, pursuant to Chapter 10 of the Rules Regulating The Florida Bar, the Standing Committee on Unlicensed Practice of Law ("the Standing Committee") filed a proposed advisory opinion, FAO #89001, Nonlawyer Preparation of Pension Plans (the "proposed advisory opinion"), in response to a request by the Executive Council of the Tax Section of The Florida Bar. The proposed advisory opinion which the Standing Committee would have this Court adopt seeks to prevent professionals such as certified public accountants ("CPAs") and enrolled actuaries from fully engaging in the designing, preparation and qualification of pension plans.

On August 24, 1989, pursuant to Florida Bar Rule 10-7.1(g)(2), Coopers & Lybrand, as an interested party, requested leave to file a brief and reply brief. On August 25, 1989 this Court entered an order granting Coopers & Lybrand leave to file an initial brief, to be served on or before October 2, 1989.

Coopers & Lybrand is an international accounting, auditing, tax consulting and actuarial firm with 99 offices located in 35 states. Coopers & Lybrand has had an actuarial, benefits and compensation consulting practice since 1961 when it acquired the G. Gilson Terriberry Co., an actuarial and benefits consulting firm founded in 1921.

Currently, Coopers & Lybrand has approximately 880 personnel in its actuarial, benefits and compensation consulting group (the "ABC group") including approximately 650 profession-

als and 62 partners. The professionals comprising the ABC group include enrolled actuaries, attorneys, certified public accountants, computer experts, benefits consultants and communications specialists. Working out of 19 practice offices, Coopers & Lybrand's ABC group provides many of the services necessary for the establishment and administration of pension plans by sponsors of those plans.

Coopers & Lybrand also has an extensive tax practice which includes over 2000 professional personnel and 300 partners. Many of these partners and staff provide tax services which relate to pension planning.

In the State of Florida, Coopers & Lybrand maintains seven offices with a staff of approximately 533 including 56 partners. Its Tampa office includes ABC personnel and provides a wide range of pension planning services in Florida. The issues presented by the Standing Committee in its proposed advisory opinion are of extreme importance to Coopers & Lybrand. If the Standing Committee's proposed advisory opinion were adopted by this Court, it could have a substantial adverse impact on Coopers & Lybrand's practices in the tax, actuarial and benefit consulting areas.

SUMMARY OF THE ARGUMENT

The Supreme Court of Florida has the authority to proscribe the unauthorized practice of law in Florida. This Court, however, may not proscribe or restrict the activities of nonlawyers where the nonlawyers' conduct is authorized under federal law.

The Employee Retirement Income Security Act of 1974, together with certain provisions of the Internal Revenue Code and Treasury Department, Department of Labor and Pension Benefit Guaranty Corporation regulations, provides the framework for the design and implementation of employee benefit plans. The statutory scheme created by Congress and implemented through regulations permits, and in many instances requires, the involvement of nonlawyer professionals such as enrolled actuaries and certified public accountants in pension planning. Since Congress has provided for practice by these nonlawyers in many important aspects of pension planning, Florida may not restrict their participation as set forth in the proposed advisory opinion.

CPAs and enrolled actuaries are licensed professionals who are trained and experienced in the pension planning area. These professionals are required by their respective licensing boards to comply with competency standards as well as ethical standards of conduct similar to those which govern attorneys. The code of professional conduct which governs CPAs specifically prohibits CPAs from subordinating their professional judgment to the judgment of another in the performance of any engagement for services.

This Court should not adopt an advisory opinion which would compel highly qualified professionals to accede to a role subservient to that of a lawyer who may or may not be as qualified to provide the expertise required by the client in the pension planning area. The decision as to which

professional expert to use at any given point in the pension planning process, and in what capacity, is a decision properly left to the client. This Court should not mandate that the lawyer - and only the lawyer - can or should be the only one to orchestrate the intricate planning process that takes place in the pension planning field.

Further, pension planning involves many financial and actuarial determinations or analyses which certified public accountants and actuaries are uniquely qualified to make. Without these analyses, or other input from these financial experts, a plan sponsor would be unable to formulate an effective pension plan which would protect the interests of both the plan sponsor and the plan sponsor's employees. A pension plan designed and implemented without meaningful, substantive participation by nonlawyer professionals such as CPAs or enrolled actuaries would result in a substantial risk that the plan would later be unable to provide promised benefits.

If the proposed advisory opinion is adopted by this Court, plan sponsors will be denied many of the benefits of the specialized training and expertise of nonlawyer professionals, such as CPAs or enrolled actuaries. Accordingly, in order to protect the public, this Court should recognize the important role played by nonlawyer professionals in the formulation and implementation of a pension plan and decline to adopt the proposed advisory opinion.

ARGUMENT

I. THE PROPOSED ADVISORY OPINION, WHICH WOULD SEVERELY RESTRICT THE PARTICIPATION OF CPAs AND ENROLLED ACTUARIES IN PENSION PLANNING, IS IN CONTRAVENTION OF FEDERAL LAW AND, THEREFORE, SHOULD NOT BE ADOPTED.

Under Florida law, this Court has the authority to determine what constitutes the practice of law and to proscribe conduct determined to constitute such practice. See The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962). Florida, however, may not proscribe conduct by nonlawyers or regulate the practice of law where the nonlawyer's conduct is permitted under federal law and state regulation is incompatible with federal interests. Sperry v. State of Florida ex rel. The Florida Bar, 373 U.S. 379 (1963).

In The Florida Bar v. Sperry, The Florida Bar initiated proceedings against Sperry, a nonlawyer registered to practice before the United States Patent Office, alleging that Sperry was engaged in the unauthorized practice of law. Id. at 381. Sperry's conduct consisted of rendering opinions as to patentability, and preparing and filing with the United States Patent Office applications and amendments to applications for letters patent. This Court granted The Florida Bar's petition and enjoined Sperry from engaging in such activities. Id. at 382. Sperry appealed the decision to the United States Supreme Court which reversed this Court's decision.

In reviewing the decision of this Court, the United States Supreme Court recognized that the preparation and prosecution of patent applications for others constitutes the

practice of law and, as such, Florida may proscribe such activity by nonlawyers. Id. at 383. The United States Supreme Court stated further, however, that "the 'law of the State, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation." Id. at 384 citing Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L.Ed. 23.

Since Congress had provided for practice by nonlawyers before the Patent Office, Florida could not prohibit a nonlawyer registered to practice before the United States Patent Office from engaging in activities incidental to his work before the Patent Office. This work included any activity engaged in by the nonlawyer in the presentation and prosecution of patent applications and "[i]nevitably requires the practitioner to consider and advise his clients as to the patentability of their inventions under the statutory criteria ... to consider the advisability of relying on alternative forms of protection which may be available under state law ... [to draft] the specification and claims of the patent application ... [a]nd upon rejection of the application, the practitioner may also assist in the preparation of amendments.'' Id. at 383 (1963).[1]

The Court thus concluded that where, by congressional enactment or administrative regulation, a nonlawyer is accorded the right to practice before a federal administrative agency, a

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1 The Court noted that the drafting of the specification and claims of the patent application was "one of the most difficult legal instruments to draw with accuracy." Id. Nonetheless, the Court determined that, if federal law permitted nonlawyers to engage in the activity, the State may not proscribe the nonlawyer's conduct.

state may not validly proscribe or in any way restrict those activities that are related to work that leads, or may reasonably be expected to lead, to practice before the department or agency or is otherwise necessary to the accomplishment of federal objectives,

The Standing Committee contends that the State of Florida may enjoin nonlawyer participation in pension planning except where there exists a federal rule or regulation explicitly allowing a nonlawyer to engage in a specific activity. See Proposed Advisory Opinion at **14.** This interpretation of the Sperry decision ignores the reasoning employed by the United States Supreme Court in Sperry. The United States Supreme Court did not focus on whether the regulations governing patent practice authorized nonlawyers to engage in a specifically defined activity (e.g. file a patent application). Instead, the Justices noted that a nonlawyer patent practitioner was necessarily authorized to engage in any activity necessary and incidental to the nonlawyer's practice before the Patent Office including providing legal advice on patentability issues. Sperry, supra at 386.

As more fully set forth below, in enacting The Employee Retirement Income Security Act of **1974** Congress created a practice area which is intended to include attorneys and other nonlawyer professionals in the designing and implementing of pension plans. As a result, the State of Florida should not restrict participation by nonlawyer professionals such as CPAs or enrolled actuaries in the designing and implementing of pension plans.

A. The provisions of the Employee Retirement Income Security Act of 1974 as well as applicable Treasury Department and Department of Labor regulations allow CPAs and enrolled actuaries to participate fully in the designing and implementing of pension plans and Florida may not proscribe such activity.

In 1974 Congress enacted the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1461 ("ERISA" or the "Act"). ERISA, in conjunction with certain provisions of the Internal Revenue Code (26 U.S.C. 5401 et seq.), and Treasury Department, Department of Labor and Pension Benefit Guaranty Corporation regulations, governs the area of qualified pension plans and provides the framework for their design, implementation, administration, and termination.

ERISA was enacted in 1974 after many years of concern about the failure of many employees to receive promised retirement benefits from pension plans. Over a number of years, employers had established plans that they could not afford or did not properly fund. ERISA, and its parallel provisions in the Internal Revenue Code, among other things, established funding requirements for some plans that had not previously been funded and increased minimum funding requirements for others (29 U.S.C. §§1081-1086); created and required payment of premiums to the Pension Benefit Guaranty Corporation which guarantees certain pension benefits (29 U.S.C. 51301-1307); imposed substantial restrictions upon the manner in which pension plan assets may be invested (See, e.g., 29 U.S.C. §§1106-1107); and established standards for plan administration (29 U.S.C. 551131-1145). Moreover, both prior

to and after the enactment of ERISA, the Internal Revenue Code has encouraged establishment of private retirement plans by providing tax incentives to plan sponsors. In order to achieve the aims of ERISA, the Act established a statutory scheme in which certified public accountants, enrolled actuaries, attorneys, plan administrators and plan sponsors must coordinate efforts and professional skills in the designing, preparation and qualification of pension plans.

ERISA also created a designation - the "enrolled actuary" - for the pension actuaries who had traditionally been involved in the design, administration and termination of pension plans. 29 U.S.C. §§1241-1242. ERISA requires an enrolled actuary to perform a variety of functions which include the determination of the maximum tax deductible contributions, compliance with minimum funding requirements and advising plan sponsors in connection with the effect of mergers, consolidations and spin-offs on established plans and/or plan termination. ERISA also requires enrolled actuaries to provide written opinions on many aspects of an ERISA plan. See 29 U.S.C. §1023(a)(4)(B); §1023(d).

The requisite functions of enrolled actuaries cannot be performed unless the actuary understands and interprets the statutory and regulatory definitions involved and is permitted to apply his or her interpretation to a client's specific plan.

As noted previously, ERISA must be construed and given effect in conjunction with 5401 et seq. of the Internal Revenue Code (the "Code"). 26 U.S.C. §401 et. seq. The Code covers

many aspects of plan design and qualification, minimum and maximum annual contributions and some facets of plan termination.

Pursuant to regulations promulgated by the Treasury Department, CPAs, enrolled actuaries, attorneys and enrolled agents are authorized to practice before the Internal Revenue Service. Treasury Department Circular No. 230, at §10.3 (the "Circular"); 31 C.F.R. §10.3 (1987). The Circular defines "[p]ractice before the Internal Revenue Service" to include:

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

31 C.F.R. §10.2 (1987) (emphasis added).

Thus, those admitted to practice before the Internal Revenue Service either by virtue of their profession or by complying with admission or enrollment procedures, regardless of their firm affiliation, may not only represent a client at all formal or informal proceedings, but they also may take all steps or perform all functions "connected with" the proper presentation of a client's rights, privileges or liabilities under *any* laws

or regulations over which the Internal Revenue Service has jurisdiction.[2]

The practice of CPAs, enrolled actuaries and attorneys before the Internal Revenue Service includes representation with respect to Internal Revenue Code (Title 26 U.S.C.) section 401 (qualification of employee benefit plans); section 403(a) (whether an annuity plan meets the requirements of section 404 (a)(2) which deals with deductibility of employer contributions to benefit plans); section 412 (funding requirements for certain employee benefit plans); section 413 (application of qualification requirements to collectively bargained plans and to plans maintained by more than one employer) as well as many other areas. rn 31 C.F.R. §10.3 (1987). While an enrolled actuary's representation of clients before the Internal Revenue Service is limited to enumerated Code sections dealing primarily with pension plans, no such limitation exists for CPAs, enrolled agents or attorneys.[3] *Id*. CPAs, attorneys and enrolled agents, may, therefore, represent a client with respect to any issue arising out of any statutory provision of the Internal Revenue Code including those sections which deal exclusively with ERISA. This includes obtaining an opinion or

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2 In the view of the Treasury Department the term "practice before the Service" is broad and includes the furnishing of tax opinions. **See** Bernard Wolfman and James P. Holden, *Ethical Problems in Federal Tax Practice* (2d ed. 1985) Chap. 7 "Organized Professions" at p. 261; compare *Sperry v. State of Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963).

3 Indeed, no distinction whatsoever is made between attorneys and CPAs.

determination letter on all types of qualified plans. **See**, e.g., Rev. Proc. 83-36, 1983-20 I.R.B. 72.

The Department of Labor has jurisdiction over certain provisions of ERISA. ERISA Proc. 76-1 explicitly permits any authorized representative, including attorneys, CPAs and enrolled actuaries, to practice before the Department of Labor in connection with requests for ERISA "information letters" and "advisory opinions." Section 1108 ERISA provides for the Secretary of Labor and the Secretary of the Treasury to grant exemptions from the prohibited transaction restrictions set forth in sections 1106 and 1107(a) of the Act and section 4975(c)(1) of the Code. ERISA directs the Secretary of Labor and the Secretary of Treasury to establish an exemption procedure with respect to such restrictions. 29 U.S.C. §1108. The regulations promulgated by the Secretary of Labor, ERISA Proc. 75-1 and proposed regulations (29 C.F.R. 2570.30) which would replace current ERISA Proc. 75-1, permit any authorized representative to practice before the Department of Labor with respect to prohibited transaction exemption requests. The authorized representative may be an attorney, a CPA, or an enrolled actuary and need only submit written proof of authority (such as a power of attorney or a written certification).

ERISA is a federal statute and regulates an area of clear federal dominance and concern. Congress has recognized that CPAs and enrolled actuaries are skilled professionals whose expertise is not only desirable but necessary in the

designing and implementing of pension plans. In order to protect the public interest Congress established a statutory scheme which requires or permits participation by these skilled professionals in many aspects of the designing and implementing of ERISA plans.

The Standing Committee recognizes that the holding in Sperry presents an obstacle to the adoption of the proposed advisory opinion. In an effort to circumvent the effect of the Sperry decision, the Standing Committee attempts to divide pension practice into discrete self contained practice areas. In this way the Standing Committee seeks to limit the effect of Sperry. This approach, however, ignores the broad, inclusive statutory scheme created by Congress which permits, and in many cases requires, involvement by nonlawyer professionals. Participation by nonlawyer professionals such as CPAs and enrolled actuaries is in keeping with the federal objectives evident in all applicable statutes and agency regulations. It is not possible or desirable to attempt to divide or compartmentalize pension practice in the manner attempted by the Standing Committee because at any given point in the process any number of professionals may be participating in the process. For these reasons, it is inappropriate to determine that attorneys should be the only persons orchestrating all aspects of plan design and implementation simply because pension planning under ERISA raises some legal issues. The client should be permitted to decide which service provider should supervise plan design and implementation.

The pertinent Internal Revenue Code provisions and the implementing ERISA regulations clearly provide for particular classes of nonlawyers to participate fully in all aspects of pension planning. As the United States Supreme Court has held, Florida may not enforce its attorney licensing requirements in such a manner as to give Florida a power of review over the federal determination that a nonlawyer is qualified to perform certain functions. See Sperry, supra, at 385. Further, a State may not impose additional conditions for the performance of those functions not contemplated by Congress (i.e. bar membership). **Id**. The proposed advisory opinion would severely limit the role of CPAs, enrolled actuaries and other professionals in ERISA pension planning contrary to the intent of Congress and to the dictates of Sperry. Id. at 402, n. **47.** Accordingly, this Court should not adopt the proposed advisory opinion.

II. PENSION PLANNING BY PROFESSIONALS SUCH AS CPAs AND ENROLLED ACTUARIES DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.

The practice of law has been defined under Florida law as the giving of advice and performance of services, as a course of conduct, which affect important legal rights of persons under the law that, for the protection of the public, should be given or performed only by persons who possess legal skill and knowledge greater than that possessed by the average citizen. See The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962).

While the Court has used this definition to assist in the determination of whether a specified activity constitutes the practice of law, it has recognized that articulating a definition of "practice of law" is "nigh onto impossible and may injuriously affect the rights of others ..." Id. at **591.** In The Florida Bar v. Sperry, this Court defined practice of law "only to the extent necessary to settle the issues" of the case. Id. See also, The Florida Bar v. Brumbaugh, **355** So.2d **1186** (Fla. 1978) ("... it is somewhat difficult to define exactly what constitutes the practice of law in all instances.... The Sperry definition is " ... broad and is given content by this court only as it applies to specific circumstances of each case"). Therefore, in determining whether pension planning by CPAs, enrolled actuaries and other professionals constitutes the practice of law, the Court should examine the particular facts or circumstances of each case.

Pension planning is a business planning process rather than, as the Standing Committee would have this Court believe, a series of unrelated steps. The business decisions involved in the designing and implementing of a pension plan are inextricably linked to the sophisticated financial and actuarial analyses that drive these decisions. Although legal rights may be involved, business considerations are at the core of pension planning, For the protection of the public, those with specialized skill and knowledge in the financial and actuarial fields should not be relegated to a subservient role

and thus precluded from participating fully in the pension planning process.

This Court should take into account the professional qualifications of CPAs, actuaries and other benefits specialists, their technical skills, the nature and extent of their responsibilities to their clients, and the nature of the practice area which the Standing Committee seeks to foreclose to the nonlawyers involved.

A. CPAs and enrolled actuaries and other benefits specialists employed by Coopers & Lybrand are professionals whose specialized training in their respective areas of expertise qualifies them to provide pension planning services.

"A certified public accountant is a person trained and expert in accounting who has passed a uniform examination and by this demonstration of competency and by meeting other requirements, has been certified by the state board to express professional opinions on financial statements." Bernard Wolfman and James P. Holden, Ethical Problems in Federal Tax Practice (2d ed. 1985) Chap. **7.** "The Organized Profession" at **279.** See Fla. Stat. §473.301 et seq. **(1987)** for licensing requirements in Florida. Accounting is **a** discipline which provides financial and other information essential to the efficient conduct and evaluation of the activities of any organization. Accounting includes the development and analysis of data, the testing of their validity and relevance, and the interpretation and communication of the resulting information to intended users in either monetary or verbal forms.

Actuarial science similarly involves the evaluation of probabilities and the financial impact of uncertain future events. Actuaries are trained to make assumptions and estimates as to the present effect of future events and other uncertainties such as illness, disability, birth, death, retirement, or accidents and casualties. Enrolled actuaries are professionals who have demonstrated competence in both pension law and pension mathematics by passing a licensing examination administered by the Joint Board for the Enrollment of Actuaries (the "Joint Board"), a body created by Federal Statute. **See** 29 U.S.C. §§1241-1242.

CPAs are regulated in much the same manner as attorneys. Each state, including Florida, has adopted a code of professional conduct which governs the activities of CPAs. **See** Chapters 455 and 473 of the Florida Statutes and Chapter 21A of the Florida Administrative Code.[4]

Because accounting requires not only technical knowledge and skill but, even more important, disciplined judgment, perception and objectivity, the rules of conduct governing accountants require CPAs to maintain standards of independence (in fact as well as appearance), integrity and objectivity in professional services performed by the licensees. CPAs are also prohibited from subordinating their

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4 In addition, the American Institute of Certified Public Accountants has established a code of conduct for all of its 285,000 CPA members and each state CPA society, including the Florida Institute of Certified Public Accountants, has done the same for its members.

professional judgment to another. Fla. Stat. 55473.315; 473.322 (1987); Fla. Admin. Code Rules 21A-21.001(1), (4)(a), (4)(b), 21A-21.002.

Competence and technical standards are also set by the State Board of Accountancy. CPAs are prohibited from undertaking any engagement for the performance of professional services which the individual cannot reasonably expect to complete with due professional competence. Fla. Stat. S473.315 (1987); Fla. Admin. Code Rule 21A-22.001. Finally, CPAs in Florida, like lawyers, are required by their licensing board to comply with continuing education requirements. **Fla**. Stat. 5473.312 (1987); Fla. Admin. Code Rule 21A-33.001.

Similarly, enrolled actuaries are subject to rules of conduct promulgated by the Joint Board. Enrolled actuaries are required to maintain standards of independence and integrity and avoid conflicts of interest (20 C.F.R. §§901.20(b), (d) 1987)) and to comply with continuing education requirements in order to qualify for re-enrollment with the Joint Board. 20 C.F.R. §901.11 (1987). The Joint Board also has established standards of performance for actuarial services and prohibits enrolled actuaries from undertaking actuarial assignments they are not qualified to undertake. 20 C.F.R.§901.20(a) (1987).

For both CPAs and enrolled actuaries violation of their respective codes of conduct can result in suspension or

revocation of their licenses. ~~See Fla. Stat.~~ 5473.323 (1987); Fla. Admin. Code Rules 21A-36.001, 36.004; 20 C.F.R. 901.31 (1987).[5]

CPAs and enrolled actuaries are professionals with responsibilities to their clients and their professions which are very similar to those of attorneys. Any concerns that the Standing Committee may have with respect to the ability of these professionals to provide independent professional judgment is unfounded. As in the case of lawyers, CPAs and enrolled actuaries provide services which they are uniquely qualified to provide - not goods.[6] Given their professionalism and their ability to perform pension planning services for their clients with competence and skill, CPAs and enrolled actuaries can be expected to act in the best interests of their clients.

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5 It should be noted too that The American Academy of Actuaries and The Society of Actuaries have promulgated strong codes of ethics governing the professional conduct of their members.

6 The Standing Committee contends, in particular, that nonlawyers practicing in this area are often motivated by the sale of a product and, therefore, will be unable to provide independent professional judgment. Coopers & Lybrand neither sells plan investments nor does it receive commissions for referrals for plan investments. The requirements of independence and avoidance of conflict of interest that apply to CPAs and enrolled actuaries bars this activity by Coopers & Lybrand professionals. **See**, ~~Fla. Stat~~. §473.315(1) (1987); Fla. Admin. Code Rule 21A-21.001; 20 C.F.R. Part **901.20(a) (1987)**. Further, the Florida Board of Accountancy specifically prohibits CPAs from receiving commissions for referrals to a client of any product or service. Fla. Admin. Code Rule 21A-21.003.

B. The designing and implementing of pension plans under the Employee Retirement Income Security Act of 1974 require consideration of complex financial, actuarial and administrative matters which various nonlawyer professionals are qualified to provide and it is, therefore, inappropriate as well as against the public interest to prohibit nonlawyer professionals from engaging in the designing and implementing of pension plans.

The process of designing, drafting and implementing pension plans is complex and necessarily draws on the expertise of numerous professionals, including accountants, actuaries, attorneys, communications specialists, investment advisers and recordkeepers or plan administrators.

In the most basic terms, the purpose of a pension plan is to replace employment income after retirement. A company's decision as to the type of pension plan to adopt, and in particular the level of benefits and the payment options to choose (i.e., particular plan provisions), are business decisions that involve sophisticated mathematical and financial projections and analyses. This is necessarily so on a practical level because the company's decisions are ultimately financial ones based on projected benefits and the associated costs of those benefits, both currently and in future years. For example, can the company afford to provide full retirement benefits to all employees, regardless of years of service to the company? Can the company afford to provide full retirement benefits to employees who opt for early retirement, or is actuarial reduction necessary? Will the company be able to provide subsidized joint and survivor annuities to pensioners, or should there be employee contributions toward the cost of

this form of benefit? If cash flow is interrupted, how will the company fund its plan?

These questions must be answered by professionals with the requisite skill and expertise to answer these questions. Moreover, the results or answers to these questions are crucial to determinations regarding plan design and must be incorporated into the plan provisions which will implement the plan. Attorneys are not necessarily qualified to answer these questions. CPAs and actuaries skilled in pension plan matters, however, are trained and uniquely qualified to respond to these questions and to incorporate the results into specific plan provisions.

To perform these cost benefit analyses accurately and efficiently requires highly specialized knowledge and often requires the use of sophisticated computer software. It is common for benefits consulting firms to spend millions of dollars in developing and maintaining computer software packages which will make these and similar analyses and assist in determining compliance with applicable regulations. These analyses, which are at the heart of pension planning, are within the unique domain of actuaries and benefits consultants who understand not only the technical requirements of pension planning, but the economic and mathematical requirements and ramifications as well. For example, when evaluating retirement income goals, a company must decide what portion of the target replacement ratio (e.g., the ratio of available retirement benefits to preretirement disposable income) it is willing, or

able, to provide. This has very little to do, initially, with the legal limits imposed by statute. An actuary or benefits consultant would compare the projected benefits and costs under numerous scenarios. For example, the actuary or benefits consultant might project and examine results for the following benefit formulas:

> 50% of Final Average Pay less 50% of the retiree's Social Security retirement benefit.

> 1.25% of Final Average Pay up to Covered Compensation multiplied by Years of Service up to 35 years plus 1.75% of Final Average Pay in Excess of Covered Compensation multiplied by Years of Service up to 35 years.

Other formulas would be tested and would take into account various actuarial factors such as assumed interest, mortality, and morbidity rates for the particular company and work force involved.

The actuary or benefits consultant would then produce a report explaining the various benefit design options available to the company and would work with the company to determine all available alternatives. Of course, the benefit formula could not be designed in isolation. The actuary or benefits consultant would help the company determine a funding strategy, accrual requirements, annual or quarterly required contributions and maximum tax deductible contributions, and many other plan features which are interrelated. A skilled

professional with mathematical and financial expertise, the ability to perform complex cost benefit analyses of interrelated factors, and the skill to correctly use the sophisticated computer tools necessary to perform these analyses must be involved. The applicable statutes and regulations virtually require that such analyses be performed, so that, for example, minimum funding requirements (26 U.S.C. §412) can be met over time.

The need for these analyses is unavoidable. Without them, it is impossible to determine whether a proposed plan is suitable to the client's specific needs. To suggest that only a lawyer should be permitted to advise a client as to the suitability of a specific plan or various alternatives is to ignore the complex financial nature of ERISA. By placing the nonlawyer professional in a subordinate capacity this Court would in effect be stating that the financial considerations involved in the pension planning process are of little significance - an untenable conclusion.

Other areas of plan design also require an actuary to give advice and make various determinations, including the determination of maximum tax deductible pension contributions (26 U.S.C. §404), determination and compliance with minimum funding standards (26 U.S.C. §412), accrual of benefits (26

U.S.C.§411), maximum benefit limitations (26 U.S.C.§415), and merger, consolidation and plan spinoffs (26 U.S.C. §414(e)).[7]

Because financial and actuarial considerations are so important in the design of a plan under ERISA, and in order to be able to fully advise and inform a plan sponsor, CPAs, actuaries and other professionals must be permitted not merely to gather client information, as proposed by the Standing Committee, but also, contrary to the view of the Standing Committee, to analyze client information in light of the client's specific needs, CPAs and enrolled actuaries are uniquely qualified to perform these analyses. Prohibiting CPAs from providing that analysis in essence regulates accountants in a manner not merely inconsistent with, but in derogation of, a CPA's professional license. Further, the failure to analyze client data and suggest alternatives may result in a breach of the accountant's duty to his client to exercise his judgment for the client's benefit. To prevent a CPA or enrolled actuary from exploring the client's specific needs because doing so involves some knowledge of applicable law and tax matters is

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7 Similarly, design of 401(k) plans is inextricably linked to the administration of those plans. Sophisticated computer software, capable of handling enormous amounts of data, is required to develop individual account balances, compare deferrals to monitor nondiscrimination tests, and monitor limitations on deferrals, contributions and benefits. Benefits consulting firms, such as Coopers & Lybrand's ABC group, have the computer capabilities and skilled professionals to perform the necessary functions and determine compliance with applicable tax laws.

not only impractical, it is **unreasonable**.[8] Attorneys are not necessarily trained or qualified to perform the financial and actuarial analyses which are necessary in designing a pension plan. The client would, therefore, be placed at a serious disadvantage if the client were not able to select the service providers who have the capability of providing the expertise which is most necessary in the designing and implementing of a pension plan.

Further, as a public policy matter, financi 1 projections and analyses must guide the selection of plan provisions so that pension plans do not terminate with assets insufficient to cover benefit commitments leaving the government's Pension Benefit Guaranty Corporation at risk. Moreover, corporate management could breach its duty to shareholders if it were unable to receive "advice concerning particular plans or their suitability to the employer or eligibility under the tax laws" directly from benefits consultants or actuaries. **See**, Proposed Advisory Opinion at 10. The result of this proscription would be to leave plan participants, the government, and company shareholders at significant risk.

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8 Requiring a nonlawyer professional with acknowledged training and expertise in pension plan matters to sit "sphinx-like in the face of even rudimentary inquiries" regarding the client's specific situation "is a rather perverse means of protecting the public". **See**, Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, **34** Stan. L. Rev. 1, 339 (1981). The end result is that the customer receives poor service and is denied the benefit of the nonlawyer professional's uncontroverted expertise in pension plan matters. **Id**.

The designation of enrolled actuaries was created by Congress when ERISA was enacted in order to protect plan participants from being promised a pension that the company was later unable to provide, or being left with no pension whatsoever, due to lack of prudent company planning and management. Adoption of the proposed advisory opinion would ignore Congress' concerns and would place participants at even greater risk by barring meaningful participation of actuaries and other skilled professionals in an area that has become very complex not so much from a legal, but from a financial, perspective. The nonlawyer professional is qualified and competent to perform pension planning services and should not be required to render these services under the supervision of a lawyer. Since this Court's undisputed aim is to protect the public, it should acknowledge the complexity of the pension planning area, recognize the proper role that nonlawyer professionals play, uphold the principle that the most qualified expert should be permitted to render services at the request and for the benefit of the client and, thus, decline to adopt the proposed advisory opinion.

C. Nonlawyer professionals such as CPAs and enrolled actuaries should be permitted to participate in drafting plan documents.

The proposed advisory opinion submitted by the Standing Committee seeks to prevent nonlawyer professionals such as CPAs or enrolled actuaries from drafting plans or any portion thereof and from drafting any documents amending or

terminating plans. See Proposed Advisory Opinion at pp. 13-17. The Standing Committee also proposes to prohibit attorney-employees of CPA firms from drafting pension plans, amendments to the plans or documents required for plan termination. Id.

Coopers & Lybrand does not dispute the assertion that attorneys should play a role in drafting documents necessary for establishing or implementing a plan or that there are some documents that should be either prepared or reviewed by an attorney for the plan sponsor. The blanket prohibition which the Standing Committee seeks to impose, however, is contrary to the public interest and contradicts federal regulations which permit such professionals to draft plan documents. Not all documents or plan provisions need be drafted by an attorney for the plan sponsor, and to prevent nonlawyer professionals or attorneys employed by CPA firms from participating in such drafting is unreasonable.

As noted in part II (B), supra, CPAs and enrolled actuaries must be involved in the designing of pension plans in order to develop a plan which responds to the plan sponsor's specific needs, be they financial, actuarial or human resource needs. Many elements of plan drafting require an in-depth understanding of financial and actuarial concepts, while other elements must conform with plan administration requirements.

Many plan provisions or features are chosen based on analyses performed by CPAs, enrolled actuaries or benefits consultants, Nonlawyer professionals involved in pension

design are therefore fully competent to draft certain plan features especially those that deal with nonlegal financial or administrative considerations.[9] The mere fact that one holds a law license does not ipso facto qualify one to perform these services. Many attorneys lack the training or expertise necessary to fully understand or articulate the financial and actuarial concepts or methodologies involved.[10] Accordingly, this Court should permit those individuals who are most qualified to prepare pension plan documents.

Other pension plan documents, such as the summary plan description, also require nonlawyer involvement in order to best serve the public. The summary plan description, required by ERISA, must be written in a manner easily understood by the average plan participant. 29 C.F.R. §2520.102-2 (1987).

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9 As an example, plan provisions dealing with benefit formulas, payment options, eligibility, vesting and social security benefits often involve cost benefit analysis and have economic consequences requiring actuarial or financial expertise. Plan sponsors would benefit from having the CPA, actuary or benefit consultant draft these provisions since they are well qualified to translate these concepts into specific plan provisions. In addition, drafting the administrative provisions which govern plan administration requires the involvement of plan administrators and recordkeepers who provide essential input regarding the client's chosen manner of administering the plan.

10 It is interesting to note that many sample provisions of plan languages made available by the Internal Revenue Service, known as "Listing of Required Modifications", are drafted by nonlawyers. In addition, IRS review of plan documents to determine eligibility or suitability under the tax laws is generally performed by nonlawyers. Clearly, the IRS does not believe that only a lawyer is capable of understanding ERISA or applicable sections of the tax code or determining eligibility under applicable federal law.

Benefit communications professionals (also part of Coopers & Lybrand ABC Services Unit) specialize in preparing summary plan descriptions and other communications designed to be understood by plan participants. These nonlawyers are experienced and trained to use language that is clear and easily understood in the preparation of the summary plan description. It is in keeping with the regulatory requirements and more cost efficient for the client to have a benefits communications specialist prepare the summary plan description.

Further, plan documents do not deal exclusively with purely legal rights. They deal with important financial concerns of the plan sponsor which should be protected by allowing those with a thorough understanding of the financial considerations involved to draft specific plan provisions. Despite the crucial role the CPA or actuary plays in the process of designing and developing a pension plan, the Standing Committee seeks not only to proscribe CPAs and actuaries from drafting all plan documents but also seeks to prevent them from participating in drafting plan documents in any fashion unless called on to **do** so by an attorney. See Proposed Advisory Opinion at 17, n.6.

More alarming, however, is the Standing Committee's attempt to proscribe all nonlawyer professionals from drafting "any other materials that comprise a plan or are required for its [the plan's] installation." Proposed Advisory Opinion p. 13. The breadth of this language is such that, if adopted by this Court, it would prevent nonlawyer professionals such as

CPAs or actuaries from engaging in activities which are properly within the domain of CPAs or actuaries such as obtaining a determination letter on a nonstandardized plan or other qualification activities. See 31 C.F.R. §10.2 (1987); See also 29 U.S.C. §1201.[11]

The proposed advisory opinion states that, even where nonlawyer professionals draft plan documents for review by an attorney, such a practice constitutes the unauthorized practice of law. The rationale offered by the Standing Committee for this proscription is that "a cursory review by an attorney is not sufficient to render the document one drafted by an attorney." Proposed Advisory Opinion at 18.

In effect, the Standing Committee presumes that the attorney reviewing plan documents prepared by a nonlawyer will fail to fulfill his professional obligations to his client. Such a presumption is unwarranted. The mere possibility that an attorney may not carry out his professional obligations is not a valid reason to penalize the public or nonlawyer professionals practicing in this area by preventing nonlawyer professionals from preparing documents for review by counsel.

Nonlawyer preparation of documents for attorney review is an everyday occurrence at most, if not all, law firms and includes documents prepared by paralegals or law clerks. The possibility of cursory review or improper supervision of the legal work has not led to a determination that paralegals or

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11 These activities are, of course, within the attorneys' domain as well.

law clerks are engaged in the unauthorized practice of law. Similarly, such a determination should not be made in the employee benefits area with regard to plan documents prepared by nonlawyer professionals for review by competent counsel selected by the client.[12]

It should be noted too that the Standing Committee's position on this issue is contrary to the position taken by the Standing Committee on the Unauthorized Practice of Law of the American Bar Association in Informative Opinion A of 1977 (the "Informative Opinion"). Before issuing the Information Opinion, the American Bar Association ("ABA") studied the problems arising in the employee benefit planning area and consulted with state and local bar groups and lawyers with experience in the employee benefit area for a number of years. The ABA Informative Opinion states that nonlawyers may prepare legal memoranda or analyses, submit drafts or suggested documents or plan provisions and prepare supporting memoranda, schedules etc. for submission to the plan sponsor for review of counsel. ABA Standing Committee on the Unauthorized Practice of Law, Employee Benefit Planning Informative Opinion A of 1977, at 13. The Informative Opinion further states that "[s]pecimen documents may be delivered to an employer provided

12 If CPAs and enrolled actuaries are prevented from drafting plan documents, even for review by the plan sponsor's counsel, in house counsel for corporate clients would be unable to request specimen documents from the CPAs or actuaries for review. This result is unreasonable especially where the plan sponsor's counsel can reasonably be expected to scrutinize plan documents thoroughly.

a statement is prominently displayed on such documents to the effect that the documents are important legal instruments with legal and tax implications and should be reviewed by the employer's lawyer."[13] Id. at 12 n.10. Moreover, "[m]aterials furnished to the employer's lawyer" do not constitute the unauthorized practice of law, Id. at 12-13.

The position taken by the ABA on the issue of drafting of plan documents is the most reasonable manner of safeguarding the public interest. Clients will retain their right to choose who will orchestrate the pension planning procedure, nonlawyer professionals will be permitted to provide the services they are uniquely qualified to provide and without which the client would not be adequately advised and legal rights would be protected by having attorneys review specimen documents prepared by nonlawyer professionals.

The Standing Committee has noted, and Coopers & Lybrand agrees, that in the area of employee benefit planning, clients are best served when attorneys and nonlawyer professionals work together to formulate and implement a pension plan.[14] Proposed Advisory Opinion at 13.

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13 Coopers & Lybrand's practice conforms to the ABA standard.

14 The attorney may take a dominant role in the preparation and implementation of a pension plan at the request of the client. The client, however, should be the one to decide whether the attorney or another equally capable service provider should take the "laboring oar" in the design and implementation of a plan.

Proscribing nonlawyer involvement in drafting pension plan documents is clearly not to the client's benefit. Accordingly, the proposed advisory opinion should not be adopted by this Court.

D. Adoption of the proposed advisory opinion will not serve the the public interest because it will create unnecessary commercial restraints on trade.

The Standing Committee urges this Court to adopt the proposed advisory opinion on the ground that it is necessary to prevent public harm, Proposed Advisory Opinion at 4. In addition to the reasons set forth previously, adoption of the proposed advisory opinion will not be in the public interest because it will create unnecessary commercial restraints on trade.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the United States Supreme Court recognized that competition in the professions and in the service sector is as important as competition in other areas of the economy. In Goldfarb the United States Supreme Court expressed its view that lawyers, and presumably other professionals, play an important role in commerce and that anticompetitive activities by lawyers may result in unlawful restraint of free market mechanisms, Id. at 788, 793.

This Court, in exercising its power to regulate the legal profession, should not lose sight of the fact that certain commercial restraints deprive consumers of the benefits of competition making it difficult to select professional

services in an informed, cost efficient manner. This principle is of particular importance in the ERISA pension plan area the complexion of which is substantially defined by federal law. When dealing with rights conferred by Federal statutes, courts should be reluctant to limit the possible exercise of those rights by attempting to exclude nonlawyer professionals from the pension planning area. See generally, Bernard Wolfman and James P. Holden, Ethical Problems in Federal Tax Practice, (2d ed. 1985) Chap. 7 at pp. 292-297.

ERISA calls for the coordinated efforts of a series of professionals in order to effectuate the aims of the statute. The Act requires involvement of CPAs and enrolled actuaries in ERISA pension planning and permits practice by authorized representatives before the Internal Revenue Service and the Department of Labor on ERISA matters. Accordingly, the development of a mixed profession service team should be encouraged by this Court in the area of pension planning by avoiding the adoption of rigid exclusionary rules as proposed by the Standing Committee. In refusing to impose anticompetitive restraints in the ERISA pension plan area the Court would further and protect the public interest.

Moreover, if adopted, the proposed advisory opinion would increase the costs of pension planning services thus potentially discouraging companies, particularly smaller ones, from developing pension plans in order to maintain a competitive position. The only persons who will ultimately be harmed by the increased costs are the employees who will be denied the benefits of a pension plan.

CONCLUSION

The proposed advisory opinion submitted to this Court improperly seeks to severely restrict nonlawyer professionals such as enrolled actuaries and CPAs from participating in the designing and implementing of pension plans under ERISA.

Federal law allows, and in some instances requires, participation by nonlawyer professionals such as CPAs and enrolled actuaries in the designing and implementing of pension planning under ERISA, as well as all related activities.

Further, the unique qualifications of CPAs, enrolled actuaries and other benefit consultants in pension planning cannot be disputed. These professionals provide services which are indispensable to the client in formulating and implementing pension plans under ERISA. The public would be well served by permitting these professionals to continue to participate meaningfully in all aspects of pension planning. Accordingly, this Court should refuse to adopt the proposed advisory opinion.

Respectfully submitted,

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1101L/VOL3/36

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