

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 09-0068

FILED

APR 20 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN RE THE PETITION AND MEMORANDUM)
IN SUPPORT OF REVISION OF THE RULES ON)
THE UNAUTHORIZED PRACTICE OF LAW)

**COMMENTS OF THE MONTANA SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

The Montana Society of Certified Public Accountants ("Society") respectfully submits the following comments in response to the Commission on Unauthorized Practice April 2009 petition and memorandum in support of revision of the rules on the unauthorized practice of law. We are specifically commenting on the proposed changes to *Rule 2 - Definitions. (h) unauthorized practice of law.* With 1,780 members, the Society represents CPAs in industry, government and academia as well as those actively engaged in the practice of public accounting. The Society has been in existence for 96 years. The Society promotes professionalism, ethics, and integrity among CPAs, and is committed to protecting the interests of its members and the public. The Society works closely with the American Institute of Certified Public Accountants (AICPA) and other organizations of professional accountants in seeking to promote professionalism, integrity and ethics among CPAs.

Commission on Unauthorized Practice's Difficult Task

The Society applauds the Commission's efforts to clarify activities constituting the unauthorized practice of law in Montana. The Society understands that the primary purpose of the Commission's work is to protect the public from representation by unqualified individuals and to promote competent professional representation of the public in the practice of law. The Society endorses this undoubtedly legitimate interest. Indeed, the Society recognizes that the Commission had a number of difficult issues with which to deal.

While the Society recognizes that the Commission has legitimate goals, we are concerned there may be certain unintended results of the Commission's attempts to redefine the unauthorized practice of law in Montana. In particular, the Proposed Revisions effectively duplicate the statutory and regulatory safeguards already in place to regulate CPAs when engaged in the practice of public accountancy in Montana. As more fully described below, the Society respectfully submits that the Proposed Revisions do not properly deal with the practice of public accountancy and, in fact, may limit a CPAs right to provide services to their clients under their own statutory and regulatory authority.

The Society believes that the Proposed Revisions may result in harm to the public by denying clients access to qualified professional representation by CPAs in their traditional and customary areas of practice, such as public accounting, taxation, tax planning, estate planning, management consultation, securities disclosures, etc. For this reason, the Society believes that the Proposed Revisions should be amended to specifically exclude CPAs, who are already subject to extensive regulation by the Montana Board of Public Accountants ("State Board"). We believe there has been no demonstrated or implied harm to the public resulting from representation by heavily regulated and uniquely qualified professionals -- such as CPAs. Our members are asking the Commission to recognize CPAs as a heavily regulated profession whose regulatory scheme already protects the public from potential harm arising from the provision of professional services.

As the Commission is undoubtedly aware, other jurisdictions have addressed the unauthorized practice of law issue and have held that CPAs are not an intended target of these rules. Specifically, other states have successfully dealt with legitimate concerns over the unauthorized practice of law, while respecting and preserving a CPAs ability to provide professional services to clients without the need for additional oversight or regulation. For example, in an order dated September 21, 1992 relating to the unauthorized practice of law, the Supreme Court of South Carolina ordered:

"[O]ur respect for the rigorous professional training, certification and licensing procedures, continuing education requirements, and ethical code required of Certified Public Accountants (CPAs) convinces us that they are entitled to recognition of their unique status. We hold that CPAs do not engage in the unauthorized practice of law when they render professional assistance, including compensated representation before agencies and the Probate Court, that is within their professional expertise and qualifications. We are confident that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest."

Because the Proposed Revisions are broadly drafted and will likely be interpreted to include CPAs providing services, recommendations, and advice on questions of tax law, and when providing other customary professional services to their clients, our members seek clarification that the intent of the Proposed Revisions is not to impact, change or alter the practice or regulation of CPAs. Accordingly, the following comments are intended to inform the Commission regarding the practice areas of CPAs, the historical interactions between CPAs and attorneys, the Society's specific concerns regarding interpretation of the Proposed Revisions, and the Society's recommendation with regard to a CPA safe harbor provision.

The Practice of Law and Public Accountancy -- Interrelated Professions

The accounting and legal professions have a long history of working together for the benefit of both professions. This cooperative effort has positively impacted the most important benefactor – the public. Collaboration between the two professions is undoubtedly in the public interest. In recognition of this fact, the accounting and legal professions have, over the years, engaged in various joint endeavors such as the National Conference of Lawyers and Certified Public Accountants, established in 1944 by the American Bar Association and the American Institute of Certified Public Accountants (AICPA).

In particular, the State Board has specifically recognized the need for cooperation between the two professions. This recognition is based in part on the fact that the practice of public accountancy and the practice of law overlap in many areas. In some areas, such as tax controversy, tax planning, securities law disclosures, and estate planning, the legal and accounting phases are so interrelated, interdependent and overlapping, that they are often difficult to distinguish. Both attorneys and CPAs are committed to utilizing their education, knowledge and skills to better serve their clients in these and other practice areas.

The Practice of Public Accountancy is a Regulated Profession

As with the legal profession, CPAs are subject to stringent examinations, educational requirements, licensing procedures and disciplinary mechanisms governing the training, certification and practice of CPAs. The State Board is responsible for the oversight and regulation of the practice of public accounting. Title 37, Chapter 1, Part 3, MCA, is the Uniform Regulatory Act passed by the Legislature in 1995. All professional and occupational licensing is covered in these statutes. Specifically, to be eligible to practice public accountancy a person must be of good moral character, meet rigorous educational requirements, pass a uniform CPA examination, meet various work experience requirements, and pass an examination on the AICPA's Professional Rules of Conduct. CPAs must also comply with stringent continuing professional education requirements to maintain their right to practice. Indeed, CPAs are held to the highest standards of professional competence, integrity, and learning.

The combination of certification, rules and regulations governing CPA practice ensures that CPAs addressing complex issues are competent, ethical and responsible representatives of their clients. The State Board is statutorily required to prepare and publicly disseminate information of public interest relating to the regulation of the practice of public accountancy and relating to the filing of complaints by a client or any member of the public against CPAs and their firms. In this regard, the State Board has developed and implemented policies that provide the public with a reasonable opportunity to appear before the State Board and to speak on any issue impacting the practice of public accountancy in Montana. As with legal malpractice claims, the judiciary also offers a vehicle for aggrieved clients to bring claims against CPAs.

Unreasonable Restraint on the CPA Profession and Harm to Consumers

Based on the expanded definitions of the "unauthorized practice of law," it is possible that the following typical public accounting services, and possibly many others, could be considered within the definition of practicing law as follows:

- Estate planning advice and assistance to personal representatives in uncontested probate matters (including preparing and filing asset inventories and appraisals, and preparing and filing probate accountings);
- Individual financial planning and general business advice;
- Real estate advisory services related to accounting and finance such as valuation and appraisal, economic and feasibility studies, work-outs and restructuring, consulting, acquisition and disposition, due diligence, project and development management, site selection and location planning, and real estate marketing; and
- Compensation and employee benefits services, including pension consulting.

Under the Proposed Revisions, CPAs who render such traditional tax, accounting and consulting services may presumably be treated as engaged in the unauthorized practice of law and subject to disciplinary action by the State Bar and additional civil liability.

It is universally accepted that CPAs are routinely called upon to use their training and expertise to interpret and apply legal principles. In fact, CPAs are authorized by statute to practice before the Internal Revenue Service ("IRS") and have been doing so since the income tax law was created. Many other federal agencies permit CPAs to represent clients before them. Clients regularly seek the following services from CPAs: (i) negotiation and preparation of settlement documents to be submitted to the IRS; (ii) advice regarding the application of federal tax law to their specific situations; and (iii) recommendations on reaching tax goals and other investment strategies. CPAs are routinely engaged to render advice -- including advice on federal tax consequences in complex matters such as corporate and business restructuring.

Adoption of a definition that would not permit CPAs to represent clients before state entities such as revenue boards, commissions and tribunals would have a disparate and inequitable effect on individual taxpayers and small businesses. If the professional service may only be provided by an attorney, individuals and small businesses might entirely forgo seeking assistance that is currently provided by a highly qualified CPA who might provide efficient, expert professional services at a lower cost than might be charged by an attorney. Denying consumers the opportunity to choose for themselves the individual from whom they might seek professional expertise is clearly not in the public interest. This is particularly true where, as under the proposed definition, a CPA, however qualified and experienced that individual might be, would be prohibited from providing the services while any attorney, regardless of that individual's experience or training, would be allowed to provide the service. Such a result would not meet the public's needs or expectations.

The U.S. Department of Justice itself has sought to protect those interests through judgments obtained against bar associations and through Competition Advisory Letters sent to various state and local bar associations related to actions which would restrict competition in the service arena. In general, the Department of Justice has expressed the following concerns

regarding unauthorized practice of law rules: (1) the public interest should guide the adoption of such rules; (2) concerns are raised when such a rule hurts the public by causing the price of services to rise and the elimination of service competition; (3) there must be a showing of actual harm to consumers to justify the rule (4) often, where there is a public interest concern, there are less restrictive measures which can protect consumers.

In sum, our members are asking the Commission to recognize CPAs as a heavily regulated profession whose regulatory scheme already protects the public from potential harm arising from the provision of professional services.

Recommendations

The Society respectfully requests that the Commission clarify that the Proposed Revisions are not intended to apply to the acts and services performed by CPAs and the individuals and employees employed by a CPA firm. Many other states have adopted an exception for CPA services as outlined in the attached "A Brief Review of What Other Jurisdictions Have Done." Specifically, the Society suggests that the Proposed Revisions be modified and expanded to include the following exception to the unauthorized practice of law definition:

"CPAs and associates or employees of CPA firms are not engaged in the practice of law when providing accounting, assurance, attest, tax, or consulting services for clients within their professional expertise and qualifications as governed by the Public Accountancy Act and the rules promulgated by the Montana Board of Public Accountants."

The Society cannot overemphasize the need for this safe harbor for CPAs.

If the proposed rules are adopted, CPAs will likely run the risk of being sanctioned for the unauthorized practice of law. The Society doubts the Commission intended to circumvent or limit in any way the services CPAs are lawfully permitted to perform for their clients. The Society respectfully submits and strongly urges the Court to consider the above recommendation to protect CPAs providing services under their own regulatory scheme. It is particularly appropriate and in the public interest that these services remain freely available without the cloud of a later claim that the CPA was engaging in the unauthorized practice of law or somehow failed to abide by the Court's standards of care or ethics. The Society is unaware of any public concern or demonstrated harm to the public arising from the services CPAs currently provide to their clients. If a client or member of the public is harmed by a CPA's actions or actions by a public accounting firm, the matter is quickly addressed and will likely be investigated under the stringent ethical and disciplinary rules promulgated and administered by the State Board.

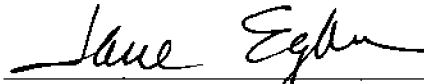
The Society would be pleased to meet with the Commission on Unauthorized Practice or individuals involved in this process to answer any questions or issues raised by this submission and the Society's recommendation as outlined herein and to work with you as you continue to craft your proposal.

Dated this 20th day of April, 2009.

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A BRIEF REVIEW OF WHAT OTHER JURISDICTIONS HAVE DONE

Arizona: The Arizona Supreme Court has included four specific exemptions for CPAs in its rules regulating the practice of law. These exemptions acknowledge the special status of CPAs in financial and tax matters. See Arizona Supreme Court Rule 31 (d) 13, 14, 16 and 17.

Connecticut: The Superior Court of Connecticut adopted rules effective January 1, 2008, to define the practice of law. These rules specifically exempt CPAs in “preparing tax returns and performing any other statutorily authorized services.” See Connecticut Superior Court Rules Sec. 2-44A (b)(10).

Florida: In issuing an advisory opinion interpreting the application of its rules on the practice of law to the question of drafting living trusts and related documents, the Florida Supreme Court noted that the Florida Bar and the Florida Institute of CPAs had stipulated that the proposed opinion would note “relate in any way to the practice of public accounting: as defined in the Florida Statutes. See Supreme Court of Florida, No. 78, 358.

Hawaii: The Hawaii State Bar Association has a petition pending before the Hawaii Supreme Court to adopt a rule on the unauthorized practice of law. The Bar’s proposal contains two specific, but limited exemptions for CPA activities. The Hawaii Society of CPAs has requested that Court to broaden the exemption to cover the full range of services provided by CPAs and to exempt persons working under the supervision of a CPA. The Hawaii Bar’s petition to the Court also defines the practice of law to include the words “where a relationship of trust or reliance exists” between the party seeking and the party giving advice. See proposed Hawaii Supreme Court Rule (c) (1).

Nebraska: The Nebraska Supreme Court has included five specific exemptions for CPAs in the rules it adopted effective January 1, 2008. See Nebraska Supreme Court Rules section 3-1004 (I). Nebraska also includes in its definition of the practice of law the words “where a relationship of trust or reliance exists” between the party seeking and the party giving advice. See Nebraska Supreme Court Rule 3-1001 (A).

South Carolina: In addressing a set of proposed rules on the unauthorized practice of law submitted by the Bar of that state, the South Carolina Supreme Court rejected the proposed rules, and then laid out some basic statements of its own. With regard to CPAs the Court said that “our respect for the rigorous professional training, certification and licensing procedures, continuing education requirements and ethical code required of CPAs convinces us that they are entitled to recognition of their unique status... We are confident that allowing CPAs to practice in their area of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest.” South Carolina Supreme Court, September 21, 1992.

Virginia: The rules adopted by the Virginia Supreme Court contain three specific exemptions for CPAs. See Virginia UPC 5-101 (2), 5-102 (A) (2) and 5-8. Interestingly, the last cited rule says that CPAs “engaged in the practice of their profession are entitled to a greater degree of latitude in the resolution of issues involving overlapping legal and accounting principles.”