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

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

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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.

RECORD CITES

The following record cite will be used:

"Transcript at ___"	=	The transcript of the January 12, 1989, public hearing.

ARGUMENT

POINT I

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.

The FICPA recognizes that the Committee had the difficult task of replying to approximately sixteen different briefs; however, the FICPA believes that the Committee failed to respond to the key arguments as raised in this preemption issue.

The FICPA previously argued that comprehensive federal regulations preempt state regulation in the designing, selection, drafting, qualifying, and terminating of pension plans by CPA's before the IRS. The FICPA's argument is based on 31 C.F.R. § 10.2(a) (1989) which defines very broadly the "practice" permitted before the IRS[1] and also 31 C.F.R. § 10.3 (1989) which admits CPA's, lawyers and actuaries (and to a limited extent enrolled agents) to practice before the IRS. In Sperry v. State of Florida, 373 U.S. 379 (1963), the United States Supreme Court interpreted federal patent regulations as authorizing certain qualified nonlawyers to perform services reasonably necessary and incidental to the preparation and prosecution of patent applications. The Court so held, despite

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[1]Practice before the IRS is defined as, "All matters connected with presentation ... relating to a clients's rights, privileges, or liabilities under the 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 ...." 31 C.F.R. § 10.2(a).

a patent regulation almost identical to the tax regulation (31 C.F.R. § 10.32),[2] that the Committee relies on as otherwise prohibiting nonlawyers from practicing law in the pension area.

Therefore, the only logical conclusion from Sperry is that reached by the FICPA and other parties. First, Section 10.3 specifically allows CPA's and other qualified nonlawyers to practice before the IRS. Second, "practice" is defined by Section 10.2 broadly enough to include the qualification of pension plans (a proposition which the Committee admits). Third, the United States Supreme Court's holding in Sperry requires that recommending, designing, drafting, and terminating pension plans be considered practice before the IRS as activities reasonably necessary and incidental to the qualification of pension plans.

In response, the Committee argues, just as the Florida Bar argued in Sperry over twenty five years ago, that the language found in 31 C.F.R. § 10.32. is a specific recognition by the federal agency that the state could define the unlicensed practice of law and therefore prohibit activities which the federal regulations would otherwise allow. In Sperry, the United States Supreme Court emphatically rejected this argument and the doctrine of stare decisis demands that this Court reject it now.

The Committee's contention that Sperry is distinguishable from this case is without merit. First, it would be difficult

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[2] "Nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law."

to find a more similar case. The language of 31 C.F.R. § 10.32 (1989) is almost identical to the regulation interpreted in Sperry.

Second, while the Committee recognizes that general constitutional principles apply in other areas, it argues that the Court's interpretation in Sperry of "practice" is limited to patent cases only. This would, of course, come as a shock to the courts that have applied Sperry beyond the patent field, including this **Court,**[3] and would be counter to our jurisprudence of stare decisis.

Another argument offered by the Committee to support its position relates to the definition of practice before the IRS. The Committee asserts that neither the preparation of tax returns nor pension plans is included within the definition in Section 10.2. The Committee then points to 31 C.F.R. § **10.7(c)** (1989) as specifically allowing nonlawyers to prepare tax returns. The Committee argues that since no similar specific regulation exists regarding the preparation of pension plans, preemption cannot exist. The Committee misunderstands the

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[3]**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): **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); 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 the unauthorized practice of law): Joffee 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 CPA's before the IRS as illicit practice of law).

intent behind Section 10.7(c) and the relationship between Sections 10.2 and 10.3. Under Sections 10.2 and 10.3, CPA's may prepare and draft tax returns and pension plans as an activity reasonably necessary and incidental to practice before the IRS. Section 10.7(c) operates to permit others, besides CPAs, who would otherwise be excluded by Sections 10.2 and 10.3, to prepare tax returns. Section 10.7(c) was added to increase the number of people who could prepare tax returns and perform other limited activities with the IRS. There is no similar regulation dealing with pension plans because the IRS wants to ensure that only those persons deemed qualified to "practice" before the IRS under Section 10.3, i.e., attorneys, CPAs, etc., can prepare such complicated documents.

The Committee also argues that the absence of specific regulations dealing with who may draft and design pension plans means that Congress and the federal agencies have deferred to the states as to who may do so. Committee Brief at 16-17. The Committee in essence seeks to impose upon Congress and the federal agencies a specificity requirement, which while desirable, is not appropriate or necessary for implied pre-emption. The more reasoned interpretation is that the absence of specific regulations indicates congressional knowledge of the regulations allowing CPA and nonlawyer practice before agencies with jurisdiction over ERISA.[4] Accordingly, Congress felt that more specific authorization for such activities was

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[4] Including, Treasury 31 C.F.R. § 10.2 (1989), Labor 29 C.F.R. § 18.34 (1989), and the Pension Benefit Guarantee Corporation 29 C.F.R. § 2606.6 (1989).

unnecessary.

The Committee also argues that if preemption applies, it will allow unqualified people to draft very complicated pension plan documents. Committee Brief at **22.** In essence, the Committee seeks to "second guess" the Treasury as to who may practice before it. Clearly, the Treasury has identified certain professions who, by reason of their training and education, are qualified to practice before it, and under the supremacy clause, it must be permitted to let those individuals so practice. If the Committee wishes to challenge that determination, it should do so before the Treasury rather than this Court.

POINT II

ERISA ALSO PREEMPTS STATE REGULATION.

As to this issue, the FICPA again adopts the position of the AICPA.

POINT III

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

It is important to note what the Committee omits in their Responsive Brief on this Point, as these omissions reveal the weakness in the Committee's position.

First, the Committee makes no mention whatsoever 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") which is on point and was discussed fully in the FICPA's Initial Brief. There, the New Jersey Supreme Court

unanimously allowed 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 determined that the public interest would best be served by permitting CPAs to prepare and file tax returns without the supervision of an attorney as long **as the** client was notified in writing that review of the return by a qualified attorney may be desirable. This Court has held similarly in In re The Florida Bar, **215 So.2d 613, 614** (Fla. **1968)** by approving a consent decree allowing a nonlawyer securities broker to complete standardized printed forms relating to prototype **"Keogh"** retirement plans provided notification to consult with an attorney is given. As urged **in** its Initial Brief, the FICPA urges this Court to adopt the **New** Jersey Society approach and recognize an exception so as to permit CPAs to practice in the five disputed pension practice areas (selection, drafting, qualification, termination, and general tax advice).

Second, the Committee completely ignores the fact that practice of law by nonlawyers is only prohibited when there are policy reasons and justifications for prohibiting such practice--none of which are present in the instant case. Instead, the Committee merely urges a simplistic, blanket prohibition against nonlawyers giving "legal advice" and "drafting legal **documents."** Committee Brief at **30,** 31, **33-34, 36, 37.** This simply begs the question of how one should define the improper giving of legal advice and at what point it

becomes "unlicensed practice of law." The policy justifications for unlicensed practice enforcement 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. As illustrated at 19-24 of our Initial Brief, CPAs, similar to attorneys, fully possess all three of these qualifications with regard to pension practice. Thus, there is no threat of public harm and no reason to define pension practice by CPAs as "unlicensed practice of law."

Third, the Committee omits any persuasive explanation as to why independent counsel review, if deemed necessary, cannot come after a CPA has recommended, drafted, or given advice as to a pension plan. The Committee at 32-33 of its Brief recognizes that a nonlawyer should be able to assist an attorney in drafting plan documents and also review documents prepared by an attorney. However, the Committee narrowly restricts this authorization. The Committee objects to what it calls **"cursory** review" by an attorney and to the common practice for a nonlawyer to draft plan documents and to then recommend that they be reviewed by the employer's attorney. Committee Brief at 33. What the Committee ignores is that it is the employer's attorney who must fulfill his/her professional responsibility and see that, if needed, appropriate legal advice is given. It is not the responsibility of the nonlawyer or the CPA to police the client or his lawyer to make sure that an independent, legal review of the nonlawyer's work

is performed. There is no policy justification or reason to prohibit CPAs from recommending, drafting, or designing pension plan documents and then recommending (if appropriate) that the documents be reviewed by the client's independent counsel.[5]

Finally, contrary to the Committee Brief at 31-32, this type of post-CPA review by counsel **is** consistent with the **1977** ABA Opinion. Although the **1977** ABA Opinion did indicate 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, the Opinion noted that this did **not** include materials furnished to the employer's lawyer. Note 10 of the Opinion stated 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 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.

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[5]Similarly, the Committee asserts that the final decision of whether to adopt a master prototype plan and which options to select rests with the employer upon the advice of independent counsel. Committee Brief at 38. However, no reason is given as to why this advice of independent counsel can't be given after a CPA gives his recommendation of options and why the employer can't make the decision as to independent legal counsel after a qualified CPA gives a recommendation to consult counsel if, in his or her professional judgment, legal assistance is deemed appropriate.

Nevertheless, the 1977 ABA Opinion does not go for enough. Instead, this Court should adopt a holding similar to New Jersey Society and permit CPAs to practice in the pension field based on the integrity, competence, independence, professionalism, and strict regulation of CPAs. Because of their special training and expertise, CPAs should be permitted to engage in all areas of pension practice with suggested review by an attorney when a CPA, in his/her professional judgment, finds that particular issues are beyond his/her expertise.

POINT IV

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

The Committee attempts to paint a picture of a "comprehensive record" below. Committee Brief at 3. The Record, however, is anything but comprehensive. Only one public hearing was held. Persons appearing at the hearing were repeatedly requested to limit their remarks to 10 minutes. Transcript at 5, 6, 29, 35, 46, 49, 65. The single hearing lasted less than 4 hours. The record below produced only 104 pages of oral testimony and 194 pages of written testimony, much of which was repetitive.

The Committee cites to the Transcript at 83-85, 98-101 and certain written testimony as examples of public harm and/or "propensity" for public harm. Committee Brief at 40. However, none of these instances are persuasive. Throughout the scant record, only brief, vague **"facts"** are given and the alleged

offending party is neither named nor given an opportunity to respond. See, e.g., Transcript at 21, 26, 74-75, 84, and 99-101. 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.

The public hearing was on January 12, 1989. The last written testimony received was dated March 21, 1989. On April 12, 1989, the Committee voted to issue its Opinion. Committee Brief at 3. Thus, on these important, complex matters, the Committee took only 3 months after a single brief public hearing and only 3 weeks after the last written testimony, to make its decision. The record below is thus not only inadequate, but what record there is was not given sufficient time and consideration by the Committee. This, along with potential conflicts of interest, leaves the impression that the Committee's collective minds were made up before the process even began.

The nonadversarial nature of the proceedings below, lack of required notice,[6] lack of investigation, and the minimal evidence presented prevent this matter from being ripe for adjudication. At a minimum this Court should appoint an ad hoc committee composed of members of various industries to study the problem and make recommendations, as was done in Florida Bar Re: Advisory Opinion HRS Nonlawyer Counselor, 518 So.2d 1270 (Fla. 1988).

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[6]See the FICPA's Initial Brief at 35-36.

POINT V

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

In response to the First Amendment rights implicated by the Proposed Opinion, the Committee argues that since the Proposed Opinion does not specifically limit a CPA's ability to advertise, First Amendment rights are not implicated. The Committee, however, misunderstands the scope of the First Amendment.

The United States Supreme Court has defined commercial speech as an expression that proposes a commercial transaction. Central Hudson Gas and Electric v. Public Service Commission, 447 U.S. 557, 562 (1980). Any regulation or prohibition of such expression necessarily implicates commercial speech and thus must withstand First Amendment scrutiny. By its Proposed Opinion, the Committee seeks to impose stringent restrictions upon the ability of CPAs to propose commercial transactions in the pension field. Such prohibitions necessarily implicate commercial speech as it restricts society's interest in ensuring "informed and reliable decisionmaking." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 458 (1978). The United States Supreme Court, has rejected the argument that the First Amendment is not implicated by such prohibitions. See, e.g., Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); Board of Trustees of the State University of New York v. Fox, 109 S.Ct. 3028, 106 L.Ed. 2d 388 (1989).

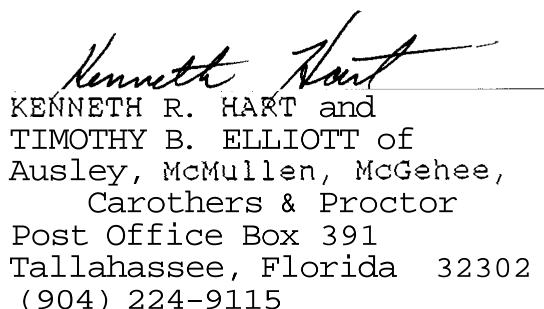
The Committee alternatively argues that even if First Amendment principles are indeed implicated, such prohibitions

may be enacted where there has been a showing that such regulations are necessary to protect the public. That assertion has never been disputed. What the FICPA does dispute is that such a showing has been made. In Florida Bar v. Brumbaugh, 355 So.2d 1186, 1193 (Fla. 1978), this court stated that 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." CPAs, because of their education and training in the tax code and the pension field, are uniquely qualified to practice in the disputed areas. Under Central Hudson, the State bears the burden of showing that such regulations are necessary to protect the public from harm. Yet, the Committee has made no showing that CPAs have caused, or are likely to cause, harm to the public. The record is completely devoid of any evidence that would justify the proposed regulation. Moreover, because under First Amendment principles regulation of commercial speech must be narrowly tailored to advance the asserted state interest, it is not permissible to regulate broadly based upon assumptions of harm. Because a showing of harm is a predicate to any decision that an activity constitutes the unlicensed practice of law and because that showing has not been made with regard to CPAs, the regulation is without its required foundation and must be stricken as overly broad.

CONCLUSION

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. Alternatively, CPA practice in the five disputed areas is not the unlicensed practice of law because the policy justifications which prohibit the practice of law by nonlawyers are not violated by CPAs practicing in these areas.

DATED this 12th day of January, 1990.



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