U.S. Department of Labor Pension and Welfare Benefits Administration
Washington DC 20210

February 14, 1994

Morgan, Lewis & Bockius
Ms. Carol V. Calhoun
1800 M Street, N.W.
Washington, D.C. 20036

94-02A
ERISA SEC.
3(32), 4(b)(1)

Dear Ms. Calhoun:

This responds to your request for an advisory opinion concerning whether the District of Columbia Bar Deferred Compensation Plan ("Plan") is a "governmental plan" within the meaning of section 3(32) of the Employee Retirement Income Security Act of 1974 ("ERISA").

Section 4(b)(1) of ERISA excludes governmental plans from coverage under title I of ERISA. Section 3(32) of ERISA defines a governmental plan as "… a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Section 3(10) of ERISA defines the term "State" to include the District of Columbia.

According to the information provided, the Plan was adopted by the District of Columbia Bar ("D.C. Bar"), effective as of August 12, 1988. The Plan is administered by the D.C. Bar and is intended to qualify as an "eligible deferred compensation plan" under section 457 of the Internal Revenue Code.

Participation in the Plan is limited to individuals who (a) are employees of the D.C. Bar or perform services for the D.C. Bar by appointment, election or contract; (b) receive compensation for performing services for the D.C. Bar; and (c) execute an agreement to participate in the Plan.[1] See Plan sections 2.08 and 4.01. "Compensation" is defined as the "total annual remuneration for employment or contracted services" payable by the D.C. Bar. See Plan section 2.01.

The above representations demonstrate that the Plan was established and is maintained by the D.C. Bar for, inter alia, its employees. It will be considered a governmental plan only if the D.C. Bar is an agency or instrumentality of the District of Columbia within the meaning of ERISA section 3(32). The terms "agency" and "instrumentality" are not defined in ERISA; nor are there any regulations under ERISA that interpret those terms. Thus, the specific facts and circumstances of the relationship between the D.C. Bar and the District of Columbia must be examined to determine whether the entity is an "agency or instrumentality" as described in section 3(32).

Your submission contains the following additional facts and representations. The highest court of the District of Columbia is the District of Columbia Court of Appeals ("D.C. Court"). In 1970, pursuant to Article I of the U.S. Constitution, Congress provided in the Court Reorganization Act that "[t]he District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion.[2]

On April 1, 1972, the D.C. Court adopted a set of Rules Governing the Bar ("Rules") and thereunder created the unified D.C. Bar. The Preamble to the Rules states:

The District of Columbia Court of Appeals in the exercise of its inherent powers over members of the legal profession does hereby create, as an official arm of the Court, an association of members of the Bar of the District of Columbia to be known as the District of Columbia Bar, and pursuant to its statutory authority governing admissions to the Bar promulgates the following Rules for the government of the Bar and the individual members thereof… [Emphasis added].

Rule I, section 2 summarizes the official purposes of the D.C. Bar:

The purposes of the Bar shall be to aid the Court in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence in public service, and high standards of conduct; to safeguard the proper professional interest of the members of the Bar; to encourage the formation and activities of volunteer bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the Bar to the public, and to publish information relating thereto; to carry on a continuing program of legal research and education in the technical fields of substantive law, practice and procedure, and make reports and recommendations thereon; to the end that the public responsibility of the legal profession may be more effectively discharged.

D.C. Bar members elect officers and a Board of Governors (the "Board"). See Rules III and IV. The Board manages and directs the affairs and activities of the D.C. Bar through periodic meetings and the appointment of an Executive Committee to act on behalf of the Board between meetings. The Board is authorized, among other things, to appropriate and disburse funds to pay necessary expenses of the D.C. Bar, engage and define the duties of employees and fix their compensation, and adopt by-laws and regulations consistent with the Rules for the orderly administration of the D.C. Bar's affairs and activities. See Rule IV, section 3. However, pursuant to 11 D.C. Code Ann. sec. 2501(a), the Rules may be made or amended only by the D.C. Court.

The D.C. Court possesses exclusive authority to regulate admission to the D.C. Bar and bears the responsibility for disciplining attorneys.[3] Rule 46 of the D.C. Court General Rules of the Court, provides that the D.C. Court shall appoint seven members of the D.C.

Bar to the Committee on Admissions. Subject to the approval of the D.C. Court, the Committee on Admissions shall adopt such rules and regulations as it deems necessary to carry out the provisions of Rule 46. To investigate alleged violations of the bar's disciplinary rules, Rule XI, section 4(a) of the Rules provides that the D.C. Court shall appoint seven members of the D.C. Bar and two members who are not lawyers to a Board of Professional Responsibility.

You represent that the D.C. Bar has never been separately incorporated and characterize it as "an arm of the Court rather than a separate legal entity."

The D.C. Bar is an integrated or unified bar; membership and dues are mandatory for anyone licensed to practice law in the District of Columbia.[4]

You represent that the D.C. Court's primary means of financial control over the D.C. Bar is its power over the mandatory membership dues, which includes the power to set a ceiling for mandatory dues and prescribe the purposes to which the D.C. Bar may devote such dues.[5] Rule II, section 4 of the Rules provides that the mandatory dues assessed by the D.C. Bar upon its members may not exceed a ceiling established by the D.C. Court. Rule VIII requires the Board to prepare and file with the Clerk of the Court an annual financial statement showing assets, liabilities, receipts, and disbursements of the D.C. Bar.

Finally, you represent that the Internal Revenue Service has determined that the D.C. Bar is not subject to federal income tax inasmuch as it is an instrumentality of the District of Columbia. The Service advised the D.C. Bar that it was not required to file income tax returns and that certain contributions to the D.C. Bar would be deductible by the donor for income, gift, and estate tax purposes.[6]

Based on your representations, it appears that the D.C. Bar exists by virtue of rules promulgated by the D.C. Court that authorize the D.C. Bar to "aid the court in carrying on and improving the administration of justice." See Rule I, section 2. The D.C. Bar exercises this delegated authority under the direction and control of the D.C. Court. Acts taken by the D.C. Bar to "engage and define the duties of employees and fix their compensation" as provided in Rule IV, section 3 of the Rules, including the decision to adopt and administer the Plan for the benefit of its employees, are activities related to the "carrying on and improving the administration of justice." Therefore, the establishment and maintenance of the Plan fall within the governmental functions of the D.C. Bar.[7]

On the basis of the facts, representations, and documents provided, it is the opinion of the Department of Labor (Department) that the D.C. Bar is an agency or instrumentality of the District of Columbia within the meaning of ERISA section 3(32) and that the Plan is a governmental plan within the meaning of that section. Accordingly, the Plan is excluded from coverage under Title I of ERISA by reasons of section 4(b)(1) of ERISA. However,

the Department offers no views in this letter regarding the status of the Plan under Title I of ERISA in the event the Plan should cover persons who are not D.C. Bar employees.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions. We wish to note that nothing in this letter constitutes a conclusion as to any particular tax treatment under the Internal Revenue Code.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

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[1] We note that these provisions appear to permit individuals who are not employees of the D.C. Bar to become participants. You have represented, however, that eligibility to participate in the Plan has at all times been limited to employees of the D.C. Bar, and you have also represented that the Plan will be amended to make that limitation express. Our opinion as expressed herein is based on these representations.

[2] District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 521, 11 D.C. Code Ann. secs. 2501-2503 (1981).

[3] 11 D.C. Code Ann. secs. 2501(a), 2502 (1981). See John Doe v. Board on Professional Responsibility, 717 F.2d 1424 (D.C. Cir. 1983).

[4] The terms “integrated” and “unified” in describing a state bar generally are used to indicate that the functions of both a private association or associations of lawyers and a regulated state agency have been combined in a single entity. The actual extent of bar activities that are governmental in nature varies among the integrated or unified state bars. The terms “integrated” and “unified” may not be synonymous in meaning, and the conclusions reached in this letter are specific to the representations and facts herein presented.

[5] In On Petition to Amend Rule I of the Rules Governing the Bar, 431 A.2d 521 (D.C. App. 1981), the D.C. Court held that the Board would not be permitted to implement a referendum passed by the membership concerning use of the mandatory dues, to the extent that so doing would conflict with the operational requirements for the D.C. Bar as promulgated by the D.C. Court in the Rules. The referendum, if fully implemented, would have severely limited the essential functions of the D.C. Bar. The court noted in dicta that while the principal committees of the D.C. Bar function as “direct arms of the court (although funded by dues), it was intended that the Bar otherwise basically should be autonomous, subject to a recognition of the fact that it, having been created by this court, is an organ of government.” See 431 A.2d at 523.

[6] Cf. State Bar of Texas v. U.S., 560 F.Supp. 21 (N.D. Tex. 1983) (holding that an integrated state bar was not liable for FUTA taxes imposed on employers because at least part of the bar's activities was governmental in nature). Also, other integrated bars that are not separately incorporated have been held to be exempt from certain state taxes as an arm of the state. See The Florida Bar v. Lewis, 358 So.2d 897 (Fla. Dist. Ct. App. 1978), aff'd, 372 So.2d 1121 (Fla. 1979) (state bar exempt from state documentary tax and penalty), Travis v. Landrum, 607 S.W.2d 124 (Ky. Ct. App. 1980) (state bar center building was public property exempt from state property tax).

[7] Cf. Keller v. State Bar of California, 496 U.S. 1 (1990). In Keller, the integrated California State Bar claimed that, because it was a regulated state agency, it was exempt from any constitutional restraints on the use of its compulsory membership dues and could therefore use them for any purpose within its broad statutory authority. The Supreme Court drew a distinction between the bar's statutory activities and those activities with a “political or ideological coloration.” Keller prevents an integrated state bar from avoiding First Amendment scrutiny of its non-regulated expenditures. See also Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 566 (9th Cir. 1990), cert. denied, 488 U.S. 805 (1991).