

IN THE SUPREME COURT
OF FLORIDA

FILED

SID J. WHITE

CASE NO. 74,479

JAN 10 1990

IN RE FAO #89001

CLERK, SUPREME COURT

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NON-LAWYER PREPARATION OF PENSION PLANS

REPLY BRIEF OF
AMICUS CURIAE AMERICAN COUNCIL OF LIFE INSURANCE

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ARGUMENT

The Answer Brief of the Standing Committee on the Unlicensed Practice of Law concerning Non-Lawyer Preparation of Pension Plans (FAO #89001) (hereafter referred to as the "Answer Brief") was filed November 27, 1989. Despite the cogency of the arguments advanced by Amicus American Council of Life Insurance in its brief of October 5, 1989 (hereafter "ACLI Amicus Brief"), the Answer Brief either ignores or treats in cursory fashion the Council's positions on specific significant issues. This Reply Brief will not reiterate all the points raised in the ACLI Amicus Brief; rather, this brief will highlight several of the Council's principal contentions not adequately addressed by the Answer Brief, with references to its ACLI Amicus Brief for further amplification of the specific points.

The Advisory Opinion fails to recognize the special role of master and prototype plans, and the right of an employer to self-representation, if he chooses to proceed without a lawyer. The Advisory Opinion, therefore, would prohibit an insurer from proceeding with the implementation of a plan even though it has recommended the use of a lawyer and even though the employer's determinations are mainly financial. See ACLI Amicus Brief, pages 9-13, concerning the nature and role of master and prototype plans and pages 13-15 concerning the right of an employer to self-representation. The failure of the Advisory Opinion to recognize and allow for the role of master and prototype plans represents a substantial practical and analytical weakness in the Advisory Opinion that must be addressed and remedied by this Court.

The Answer Brief does consider, to some extent, the issue of Federal preemption suggested in State ex rel. The Florida Bar v. Sperry, 363 U.S. 379 (1963), which reversed this Court's decision, at 140 So. 2d 587 (Fla. 1962). However, the Answer Brief does not give full scope to the preemption rationale. Sperry dealt with the overriding interest of the Federal Government in patent applications. The Answer Brief and the Advisory Opinion fail to recognize the overriding interest of the Internal Revenue Service in the simplified pension administration implicit in master and prototype plans.

Moreover, neither the Advisory Opinion nor the Answer Brief reflects a reasoned weighing of isolated incidents of perceived and potential public harm vis-a-vis the substantial and concrete public benefit from the increased reliance on master and prototype plans and related documents. The rigid insistence in the Advisory Opinion and Answer Brief on attorney representation in every instance -- despite an employer's desire for self-representation - - will have the effect of substantially restricting the obvious public benefits of master and prototype plans and their simplified administration.

The ACLI Amicus Brief, at page 20, notes that several documents pertinent to a pension plan may be reasonably manageable without the assistance of a lawyer. These include summary plan descriptions, notices to interested parties and employee communication materials. These types of documents require emphasis on employee comprehensibility, as opposed to rigorous technical

accuracy which could undermine the purpose of such materials. The Florida Bar's insistence on an attorney's supervision of the preparation of these type materials will likely undermine the purposes of the ERISA provisions regarding these matters, particularly employee comprehensibility.

The proposed Advisory Opinion, at page 18, indicates that a non-lawyer could not proceed with the implementation of a plan even though reviewed by an attorney, where the attorney's review was but a " cursory " one. Neither an insurer nor anyone else is in a position to determine how careful a lawyer's review is, or needs to be, in light of the lawyer's experience and possible familiarity with the client. Thus, the Advisory Opinion creates another area of doubt or confusion in which the non-lawyer, to avoid a charge of unlicensed practice of law, must make an essentially legal judgment as to how " cursory " or thorough an attorney's review was, prior to assisting the client with the implementation of a plan.

Finally, the Answer Brief concludes at page 39, footnote 11, that the special role of Home Office Counsel was deemed "beyond the scope of the duties of the Standing Committee." The American Council of Life Insurance respectfully submits, however, that the resolution of this point is central to what life insurance companies can and cannot lawfully do in this area. For a detailed discussion of this issue, see ACLI Amicus Brief, at pages 15-20.

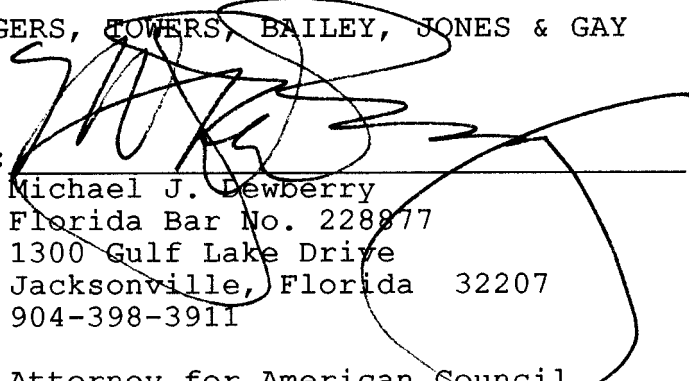
CONCLUSION

As stated in the ACLI Amicus Brief, the proposed Advisory Opinion is more restrictive than necessary for the protection of the public and is deficient in several other respects. The American Council of Life Insurance respectfully submits that the Court should: (1) modify the Advisory Opinion to permit qualified non-lawyer's to assist in the completion of adoption agreements and other related documents necessary for the implementation of a master or prototype plan; (2) recognize the employer's right of self-representation, especially in the context of master and prototype plans; (3) clarify the Advisory Opinion to provide appropriate scope to the role of Home Office Counsel of Life Insurance Companies, as has been elaborated upon for almost 40 years in cooperative efforts by the ABA and appropriate industry groups.

Respectfully submitted,

ROGERS, TOWERS, BAILEY, JONES & GAY

By:

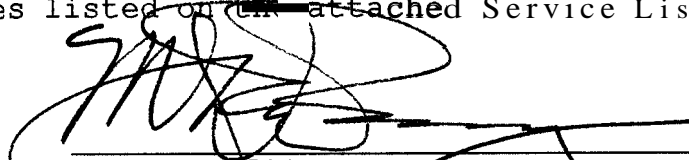


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by U. S. Mail this 12th day of January, 1990, to all parties listed on ~~the~~ attached Service List.



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