IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

RE: ADVISORY OPINION - NONLAWYER PREPARATION OF PENSION PLANS / CASE NO. 74,479

In Review of FAO #89001, Nonlawyer Preparation of Pension Plans

INITIAL BRIEF OF THE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN OPPOSITION TO THE PROPOSED ADVISORY OPINION

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PRELIMINARY STATEMENT

The Florida Institute of Certified Public Accountants ("FICPA") is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. Founded in 1905, the FICPA is an active professional organization of approximately 17,000 Certified Public Accountants ("CPAs") working to improve the accounting profession and to better serve the public. The FICPA is the fifth largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government and education. Other membership categories include associate members, retired CPAs and CPAs domiciled outside the State of Florida.

One of the primary purposes of the FICPA is to encourage the analysis, discussion, and understanding of the issues and trends in the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States, assisting in the development of auditing and accounting standards, and educating the public with regard to the responsibilities of CPAs. These areas of activity bear directly on the issues now before this Court.

ABBREVIATIONS

The following symbols will be used in this Brief:

AICPA	=	The American Institute of Certified Public Accountants.
Committee	=	The Florida Bar Standing Committee on Unlicensed Practice of Law.
CPAs	=	Certified Public Accountants.
ERISA	=	The Employee Retirement Income Security Act of **1974.**
the FICPA	=	The Florida Institute of Certified Public Accountants.
IRS	=	Internal Revenue Service.
Pension Plan	=	The same definition used in the Proposed Opinion at 3, n.2 - that is "all qualified retirement plans, including, but not limited to, pension plans, profit sharing plans, target benefit plans, cash or deferred plans and employee stock ownership plans."
Proposed Opinion	=	The Proposed Advisory Opinion below.
Tax Section	=	The Executive Council of the Tax Section of The Florida Bar.

RECORD CITES

The following record cites will be used:

"Prop. Op. at ___"	=	Citation to the Proposed Advisory Opinion.
"Transcript at ___"	-	The transcript of the January 12, **1989,** public hearing.
"Tab **4,** January 20, **1989,** 1etter"	-	Cite to written testimony.
"tab"	-	Refers to the separately tabbed categories on file with this Court.

STATEMENT OF THE CASE AND FACTS

In a November 8, 1988 letter, the Executive Council of the Tax Section[1] of The Florida Bar (the "Tax Section") requested an advisory opinion from The Florida Bar Standing Committee on the Unlicensed Practice of Law (the "Standing Committee" or "Committee") regarding the propriety of nonlawyer involvement in the area of pension plan design, preparation, and advice.[2]

A public hearing was held on January 12, 1989. Oral testimony was received from twelve persons, representing various interests. Record, Tab 2. Approximately thirty others attended, but did not testify. Prop. Op. at 2. Written testimony was also received. Record, Tabs 3, 4.

On April 21, 1989, the Standing Committee voted[3] to issue the Proposed Opinion, and on July 28, 1989, the Committee

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[1]The opinion was requested only by the Executive Council, not by the entire Tax Section. The Tax Section as a whole was not polled on these issues. Transcript at 13-14.

[2]On July 2, 1988, the Tax Section adopted a resolution requesting the Standing Committee to investigate nonattorneys whose activities may constitute unlicensed practice due to providing legal advice and drafting qualified retirement plans. The Resolution requested that if the Committee determined that unlicensed practice of law was occurring, the Tax Section requested an advisory opinion. Tab 1, July 27, 1988 letter.

[3]Due to their legal practice in the pension plan field, Committee members Gregory G. Keane, William D. Mitchell, James E. McDonald and Robert M. Sondak abstained from voting on the issue pursuant to Rule 10-7.1(e), Rules Regulating The Florida Bar. Prop. Op. at 2; Transcript at 9-11. Nevertheless, Mr. Keane and Mr. Mitchell indicated they would participate in the proceedings. Transcript at 10-11. Mr. McDonald and Mr. Sondak likewise apparently participated. Prop. Op. at 2, n. 1. Also, despite the Proposed Opinion's indication that all potential conflicts were disclosed at the hearing, the FICPA can find no such disclosure in the Record for Mr. McDonald.

filed the Proposed Opinion. The question addressed was:

> 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.

Prop. Op. at 1.

At the public hearing, little testimony was taken from lay witnesses regarding the issue of public harm in connection with the allegations of the unlicensed practice of law. Prop. Op. at 4. In fact, the FICPA can find none. According to the Committee, attorneys related "numerous" instances of harm resulting to an employer or employees. Id. However, the collective Record indicates that these instances were neither numerous nor specific. See Point V below. Rather, the instances were generalized attacks usually on vaguely identified entities (i.e., "a pension consultant") without opportunity for response. Despite the scant and inadequate record, the Committee made a "finding" of public harm. Prop. Op. at 4.

In rendering its Proposed Opinion, the Bar categorized the implementation of a pension plan into eight areas (Prop. Op. at 8) and prohibited nonlawyer practice in several important areas. See Point I below.

This matter is now before this Court pursuant to Rule 10-7.1(g)(3), Rules Regulating The Florida Bar, to approve, disapprove, or modify the Proposed Opinion.

SUMMARY OF ARGUMENT

The Proposed Opinion should be disapproved as it encroaches into areas preempted by the federal government, is overly broad, effects the due process rights of nonlawyers without an adequate and proper record, and violates the First Amendment. First, five areas of disputed pension practice are disputed. See Point I below. Second, federal statutes and regulations of the Treasury and other federal agencies permit CPA practice in all five of the disputed areas, thereby pre-empting any state regulation by this Court of CPAs who practice in these areas. Third, federal statutes and regulations relating to the Employee Retirement Income Security Act of 1974 also permit nonlawyer practice in the five pension areas, thereby preempting state regulation. Fourth, practice by CPAs in the five disputed areas should not constitute the unlicensed practice of law based on the policy reasons explained in Point IV below. This Court is urged to adopt, as the New Jersey Supreme Court has done in the area of state inheritance tax returns, an exception allowing CPAs to practice in the five areas based on their unique training and qualifications. Such a limited exception would best serve the public interest. Fifth, procedural elements required by the rules governing the manner in which this issue should be presented to the Court have not been followed resulting in an inadequate record. Finally, the Proposed Opinion violates the First Amendment rights of CPAs.

ARGUMENT

POINT I

THE FIVE DISPUTED PENSION PRACTICE AREAS *ARE:* (1) SELECTION; (2) DRAFTING; (3) QUALIFICATION; (4) TERMINATION; AND (5) GENERAL TAX ADVICE.

The Proposed Opinion addresses eight distinct areas of practice regarding pension plans.[4] Prop. Op. at *8.* The Proposed Opinion generally permits nonlawyers to perform various functions relating to the implementation of pension plans, including: promoting the plan; explaining alternatives generally available; gathering information from the client; and administering the plan. These determinations are not contested by the FICPA.

However, the Proposed Opinion prohibits nonlawyer practice in five areas that are of concern to CPAs: (1) selection of the plan; (2) drafting of the plan; (3) qualification of the plan; (4) termination of the plan; and (5) general tax advice including suitability and tax eligibility of plans. This last category is not separately categorized in the Proposed Opinion at *8*, but is instead touched upon throughout. Id. at 10, 11, 12, and 16-17.

Contrary to the Proposed Opinion, and for the reasons explained below, the FICPA believes CPAs are fully qualified to practice in all five of these disputed areas. Accordingly, the arguments in the remainder of this Brief apply to all of these five areas.

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[4] "Pension plan" or "pension practice" is used throughout in the same broad sense as used in the Proposed Opinion. See "Abbreviations" above.

POINT II

FEDERAL STATUTES AND REGULATIONS OF THE TREASURY DEPARTMENT, THE LABOR DEPARTMENT, *AND* THE PBGC AUTHORIZE NONLAWYERS TO PRACTICE IN THE FIVE DISPUTED AREAS; THE SUPREMACY CLAUSE THEREBY PREEMPTS STATE REGULATION.

Federal preemption is based on the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. It invalidates state laws that interfere with or are contrary to federal law.[5] Preemption may be by statute or regulation[6] and may occur in one of three ways.[7]

Here, the Proposed Opinion denies CPAs the right to perform functions broadly and clearly authorized under federal statute and three different federal regulations. The United States Supreme Court has held that when state law is incompatible with federal law in the unlicensed practice of law area, the state law must yield. Sperry v. Florida, 373 U.S. 379, 384 (1963). Sperry held that states do not have the power to place limitations on the authority granted to a nonlawyer by a federal agency. Id.

Title 5, U.S.C. §500 and Treasury Department regulations

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[5] Hillsborough County, Florida v. Automated Medical Laboratories, 471 U.S. 707 (1985).

[6] Fidelity Federal Savings and Loan Association v. Custa, 458 U.S. 141 (1982).

[7] Preemption applies: when the federal legislative scheme is so complete and pervasive that no room is left for states to supplement it; when the federal interest is so dominate that state laws on the same subject must yield; and when enforcement of the state statute would present a substantial conflict with the administration of the federal program. Marino v. Town of Rampapo, 326 N.Y.S.2d 162, 179 (1971). See also Hillsboroush, 471 U.S. at 713.

in 31 C.F.R. §10.3(b) (1989) specifically authorize CPAs to "practice" before the Internal Revenue Service.[8] As shown below these regulations broadly define "practice" to include the five disputed pension plan areas. Sperry interpreted almost identical regulations in the patent area so as to prohibit Florida from regulating the practice of law in matters covered by or reasonably necessary and incidental to the federal patent authorization. The Proposed Opinion ignores Sperry and attempts to limit the activities nonlawyers can perform in the five disputed areas despite authorization by the Treasury Department regulations. The Proposed Opinion is therefore contrary to federal law.

A. The Sperry Decision.

The petitioner in Sperry was a nonlawyer patent practitioner. He attacked an injunction imposed by the Florida Supreme Court prohibiting him from engaging in specific activities covered by his federal license to practice before the Patent Office. 373 U.S. at 382. The injunction prohibited activities in the patent area similar to those prohibited in the pension area by the instant Proposed Opinion, including: (1) rendering legal opinions, including opinions as to patentability or infringement; (2) preparing, drafting, and construing legal documents; (3) holding himself out in the

[8] Title 29 C.F.R. S2606.6 (1989) and 29 C.F.R. §18.34 (1989) also allow nonlawyers to represent others before the Pension Benefit Guarantee Corporation ("PBGC") and the Labor Department respectively.

state as qualified to prepare and prosecute applications for letters patent; (4) preparation and prosecution of applications for letters patent in the state; and (5) otherwise engaging in the practice of law. Id. Petitioner claimed he should be allowed to engage in activities considered by the state to be the unlicensed practice of law if authorized by his federal license.

The Court unanimously agreed with petitioner and held that pursuant to the Supremacy Clause, a state may not enforce licensing requirements where there has been a federal determination that a person or agency is qualified or entitled to perform certain activities. Id. at 384.

Subsequent decisions have applied the Sperry rationale directly to the Treasury regulations. See, e.g., Grace v. Allen, 407 S.W.2d 321, 324 (Tex. Ct. App. 1966) (practice rights before the Treasury Department are federal rights which cannot be impinged upon by the state in efforts to prevent unauthorized practice of law); Joffe v. Wilson, 381 Mass. 47, 407 N.E.2d 342, 345, n.5 (1980) (citing Sperry and noting plaintiff did not suggest that the state could choose to regard practice by CPAs before the IRS as illicit practice of law).[9]

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[9] See also the Justice Department Comments on Report of IRS Chief Counsel's Advisory Committee on Rules of Professional Conduct and Representation of Taxpayers before IRS (December 10, 1976), reprinted in BNA Daily Tax Reporter No. 241, J-1, J-3 (December 14, 1976) (noting that stipulation that CPAs are layman in the IRS practice market would contradict the design of 5 U.S.C. §500, and that the IRS should promote not discourage competition and eliminate, not support, unreasonable artificial restrictions).

Similarly, the Attorney General of Oregon determined that an Oregon statute which provides that a "person shall not prepare or advise or assist in the preparation of personal income tax returns for another.. .unless he is a licensed tax consultant" under Oregon law was in substantial conflict with the Treasury Department rules. 38 Op. Att'y Gen. 1303 (Or. 1977). Therefore, the Attorney General ruled that federal preemption applied.[10]

The Sperry decision and its progeny are thus directly applicable to the instant case. As noted above, 31 C.F.R. §10.3(b) (1989) authorizes CPAs to "practice" before the IRS:

> Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the service upon filing with the Service a written declaration that he is currently qualified as a certified public accountant and is authorized to represent the particular party on whose behalf he acts.

The regulation defines "practice" to mean:

> All matters connected with presentation to the Internal Revenue Service or any of its officers or employees relatina to a client's rights, privileges or liabilities under laws or resulations 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

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[10] See also The Florida Bar v. Wishnefsky, 515 So. 2d 1284 (Fla. 1987) (this Court prohibited respondent from practicing law except to the extent that regulations of the Social Security Administration allowed representation by nonattorneys) and The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980) (recognizing that the Florida Legislature or a Florida agency could allow nonlawyer agency practice and that this is a "corollary" to federal preemption).

representation of a client at conferences, hearings and meetings.

31 C.F.R. §10.2(a) (1989) (emphasis added). The authority granted in this definition of practice is extremely broad and clearly encompasses the five disputed pension plan areas. Another part of the Treasury regulation contains the identical language regarding the practice of law as that interpreted in Sperry and provides that "nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law." 31 C.F.R. 510.32 (1989). Sperry nevertheless held that state regulation was preempted. Therefore, just as in Sperry, the Treasury regulations preempt Florida's definition of unlicensed practice of law as to those activities which are reasonably necessary and incidental to practice before the Treasury.[11]

Similarly, 29 C.F.R. 52606.6 (1989) and 29 C.F.R. 518.34 (1989) authorizes nonlawyer representation of others before the PBGC and the Department of Labor respectively. Analysis of 29 C.F.R. 52606.6 shows that nonlawyers may represent others before PBGC as long as the person designating the representa-

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[11]The 1956 Statement of the Secretary of Treasury interpreting this regulation also supports this conclusion. 21 Fed. Reg. 833 (1956), reprinted in 42 A.B.A. J. 349 (1956). The Secretary specifically rejected the interpretation of the phrase "nothing in the regulation is to be construed as authorizing persons not members of the bar to practice law" as an election by the Department not to fully exercise its responsibility to determine the proper scope of practice by enrolled agents and attorneys before the Department. Id. In other words, the Secretary denied that it was the regulation's intent to defer to the state's definition of the unauthorized practice of law when determining the scope of nonlawyer's authority to practice before the Treasury Department.

tive signs a notarized power of attorney and files it with the corporation. This power of attorney also specifies the scope of the representation. Title 29 C.F.R. §18.34 explicitly provides that any citizen of the United States who is not an attorney shall be admitted to appear in a representative capacity before the Department of Labor.[12]

Since Congress clearly intends that nonlawyers be able to represent others before federal agencies, the scope of the representation must be determined by the federal agency and not the state. Otherwise, if an agency decides to permit both lawyers and nonlawyers to represent others before it, and nonlawyers are limited in the functions which they can perform by state law, the agency's intention to allow nonlawyer representation would become void. No one would rationally choose nonlawyer representation, which due to the limitations imposed by the state, would be inferior to the representation provided by a lawyer.

B. Scope Of The Federal Preemption.

The Court in Sperry concluded that the federal patent statutes and regulations sanctioned the performance of those activities which were reasonably necessary and incidental to the preparation and prosecution of Patent Office applications. 373 U.S. at 386. In other words, if the activities are

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[12]The nonlawyer, however, can be removed if it is determined that the nonlawyer does not possess the requisite qualifications or lacks character or integrity; has engaged in unethical conduct; or has engaged in an act involving moral turpitude.

reasonably necessary and incidental to the preparation before the federal agency, a nonlawyer can perform them even if the state defines such activities as the unlicensed practice of law. Since CPAs are authorized to practice before the Treasury Department, Department of Labor, and the PBGC, they are not subject to limitations imposed by the Proposed Opinion if they perform activities reasonably necessary and incidental to the representation before these federal agencies. The question becomes what activities of the plan are reasonably necessary and incidental.

As a preliminary matter, it should be noted that the Proposed Opinion appears to recognize Sperry's preemption as to plan qualifications when it notes that "a nonlawyer specifically authorized by a federal rule or regulation to present a plan to the Internal Revenue Service for qualification may handle the qualification of the plan." Prop. Op. at 20. Since all CPAs are allowed to practice before the IRS under 31 C.F.R. §10.3(b) (1989), CPAs are not restricted from obtaining and maintaining qualification of the plan for tax purposes. This issue, however, should not be in doubt and any opinion should expressly state that CPAs may obtain and maintain tax qualification of the Plan.

A reasonable comparison of the remaining four disputed activities (selection, drafting, termination, and advice) shows many similarities to the Sperry permitted activities. Each of the four activities are necessary and incidental to practice before the Treasury, Labor Department, and PBGC.

First, as to both plan drafting and termination, the Sperry decision determined that preparing, drafting and construing legal documents was reasonably necessary and incidental to practice before the Patent Office. The Proposed Opinion prohibits nonlawyers from performing all three of these activities both in creating the plan and terminating it. If preparing, drafting and construing legal documents were reasonably necessary and incidental to practice before the Patent Office, such activities must also be reasonably necessary and incidental to practice before other federal agencies especially when the authorizing regulations are identical.

Second, as to both plan selection and advice, Sperry allows those practicing before the Patent Office to render legal opinions as to patentability or infringement on patent rights. Sperry, 373 U.S. at 383. The Proposed Opinion prohibits CPA's from selecting the type of plan and its provisions because it involves an analysis of legal principles. Prop. Op. at 12. Since rendering legal opinions which Sperry allowed cannot be done without an analysis of legal principles, such analysis should also be considered reasonably necessary and incidental to practicing before federal agencies.

Finally, as to plan advice, Revenue Procedure 76-15, 1976-1 Cumulative Bulletin 553, has recognized a CPA's authority to render services in tax matters, specifically with respect to ERISA. Revenue Procedure 76-15 specifically states that nonlawyers authorized to practice before the Internal

Revenue Service will not be precluded from representing a taxpayer with regard to a pattern plan approved for use by a law firm. This further illustrates that the prohibition in the Proposed Opinion against providing tax advice is preempted.[13]

Based on the foregoing, each of the five disputed activities should be considered to be reasonably necessary and incidental to practice before the federal agencies and therefore not subject to limitation by state law.

POINT III

ERISA *ALSO* PREEMPTS STATE REGULATION.

As to this issue, the FICPA adopts the well-reasoned argument contained in Point I of the brief filed by the AICPA in this cause.

POINT IV

CPA PRACTICE IN THE FIVE DISPUTED AREAS IS NOT THE UNLICENSED PRACTICE OF LAW.

The Proposed Opinion, especially as applied to CPAs, is an overbroad response to perceived but unproven pubic harm

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[13] Rev. Proc. 76-15 was updated and partially superseded in Rev. Proc. 84-86 but nothing therein affects the right of nonlawyers to represent taxpayers. See also Rev. Proc. 89-13, 1989-7 I.R.B. 25, authorizing "sponsors" to make available regional prototype plans and to submit adoption agreements to the IRS on behalf of employees for these plans. Sponsor is defined to include partnerships or corporations having members or employees authorized to practice before the IRS with respect to employee plan matters. Id. at 54.03. Parts of Rev. Proc. 76-15, although allowing nonlawyer representation, limited to law firms the ability to submit pattern plans to the IRS. The Rev. Proc. 89-13 makes it clear that others are now authorized to present plans and adoption agreements.

allegedly caused by nonlawyer practice in the pension field. The Opinion disregards the unique ability of CPAs to provide ethical, responsible, competent, and independent advice in the pension field. The Opinion unnecessarily restricts and impedes commerce, is unduly anticompetitive, and constitutionally overbroad in its restrictions.[14] To avoid this improper overreaching, this Court must balance the competing interests and narrowly tailor any practice restraints in the least restrictive manner possible.

For the reasons below, the FICPA urges that, should this Court decide against preemption, the Court should nevertheless find that involvement by CPAs in the five disputed areas is not the "unlicensed practice of law." This Court should do as the New Jersey Supreme Court has done in the state inheritance tax area (see subpoint C below), and recognize an exception so as to permit CPAs to practice in the pension area.[15]

A. Florida's Definition of Unlicensed Practice of Law and Underlying Policies.

Florida's basic guidelines for determining unlicensed practice of law are contained in Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962), vacated on other srounds, 373 U.S. 379

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[14]The Proposed Opinion is thus violative of the substantive due process clause of the Fourteenth Amendment to the United States Constitution.

[15]Implicit in the power to define the practice of law and prohibit unauthorized practice, is the ability to authorize the practice of law by nonlawyers in appropriate situations. See The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980) also noting that the unauthorized practice of law and the practice of law by nonlawyers is not synonymous.

(1963). Practice of law is involved if: (1) the advice and the services affect important rights of a person under the law; (2) the reasonable protection of the rights and property of those advised requires that the advisor possess legal skill and knowledge of the law greater than that possessed by the "average citizen"; and (3) the services are provided to others as a course of conduct. 140 So. 2d at 591.

However, this Court has recognized that the mere application of the Sperry definition will not suffice. The Florida Bar v. Moses, 380 So. 2d 412, 416 (Fla. 1980). The underlying policies must be considered. In Moses, this Court stated that, "[t]he single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." Id. at 417. See also Florida Bar v. Brumbaush, 355 So. 2d 1186, 1194 (Fla. 1978) (Karl, J., concurring).

Because the underlying policy considerations of the rule must be considered, this Court has recognized that cases involving the unauthorized practice of law must be determined on a case-by-case basis and flexible enough to conform to the changing conditions in society. Id. at 1191-1192. This is illustrated by Keyes Co. V. Dade County Bar Ass'n, 46 So. 2d 605 (Fla. 1950), where this Court carved out an exception for unauthorized practice of law for real estate brokers who prepare real estate contracts. Since the preparation of such legal documents clearly constitutes practice of law under the

Sperry definition, the only way to explain Keves is as a policy oriented exception. In Keves, the Court was influenced by the fact that Florida carefully regulates real estate licensees under Chapter 475. Certain technical qualifications are required of brokers, thus providing protection to the public in real estate transactions. Accordingly, no policy justification existed in Keves for prohibiting brokers from drafting contracts.

Thus, in order to determine what constitutes unlicensed practice of law in a specific area such as pension planning, it is necessary to consider the policies underlying the unlicensed practice enforcement and ask: do those policies require restraining of the conduct at issue?[16]

The policy justifications for unlicensed practice enforcement relate to protection of the public and can be separated into three main qualifications which nonlawyers are presumed to lack with regard to the practice of law: (1) integrity and regulation; (2) competence; and (3) independence. The presence of these three ingredients operates to protect the public from harm by those who provide services related to the law. See, e.g., ABA 1977 Opinion, Part IV (Appendix "B" hereto).[17]

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[16] See 1977 ABA Standing Committee on Unlicensed Practice of Law, Employee Benefit Planning Informative Opinion A of 1977, Part IV (ABA May 1, 1977), reprinted in 40 Unauthorized Practice of Law News 237 (1977) (Appendix "B" hereto) (hereinafter "1977 ABA Opinion").

[17] See also C. Hyrne, Jr., Unauthorized Practice and Estate Plannins and Administration: A Mild and Temporate Dissent, 29 U. Fla. L. Rev. 647, 659-60 (1977).

B. The Special Qualifications of CPAs.

The aforementioned policy justifications which may prohibit others from practicing in the pension area, should not prohibit CPAs in the instant case. As illustrated below, CPAs are in fact: (1) held to high standards of integrity and ethics, and are strictly regulated; (2) highly competent, trained and qualified; and (3) required to exercise independent judgment for their clients. Because of such, there is no threat of public harm and no reason to define pension practice by CPAs as "unlicensed practice of law."

(1) Integrity, Ethics, & Regulation.

Accountants are subject to regulation that incorporates ethical and fiduciary standards comparable to those in Florida's Rules of Professional Conduct for lawyers. Accountancy, like law, is heavily regulated in order to assure ethical, competent, independent, and professional accounting services. S473.301, Fla. Stat. (1987). Every CPA in Florida is governed and controlled by Chapter 473, Florida Statutes (1987), and the rules adopted by the Florida Board of Accountancy. CPAs are also governed by a standard of care and a standard of ethics similar to the Code of Professional Responsibility.[18] As the Statement of Principles between Lawyers and

[18]The AICPA's Code of Professional Conduct and Bylaws are similar to the ABA's Code, and contains general principles of conduct and specific rules of performance. The AICPA Bylaws also provide disciplinary procedures including the termination of membership in the AICPA. **See** AICPA Bylaws §7 (1988). The FICPA has adopted the AICPA Code of Professional Responsibility as the Code of Professional Ethics of the FICPA.

Accountants[19] noted:

> It is in the best public interest that services and assistance in federal income tax matters be rendered by lawyers and certified public accountants, who are trained in their fields by education and experience, and for whose admission to professional standing there are requirements as to education, citizenship, and high moral character. They are required to pass written examinations, are subject to rules of professional ethics, such as those of the American Bar Association and American Institute of [Certified Public] Accountants, which set a high standard of professional practice and conduct, ...

(Emphasis added). An applicant for CPA licensure must be of good moral character, meet certain educational requirements, and pass a comprehensive national exam. A CPA must exercise due professional care in the planning, supervision, and performance of an engagement. Fla. Admin. Code Rule 21A-22.001 (1989). Section 473.315(2), Florida Statutes (1987), requires that a CPA have a reasonable expectation that he can complete any project undertaken with professional competence. Failure to do so, or for any other violation under Chapter 473, may subject that CPA, like an attorney, to disciplinary proceedings. §473.323(1), Fla. Stat. (1987). The penalties imposed are similar to those imposed on attorneys and can include denial or revocation of their license; a fine of up to

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[19]The American Bar Association previously entered into a Statements of Principles with accountants with respect to the practice of law. See VII Martindale-Hubbell Directory 71M-72M (110th ed. 1978). The Statement has since been rescinded due to antitrust concerns and pressure from the FTC. See Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. at 10, 20, n.36 (1981) (hereinafter "Rhode").

$1,000 for each offense; or a reprimand, probation, or a restriction on their license to practice. §473.323(3), Fla. Stat. (1987).

The Florida Department of Professional Regulation is required to investigate complaints and may continue any investigation after a complaint is withdrawn. S455.225, Fla. Stat. (1987). Moreover, the federal Treasury regulations discussed in Point II above also provide procedures to prohibit disreputable conduct by CPAs practicing before the IRS. 31 C.F.R. §§10.50-76 (1989).

(2) Competence, Training, & Qualifications.

A CPA must meet educational requirements consisting of a baccalaureate degree from an accredited school with a major in accounting or its equivalent. In addition, he or she must complete at least thirty semester hours or forty-five quarter hours in excess of those required for the baccalaureate degree including a total education program with a concentration in accounting and business. The number of hours in each area of study are specifically set forth in Florida Administrative Code Rule 21A-27.002 (1989). The total hours of education in accounting course work compares favorably to the legal training required of attorneys.

Similarly, like the law profession, regulation of the accounting profession does not end with obtaining a license. In order for an accountant to have his license renewed, every two years he must complete eighty hours of continuing professional education programs in public accounting subjects

approved by the board.[20] S473.312, Fla. Stat. (1987); Fla. Admin. Code Rule 21A-33.003 (1989). These continuing professional educational programs have to be formal programs of learning which contribute directly to professional competency. Id. They may include (1) programs developed by the AICPA; (2) technical sessions; (3) university or college courses; or (4) formal organized in-firm education programs. Id.

Further, given the complexity of the Internal Revenue Code, it should be obvious that most accountants are better qualified to handle ordinary tax matters than nonspecialist attorneys. Rhode, 34 Stan. L. Rev. at 81, n. 321 (1981). With regard to the pension field specifically, part of the eduction and the training CPAs receive is specifically devoted to the pension field. The pension field arises directly out of and is grounded upon the tax laws of the Internal Revenue Code. Therefore, unlike any other profession, CPAs are intimately familiar with the issues that arise out of the pension field and the resolution of such. As a result, CPAs have a greater knowledge of the pension field than the average layman and, indeed, often greater than the average lawyer. In its position paper,[21] the Tax Section admitted that its experience with "pension consultants" was that such consultants are technically knowledgeable and possess a good understanding of the rules governing qualified retirement

[20]By comparison, Florida lawyers are only required to complete thirty hours every three years. Rule 6-10.3(b), Rules Regulating The Florida Bar.

[21]Tab 4, March 20, 1989 Heilbronner letter, at 4.

plans. Therefore, no policy justification exists for excluding CPAs from the pension field as it is their expertise and training upon which attorneys and employers often rely.[22]

(3) Independence and Loyalty.

The accounting profession shares another similarity with the law profession in its concern to ensure independent professional judgment. Section 473.315(1), Florida Statutes (1987), requires CPAs to be independent of any enterprise on which they express an opinion concerning a financial statement. Further, Florida Administrative Code Rule 21A-21.002, requires a CPA to maintain integrity and objectivity in his practice and prohibits a CPA from subordinating his judgment to that of others.

Indeed, similar to attorneys, any communication CPAs have with their clients is privileged. §§90.5055 and 473.316, Fla. Stat. (1987). Both professions are subject to strict ethical obligations and failure to adhere to such obligations subjects the individual to disciplinary proceedings.

Therefore, the Committee's Proposed Opinion at 4 indicating that it was concerned about nonlawyers practicing in this area being motivated by the sale of a product or service other than the plan itself, simply does not apply to CPAs. A CPA's relationship to the client is very similar to that of an

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[22]The Tax Court of the United States has recognized this fact by allowing practice in that court by both lawyers and nonlawyers who have learned tax law and procedure sufficient to pass the court's oral and written examination. 60 T.C. 1152 (1973).

attorney's. 23

(4) Summary as to *CPA* Qualifications.

Due to the many similarities between the accounting and law professions, the concerns expressed by the Proposed Opinion are unfounded as they relate to CPAs. The legal and accounting fields overlap in certain areas such as taxation and pension planning. CPAs are in a unique position to perform many activities which may require a certain amount of legal expertise both because of their knowledge of the law in these areas and because their profession is so highly regulated.

The pension area is such that it requires the special competence of CPAs in order for pension service to be delivered efficiently and cost effectively. The regulations which CPAs are subject to provide the public with the same protection against fraud and incompetence as the public has with attorneys.

Because of these similarities between accountants and attorneys, the New Jersey Supreme Court, as discussed below, allows an exception for CPAs to perform activities in the state inheritance tax area. The same exception is urged for CPAs in the Florida pension planning area.

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[23] **Similarly,** the Tax Section was incorrect when it asserted that pension consultants are not regulated by any supervising authority, are not subject to disciplinary proceedings, and generally do not have to answer for their mistakes other than in an action for negligence. Tab 4, March 20, 1989 Heilbronner letter at 4. As set forth above, this is **not** true for CPAs.

C. The New Jersey Case and Appropriateness of a Limited Exception for CPA Practice in the Pension Plan Area.

This Court is urged to recede from The Florida Bar v. Turner, 355 So. 2d 766 (Fla. 1978) which was decided in a stipulated, nonadversarial setting[24] and instead adopt the position of the New Jersey Supreme Court in the case of In re Application of New Jersey Society of Certified Public Accountants, 102 N.J. 231, 507 A.2d 711 (1986) (hereinafter "New Jersey Society"). The court unanimously allowed a limited exception to permit CPAs to prepare and file inheritance tax returns even though the preparation of those returns required the application of a broad range of technical legal principles. Id. at 712, 715. The court reasoned that:

> ...[I]n cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation.... [E]ach set of circumstances must be considered "in a common sense way which will protect primarily the interest of the public and not hamper or burden that interest with impractical and technical restrictions which have no reasonable justification."

507 A.2d at 714, quoting, Gardner v. Conway, 234 Minn. 468, 481, 48 N.W. 2d 788, 797 (1951) (emphasis added). The New Jersey Standing Committee's proposed opinion had noted numerous

[24] In Turner, this Court approved stipulated conclusions of law to the effect that the designing, drafting and amending of pension plans by nonlawyers for others constituted the unlicensed practice of law. The facts on which the opinion was based were not set out. The Court merely approved the parties' stipulation containing the conclusions of fact and law. Because Turner was not a truly contested case and the Court was not fully briefed on the important issues in a truly adversarial setting, Turner should be questioned.

aspects of Inheritance Tax Returns that might require knowledge of legal principles. 507 A.2d at 715. The preparer, for example, might have to know the difference between various forms of joint tenancy, and their taxability. One schedule required knowledge of various fields of law, including corporations, partnerships, closely held corporations, agency, trust, custodial accounts, and contracts. Another schedule involved legal interpretations relating to transfers, gifts in contemplation of death, inter vivos trusts, ownership of property, life insurance, and annuities. Still another schedule involved a listing of beneficiaries and legal questions such as the statute relating to lapses, statutes relating to taxability, and the laws of dissent and distribution.[25]

The court first determined that the preparation of the inheritance tax return was so dependent on the correct application of legal principles as to require the court to exercise its supervisory jurisdiction over the practice of law.[26] However, after recognizing that CPAs are closely regulated by the state and disciplined by their own profession and that many CPAs are qualified both by training and experience to prepare

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[25]As here, the New Jersey CPAs argued that the federal government allows qualified CPAs to practice before the Treasury Department and the United States Tax Court. 507 A.2d at 715. In addition, they noted that a majority of the states permit CPAs to prepare, sign and receive a fee for preparing inheritance tax returns. Id.

[26]However, the court determined it would not post needless restrictive conditions that disserve the public interest and noted that the practical criterion distinguishing that which is from that which is not law practice must be closely related to the purpose for which lawyers are licensed as the exclusive occupants of their field. Id. at 716.

Inheritance Tax Returns for most estates, the court held:

> Recognition of the skills possessed by a substantial number of certified public accountants compels the conclusion that the public interest would best be served by permitting certified public accountants to Prepare and file Inheritance Tax Returns without the supervision of an attorney, subject to the condition that the client be notified in writing, before the certified public accountant commences work on the return, that review of the return by a qualified attorney may be desirable because of the possible application of legal principles to the preparation of the tax return.

Id. at 717 (emphasis added). Thus, the New Jersey court determined that the public interest would best be served by permitting CPAs to prepare and file the tax returns without the supervision of an attorney as long as the client was notified in writing that the review of the return by a qualified attorney may be desirable. The court recognized that CPAs are aware of the boundaries of their own professional skills and would recommend consultation with counsel whenever the complexities of the particular return indicated legal advice was desirable. Id.

Here, the FICPA urges a similar holding. CPAs should be able to practice in the five disputed pension areas. Florida's policy-oriented analysis of the definition of practice of law mandates such. See, e.g., Keyes Co. v. Dade County Bar Ass'n, 46 So. 2d 605 (Fla. 1950); The Florida Bar v. Moses, 380 So. 2d 412, 416 (Fla. 1980). In keeping with that policy, this Court should adopt the holding of New Jersey Society and permit CPAs to practice in the pension field. As

set forth above, based on lack of public harm and based on the integrity, competence, independence, professionalism, and strict regulation of CPAs, CPAs should be permitted to engage in all areas of the pension field. This includes the drafting of a plan for a client, with suggested review by an attorney. Such a holding would be in line with Keyes, Moses, and New Jersey Society and permit the public to receive the benefit of CPA expertise.

D. Specific Application to the Five Disputed Pension Areas.

(1) Selecting the Plan.

In accord with Keyes, Moses, and New Jersey Society CPAs should be permitted to recommend a specific plan. As explained above, CPAs are educated and trained in the complexities and intricacies of federal statutes, including the Internal Revenue Code. Part of this education and training is specifically devoted to the pension area. As a result, CPAs clearly have a greater knowledge of the tax and pension laws than the average citizen, and indeed often greater than the average lawyer. Accordingly, CPAs are more than capable and knowledgeable to provide advice to clients in the selection of a plan. There is no reason why CPAs cannot advise as to the selection of types of plans, subject to recommended review by a lawyer when a CPA in his professional judgment finds that particular issues or complexities are beyond the boundaries of his skills and require legal counsel.

(2) Drafting Plan Documents.

The Proposed Opinion prohibits a nonlawyer from drafting any plan documents, from selecting an attorney for the employer, and from using an attorney to "cursorily" review the documents relating to a plan. Prop. Op. at **17-18.** The Proposed Opinion further indicates that unauthorized acts may not be cured by the nonlawyer informing the employer that the employer should have the plan reviewed by the employer's attorney. Id. The rationale given is that it is the nonlawyer, rather than the lawyer, who is making the decision as to what is to be included in the plan and drafting the plan documents. Prop. Op. at **18.**

These prohibitions are entirely inappropriate for CPAs. There is no reason why CPAs cannot draft plan documents subject to review by counsel when appropriate. The Proposed Opinion ignores the fact that many law firms already rely heavily on the services of nonlawyers for the drafting of legal instruments. These nonlawyers may be paralegals,[27] law students acting as summer interns, law graduates who have not yet been admitted to the Bar, or legal assistants with no formal training. They complete probate forms, prepare deeds, and draft corporate charters and bylaws, subject to lawyer review. In Keyes, this Court permitted some drafting and

[27] See, e.g., Ch. 11, Rules Regulating the Florida Bar (allowing law student practice program subject to lawyer general supervision); P. Haskell, Issues in Paraleaalism: Education Certification, Licensing, Unauthorized Practice, **15** Ga. L. Rev. **631, 660 (1981); and J.** Lehan, Ethical considerations of Employing Paraleaals in Florida, 53 Fla. B. J. 14, **20 (1979).**

practice of law by brokers in the real estate field. Similarly, banks establish IRA accounts without the assistance of attorneys.[28] None of these persons has the qualifications of a CPA.

The Proposed Opinion would prohibit a nonlawyer from completing a prototype plan or the document implementing such. The Proposed Opinion requires that the nonlawyer advise the employer to consult an attorney of his choosing to review the plan so as to advise as to which options should be chosen. Prop. Op. at 16, 18.[29]

Rather than the Committee's broad prohibitions as to drafting, this Court should at a minimum consider the ABA 1977 Opinion. Although still not sufficiently broad, it allows nonlawyer drafting with recommended attorney review.[30]

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[28] Compare In re The Florida Bar, 215 So. 2d 613, 614 (Fla. 1968) (approving consent decree allowing securities broker to complete standardized printed forms relating to prototype "Keogh" retirement plans approved by the IRS provided notification to consult with attorney is given).

[29] The Committee so held even though the Tax Section apparently believes that a CPA can complete a prototype plan, subject to review by an attorney. See, e.g., Tab 4, March 20, 1989 Heilbronner letter at 4 indicating that it is only prudent that the services of an attorney be used in a prototype situation "at least to review" the adoption agreement with the client. Moreover, the Committee's holding conflicts with In re The Florida Bar, supra, n. 28.

[30] The 1977 ABA Opinion indicated that nonlawyers were not authorized to prepare draft legal documents affecting the adoption or amendment of a pension plan, including trust instruments, contracts and corporate documents. However, the Committee noted that this did **not** include materials furnished to the employer's lawyer. Note 10 of the 1977 Opinion noted that specimen documents could even be delivered to an employer provided a statement was prominently displayed on such documents to the effect that the documents were important legal instruments with legal and tax implications and should be

Additionally, the **1977** ABA Opinion explicitly permits nonlawyers to prepare employee handbooks and Summary Plan Descriptions ("SPDs"). The Proposed Opinion below, however, states that a SPD must be prepared by an attorney since the failure to carry out this communication in a timely manner is a breach of the employer's fiduciary duty and could result in liability to the employer as well as harm to the employee. However, CPAs are just as qualified as attorneys to file such documents in a timely manner. Pursuant to ERISA Section 102(a)(1), the SPD must be written in a manner calculated to be understood by the average plan participant. Since it was not the intention of Congress that this be written in a manner that is beyond the understanding of the average plan participant, there is no reason CPAs should be prevented from drafting this document.

Generally, because CPAs are uniquely qualified by training and experience, strictly regulated and disciplined, and act independently on behalf of clients, there is no reason to restrain CPAs from preparing any of these documents, especially if subject to attorney review.

(3) *Qualification of the Plan.*

The Proposed Opinion permits only attorneys to obtain and maintain qualification of a plan for tax purposes. Prop. Op.

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reviewed by the employer's lawyer. In so noting, the **1977** Opinion added that nonlawyers had a very wide latitude in assisting and consulting the employer's lawyer and it was up to the employer's lawyer to exercise independent legal judgment on behalf of the client. **1977** ABA Opinion, Part IX.

at 19.[31] The Proposed Opinion, however, recognizes an exception with regard to qualification for nonlawyers who are specifically authorized by federal rule or regulation to present a plan to the IRS for qualification. As discussed in Point II above, the FICPA maintains that there are, in fact, specific federal rules authorizing qualifications by CPAs, and therefore such rules preempt this Court's authority. To remove any doubt, this Court's opinion should expressly recognize this right. Alternatively, CPAs by virtue of their special qualifications and characteristics described above, should be allowed to obtain and maintain qualifications of plans.

(4) Termination of the Plan.

The Proposed Opinion requires the supervision of an attorney throughout the termination process. Prop. Op. at 21. This includes the preparation of corporate resolutions, plan amendments if necessary, and the application to the IRS for a determination letter on the termination.[32] Although the Opinion recognizes nonlawyer involvement is essential, the Opinion, nevertheless, requires coordination and supervision with legal counsel.

Again, we urge that CPAs, by virtue of their special qualifications and the characteristics described above, should

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[31] The 1977 ABA Opinion is silent on this matter.

[32] Nevertheless, the Proposed Opinion recognizes that various forms to be filled out with the IRS, such as the final return for the plan, the application materials for the determination request, as well as materials to be submitted to the PBGC are typically handled by nonlawyers. Prop. Op. at 21.

be allowed to handle all aspects of plan termination subject to recommended review by counsel should the CPA, in his professional judgment, deem assistance necessary. CPAs in the pension field are eminently qualified to handle the various administrative forms involved such as elections and waivers and consents in connection with payouts. Moreover, they have special expertise with regard to advice concerning taxation of distributions, tax-free rollovers, and transfers to other qualified plans.

(5) General Tax and Pension Advice.

CPAs should not be prohibited from giving a client an opinion that a particular type of plan is suitable to the client's situation or that it may qualify for tax benefits under the Internal Revenue laws and regulations.

CPAs are eminently qualified to give specific advice regarding pension matters including the effect of tax laws[33] upon contributions by the employer, upon withdrawals from the fund during employment, upon employee resignation, discharge or death, or upon the selection of the methods of funding the plan. They should also be able to advise of such matters as the proper interpretation of the plan, the deductibility of

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[33]The Proposed Opinion notes that practice in the pension plan area and in the ERISA area has ramifications in other areas of the law. For example, there is a question as to personal tax planning for small business owners and the interplay between some of the income tax consequences to a retirement plan and some of the estate tax consequences or probate planning to the individual. CPAs, by reason of their training, are as qualified, or more qualified, in these areas than attorneys.

excess contributions, and the effect of suspending contributions in a particular year. Due to the CPAs expertise, these activities should not be considered the unlicensed practice of law.

(6) Summary as to the Five Disputed Areas.

In summary, the pension plan practice is well within the expertise of the CPA. Should a CPA in his professional judgment determine that a particular area is beyond his expertise, a lawyer's assistance can be obtained. As to CPAs, there is no reason to adopt the Proposed Opinion's overbroad prohibitions against giving advice as to suitability or eligibility of plans. Moreover, there will be an anticompetitive effect if the broad prohibitions of the Proposed Opinion are upheld. The Proposed Opinion would prohibit the public from receiving competent, ethical and responsible representation by highly trained experts in the pension field. A broader choice of services is in the best interests of employers and the public. These important interests must be balanced against any presumed injury to the public.

POINT V

THE PROCEDURES FOLLOWED BELOW *AND* THE RESULTANT RECORD ARE CONSTITUTIONALLY INADEQUATE TO DECIDE THESE IMPORTANT ISSUES.

Should this Court reject the arguments set forth above, this Court, nevertheless, should not affect the substantial rights at issue based on the scant Record below. The Record is

wholly inadequate to make a determination that CPAs improperly practice law when they practice in the five disputed areas. The nonadversarial nature of the proceedings below, lack of proper notice, lack of investigation, and the minimal evidence presented prevent this matter being ripe for adjudication.[34] At a minimum, this Court should appoint an ad hoc committee and remand for further investigation, hearings, and findings.

A. The Inadeauate Record Below.

Rule 10-7.1(b), Rules Regulating The Florida Bar, requires that a request for an advisory opinion detail all operative facts upon which the request for opinion is based. This was not done. The Tax Section only requested that the Committee investigate nonlawyers practicing in the pension field, and if that investigation showed nonlawyers to be engaged in the unlicensed practice of law, to then issue an advisory opinion.[35] Since no operative facts were presented at the time the question was presented by the Tax Section to the Standing Committee, or noticed for public hearing, there was nothing for the public to respond to as contemplated by Rule 10-7.1(b). This is contrary to the procedure set forth in Rule 10-7.1(b) and fails to provide those potentially affected with notice of what is at issue, denying them an opportunity to present contrary viewpoints.

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[34] For these reasons, the determination below is violative of FICPA's procedural due process rights. U.S. Const. amend. XIV; art. I, §9, Fla. Const.

[35] See n. 2 supra.

Similarly, the question presented to the Committee was very limited in scope. The Proposed Opinion, however, goes far beyond the question presented. Thus, the public notice was ineffective as it failed to apprise those operating in the area of the extent of the issues which would be considered.

At the Standing Committee level, only one public hearing was held and limited oral and written testimony was received. Despite being prompted to do so,[36] there is no evidence that the Committee communicated directly with or entered into any active dialogue with any of the relevant agencies such as the Internal Revenue Service, the Labor Department, the PBGC, or any of the various industries involved such as the life insurance industry, banking, accounting, actuaries, or pension consultants. As a result, those practicing in the field were deprived of their right to influence decisions that are to affect their livelihood.

As to CPAs, there was no evidence in the Record below regarding their unique qualifications, education requirements, supervisory and regulatory requirements, or disciplinary procedures. Nor was there sufficient discussion of the federal statutory and regulatory provisions governing the extensive practice of CPAs before the IRS.

Moreover, in its Proposed Opinion, the Standing Committee made a specific finding of public harm even though there is very little "evidence" in the Record of any actual public harm as a result of nonlawyer activity in the pension field.

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[36] Transcript at 63.

Public harm, or the likelihood of such, is a prerequisite to this Court issuing an opinion. See, e.g., The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980). Yet, the Committee admitted that it did not receive a great deal of testimony on the issue of public harm from lay witnesses. Prop. Op. at 4. In fact, the FICPA can find no testimony by lay witnesses regarding public harm. The Proposed Opinion does, however, indicate that attorneys related "numerous" instances of harm. Id. But, the Record in total indicates the instances were not numerous and were generally of a nonspecific nature. Typically, only brief, vague "facts" were given and the alleged offending party was not named nor was the offender given an opportunity to respond. See, e.g., Transcript at 21, 26, 74-75, 84, and 99-101.[37] Most of the testimony came from lawyers practicing extensively in the area who have a vested interest in seeing that nonlawyers not be allowed to compete. Additionally, the Record contains absolutely no probative evidence of public harm as a result of CPAs practicing in the pension field.[38] Nor was there ever any discussion as to whether as much or even more harm is caused by lawyers.

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[37] But see Tab 4, March 20, 1989 Dixon letter, which contained a somewhat specific charge against a non-CPA pension consultant. However, the person charged denied the charges and denied any harm could occur. Tab 4, May 2, 1989 Liedman letter.

[38] The Record appears to contain only one alleged incident relating to CPAs. That incident came from an attorney who indicated that an unnamed Big Eight accounting firm gave advice that a plan did not have to be amended when it was clear that it did have to be amended. Transcript at 83. Little specifics were given nor was the unidentified Big Eight firm given an opportunity to respond to the charge.

Based on this inadequate record, it was entirely improper for the Committee to make a finding of public harm and then use that as a basis for issuing the Proposed Opinion. Before broadly prohibiting pension practice, especially by CPAs, this Court should, at a minimum, insist that an adequate record be developed on the various issues, including public harm, if such exists.[39]

In Florida Bar Re: Advisory Opinion HRS Nonlawyer Counselor, 518 So. 2d 1270 (Fla. 1988), this Court was faced with complex issues involving an unlicensed practice of law question relating to nonlawyer court representation in contested dependency court cases. Based on the record presented, this Court declined to decide the case and decided further study was needed:

> While we agree with the Committee that HRS lay counselors are engaged in the practice of law, we are not convinced that such practice is the cause of the alleaed harm. or that enjoining this practice is the most effective solution to this complex problem. The parties have raised legitimate and pressing concerns which are worthy of further study. The Chief Justice shall appoint an ~~ad hoc committee~~

[39]The only empirical study of which the FICPA is aware shows no indication of wide-spread public injury attributable to nonlawyer practice in various areas of law. See Rhode, Policina The Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 33-35; 85-86 1981) (hereafter "Rhode"). Instead, some courts have noted the absence of empirical support for allegations of nonlawyer incompetence. For instance, in Colorado, where realtors had given real estate advise in most real estate transactions over a 50-year period, the record in a bar-initiated unlicensed practice suit revealed no "instance in which the public had suffered injury." Id. at 86. Similarly findings were made by New Mexico Supreme Court. Id.

> to study the problem and make recommendations to this Court.

Id. at 1272 (emphasis added). This case is similar. The Record does not contain evidence of public harm or that enjoining nonlawyers from certain activities is an effective solution. The matters at issue are of great public importance and involve thousands of CPAs and nonlawyers as well as the public interest. A decision restricting nonlawyer practice in the five disputed areas should be made only after an adequate record is developed with fuller opportunity for investigation and testimony. If this Court is persuaded that the Committee has raised legitimate issues, it should appoint an ad hoc committee composed of members from various industries to study the problem and make recommendations.

B. Committee Conflicts of Interest.

The Proposed Opinion also fails to comport with the rules of this Court based on the improper participation by certain members of the Standing Committee. Rule 10-7.1(e) addresses conflicts of interest with respect to members of the Standing Committee and states:

> Committee members shall not participate in any matter in which they have either a material pecuniary interest that would be affected by a proposed advisory opinion or committee recommendation or any other conflict of interest that should prevent them from participating. However, no action of the committee will be invalid where full disclosure has been made and the committee has not decided that the member's participation was proper.

(Emphasis added.) Four attorney members of the Committee

declined to vote because of conflicts relating to their legal practice in the pension area. Nevertheless, the Record indicates that these members may have participated in some fashion.[40] One is a member of the Tax Section and actually wrote a letter to the UPL counsel, arguing on behalf of the Tax Section, and initially requesting an advisory opinion. Tab 1, November 8, 1988 Keane letter.

This participation and the actual conflicts supply an additional reason this Court should disapprove the Proposed Opinion or appoint an ad hoc committee to study the issues in more detail.

POINT VI

FIRST AMENDMENT RIGHTS OF CPAs WOULD BE VIOLATED BY ADOPTION OF THE OPINION.

Although accorded less protection than political speech, commercial speech is still entitled to the protection of the first amendment to the United States Constitution. See Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980). In Central Hudson, the United States Supreme Court recognized that such speech is worthy of protection as it furthers the avowed societal objective of disseminating information to consumers. Absent a danger, the state cannot regulate such speech. Id. at 565. In Florida Bar v. Braumbaush, 355 So. 2d 1186, 1192 (Fla. 1978), this Court recognized that any limitations imposed as a result of a

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[40] See n. 3 supra.

finding of the unlicensed practice of law, necessarily involves first amendment rights. See also, Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979).

In supplying protection to commercial speech, the United States Supreme Court has adopted a balancing test. Under this balancing approach, the state may act to ban misleading or unlawful commercial speech. But see Brumbauah, 355 So. 2d at 1193 (misleading commercial speech is not alone sufficient justification to ban such speech). But where the speech is neither misleading nor unlawful, the state's power is strictly limited and the regulation must be narrowly tailored to achieve a substantial governmental interest. Central Hudson 447 U.S. at 564; Brumbauah, 355 So. 2d at 1192-93; Rhode, 34 Stan. L. Rev. at 74-97 (1981).

The state may not, under the guise of unlicensed practice of law, "...assume a paternalistic approach which rests in large part on its citizens being kept in ignorance." Brumbauah, 355 So. 2d at 1193, citing, Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

Here, by intent or by effect, the Proposed Opinion accomplishes just such a result. As to CPAs, there has been no showing that their involvement in the pension field has caused, or is likely to cause, harm to the public. This must be a predicate to any decision that an activity constitutes the unlicensed practice of law, because without such, there can be no danger, and thus no state justification for banning such. See UMW District 12 v. Illinois State Bar Ass'n, 389

U.S. 217 (1969) (courts scrutinize the record for some concrete evidence "of abuse, of harm to clients, [or] actual disadvantage to the public"). See also Central Hudson, 447 U.S. at 565; Brumbauah, 355 So. 2d at 1193-94; Florida Bar Re: Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909 (Fla. 1989).

As previously discussed (Point IV), CPAs possess the integrity, the competence, and the professional independence to continue supplying their expertise and knowledge in the pension field. Restricting speech beyond that absolutely required to protect the public is unjustified and a violation of the first amendment rights of CPAs. Brumbauah, 355 So. 2d at 1194, 1195. Accordingly, this Court should reject the Proposed Opinion.

CONCLUSION

Rather than meeting its expressed goal of clarifying the issues related to pension plans, the Proposed Opinion confuses them. It directly conflicts with the comprehensive federal scheme discussed in Points II and III above. Portions also conflict with the **1977** ABA Opinion. Moreover, the Proposed Opinion conflicts with the policies and case law discussed in Point IV.

This Court should reject the Proposed Opinion as it relates to CPAs. CPAs must be allowed to practice in the five disputed areas based on the Supremacy Clause of the United States Constitution and the federal statute and regulations discussed above. Should this Court reject the preemption arguments, it should find that CPA practice in the five disputed areas is not unauthorized practice of law because the policy justifications which prohibit the practice of law by nonlawyers are not violated by CPAs practicing in this area.

DATED this **2nd** day of October, **1989.**

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