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COMMISSION AUTHORIZED

IN THE SUPREME COURT OF FLORIDA

In re the Florida Bar: Formal Advisory Opinion on Nonlawyer Drafting of Pension Plans	Case No. 74,479

AMICUS CURIAE BRIEF
OF THE STAFF OF THE
FEDERAL TRADE COMMISSION

The Florida Bar's Standing Committee on the Unlicensed Practice of Law has submitted to this Court a proposed advisory opinion that may significantly reduce the role of non-lawyer professionals -- such as accountants and business consultants -- in the establishment of employee pension plans.

The staff[1] of the Federal Trade Commission is pleased to offer its views on this proposal as amicus curiae. We believe that if the final opinion prevents non-legal professionals from performing certain advisory functions with respect to pension plans, it would be likely to injure those who wish to establish

[1] These comments are the views of the staff of the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner. Commissioner Azcuenaga voted against authorizing the staff to file this brief because she believes that the FTC has insufficient information on competition in the market for pension planning services and that it has no expertise in evaluating the need for professional regulation in this market.

or revise such plans and the employees who would participate in them.

This brief focuses on competition issues and on the competitive implications of the proposed opinion. We do not address questions relating to what new substantive protections, if any, Florida consumers may require. We think this issue is best left to the judgment of appropriate state officials.

Our discussion of the proposed opinion is divided into four sections. The opening section describes the experience of the Federal Trade Commission staff and our interest in this area. The second section summarizes the background of this advisory opinion. The remaining two sections discuss two troublesome aspects of the proposed opinion. First, the opinion apparently would not allow non-lawyers to make bottom-line recommendations as to which format and plan provisions would be most suitable to a client's needs, even though practitioners in non-legal disciplines may be best able to make that assessment. Second, the opinion apparently would not allow non-lawyers to prepare the initial drafts of pension plan documents, even if the documents were subsequently reviewed and adopted by the client's lawyers. We believe that employers and employees would probably be injured by both of these apparent prohibitions.

The interest of the Federal Trade Commission

The Federal Trade Commission is an agency created by Act of Congress and charged with the duty of preventing, among other

things, unfair methods of competition.[2] This task has involved the application of antitrust principles both to markets for tangible goods and to markets for services, including, in particular, professional services.[3]

We believe that competition in the professions can benefit consumers in many ways. It can lead to lower prices, enhanced service, and beneficial innovations. The evidence suggests that competition among lawyers can lead to reduced consumer prices without a diminution in service quality.[4] In light of this, we have acted -- both through litigation and through comments such as this one -- to encourage competition among licensed professionals to the maximum extent compatible with other legitimate state goals.[5]

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[2] See 15 U.S.C. §§ 41 et seq.

[3] See, e.g., Indiana Federation of Dentists, 101 F.T.C. 57 (1983), vacated, 745 F.2d 1124 (7th Cir. 1983), rev'd, 476 U.S. 447 (1986); American Medical Ass'n, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982).

[4] See Calvani, Langenfeld & Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761, 781-84 (1988); Schroeter, Smith & Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 36 J. Indus. Economics 49 (1987). Cf. Bond, Kwoka, Phelan & Whitten, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (FTC staff paper 1980); Benham, Licensure and Competition in Medical Markets, draft AEI conference paper (1989); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

[5] Our comments include the following: Comments of the Federal Trade Commission Staff on the Florida Rules of Professional Conduct, submitted to William F. Blews, Esq. (July 17, 1989); Comments of the Federal Trade Commission Staff on the American Bar Association Model Rules of Professional Conduct (November 22, 1988); Comments of the Federal Trade Commission

The background of this advisory opinion

Many knowledgeable observers believe that companies establishing pension plans benefit from having the advice of professionals in several different fields.[6] A tension will predictably arise, however, among the members of different professions as to what the precise rights and responsibilities of each discipline should be.

The instant matter arose at the suggestion of the Executive Council of the Tax Section of The Florida Bar. The Council requested an advisory opinion as to whether certain activities undertaken in the pension field by members of other professions would constitute the unlicensed practice of law. That question

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Staff on the Rules of the Idaho State Board of Chiropractic Physicians (December 7, 1987); Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the New Jersey Supreme Court, submitted to the Committee on Attorney Advertising of the New Jersey Supreme Court (November 9, 1987); Comments of the Federal Trade Commission Staff on the Code of Professional Responsibility of the Alabama State Bar, submitted to the Supreme Court of Alabama (March 31, 1987); Comments of the Federal Trade Commission Staff on the Rules of the South Carolina Boards of Optometry and Opticianary, submitted to the Legislative Audit Council of the State of South Carolina (February 19, 1987).

[6] The value of multi-disciplinary advice was emphasized by several speakers at the hearings conducted by The Florida Bar. See, e.g., Hearings Before the Standing Committee on Unlicensed Practice of Law (Jan. 12, 1989) at 22 (remarks of Edward Heilbronner, Esq.) ("there is no question in my mind but that plan administration firms and plan consultants lend a tremendous hand in terms of the design of the plan"); id. at 57 (remarks of James McGann on behalf of two associations of life underwriters) (the associations "believe that there are at least as many actuarial and insurance matters to be considered as there are strictly legal interpretations, and that therefore the interpretive aspects of employee benefit planning should properly involve life underwriters as well as practicing attorneys").

was considered by the Standing Committee on the Unlicensed Practice of Law, which drafted a proposed advisory opinion. That opinion is now before this Court for review.

The proposed advisory opinion appears, in our view, to contain at least two questionable restraints on inter-disciplinary competition. These will be discussed in the following sections.

Recommendations on overall plan format

The proposed opinion apparently would allow anyone -- including non-lawyers -- to inform a client in general terms about different types, formats, terms and structures of pension plans. The opinion, however, apparently would reserve to lawyers the task of recommending a particular format and specific provisions:

> Analyzing the information and making a determination as to what plan would be best for the client affects important legal rights of the employer and employees and involves an analysis of legal principles and a skill and knowledge of the law greater than that possessed by the average citizen. This step in the process therefore constitutes the practice of law.[7]

The proposed opinion apparently would allow only lawyers to perform this function even in cases where standardized master or prototype plans are used, and even though these plans could be

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[7] Proposed Opinion at 12, citing The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962), rev'd on other grounds, 373 U.S. 379 (1963).

customized by the simple process of checking boxes or filling in a relatively small number of blanks.[8]

We believe that such a rule may prevent non-lawyers who can perform the task of recommending plan formats and provisions from providing that service. Legal skills undoubtedly are relevant to the selection of a specific plan structure. Other skills, however, are also relevant to that task, such as those of the actuary, the accountant, and the business consultant. Some of these professionals are required to have specific knowledge of pension law.[9] All are able to seek legal counsel, and they are likely to be motivated to do so when necessary because their business reputations will be affected by the quality of their services. Furthermore, the provisions of many state and federal regulatory schemes, designed to curb potential abuses in the pension area, would govern plans devised by all categories of professionals.

A competitive market in the provision of plan structuring services, therefore, is likely to result in the provision of these services by the professionals or the combination of professionals that can satisfy consumer demands most efficiently. For example, the consumers of pension advisory services may

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[8] Proposed Opinion at 10.

[9] Cf. Hearing Record at 68 (remarks of Kenneth Ingham) ("enrolled actuaries" are the only professional group to be specifically tested by the federal government in both the areas of pension mathematics and pension law). Ironically, attorneys themselves may not be required to show any special competence in the pension area before practicing there.

believe that accountants can give better advice on plan formats and provisions than attorneys can. Alternatively, those consumers may prefer to obtain advice from accountants, rather than from lawyers, even if accountants lack certain relevant expertise. The advice given by accountants may be less fully developed in its legal aspects, for example, but it may be expressed in terms that are more easily understood by a business person.

In general, three reasons might be offered for permitting only attorneys to recommend specific pension plan formats and terms: The market for these services is undermined by insufficient consumer information, or by inadequately represented interests of employees, or by conflicts of interest on the part of non-lawyers who are both giving advice and selling an investment product. From our perspective, however, we do not believe that these reasons are persuasive.

The first reason assumes a significant disparity in the knowledge possessed by consumers and suppliers of pension advisory services.[10] Employers may not possess the ability to gauge the quality of different pension plans, nor do they ordinarily have the opportunity to acquire this knowledge through repeat purchases. They therefore may be readily misled in their selection of plans. Knowing this to be so, unscrupulous advisors may provide a somewhat lower quality of services, at lower cost

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[10] See generally, Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328 (1979).

to them, than consumers would prefer if they had more information.

We think this argument is not persuasive. It assumes a substantial deficiency in the information available to consumers about the quality of professional services. However, in this market many consumers are likely to evaluate the quality of services in various ways, such as through certification mechanisms, or an assessment of the suppliers' reputations or experience. Moreover, the consumers of pension planning services tend to be sophisticated businesspersons who will generally have dealt with consultants and complex financial proposals before and who know how to evaluate the quality of advisors and advice. They are less likely to be misled than consumers of some other professional services might be.

The second argument is that poor-quality advice may harm not only the company that establishes a pension plan, but also the employees who are dependent on that plan. Since the employee losses from a faulty plan may not be borne by management, management may not be properly motivated to avoid such losses.

This argument is also unpersuasive for two reasons. First, though management and labor may not have identical interests, lawyers are not necessarily any less susceptible than other professionals to the tensions that may arise in cases where the interests of management and labor diverge. Second, non-lawyers, as well as lawyers, may be held accountable to employees if a

pension plan fails. For instance, the accountants involved in preparing a faulty plan may also risk malpractice liability.[11]

The third argument in favor of a practice restriction assumes conflict of interests. Some non-lawyer advisors are in the business of selling particular investment instruments and may actually earn most of their income from the sale of those products. This may create a conflict between their duty to render objective advice and their financial interest in fostering the sale of their own product.[12]

This argument also appears to us to be unconvincing. Since many of the purchasers of these advisory services are experienced businesspersons, they are likely to be aware of any potential conflicts and able to make allowance for them, particularly because many conflicts will be readily apparent. If purchasers are still concerned about possible conflicts, they may seek advice from independent professionals. The independent advisor need not always be an attorney as opposed to some other professional. Finally, this argument proves too much. Conflicts of this type exist throughout the economy, whenever a salesman both advises a customer to purchase a product and offers to sell it. Indeed, an attorney faces such a conflict, for example, when

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[11] Cf. Seaboard Surety Co. v. Garrison, Webb & Stanaland, 823 F.2d 434, 436 (11th Cir. 1987) (accountants could be liable under Florida law to third-party beneficiaries, although negligence in this specific case was not proven), citing First American Title Ins. v. First Title Serv. Co., 457 So.2d 467 (Fla. 1984) (case involving title abstracters).

[12] See, e.g., Proposed Opinion at 4.

he or she recommends litigating a case and then offers to conduct the litigation. Consumers, however, may value the convenience of one-stop service over the possible loss of objectivity that it may entail. We believe that consumers need not always be compelled, as a safeguard, to obtain independent advice.

A former committee of the American Bar Association apparently agreed that non-lawyers may properly make bottom-line recommendations on the structure of pension plans.[13] The ABA committee would have allowed non-lawyers to gather information about the employer's work force and financial resources, to explain to the employer the various plan options, and then to

> provid[e] recommendations concerning the basic economic structure of the proposed plan on the basis of such data, information, calculations and assessments.[14]

The presence of lawyers would not be mandatory under this rule except with respect to the distinctively legal aspects of the plan. Those distinctly legal aspects would not include recommendations on plan format or coverage provisions.[15]

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[13] Final Opinion on Employee Benefit Planning of the American Bar Association's Standing Committee on the Unauthorized Practice of Law, reprinted in BNA Pension Reporter, p. R-12 (Oct. 17, 1977). This committee has since been merged into another and its opinions withdrawn, but this action reportedly was not taken because of any concern about the merits of the positions expressed by the committee.

[14] Id. at page R-17.

[15] The ABA defined the distinctly legal aspects of the pension plan in the following terms:

> Generally, only a lawyer in the course of a lawyer-client relationship with an employer should (1) advise an employer with respect to

In summary, if providing bottom-line advice on plan formats is considered to be the unauthorized practice of law, competition is likely to be needlessly restricted, to the detriment of employers and employees. We therefore suggest that the law on this point be construed insofar as possible in a way that will avoid such a result. For example, the kinds of advice involved in establishing a pension plan could be found to be primarily "business" rather than "legal" in their orientation, and therefore not to be the kinds of advice that must come from a lawyer.[16]

> the fiduciary obligations created by the plan; (2) offer an opinion on or interpretation of existing trust instruments, contracts or other agreements; (3) advise the employer with respect to the form of corporate documents and actions necessary to effectuate the plan; (4) advise the employer on the specific legal consequences of financial transactions, forms of property ownership, etc.; and, (5) offer an opinion that an existing or proposed plan is in compliance with ERISA or any other law, is or will qualify for special tax treatment, or is in any other respect legally sufficient.

Id. Even on these topics the lawyer's exclusive role would have been limited. The opinion contains no absolute requirement that a lawyer be consulted, and, moreover, the non-lawyer apparently would have been permitted to make recommendations based on assumptions about these legal issues as long as he or she advised the client to seek an independent legal review. Id.

[16] This conclusion is suggested by an examination of three of the standard textbooks in the pension-planning field. These generally reveal a focus on non-legal issues. For example, one text lists seven topics in its general section on plan design. See D. McGill, Fundamentals of Private Pensions (3d ed., Wharton School 1975). These are "coverage and participation," "retirement benefits," "withdrawal benefits," "death and disability benefits," "financial considerations," "integration of Social Security pension plan benefits," and "adjustment of

Preparation of initial drafts

The proposed opinion also would reserve to lawyers the task of drafting all the legal documents involved in a pension plan, such as the plan itself, corporate resolutions, trust documents, and contracts. It would not allow non-lawyer professionals to supply draft documents that are then reviewed and adopted by the client's attorney, a practice that is now common.[17]

Again, we believe that the proposed approach may injure employers and employees by needlessly restraining competition in the provision of these services. Some non-lawyers may have a

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pensions for inflation and productivity gains." These are not issues on which lawyers would seem to have any particular monopoly. A second text has three authors, one of whom is a lawyer, but two of whom are Ph.D.'s and executives in the insurance industry. See E. Allen, J. Melone & J. Rosenbloom, Pension Planning (3d ed., Irwin 1976). And in a third text the author, himself a lawyer, spends his opening chapters defining the basic legal requirements of pension and profit-sharing plans, and then turns to the practical design of such plans with the remark that "[t]his chapter explores those requirements from a business and cost standpoint." J. Mamorsky, Pension and Profit-Sharing Plans, p.38 (Executive Enterprises 1977). The selection of a specific plan format, in other words, is a "business and cost" issue more than it is a legal one. The relevant advice is not primarily addressed to issues that involve an analysis of legal principles, and that require a skill and knowledge of the law greater than that possessed by the average citizen. The advice therefore fails to meet the test of illegality set out in Sperry. The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962), rev'd on other grounds, 373 U.S. 379 (1963).

[17] This practice would be declared improper on the ground that "it is the non-lawyer who is making the decisions as to what should be included in the plan and drafting the plan document." Proposed Opinion at 18. A limited exception is made for the use of master or prototype plans, or "kits" that include these plans. These may be marketed or sold by non-lawyers, although the non-lawyers may not complete the implementing documents. Id. at 15-16.

relative advantage in drafting pension plan documents. For example, accountants and actuaries can have a special expertise in the issues most likely to arise in these documents. Other non-legal entities, such as national insurance and consulting firms, can be large enough to realize scale economies in the drafting process, such as being able to maintain files of model documents and special provisions. And all of these "non-lawyer" corporate entities may have lawyers as members of their staffs, so that their draft documents may already reflect input from attorneys. None of these considerations may eliminate the desirability of a final, independent review of these documents by the client's own attorney. But they do suggest that the initial drafting could be done by others.

Once again, the ABA's former Committee on the Unauthorized Practice of Law appears to have agreed with this view. That Committee's report concluded that the final responsibility for preparing plan documents must rest with lawyers.[18] The report also concluded, however, that non-lawyers could properly provide suggested drafts:

> Because of the unique and complex nature of the pension planning process, the preparation and drafting of the legal documents effectuating the adoption or amendment of a plan by the employer's lawyer will normally entail detailed consultation with non-lawyers who are engaged in plan design and administration. This consultation may

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[18] Final Opinion on Employee Benefit Planning of the American Bar Association's Standing Committee on the Unauthorized Practice of Law, reprinted in BNA Pension Reporter, p. R-12.

> include the preparation of legal memoranda or analyses, the submission of draft or suggested documents or provisions and the preparation of supporting memoranda, schedules, etc. by the non-lawyers. It may also involve a review of the documents proposed by the lawyer. Although non-lawyers have a very wide latitude in assisting and consulting the employer's lawyer, the employer's lawyer must at all times exercise independent legal judgment on behalf of the client; he/she may not simply rely upon the expertise of the non-lawyer consultants [or] their legal staffs.[19]

We recognize that this Court considered a similar set of issues in the Turner case and arguably reached contrary conclusions.[20] The Justices there did not believe that independent attorney review would necessarily cure all problems: "The fact that the supplier adviser urges another to consult an attorney does not make the advice any less 'legal advice' or his services any less 'legal services.'"[21]

We suggest, however, that Turner is in fact consistent with our position. The critical issue is the exact function being served by attorney review. In the Turner case a life insurance agent had set up corporations and drafted final pension documents for physicians. The Court there evidently concluded that an optional, post hoc "review" by an attorney would not be sufficient to keep Turner's conduct from being the unauthorized practice of law. Under our suggested approach, on the other

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[19] Id. at R-17.

[20] The Florida Bar v. Turner, 355 So.2d 766 (Fla. 1978).

[21] Id. at 769.

hand, the non-lawyer would be limited to preparing detailed draft proposals for the attorney's consideration. The attorney would remain ultimately responsible for the substance and legal sufficiency of the documents. We believe that such a rule would allow the benefits of non-attorney input while still adequately meeting the concerns of the Turner Court.[22]

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[22] If this Court should nonetheless conclude that Turner is inconsistent with the suggested rule, then it may be appropriate to reconsider or narrow the Turner opinion. In this context it is worth bearing in mind that Turner was not a fully-litigated case. Although not technically a consent either, the parties did submit it to the referee on a stipulated list of legal principles, which the Court subsequently approved. Since this procedure is likely to overlook certain issues or specialized applications of the law, the case may not be entitled to quite the same degree of stare decisis as other precedents.

Conclusion

We believe that the proposed advisory opinion may injure employers and employees in two respects: (1) by permitting only lawyers to make bottom-line recommendations as to the formats and specific provisions of pension plans; and (2) by permitting only lawyers to prepare proposed drafts of pension-related legal documents, even when the documents are independently reviewed and adopted by the client's attorney. We suggest that the opinion be changed to ensure that non-lawyers are not prohibited from performing both of these tasks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing amicus curiae brief has been furnished to the following attorneys of record by U.S. Mail, first class postage franked, this ~~29th~~ 2nd day of ~~September~~ October, 1989:

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IN THE SUPREME COURT OF FLORIDA

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MOTION FOR LEAVE TO
FILE OUT OF TIME

We hereby request permission to file the attached amicus brief out of time, since our internal review process took somewhat longer than anticipated.

We hope that the brief will still be helpful to the Court.

Respectfully submitted,

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