

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,479

**IN RE FAO# 89001
NON-LAWYER PREPARATION OF PENSION PLANS**

**REPLY BRIEF OF THE AMERICAN SOCIETY OF PENSION ACTUARIES
TO THE RESPONSIVE BRIEF OF THE FLORIDA BAR
STANDING COMMITTEE ON THE UNLICENSED PRACTICE OF LAW**


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I. STATEMENT OF CASE

The American Society of Pension Actuaries **was** granted an extension of time by this Court until January **12, 1990**, in which to file its Reply Brief to the Responsive Brief of the Florida Bar's Standing Committee on the Unlicensed Practice of Law.

II. SUMMARY OF ARGUMENT

A. The Responsive Brief of the Standing Committee does not address our analysis of the asserted public harm basis for the Proposed Advisory Opinion.

B. The Responsive Brief's analysis of the circumstances under which a non-lawyer pension professional can draft pension documents for review by **an** attorney is illogical.

C. The assertion in the Responsive Brief of the state-action exemption for **an** exclusion from the Sherman Act is unjustified.

111. ARGUMENT

A. THE RESPONSIVE BRIEF DOES NOT ADDRESS OUR ANALYSIS OF THE ASSERTED PUBLIC HARM BASIS FOR THE PROPOSED OPINION.

As the Supreme Court of Florida has emphasized, the public interest is the paramount consideration in the determination of what is the unauthorized practice of law.’ We find the Responsive Brief of the Florida Bar substantially unresponsive to the arguments presented in our brief that the adoption of the Proposed Advisory Opinion (Opinion) is unnecessary to preclude the harm cited as a basis for the Opinion.

The Opinion states that public harm is being caused by the activities of non-lawyers in the pension field for two reasons. The first stated reason was that the non-lawyer practicing in the pension field is often motivated by the sale of a product or service other than the plan itself.

We described in our brief the extensive manner in which ERISA addresses such conflict of interest situations on the part of **“parties-in-interest”**.² A pension actuary *or* consultant who provides services to a plan is a party-in-interest. The Responsive Brief of the Standing Committee ignored our discussion of the ERISA rules and simply reiterates the concern expressed in the Opinion.

¹ See *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978) (per curiam); See also *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980)

² The Employee Retirement Income Security Act of 1974

As a practical matter, it is impossible to eliminate the potential harm from every conflict of interest situation that the mind can envision. What is appropriate is a framework that addresses the problems which are likely to occur. For example, a lawyer who advises a client to litigate is not barred from representing that client in the litigation process. Such a conflict of interest is too unlikely to cause harm to be an appropriate subject for regulation. Similarly, in the instant case, the potential **harm** is too unlikely to occur because of the ERISA rules, and because the employers who adopt pension plans are, as a group, successful businessmen who are quite capable of determining whether there is any potential harm from dealing with pension professionals who also sell products.

The Opinion states that:

"Another concern of the Standing Committee...is the nonlawyer's failure to consider the effect of the pension plan on other areas of the law or the employer's business. For example, the nonlawyer often lacks the expertise to consider the interplay between the tax consequences arising from the pension plan and other tax ramifications such as estate tax or probate planning. If these areas are not taken into account the client is not properly served and the likelihood of public harm is substantial."

Before dealing with this specific concern, a fundamental question should be considered--the knowledge of the average attorney with respect to pension law and related matters. The Responsive Brief recognizes that the average attorney has little expertise in this area. However, the Responsive Brief then concludes that this is immaterial, and that the complexity of the field justifies the restrictions on non-lawyer practitioners contained in the Opinion. We **find** this logic to be strained at best. It is exceedingly relevant to any

consideration of the public interest, which is the stated foundation of the Opinion, as to the relative expertise of lawyers and non-lawyer pension practitioners in pension law. In this regard it is clear that the level of knowledge of the average pension actuary and consultant far exceeds that of the average attorney. It should also be noted that not only is the average pension actuary and consultant more familiar with pension law, but is also much more familiar with the complexities involved in such operational matters as participants entering and leaving the plan, the computation of benefit accruals and payments, and the administration of plan loans. A knowledge of such matters is critical to devising a plan that is administrable on a cost-effective basis as well as legally sufficient. It is clearly not in the public interest to deny to employers the ability to utilize the expertise of such pension actuaries and consultants to the fullest extent possible.

As indicated above, it cannot be presumed that an individual has any particular degree of expertise in the pension field because he is an attorney. However, there are objective indicators of such expertise with respect to non-lawyer pension practitioners. Enrolled Actuaries must pass vigorous federal examinations which test their knowledge of pension law as well as pension mathematics and must meet an experience requirement. ASPA has an educational program under which an individual can attain the designation of Certified Pension Consultant (CPC) after passing four difficult examinations and meeting an experience requirement. Thus, this CPC designation certainly provides evidence of expertise in the area of pension law, as well as a variety of other areas material to the adoption and maintenance of pension plans. Other ASPA designations, and various designations of other organizations, indicate various degrees of expertise. Where the members of the Bar as a whole have no special expertise in pension matters, and non-lawyer pension professionals do possess special expertise, it is clearly in the public interest to allow employers to select

non-lawyer pension actuaries and consultants for detailed consulting and the drafting of pension documents for ultimate review by an attorney. The successful businessmen who adopt pension plans are quite capable of selecting the persons best able to assist them and should not be restricted from so doing by an exceedingly broad interpretation of what constitutes the unauthorized practice of law.

With respect to the specific concern expressed by the Committee as to the knowledge of the non-lawyer pension practitioner of estate and other matters, we reiterate the comments made in our brief that the concern of the Committee does not reflect reality. In fact, pension actuaries and consultants are generally well versed in these matters, either as a result of participating in ASPA's comprehensive educational program or by participating in other study programs.

B. THE RESPONSIVE BRIEF'S ANALYSIS OF THE CIRCUMSTANCES UNDER WHICH A NON-LAWYER PENSION PROFESSIONAL CAN DRAFT PENSION DOCUMENTS FOR REVIEW BY AN ATTORNEY IS ILLOGICAL.

The Responsive Brief of the Florida Bar fails to adequately respond to the argument that review by an attorney of a document prepared by a non-lawyer actuary or consultant is analogous to the review by an attorney of a document prepared by a non-lawyer, such as a paralegal, in his or her own firm. An attempt is made in the Responsive Brief to distinguish the permissible activities of the non-lawyer pension professional according to the sequence of events. The basic argument in the Responsive Brief is that if the non-lawyer pension professional is contacted first by the client, drafts the documents, and then an attorney reviews them, the review will not be sufficient. On the other hand, the Responsive

Brief views as acceptable the situation where the initial contact is between the lawyer and the plan sponsor and the lawyer then requests the assistance of the non-lawyer pension professional in the drafting of the documents. We do not believe there is any substantive difference between these two scenarios. The attorney's legal duty to review the documents is exactly the same no matter when in the sequence of events he has received them. In fact, the attorney would be subject to disciplinary proceedings if he fails to conduct an adequate review, without regard to when the review is conducted.

C. THE ASSERTION IN THE RESPONSIVE BRIEF OF THE STATE-ACTION EXEMPTION FOR AN EXCLUSION FROM THE SHERMAN ACT IS UNJUSTIFIED.

The Responsive Brief of the Florida Bar asserts that adoption of the Opinion would not violate the Sherman Antitrust Act because the state-action exemption **applies**.³ It is argued that the act of issuing an advisory opinion is an act of the sovereign itself, not of the Florida Bar, and therefore antitrust restrictions are not applicable. The Responsive Brief relies on principles stated in *Hoover v. Ronwin* and states that the case is controlling!

However, the facts of *Hoover* are dissimilar to those at issue in this case, and thus, the reasoning does not apply. *Hoover* involved an act of the Arizona Committee on Examinations and Admissions (Arizona Committee). The Arizona Supreme Court appointed the Arizona Committee to perform one specific function--to administer the Arizona Bar

³ The Sherman Anti-Trust Act, 15 U.S.C. (1970).

⁴ *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989 (1984).

Examination and to report the results back to the court.' The rationale for the holding in *Hoover* was that the party was challenging the action of the Arizona Supreme Court, who denied his admission to the Arizona Bar. The Court stated that the real party in interest was the Arizona Supreme Court and not the Arizona Committee.

However, the facts in *Hoover* and the instant situation are clearly distinguishable from one another. Unlike the Arizona Committee in *Hoover*, which was directed to perform one specific, supervised task, the Standing Committee in this case has broad authority.⁶ Therefore, an act of the Standing Committee can not be attributed to the State Supreme Court as was the act of the Arizona Committee, since the Standing Committee has a significant degree of autonomy. Thus, the argument that the Florida Supreme Court is the real party in interest in this case, and not the Standing Committee, is invalid.

The activity in this case was not directly that of the Florida Supreme Court; it was activity conducted pursuant to state authority. As stated in *Hoover*, "closer analysis is required when the activity in question is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization."⁷ As stated in our supplemental amicus curiae brief, the Supreme Court has held that two requirements must be met before

⁵ "The Arizona Supreme Court established the committee for the sole purpose of examining and recommending applicants for admission to the bar. *Rule 28(a)*. Its Rules provided: 'The examination and admission of applicants shall conform to this Rule...The committee shall examine applicants and recommend [qualified applicants] to this court...Two examinations will be held each year...' The Rules also specified the subjects to be tested and required the Committee to submit its grading formula to the Court in advance of each examination." *Id.*

⁶ The Supreme Court of Florida has delegated the duty of "considering, investigating, and seeking prohibition of matters pertaining to the unlicensed practice of law and prosecution of alleged offenders to the Florida Bar. *Rules Regulating the Florida Bar, Chapter 10, Rule 10-11(c)*.

⁷ *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989 (1984).

the state-action exemption will apply. The challenged restraint must be clearly articulated and affirmatively expressed as state policy and the policy must be actively supervised by the state itself. As indicated above, these conditions were not met in this case; furthermore, the asserted state interests must be balanced against the national policy of the Sherman Act in favor of competition.* We reiterate below some of the comments in our supplemental brief with respect to the application of the balance test in the instant case:

"The Fourth Circuit applied a balancing test to the state-action exemption issue in *Surety Title* on facts very similar to those presented in the instant case.⁹ The Court held that the Virginia State Bar's procedure on issuing advisory opinions, initiated by lawyers, on the unauthorized practice of law will not be exempt from the Sherman Act by the state-action doctrine."

"The Unauthorized Practice of Law opinion process places attorneys in the unique position of being able to define the extent of their own monopoly. It belabors the obvious to point out that lawyers in general would benefit from an expansive definition of the practice of law....This direct pecuniary interest highlights the infirmity of the system as it now operates....The state policy behind restricting the practice of law to licensed attorneys...is thwarted when...the regulatory activity serves an anti-competitive end without necessarily improving the services rendered to the consuming public....[The Advisory Opinion procedure on the Unauthorized Practice of Law] does not act to advance the consumer interest, but merely that of the

⁸ *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980).

⁹ *Surety Title Ins. Agency v. Va. State Bar*, Supra n. 4, at 298.

¹⁰ *Id.* at 309.

attorney. It is neither necessary to, nor **are** its anti-competitive effects reasonable, in light of the justifying state interest."

"The Florida procedure for issuing advisory opinions of the unlicensed practice of law is very similar to the Virginia procedure, except that it allows non-attorneys to file and it includes a system for limited judicial review." While these two factors make the procedure slightly less egregious, the anti-competitive factors, particularly in this situation, far outweigh the asserted state interests.

"On a more specific level, this particular Advisory Opinion, which limits non-lawyers in consulting on and developing pension plans, will be harmful to the public. Thus, the *California Liquor Dealers* balancing test dictates that the that the state-action exemption should not apply. The adoption of the Advisory Opinion would preclude actuaries and consultants from drafting a plan or amendment thereto or even discussing a potential plan in any detail. **This** would deny to the employer, and also the employee, the expertise vital to the process of establishing and maintaining the most effective and cost-efficient plan."

IV. CONCLUSION

The Opinion should be rejected. Pension actuaries and consultants should not be considered to be engaged in the unauthorized practice of law when performing any of the eight activities described on page **14** of the Opinion. Allowing non-lawyer pension actuaries and

¹¹ *Id.* at 308-9.

¹² *Rules Regulating the Florida Bar*, Chapter 10, Rules 10-7.

consultants to fully utilize their expertise will best serve the public.

Respectfully submitted,

A handwritten signature in cursive script, reading "Chester J. Salkind". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th of January, 1990, a true and correct copy of the foregoing Reply Brief of the American Society of Pension Actuaries was served upon the following parties of record by placing the same in the **U.S.**mail, with proper postage thereon fully prepaid, and addressed to said following individuals at their last known address as indicated:

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