IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 74,479

IN RE: THE FLORIDA BAR
PROPOSED ADVISORY OPINION
RE: NONLAWYER PREPARATION
OF PENSION PLANS

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RESPONSIVE BRIEF OF THE STANDING COMMITTEE ON UNLICENSED PRACTICE OF LAW

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ABBREVIATIONS

The following symbols will be used in this Brief:

AAA	=	American Academy of Actuaries
AALU	=	Association for Advanced Life Underwriters
ABA opinion	=	**1977** American Bar Association Informative Opinion A
AICPA	=	The American Institute of Certified Public Accountants
CPA(s)	=	Certified Public Accountant(s)
ERISA	=	Employee Income Security Act of **1974**
FALU	=	Florida Association of Life Underwriters
FBA	=	Florida Bankers Association
FICPA	=	Florida Institute of Certified Public Accountants
FTC	=	Federal Trade Commission
Interested Parties	=	the individuals who requested leave to file objections to the proposed opinion
IRS	=	Internal Revenue Service
NALU	=	National Association of Life Underwriters
R	=	Materials Considered by the Standing Committee filed with the Court on July 28, **1989**
Standing Committee	=	Standing Committee on Unlicensed Practice of Law
Tr.	=	Transcript of public hearing held January 12, **1989**
William M. Mercer	=	William M. **Mercer-Meidinger-Hansen,** Inc. and Towers Perrin Forster & Crosby, Inc.

STATEMENT OF THE CASE AND OF THE FACTS

The question of nonlawyer participation in the pension area was brought before the Standing Committee on Unlicensed Practice of Law on September 9, 1988 as a request for a formal advisory opinion pursuant to Rule 10-7, Rules Regulating The Florida Bar. R., tab 1. The question considered by the Standing Committee 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." Proposed Opinion, p. 1. Finding the matter of great public importance, the Standing Committee voted to hold a public hearing.

Pursuant to Rule 10-7.1(f), Rules Regulating The Florida Bar, public notice of the date, time, place of meeting, and question presented was published in the Tallahassee Democrat and The Florida Bar News thirty days in advance of the public hearing. While not required by the Rules Regulating The Florida Bar, additional notices in the form of personal letters of invitation were sent to sixty-one individuals and organizations informing them of the hearing and stating the question to be considered. Among the parties receiving the personal invitation to appear were the Florida Institute of Certified Public Accountants, the Florida Bankers Association, twenty-one pension consulting firms in the Orlando area (the hearing was held in Orlando) and the Florida Association of Life Underwriters.

The hearing was held on January 12, 1989. At the hearing, the Standing Committee received testimony from twelve witnesses, including representatives of pension consulting firms, actuarial firms and the National Association and Florida Association of Life Underwriters. The transcript of that hearing is **104** pages long. Appearing at the hearing but choosing not to present oral testimony were representatives from the Florida Bankers Association and various accounting, pension, and actuarial firms.

Desiring further input from the pension community, the chairman of the Standing Committee held the record open for the submission of written testimony for a period of thirty days after the hearing. Tr. pp. **6, 34, 46,** 58-59, **64,** 81, 87, 93, 102. Although requesting information in general, the chairman also specifically requested written testimony on the issues of federal preemption and public harm. Tr. pp. 58-59, 81, 93. The record was again opened in March to receive responses to specific areas of concern. R., tab **4.** This request for additional written testimony was sent to everyone who attended the hearing regardless of whether they testified. The requests resulted in an additional 194 pages of written testimony. R., tabs 3 & 4.

Aside from this extensive record, the Standing Committee also reviewed related opinions issued by other states and the American Bar Association. R., tabs 5, 6 & 7. The Standing Committee was briefed before and after the hearing on the legal issues involved, many of which have been raised by the

interested parties. The Standing Committee was further aided by special counsel Robert W. Mead, Jr., a tax attorney who practices in the ERISA area. Although declining to vote because of a possible conflict of interest, the members of the Standing Committee who practice in the pension area were also available for guidance on technical ERISA questions.[1]

The materials considered by the Standing Committee form a comprehensive record more than adequate to consider the question presented. In order to analyze the record, the Standing Committee deferred any action on the request for opinion to its April 12, **1989** meeting. At that time, the Standing Committee voted to issue a formal advisory opinion. On June 15, **1989,** the Standing Committee reviewed a draft

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1. Rule 10-7.1(e), Rules Regulating The Florida Bar provides that:

> 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 improper.

(Emphasis supplied.) Such a determination was made in this proceeding. Tr. pp. 5-12. Although not all of the disclosures are on the record as some were made after the public hearing, the fact of the disclosure being made and not where or when the disclosure was made is what controls. As the requisite disclosure and determination was made in this proceeding, the actions of the Standing Committee are not objectionable on the basis of any potential conflict.

opinion and voted to file it with this Court. The opinion was filed on July 28, 1989, and published in the August 1, 1989 issue of The Florida Bar News pursuant to Rule 10-7.1(f)(3), Rules Regulating The Florida Bar. The proposed opinion, which must be read as a whole, is issued by the Standing Committee on Unlicensed Practice of Law, not by The Florida Bar and is an interpretation of the law only. Rule 10-7.1(f)(3), Rules Regulating The Florida Bar; Proposed Opinion, cover. In reaching the conclusions contained in the opinion, the Standing Committee reviewed general principles regarding the unlicensed practice of law and analyzed the purpose and scope of ERISA and the federal scheme which regulates the pension area. The law was then applied to the facts as presented at the hearing and through the written testimony. The opinion is nonadversarial and only seeks to set forth guidelines in the pension area.

Following publication, this Court received requests from twenty-four individuals to appear as interested parties, many of whom filed briefs.[2] This brief is filed in response to the initial briefs of the interested parties.

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2. Although requesting leave to appear, briefs were not filed by Wyatt Co., Kwasha Lipton, J. T. Comer & Associates, Alexander & Alexander Consulting Group, and Hewitt Associates.

SUMMARY OF THE ARGUMENT

The briefs of the interested parties raise two basic points: 1) that adoption of the proposed advisory opinion is preempted by federal law; and 2) that CPAs and actuaries are permitted by federal regulation to draft pension plans. The remaining arguments involve allegations of antitrust violations and abridgement of First Amendment rights, as well as issues of public policy. As discussed below, none of the arguments provide persuasive reasons why this Court should decline to adopt the proposed advisory opinion.

As a basis for the first point, the interested parties argue that federal law totally preempts state regulation in this area, and therefore, prevents the adoption of the proposed advisory opinion. The interested parties are incorrect in this assertion as the proposed advisory opinion "relates to" the unlicensed practice of law rather than the operation of an ERISA pension plan. As the opinion does not affect the operation or the terms of a pension plan, it is not preempted by federal law.

As to the second point, the CPAs and actuaries argue that an implied preemption exists which allows them to draft pension plans. The interested parties contend that federal regulations which authorize certain categories of nonlawyers to "practice" before the IRS allow them to draft pension plans. However, those regulations do not allow a nonlawyer to

draft pension plans as this activity is not within the definition or intent of the term "practice."

In a further attempt to dissuade this Court from the adoption of the proposed advisory opinion, the interested parties allege an antitrust violation should this Court adopt the opinion. The allegation of an antitrust violation is unfounded as the adoption of the proposed opinion is exempt from antitrust liability as "state action." The opinion filed by the Standing Committee is an interpretation of the law only and does not constitute final court action. The opinion does not become law until it is acted upon by this Court thereby bringing the issuance of an advisory opinion within the "state action" exemption to antitrust liability.

Additionally, adoption of the proposed advisory opinion does not violate the First Amendment rights of any of the interested parties. The drafting of a pension plan is not commercial speech as it does not constitute advertising. Moreover, the proposed advisory opinion expressly leaves intact nonlawyer advertising or advertising related activities.

Most importantly, adoption of the proposed advisory opinion is in the public interest. The proposed advisory opinion strikes a reasonable balance whereby qualified nonlawyers may participate in pension matters in their areas of expertise while carefully restricting to licensed attorneys the duties of providing legal advice and services. Through adoption of the opinion, this Court may exercise proper

regulation and control over the unlicensed practice of law for the protection of the public.

I. FEDERAL LAW DOES NOT PREEMPT ADOPTION OF THE PROPOSED ADVISORY OPINION

The interested parties argue two types of federal preemption: express and implied. As a basis for express preemption the parties rely on §514 of ERISA which preempts all State laws which "relate to" an employee benefits plan. As a basis for implied preemption the parties rely on the principle that State law must yield when incompatible with federal regulation. State ex rel. The Florida Bar v. Sperry, 363 U.S. 379, 83 S.Ct. 1322 (1963). Because neither principle is applicable in this case, federal law does not preempt adoption of the proposed advisory opinion.

A. ERISA Does Not Expressly Preempt State Law Regarding Who May Design Or Draft A Pension Plan

"Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained'." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522, 101 S.Ct. 1895, 1905 (1981); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217 (1963). The interested parties rely on §514 of ERISA as the basis for preemption. Section 514 of ERISA does not however provide persuasive reasons which would support preemption of State laws regulating who may design or draft a pension plan.

Section 514 of ERISA provides that the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." The interested parties argue that the proposed opinion "relates to" ERISA plans, and therefore, adoption of the opinion is preempted. The proposed opinion, however, does not "relate to" ERISA plans in the sense contemplated by section 514.

Although the term "relates to" is used in its broad sense, not all State laws which have an impact on ERISA plans are preempted. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890 (1983); Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211 (1987). Where the regulation affects a plan in too tenuous, remote, or peripheral a manner, it does not "relate to" the plan and is not subject to preemption. Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir. 1989)(citing Shaw, supra). Therefore, the regulation must relate to the plan itself or purport to regulate the terms and conditions of the plan in order to fall within ERISA's preemption provision. Fort Halifax, supra; Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984), cert. denied, 472 U.S. 1138 (1985). The proposed advisory opinion does neither.

The proposed advisory opinion deals with the question of "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 plan for another." Proposed Opinion, p. 1. What is at issue is the unlicensed practice of law and the

conduct of parties who design and draft a plan. The opinion does not involve or discuss the operation of the plan or regulate how the plan should be administered.[3] The terms of a plan, how the plan is interpreted and whether a plan, regardless of who drafted it, is valid are matters of Federal law and are not disturbed by the proposed opinion. The proposed opinion does not regulate the contents of the documents required by ERISA or how they interrelate with the plan or the employee but merely discusses who may be involved in the drafting of these documents from the standpoint of the unlicensed practice of law. The opinion affects the person drafting the plan, not the plan itself. The mere fact that the document being designed and drafted is a pension plan is too tenuous a connection upon which to base preemption. Therefore, the proposed opinion does not "relate to" employee benefits plans.

A comparison of the types of cases which have held a state law was preempted with cases which have held that the state law was not preempted supports the conclusion that the proposed advisory opinion does not "relate to" employee benefit plans, Preemption has been held **to** apply to state laws which create a common law cause of action to enforce

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3. Although the proposed opinion discusses administration of the plan as a step in implementing a pension plan, the opinion finds that this activity does not constitute the unlicensed practice of law. Proposed Opinion, p. 20. The interested parties do not dispute this conclusion. Therefore, the administration of a plan is not affected by the opinion.

claims for pension benefits, Johnson v. District 2 Marine Engineers Beneficial Assoc., 857 F.2d 514 (9th Cir. 1988); create a criminal violation and penalty for withholding payments to a pension fund, State v. Burten, 530 A.2d 363, (N.J. Super. Ct. Law Div. 1986); create a tax on benefits paid by an employee benefits plan, National Carriers' Conference Committee v. Heffernan, 454 F.Supp. 914 (D. Conn. 1978); create a requirement that employee benefits plans not discriminate on the basis of pregnancy and create a payment schedule in the event of pregnancy, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890 (1983); and create a prohibition on offsetting workers' compensation payments from an employee benefits plan, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S.Ct. 1895 (1981). These laws regulate how a plan is enforced, the terms of a plan, how benefits are calculated and how benefits are paid. Accordingly, they "relate to" an employee benefits plan and are preempted.

On the other hand, state laws which require employers to provide severance pay, Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211 (1987); which set a rate hospitals must charge for inpatient care, Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984), cert. denied, 472 U.S. 1138 (1985); or which allowed unpaid benefits to be subject to the state's escheat law, Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir. 1989) were held not to be preempted. The effect of these laws on ERISA plans is only incidental and, at most,

marginally economic. "Where . . . a State statute . . . does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated." Rebaldo, 749 F.2d at 139. What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." Aetna, 869 F.2d at 146-147.

As discussed above, the proposed opinion does not affect the structure, administration, or type of benefits provided under an ERISA plan as these matters are not discussed in or covered by the opinion. At most, the interested parties suggest a marginal economic impact as the cost of implementing a plan may increase if attorney participation is required. As held in the cases cited above, this tenuous, remote and peripheral effect on employee benefit plans requires a finding that $514 of ERISA does not preempt state law regarding who may design or draft a pension plan.

Moreover, the Congressional intent in enacting §514 does not support preemption. Congress' intent in preempting State laws that "relate to" ERISA plans was to limit the threat of inconsistent State and local regulation of employee benefit plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890 (1983); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211 (1987). Preemption prevents a patchwork

scheme of regulation while providing "a set of standard procedures to guide processing of claims and disbursement of benefits." Fort Halifax, 107 S.Ct. at 2216. Since the proposed opinion does not impact on the regulation of a plan or set inconsistent procedures for processing claims or disbursing benefits, no provision of ERISA is affected. Plans will continue to operate pursuant to ERISA's regulatory scheme. Therefore, Congress' intent in enacting §514 is not frustrated by the adoption of the proposed advisory opinion.

In fact, the opinion furthers ERISA's central policy of protecting the interests of employees and their beneficiaries by providing safeguards during the design and drafting process. Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510, 101 S.Ct. 1895, 1899 (1981). As the brief filed by the Florida Bankers Association states, ERISA is an area "of subtle complexity further complicated by frequent revisions of the laws and regulations governing it." Initial Brief of Florida Bankers Association, p. 21. It is unlikely that Congress intended by its preemption statute to allow any nonlawyer, no matter how unqualified, to draft a pension plan for the employer, in contravention to the unlicensed practice of law restrictions of the states. Nevertheless, this would be the result should this Court find that adoption of any advisory opinion is preempted. Likewise, express preemption is inconsistent with the recognition that "attorneys should play a role in drafting documents necessary for establishing

or implementing a plan . . . . " Initial Brief of Coopers & Lybrand, p. 28.

Furthermore, the adoption of an advisory opinion is exempt from ERISA's preemption as a "generally applicable criminal law." 29 U.S.C. §1144(b)(4) (1985). Under Florida Statute §454.23, engaging in the unlicensed practice of law is a first degree misdemeanor, clearly a criminal law of general applicability. Whether conduct constitutes the unlicensed practice of law is determined by statute, court rule and case law. Rule 10-7.1(b), Rules Regulating The Florida Bar. Once adopted by this Court, an advisory opinion has the force and effect of an order of the Supreme Court of Florida. Rule 10-7.1(g)(3), Rules Regulating The Florida Bar. The proposed advisory opinion, therefore, may form the basis for a criminal prosecution just as any other case law defining the unlicensed practice of law. Just as other case law is not preempted by ERISA, the adoption of an advisory opinion is not preempted.

As there is an absence of persuasive reasons supporting preemption, ERISA's express preemption provision does not prevent this Court from issuing an advisory opinion.

B. Federal Regulation Does Not Create An Implied Preemption Of State Law Regarding Who May Design And Draft A Pension Plan

Several of the interested parties, most notably the certified public accountants and the actuaries, argue that federal regulation has preempted state law regarding who may

design and draft a pension plan. Essentially, this argument involves the principle of implied preemption.

Federal preemption of state law will be implied where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation [or] where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'." Hillsborough Co., Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375 (1985)(citations omitted). When dealing with an area that has traditionally been regulated by the States, such as the unlicensed practice of law, "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'." Id. at 715; State ex rel. The Florida Bar v. Sperry, 363 U.S. 379 (1963)(recognizing that Florida has a substantial interest in regulating the practice of law within the State). The interested parties "must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of [unlicensed practice of law] matters can constitutionally coexist with federal regulation." Hillsborough Co., 471 U.S. at 716.

As discussed in section A above, the proposed opinion deals with the unlicensed practice of law as it relates to the design and drafting of pension plans. The interested parties assert implied preemption based on certain provisions of the Code of Federal Regulation. However, these regulations show that this area has not been so occupied as to leave no room for State regulation. In fact, federal regulations expressly make room for State regulation of the unlicensed practice of law.

The rules regarding practice before the Internal Revenue Service ("IRS") are found in 31 C.F.R. §10.1, et seq. (For the convenience of the Court, the sections of the Code of Federal Regulations cited in the brief are attached hereto in the appendix.) The regulations give a limited grant of authority to certain categories of nonlawyers to represent parties before the IRS. **31** C.F.R. §10.3 **(1988).** Although limited authority is given, **31** C.F.R. §10.32 states that "nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law." Inclusion of this section should end the discussion. These regulations expressly leave open the State's authority to regulate the unlicensed practice of law. See, State ex rel. The Florida Bar v. Sperry, **363** U.S. **379, 386 (1963).**

Additionally, where the federal regulations are silent on an issue there can be no implied preemption. Although there are regulations dealing with other aspects of the plan process such as the filing of the annual reports, there is no specific

regulation dealing with the drafting of a plan. See, 29 U.S.C. §1023 (1974). Certainly, the absence of specific legislation cannot provide the reasonable inference that Congress or the federal agencies which deal with pension plans left no room for State regulation of who may draft pension plans. To the contrary, the only reasonable inference is that State regulation is welcome. Therefore, the first test of implied preemption, that federal regulation leaves no room for supplementary State regulation, is not met.[4]

Similarly, the second test for implied preemption, that of the dominant federal interest, is not met. As the United States Supreme Court held in Sperry, supra, "Florida has a substantial interest in regulating the practice of law within the State . . . . 373 U.S. at 383. A similar federal interest was not recognized. In fact, the federal interest in the pension area is to insure that plans are structured and administered in such a way as to protect the interests of employees and their beneficiaries. Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986). This interest can easily coexist with the State's interest in protecting the public through regulation of who may design and draft pension plans. Accordingly, there is no basis upon which to imply federal preemption or overcome the strong presumption against

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4. The interested parties point to Rev. Proc. 89-13 for the proposition that they are authorized to draft the plan. However, there is no specific authorization in 89-13 regarding drafting the plan. A copy of Rev. Proc. 89-13 is included in the appendix for the convenience of the Court.

preemption created by the traditional State regulation of the unlicensed practice of law.

Moreover, the proposed opinion recognizes that there are federal regulations which govern aspects of the pension plan process and stresses that "nothing in this opinion should be read to prohibit a nonlawyer from . . . engaging in activities which federal rules or regulations specifically state may be conducted by a nonlawyer . . . ." Proposed Opinion, p. 22. Therefore, where there is a specific regulation, the opinion recognizes the principle of implied preemption and defers to the federal regulation accordingly.

Nevertheless, the interested parties argue that federal regulation which allows certain nonlawyers to practice before the IRS extends to the drafting of pension plans. 31 C.F.R. S10.3 allows attorneys, certified public accountants ("CPAs"), enrolled agents and, to a limited extent, enrolled actuaries to practice before the IRS. Practice before the IRS is defined as comprehending

> all matters connected with presentation to the Internal Revenue Service . . . relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a client at conferences, hearings, and meetings. 31 C.F.R. §10.2(a) (1988).

The interested parties argue that this limited grant of authority to represent clients before the IRS also gives them the authority to draft pension plans. As a basis for this

argument, the interested parties rely on State ex rel. The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), judg. vacated, 363 U.S. 379 (1963), on remand, 159 So.2d 229 (1963). Sperry, however, is distinguishable.

The respondent in Sperry was a patent attorney who had established an office in Florida. As he was not a member of The Florida Bar, an unlicensed practice of law action was filed against him. After reviewing the evidence, this Court enjoined the respondent from "using the term 'patent attorney' . . . ; rendering legal opinions, including opinions as to patentability or infringement on patent rights; preparing, drafting and construing legal documents; holding himself out . . . as qualified to prepare and prosecute applications for letters patent, and amendments thereto; preparation and prosecution of applications for letters patent, and amendments thereto . . . ; and otherwise engaging in the practice of law." 140 So.2d at 596. The respondent took an appeal to the Supreme Court of the United States "attack[ing] the injunction 'only insofar as it prohibit[ed] him from engaging in the specific activities . . . [referred to above], covered by his federal license to practice before the Patent Office'." 363 U.S. at 382. The Court granted Certiorari on the narrow question presented and vacated the judgment.

Relying on the regulation which allowed applicants for a patent to be represented by an attorney or a registered agent, the Court held that the provision in the regulations limiting practice before the Patent Office was not intended to prohibit

practice in Florida but "was intended only to emphasize that registration in the Patent Office does not authorize the general practice of patent law, but sanctions only the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications." **363** U.S. at **386.** Therefore, Florida could maintain "control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives." **363** U.S. at **402.** Finding that the preparation and prosecution of patent applications necessarily required the practitioner to render advice as to patentability, consider alternatives which may be available, participate in the drafting of the specification and claims of the patent application, and assist in the preparation of amendments, the Court ordered that the injunction be vacated.

The interested parties rely on the "reasonably necessary and incident" language of Sperry for the proposition that **31** C.F.R. §§10.2 and **10.3** allow the drafting of pension plans. This reliance is misplaced. First, Sperry is specifically limited to patent law. Although the general constitutional principles apply in other areas, the extent of the practice which the Court found was "reasonably necessary" relates to patent practice only. Therefore, any similarities drawn are questionable at best.

Moreover, the drafting of a pension plan is not reasonably necessary and incident to the representation of a party before the IRS. What the Treasury regulations speak to is practice

before the IRS and presentation to the IRS. They envision the representation of a party in a dispute with the IRS. As such, the preparation of a tax return, an activity specifically authorized by other federal regulations, is not considered "practice" before the IRS. 31 C.F.R. §10.7(c) (1988). Similarly, the drafting of a pension plan does not constitute "practice" before the IRS. There is no regulation permitting the drafting of pension plans by nonlawyers similar to the regulation permitting the preparation of tax returns by nonlawyers. Moreover, the drafting of pension plans have nothing to do with the IRS. Only the submission of a completed plan to the IRS for qualification, which is optional, not mandatory under ERISA, is "practice" before the IRS. What the drafting of a pension plan does constitute is the general practice of tax law, the regulation of which is clearly left to the states.

As further support for implied preemption, the CPAs and actuaries point to their special qualifications and training in an attempt to equate themselves with attorneys in ERISA matters. However, the arguments advanced by the CPAs and actuaries show that the concentration of their training and experience is in areas other than the practice of law. As defined by Coopers & Lybrand, "a certified public accountant is a person trained and expert in accounting who has . . . been certified by the state board to express professional opinions on financial statements." Initial Brief of Coopers & Lybrand, p. 17. Likewise, "[a]ctuarial science . . . involves

the evaluation of probabilities and the financial impact of uncertain future events. Actuaries are trained to make assumptions and estimates as to the present effect of future events and other uncertainties . . . ." Id. at 18. These areas of expertise are radically different from those of attorneys. In order to become a member of The Florida Bar an individual must have graduated from a full-time accredited law school and pass an examination which tests principles of general law and Florida law. Fla. Sup. Ct. Bar Admiss. Rule, art. III and VI. In order to be certified as a tax attorney, a member of The Florida Bar in good standing must demonstrate proficiency in the area of tax law through experience, training, education and the successful completion of an examination. Rule 6-5.1, Rules Regulating The Florida Bar. Nothing in the definition of CPA or actuary suggests that they have qualifications or training commensurate with those of an attorney.

In addition, the authority to practice before the IRS is not limited to CPAs and enrolled actuaries but extends to enrolled agents and individuals without enrollment as well. 31 C.F.R. §§ 10.3, 10.7. If the expression "practice before the IRS" in these regulations provides a preemption in the drafting of pension plans, persons with little or no training or education would be authorized to draft what all of the interested parties concede is a very complicated legal document.

The preemption argument advanced by the interested parties would allow any nonlawyer to engage in the general practice of tax law. That "practice before the IRS" is not intended to go this far is evident when the argument is taken to its logical extreme. If "practice" encompasses the drafting of any document that has tax consequences, the range of documents a nonlawyer authorized to practice before the IRS could draft is limitless. For example, most divorces have tax ramifications. If the implied preemption argument is accepted, preparation of a petition for dissolution and a property settlement would be allowed. It would also allow a CPA to form a corporation. Following the logic of the argument, it is reasonably necessary to prepare the corporate charter for a corporation which the CPA may represent before the IRS in a dispute over the amount of corporate income tax paid. However, it is clear that a nonlawyer, even if he is a CPA, is engaging in the unlicensed practice of law if he forms a corporation for a third party or prepares the documents necessary for a divorce. The Florida Bar v. Town, 174 So.2d 395 (Fla. 1965); The Florida Bar v. Fuentes, 190 So.2d 748 (Fla. 1965); The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978).

The law and the facts show that regulation of the unlicensed practice of law as it relates to designing and drafting a pension plan has not been preempted. Therefore, federal law does not preempt adoption of the proposed advisory opinion.

11. ADOPTION OF THE PROPOSED ADVISORY OPINION DOES NOT VIOLATE THE SHERMAN ANTITRUST LAW

At least one interested party argues, although other intimate, that adoption of the proposed opinion would violate the Sherman Antitrust Law, **15** U.S.C. §1, et seq. **(1970).** What the argument fails to recognize is that this Court's issuance of an advisory opinion is exempt from antitrust liability because it is State action.

State action will exempt an activity from antitrust liability. Parker v. Brown, **317** U.S. **341, 63** S.Ct. **307 (1943).** State action includes acts of the legislature as well as acts of the Supreme Court when acting in a rule-making capacity. Bates v. State Bar of Arizona, **433** U.S. **350, 97** S.Ct. **2691 (1977).** In order for the exemption to apply, the threshold question of whether the act is that of the Court or that of a representative of the Court must be answered. Hoover v. Ronwin, **466** U.S. **558, 104** S.Ct. **1989 (1984).**

It is clear that the act of issuing an advisory opinion is that of this Court, and thus exempt from an attack on antitrust grounds.

The question of a Bar committee's liability for an antitrust violation was addressed by the United States Supreme Court in Hoover v. Ronwin, **466** U.S. **558, 104** S.Ct. **1989**

(1984).[5] The Respondent in Hoover was an unsuccessful applicant to the Arizona Bar. After failing to be admitted, he brought an action against the Arizona Committee on Examinations and Admissions (hereinafter "the committee") and others alleging that the grading procedure which the committee developed and used on his exam violated the Sherman Antitrust Law by artificially reducing the number of competing attorneys in the State of Arizona. The United States Supreme Court held that the "state action" exemption applied. The basis of the holding was that the real party in interest was the Arizona Supreme Court; therefore, the activity was that of the State rather than the State's representative.

Under the Arizona Constitution, the authority to determine admission to the Bar rested with the Arizona Supreme Court. Pursuant to this authority, the court appointed the committee to develop a grading policy and suggest successful applicants for admission. Although the committee had some discretion, its authority was limited to making recommendations to the Court. The final authority to approve the grading procedure and the applicants rested with the Court. If an applicant disagreed with the decision, he could file a petition directly with the Court. The committee was given an opportunity to

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5. The holding in Hoover was based on an earlier holding in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977) which found that actions of a State Bar grievance committee were subject to the state action exemption.

respond to the petition but the final authority rested with the Court.

The United States Supreme Court considered these rules and the procedure for determining admission to the Bar and found that the act complained of was that of the State itself rather than the State's representative. As the Arizona Court was the only body who had the authority to make the determination of admittance, the activity had to be that of the Arizona Court rather than the committee.

The Florida rule governing the issuance of formal advisory opinions is patterned after the Model Rules for Advisory Opinions on the Unauthorized Practice of Law approved by the American Bar Association House of Delegates in February 1984. The antitrust question was studied by the ABA and was presented to this Court when adoption of the rule was proposed. Brief in Support of Proposed Rules Regulating The Florida Bar, The Florida Bar re: Amendment to the Integration Rule of The Florida Bar, 494 So.2d 977(Fla. 1986). (A copy of the relevant portions of the brief and the ABA Model Rule are included in the appendix attached hereto.) A review of the rule shows that it falls within the facts of Hoover.

Under Article V, Section 15 of the Florida Constitution, this Court is vested with the exclusive power to regulate the practice of law. This power includes the authority to prohibit the unlicensed practice of law. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). The rules governing the Standing Committee and issuance of opinions are adopted by

this Court. Chapter 1, Rules Regulating The Florida Bar. Most importantly, the opinion issued by the Standing Committee is a proposed opinion only. It is merely "an interpretation of the law and does not constitute final court action." Proposed Opinion, cover page; Rule 10-7.1(f)(3), Rules Regulating The Florida Bar. The opinion only becomes law after it is acted upon by this Court. Rule 10-7.1(g)(3), Rules Regulating The Florida Bar. Moreover, this Court has total authority to accept, reject or modify the opinion. Id. Therefore, the act of issuing an opinion is that of this Court rather than the Standing Committee and, as such, is exempt from antitrust liability.

Nor does adoption of the proposed opinion create an unnecessary restraint on trade or hinder competition. As more fully discussed in Issue IV below, the interested parties may continue to engage in their lawful professions. What the interested parties may not do is engage in the practice of law, an area in which they are not licensed. Continuation of one's profession in a lawful manner does not hinder competition or act as a restraint of trade.

III. FIRST AMENDMENT RIGHTS ARE NOT VIOLATED BY ADOPTION OF THE PROPOSED ADVISORY OPINION

Another argument raised or intimated by several of the interested parties is that First Amendment rights would be violated by adoption of the proposed opinion. In support of this argument, the interested parties state the general proposition that commercial speech is afforded First Amendment protection.[6] Although this may be true, designing and drafting a pension plan is not commercial speech as defined by case law. The commercial speech doctrine developed by the Supreme Court of the United States involves restrictions upon advertising and advertising related activities. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 96 S.Ct. 1817 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977); Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887 (1979). Its protection stems from society's strong interest in the free flow of commercial information. Friedman, supra. Requiring that attorneys play a role in the designing and drafting of a pension plan in no way restricts advertising or hinders the free flow of commercial information.

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6. Although the interested parties state that commercial speech is afforded protection, they do not state why the designing and drafting of pension plans is commercial speech or how adoption of the proposed opinion would violate their rights.

Even when applying a First Amendment analysis to an unlicensed practice of law situation, the competing interests of a nonlawyer's First Amendment rights and the protection of the public balances in favor of protection of the public. The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978). Consequently, this Court has enjoined activities constituting the unlicensed practice of law despite contentions that the results violated First Amendment rights. Brumbaugh, supra; The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979).

Moreover, the proposed opinion specifically address activities which constitute advertising and finds that it is not the unlicensed practice of law for a nonlawyer to advertise or engage in a general motivational discussion with an employer so long as the nonlawyer does not hold himself out as able to render legal advice. Proposed Opinion, p. 9. There is also no prohibition against the nonlawyer sending general information to his clients to keep them abreast of the changes in ERISA. In re: Raymond, James & Assoc., Inc., 215 So.2d 613 (Fla. 1968). The fact that these activities are not restricted defeats any claim of a First Amendment violation. Hence, First Amendment rights are not violated by adoption of the proposed advisory opinion.[7]

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7. As there is no violation of the interested parties' First Amendment rights, unless this Court requests the Standing Committee to do *so*, it will not address the argument that the proposed opinion must adopt the least restrictive means of regulation.

IV. ADOPTION OF THE PROPOSED ADVISORY OPINION IS IN THE PUBLIC INTEREST

Several of the interested parties argue that adoption of the proposed opinion is not in the public interest. As support for this argument, the interested parties point to the need for nonlawyer participation in the pension area. This point is not disputed by the Standing Committee. Proposed Opinion, pp. 22-23. In fact, the proposed advisory opinion keeps intact nonlawyer participation in the nonlegal aspects of the pension planning process.

The proposed advisory opinion analyzes the question presented from an unlicensed practice of law standpoint. The focus of the opinion is the giving of legal advice and the performance of legal services by a nonlawyer. Therefore, the opinion in no way prevents a nonlawyer from doing his job. Proposed Opinion, p. 22. The actuary may continue to make projections and advise the employer from an actuarial standpoint. The CPA may continue to review the finances of the employer and advise whether a plan will meet the employer's financial needs. The life insurance underwriter may continue to solicit the purchase of life insurance by plans. Banks may continue to act as investment managers. The pension consulting firms may continue to draft nonlegal financial documents and administer the plan. What the interested parties may not continue to do, however, is give legal advice and draft legal documents.

A. Nonlawyers May Continue To Give Nonlegal Advice Regarding The Design Of A Pension Plan

Both the proposed advisory opinion and the briefs recognize the role that nonlawyers play in the design of a pension plan.[8] The opinion finds that the nonlawyer may gather client information and explain alternatives generally available to the public. Proposed Opinion, pp. **10-12.** This encompasses discussing which type of plan would be best for the employer from a financial standpoint and assisting the employer in making any necessary business decisions. Business and financial advice may, and often should, be given by nonlawyers. Consequently, Coopers & Lybrand is wrong in suggesting that the proposed opinion would prevent the type of mathematical analysis described in their initial brief from being performed by a qualified nonlawyer. Initial Brief of Coopers & Lybrand, pp. **22-24.** However, legal advice must be rendered by an attorney. An attorney, therefore, must become involved in the process by analyzing the client information,

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8. The opinion divides the pension area into eight steps and analyzes each step separately. Proposed Opinion, p. 8. Coopers & Lybrand argues that this approach "ignores the broad, inclusive statutory scheme created by Congress . . . [11] Initial Brief of Coopers & Lybrand, p. **14.** The format used by the Standing Committee was patterned after the 1977 ABA opinion, the opinion which some of the interested parties urge this Court to adopt. See Initial Briefs of The Florida Institute of CPAs, The American Institute of CPAs, Towers Perrin, The Federal Trade Commission, and Coopers & Lybrand at p. 33. The Standing Committee believes that the organization of the proposed opinion into eight stages will aid the Court in its analysis.

deciding on the type of plan, and selecting plan options from a legal standpoint. Proposed Opinion. pp. 12-13. In other words, while the nonlawyer may recommend a particular plan from a financial standpoint, an attorney is required to review the recommendation in light of the legal requirements of ERISA and advise the employer on this point. The Court will find that this analysis, found in the proposed opinion, is also found in the submissions of several of the interested parties, including the Federal Trade Commission. Initial Brief of the FTC, pp. 10-11. It also is in harmony with the ABA opinion on which several of the interested parties rest their analysis. ABA Opinion, pp. 11-12.

B. Nonlawyers May Continue To Assist An Attorney In Drafting Plan Documents

1. Assisting the attorney

The proposed advisory opinion also recognizes the role a nonlawyer plays in assisting an attorney in drafting plan documents and states that, "nothing in this opinion should be read as preventing the attorney from seeking the services of a nonlawyer to assist the attorney in drafting plan documents." Proposed Opinion, p. 17, ftn. 6; See also Proposed Opinion, p. 19. As recognized by Wolper Ross Ingham & Co. "such 'assistance' can be likened to the assistance of a paralegal wherein the paralegal drafts documents for review by an attorney who takes ultimate responsibility for the form and content of the documents and their applicability to the

situation for which they are intended." Memorandum in Support of Request for Clarification, p. 3. The nonlawyer may, therefore, prepare drafts of documents for the attorney and review documents prepared by the attorney. The final decision, however, rests with the employer upon the advice of his attorney. In this regard as well, the proposed opinion is in harmony with the points raised by the FTC and the ABA opinion. Initial Brief of the FTC, pp. 13-15, ABA opinion, pp. 12-13.[9]

Several of the briefs of the interested parties take issue with the statement in the opinion about the "cursory review" by an attorney. Proposed Opinion, p. 18. This discussion was included in the proposed opinion because of the testimony the Standing Committee received on this issue. The testimony shows that it is common practice for a nonlawyer to draft plan documents and then recommend that they be reviewed by the employer's attorney. Tr., pp. 21-23, 25, 68-69, 74-76. Even more problematic is the situation in which the nonlawyer offers to have the nonlawyer's attorney review the documents. Id. Viewing this activity in light of general principles regarding the unlicensed practice of law, the Standing Committee found that this practice constitutes the unlicensed

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9. In many other respects, there is unspoken agreement between the proposed opinion and the briefs filed by the interested parties. For example, the supplemental brief of Towers Perrin describes the services they perform in the pension area. Supp. Brief, pp. 3-6. Under the proposed advisory opinion, these activities do not constitute the unlicensed practice of law as they are being performed under the direction of an attorney.

practice of law on the part of the nonlawyer as it is the nonlawyer making all of the decisions, rendering the legal advice and performing the legal services.

The proposed opinion does not seek to prevent a nonlawyer from recommending a particular attorney to an employer, as long as there is no indirect solicitation involved. However, the choice of an attorney must lie with the employer. Any attorney-client relationship that is established must be established by the employer. See, Joffe v. Wilson, 407 N.E.2d 342, 346 (Mass. 1980).[10]

2. The summary plan description

As to specific documents, the interested parties state that they should be allowed to draft the Summary Plan Description ("SPD") required by section 104 of ERISA. 29 U.S.C. 51022 (1974). As justification, the interested parties point to the requirement that the SPD must be "written in a manner calculated to be understood by the average plan participant. . . ." Id. Initial Brief of Coopers & Lybrand, pp. 29-30. This ignores the legal requirements of

10. The Standing Committee was concerned about the possible ethical violation on the part of the attorney where the attorney is chosen by the nonlawyer. However, this determination is beyond the jurisdiction of the Standing Committee. The focus of the Standing Committee and the proposed advisory opinion is the nonlawyer, not the attorney.

the SPD and the harm that could result if it is not completed properly. See for example, R., tab 3, written testimony of Charles P. Sacher. Moreover, it would be a novel approach indeed to say that whenever a document can be understood by an average citizen, drafting it is not the practice of law.

3. The master or prototype plan

Perhaps the major point of contention in the area of drafting documents is the preparation of the adoption agreement which activates a master or prototype plan. The Standing Committee found that although a nonlawyer could sell a master or prototype plan, the nonlawyer could not tailor the plan to the exact needs of the employer by completing the adoption agreement as such would constitute the unlicensed practice of law. Proposed Opinion, pp. 15-17. The interested parties complain that this aspect of the opinion is more strict than the **ABA** opinion. However, the proposed advisory opinion is in agreement with the **ABA** opinion on this issue.

The **ABA** opinion recognizes the fact that the master or prototype plan is used as a substitute for an individually designed plan and therefore should be treated the same as individually designed plans. **ABA** opinion, p. **13**. The **ABA** opinion further finds that although the nonlawyer may market a master or prototype plan, the nonlawyer engages in the unlicensed practice of law when he submits a plan to an employer with a representation that the plan is suitable in

all circumstances to the employers needs, gives an opinion regarding the consequences of tax or other laws on the employer's situation, or advises that a particular plan will qualify for tax benefits or comply with ERISA. ABA opinion, pp. 13-14. The proposed advisory opinion is no different. Proposed Opinion, p. 16.

As described by The Florida Bankers Association, the adoption agreement "permits the employer to designate specific terms and conditions of Plan funding, management and participation from a set menu of options" each of which have legal components. Initial Brief of FBA, pp. 4-5. "Significant legal obligations are created by the execution of the [adoption] agreement" not the least of which is adoption of the plan itself. Initial Brief, American Council of Life Insurance, p. 9. The completion of the adoption agreement is what renders the plan suitable for the employer's situation thereby raising the services provided by the nonlawyer to the giving of legal advice and the unlicensed practice of law. ABA opinion, pp. 13-14; Proposed Opinion, pp. 15-18. It is for this reason that the ABA opinion states that the nonlawyer "should encourage the employer to consult with his own attorney <u>with regard to the adoption</u> of any such plan" and prohibits the nonlawyer from "advising that a particular plan will, <u>if adopted by the employer</u>, either qualify for tax benefits or be in compliance with ERISA." ABA opinion at 14 (Emphasis supplied.)

Moreover, the briefs of the interested parties themselves recognize the importance of attorney involvement in the adoption of a master or prototype plan. Although wishing to complete the documents, the nonlawyers stress that a warning should be added making the employer "aware of the significant legal obligations and responsibilities being created by the adoption of a master or prototype plan." Initial Brief of William M. Mercer, p. 34. The "warning" should take the form of a bold-faced statement on the front of any document setting forth the nonlawyer's limitations and recommending that the employer seek legal advice. Id.; Initial Brief of FALU, NALU and AALU, p. 44. This suggestion exposes the fallacy of the interested parties' arguments. Certainly, if nonlawyers were not rendering legal advice and services in the completion of the documents, such a warning would not be necessary.

Nevertheless, the interested parties classify the decisions which must be made in selecting the options of the adoption agreement as nonlegal and "limited essentially to economic and employee-relations issues". Initial Brief of William M. Mercer, p. 33. They also point to IRS preapproval of the plan as providing substantial assurances that the legal requirements have been met. Initial Brief of FBA, p. 24. This ignores the legal significance of the decisions which must be made and the fact that the master or prototype plan may not be suitable for the particular employer. As pointed out by this Court "[a]n instrument entirely adequate in one

instance may be totally inadequate in another . . . ." Keyes Co. v. Dade County Bar Ass'n, 46 So.2d 605, 607 (Fla. 1950). Therefore, although a nonlawyer may market the plan and recommend its use from a nonlegal standpoint, the final decision of whether to adopt a master or prototype plan and which options to select rests with the employer upon the advice of independent counsel. Proposed Opinion, pp. 10-11, 16; ABA opinion, pp. 13-14.

As to the marketing of a master or prototype plan, the interested parties wish to provide "[s]pecimen or sample plan documents . . . to the employer . . . to illustrate the structures of different plan types.'' Initial Brief of The Association of Private Pension and Welfare Plans, Inc., p. 5. The proposed advisory opinion finds that providing an example of the types of plans available would not be considered the unlicensed practice of law as long as the nonlawyer did not present a final plan or represent that the sample or specimen document is suitable for the employer's need in all respects. Proposed Opinion, pp. 9-11.

C. Nonlawyers May Continue To Keep Employers Informed

In a highly strained argument seeking authority for nonlawyers to render legal services and advice, the Association for Advanced Life Underwriters argues that the proposed opinion overlooks the employer's right to represent himself and the "important corollary to this basic principle . . . that each person should have the right to select those

who will assist him in performing the services for himself so long as he understands that any nonlawyer he selects is just that--a nonlawyer." Initial Brief NALU, FALU and AALU, p. 39. In other words, the AALU argues that an individual has the right to choose to receive legal advice and services from a nonlawyer. In the absence of a specific authorization, such a right has not been recognized by this Court and, in fact, is contrary to this Court's authority to prohibit the unlicensed practice of law. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). Although an individual should have access to information which will determine the complexity of the legal problem, the assistance he may receive is limited in that legal advice and legal services may only be performed by an attorney. The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978). The proposed advisory opinion recognizes the need for access to information and finds that it is not the unlicensed practice of law for a nonlawyer to motivate an employer to establish a pension plan or to discuss alternatives generally available to the public. Proposed Opinion, pp. 9-11. However, once the services become legal in nature, an attorney's participation is required.[11]

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11. The American Council of Life Insurance requests clarification of the role of home office counsel. Initial Brief of the American Council of Life Insurance, p. 22. As pointed out in the proposed advisory opinion, this question is beyond the scope of the duties of the Standing Committee as it involves the conduct of an attorney. Proposed Opinion, p. 17.

D. Protection Of The Public

The Florida Bankers Association suggests that "[t]he Bar is not able, by itself, to meet the demand for services in this area [as] [t]he vast majority of members of The Florida Bar are as ignorant of the law of pension and profit sharing plans as the average non-lawyer." Initial Brief of the FBA, p. 9. This argument can be applied to any area of the law, it is not unique to the pension field. It does not, however, provide a persuasive reason to allow nonlawyer practice in the pension area, or, for that matter, any area of the practice of law.

To the contrary, the complexity of the area supports the Standing Committee's finding of public harm and the need for regulation in this area to protect the public. "In determining whether a particular act constitutes the practice of law, [the] primary goal is the protection of the public." The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1194 (Fla. 1978); See also, State ex rel. The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), judg. vacated on other grounds, 363 U.S. 379 (1963). The testimony of several witnesses not only gave examples of public harm but also the propensity for public harm. Tr., pp. 83-85, 98-101; R., tab 3, written testimony of Alton C. Ward, Edward Heilbronner, Mary Ann Arlt, Charles P. Sacher; R., tab 4, written testimony of Sharon Quinn Dixon, James B. Davis, Donald J. Jaret, tab 4. As harm in this area may not be exposed until several years after a

plan is adopted, instances of public harm due to nonlawyers rendering legal advice and services will continue to surface.

Rather than setting forth any basis for finding that the rendering of advice as to the design of a pension plan and/or drafting or amending a pension plan for another does not constitute the unlicensed practice of law, the interested parties attempt to defend their current activities by arguing that because they have been doing it for years, they should be allowed to continue. The proposed advisory opinion does not prevent the interested parties from continuing to engage in their professions so long as they do not engage in the practice of law. Proposed Opinion, p. 22. The public is protected by keeping access to nonlawyer professionals open while, at the same time, insuring that legal services are not performed by unlicensed individuals "over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." State ex rel. The Florida Bar v. Sperry, 140 So.2d 587, 595 (Fla. 1962). The public interest is therefore best served by the adoption of the proposed advisory opinion.12

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12. In this brief, the Standing Committee has attempted to respond to the arguments raised in the sixteen initial briefs filed with this Court. The failure to address a particular argument is inadvertent and does not indicate that the Standing Committee agrees with the argument. If this Court requests, the Standing Committee will address any argument which may have been overlooked.

CONCLUSION

Several interested parties have urged this Court to appoint an Ad Hoc Committee to advise the Court on issues raised on this appeal. In light of the extensive record already developed in this proceeding, the Standing Committee does not believe that the appointment of an Ad Hoc Committee is necessary or desirable. All relevant matters are before this Court through the materials submitted to the Standing Committee and the briefs. Although this Court has appointed such a committee on one previous occasion, the process added over one year to the final resolution of the question presented. The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselor, 518 So.2d 1270 (Fla. 1988)(decided February 4, 1988), aff'd and expanded, 547 So.2d 909 (Fla. 1989)(decided May 25, 1989, clarified September 13, 1989). Due to the ever increasing requirements of ERISA, such a delay in this case may prove to be very detrimental.

The fact that there is so much interest in the proposed advisory opinion shows the need for prompt guidance to the public. As the proposed advisory opinion contains such guidance, the Standing Committee on Unlicensed Practice of Law respectfully requests that this Court adopt the opinion or establish its own guidelines to assist the conscientious nonlawyer working in this area.

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