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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1730

IN RE: STANDING COMMITTEE ON THE UNLICENSED PRACTICE OF LAW'S PROPOSED ADVISORY OPINION #2014-3, SCHARRER V. FUNDAMENTAL ADMINISTRATIVE SERVICES

OBJECTIONS AND SUPPORTING BRIEF IN OPPOSITION TO UNAUTHORIZED PRACTICE OF LAW COMMITTEE PROPOSED FORMAL ADVISORY OPINION #2014-3

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STATEMENT OF CASE AND FACTS[1]

Introduction. Fundamental Administrative Services, LLC ("**FAS**") and its in-house counsel Christine Zack ("**Ms. Zack**") (collectively "**Respondents**") ask this Court to disapprove The Florida Bar Standing Committee on the Unlicensed Practice of Law's ("**UPL Committee**") Proposed Formal Advisory Opinion #2014-3, *Scharrer v. Fundamental Administrative Services* (the "**PAO**").[2]

Procedurally, the PAO (**1**) conflicts with the UPL Committee's vote finding that the conduct at issue is not UPL; (**2**) was issued in violation of *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 906 (Fla. 2010), and the new UPL

[1] Citations to the Appendix filed with this Brief are to Tab Number, Exhibit Number, and/or Page Number, *e.g.*, [A1 at 1] refers to Tab 1 of the Appendix, Page 1; [A1, Exh. A, at 1] refers to Tab 1 of the Appendix, Exhibit A, Page 1.

[2] Out of an abundance of caution due to the ongoing litigation between the parties, this brief and any submissions or appearances by FAS and Ms. Zack are a "special appearance" to preserve their jurisdictional defenses. As noted herein, FAS is a Delaware LLC with its principal place of business in Maryland. Ms. Zack is an FAS employee who resides in Nevada. Ms. Zack is licensed to practice law in the State of Maryland and holds an in-house counsel license in the State of Nevada. She has already been dismissed from two different lawsuits filed by the Bankruptcy Trustee, in part on the basis she is not subject to personal jurisdiction in this State, which included an analysis of whether any of her purported conduct occurred in Florida. *Scharrer v. Fundamental Admin. Servs. LLC,* No. 8:12-cv-01854 (M.D. Fla. Aug. 27, 2014) (Order dismissing suit against Ms. Zack with prejudice) [A20]; *Scharrer v. Fundamental Admin. Servs., LLC,* No. 12-cv-1855 (M.D. Fla. November 27, 2012) (Order dismissing suit against Ms. Zack without prejudice for lack of personal jurisdiction) [A2]. By the filing of this Brief, neither FAS nor Ms. Zack waive any jurisdictional defenses to any claims or other relief that may be sought against them in a Florida state or federal court. Nor do they waive the requirement of service of process as may be appropriate to the forum. *See Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026 (Fla. 1982).

Rules adopted pursuant to that opinion, and (**3**) does not address "specified" conduct. Substantively, the PAO (**1**) misconstrues the law governing an attorney's exercise of independent judgment, (**2**) wrongly interjects the issue of "control" in potentially every case in which a client's delegated agent is involved in litigation, and (**3**) purports to unlawfully delegate to other courts this Court's exclusive authority to determine what is or is not the unlicensed practice of law.

Background. The PAO was issued in response to a petition for formal advisory opinion (the "**UPL Petition**") brought by Beth Ann Scharrer, as Trustee for the Bankruptcy Estate of Fundamental Long Term Care, Inc. ("**Trustee**"), and separately, on behalf of Trans Health Management, Inc. ("**THMI**") (collectively "**Petitioners**"). [A3 at 2.] THMI is not part of the bankruptcy estate, and the Trustee's authority to direct litigation on its behalf remains in dispute. The UPL Petition relates to corporate transactions dating back at least eight years and dozens of pending lawsuits and appeals involving potentially billions of dollars currently pending in at least four different states. Currently, there are at least 15 lawsuits among the various companies and litigants related to this action in Florida alone.[3] The following provides a brief history underlying the allegations of unauthorized practice of law ("**UPL**") against FAS and Ms. Zack, and the relief sought through this petition. Importantly, FAS disputes any allegations that it ever practiced law

[3] *See* A5 for a list of pending cases between the parties.

and Ms. Zack disputes any allegations that she practiced law in Florida—much less engaged in UPL.

Corporate Structure Of The Parties And The THMI Lawsuits

FAS is a Delaware limited liability company with its principal place of business in Maryland. [A23 at 2.] FAS provides administrative support services to skilled nursing facilities—a business arrangement that is common in the nursing home industry. [A1 at 4.] Ms. Zack is employed by FAS as its Senior Vice President, Chief Risk Officer, and in-house counsel. [A11 at 1.] Ms. Zack is duly licensed to practice law in the State of Maryland and holds an in-house counsel license in Nevada. [A11 at 1.]

Trans Health Care, Inc. ("**THI**") owned subsidiaries that operated and/or managed nursing homes across the country. [A8 at 2.] THMI, which is one of the parties purportedly requesting the advisory opinion, was a wholly-owned subsidiary of THI that provided operational support services to nursing homes. *Id*.

In the early to mid-2000's, the law firm of Wilkes and McHugh, P.A. (the "**Wilkes law firm**") filed a number of tort lawsuits against THI and/or THMI in Florida. [A10 at 2.] These included lawsuits filed on behalf of the Estates of Juanita Jackson, Arlene Townsend, Elvira Nunziata, Opal Lee Sasser, and Joseph Webb (the "**Wilkes lawsuits**"). [A10 at 2-3.] In every one of the Wilkes lawsuits, THI defended itself and/or THMI by hiring Florida-licensed lawyers. [A1 at 5.]

For years, until the THI Receiver decided to withdraw the defense in the Wilkes lawsuits, THI/THMI were represented by Florida-licensed lawyers; and at no time were THI/THMI ever defended by non-Florida lawyers. [A11 at 5.]

In 2006, THI sold its stock in THMI to an unaffiliated company and THMI ceased operations. [A10 at 2; A11 at 3.] THI believed it had a continuing indemnity obligation to THMI and continued to defend THMI in the Wilkes lawsuits (and others) by retaining Florida-licensed lawyers. [A10 at 2-3.] Through these Florida lawyers, THI continued defending against the Wilkes lawsuits due to its perceived indemnification obligations to THMI. [A10 at 2-3.] Later, THI hired FAS to provide administrative support services. [A11 at 3-4.] Relative to the Wilkes lawsuits, FAS' role in working for THI was to identify, retain, and work with Florida-licensed lawyers who defended THI and/or THMI. [A11 at 4, 7.]

In 2009, THI and its subsidiaries became insolvent and were placed into receivership in Maryland. [A10 at 1.] In its Order Appointing Receiver, the Maryland court vested the THI Receiver with "the power and authority to take any and all actions necessary to preserve, protect and liquidate the assets of the THI Entities." [A12 at 2.] Once appointed, the THI Receiver assumed the contractual relationship with FAS. [A11 at 5.]

The THI Receiver continued to defend THI/THMI in the Wilkes lawsuits through Florida-licensed lawyers. [A11 at 5.] The THI Receiver made a decision

that continued defense of the Wilkes lawsuits was wasteful, and the THI Receiver directed the Florida-licensed lawyers to cease defending THI/THMI in the Wilkes lawsuits. [A9 at 4-5; A10 at 5-6.] Accordingly, an FAS employee communicated the THI Receiver's direction to the Florida-licensed defense lawyers who withdrew. [A11 at 6.]

After the THI Receiver's decision to have its Florida defense lawyers withdraw, several extremely large default judgments resulted. [A10 at 6-7; A13; A14.] Numerous proceedings involving those judgments and other related issues are currently pending in various courts. Details regarding those lawsuits are contained in the "All Writs Petition" previously filed with this Court. [A6.] For example, Petitioners have sought to use certain trial orders detrimental to FAS and Ms. Zack, all of which were issued without notice, due process, or even an evidentiary hearing. Those orders have been appealed, and two of the orders were reversed by the First and Second District Courts of Florida after the UPL petition for the PAO at issue was filed. *See, e.g., Trans. Health Mgmt., Inc. v. Webb*, 132 So. 3d 1152 (Fla. 1st DCA 2013) (reversing $900 million judgment for court's failure to observe due process), *rev. denied*, 143 So. 3d 924 (Fla. May 9, 2014); *Gen. Elec. Cap. Corp. v. Shattuck*, 132 So. 3d 908 (Fla. 2d DCA 2014) (reversing trial court order "adding" non-parties to a $1.1 billion judgment without notice or opportunity to be heard).

The sworn testimony in all of these proceedings reveals that FAS and its employees acted as a "litigation liaison" between THI (and later the THI Receiver) and the Florida-licensed lawyers defending THI/THMI. [A11 at 4.] FAS and Ms. Zack deny that any of the services provided constitute the practice of law—much less UPL. Indeed, Ms. Zack never served as a litigation liaison for THI or the THI Receiver. [A11 at 10.] For the lawsuits nationwide, as well as the Wilkes lawsuits in Florida, FAS served as a litigation liaison between the THI/THI Receiver and the Florida-licensed lawyers who appeared on behalf of THI/THMI. [A11 at 4.]

In 2011, the entity which purchased THMI's stock, Fundamental Long Term Care, Inc.("**FLTCI**"), was placed into Chapter 7 bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. *See In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258-MGW (M.D. Fla. filed Dec. 5, 2011). Beth Ann Scharrer was appointed bankruptcy Trustee for FLTCI. [A15 at 2.] Both Ms. Scharrer and THMI are represented by Florida–licensed lawyer Steven M. Berman. [A15 at 1, 19.] Under 11 U.S.C. § 326(a), a Chapter 7 Trustee's fees are statutorily set based upon a percentage of the estate. As such, the more the Chapter 7 Trustee recovers for the estate, the higher her fees may be. Accordingly, the Trustee, rather than defend and appeal the adverse judgments against THMI, has a vested interest in permitting the judgments against THMI to stand so that she can claim a "damage" to fuel her claims against other individuals and entities that would fund

the bankruptcy estate. Additionally, Mr. Berman's law firm, Shumaker, Loop & Kendrick, LLP, sought and obtained permission from the bankruptcy court to receive compensation from the bankruptcy estate on an hourly-fee basis with a contingency-fee enhancement equal to 7% of any assets recovered by the estate. [A21; A22.] Thus, as with the Trustee, Mr. Berman has a personal and vested interest in permitting judgments against THMI (one of the entities he purports to represent in this proceeding) to stand. [A21; A22.]

The UPL Proceedings

The Trustee has pursued proceedings supplementary and other actions against various parties. Notwithstanding the fact that THI/THMI were defended by Florida-licensed lawyers until the THI Receiver decided to cease defending the Wilkes lawsuits, the Trustee and THMI filed three of her lawsuits against FAS and Ms. Zack, asserting that they engaged in UPL or committed legal malpractice/breach of fiduciary duty. [A23 at 2.]

a. The UPL And Two Malpractice Civil Actions. The Trustee's and THMI's complaint alleging UPL was filed in Florida state court and removed to the federal district court on August 15, 2012. *See Scharrer v. Fundamental Administrative Services, LLC,* No. 12-cv-1855 (M.D. Fla. filed July 20, 2012) (the "**UPL Civil Action**"). They alleged that FAS through Ms. Zack and another in-

house attorney,[4] engaged in UPL by purportedly directing and controlling THMI's defense in five personal injury/wrongful death actions in Florida. [A23, Exh. A at 2-3.]

At the same time the Trustee and THMI's counsel filed the UPL Civil Action, they filed a separate action alleging that FAS and Ms. Zack committed legal malpractice and/or breached their fiduciary duty. *See Scharrer v. Fundamental Admin. Servs. LLC*, No. 8:12-cv-01854 (M.D. Fla. filed July 20, 2012) (the "**First Malpractice Action**") [A23, Exh. B]. The operative factual allegations of the UPL Civil Action and the First Malpractice Action are materially identical. [*Compare* A23, Exh. A *with* A23, Exh. B.]

The Trustee and THMI refused to voluntarily dismiss or have the UPL Civil Action stayed—as required by Rule Regulating the Florida Bar 10-9.1(c) for a proposed UPL advisory opinion to issue. [A23 at 4-5.] Instead, FAS and Ms. Zack were forced to argue that case on the merits. As a result, the federal district court dismissed the UPL Action without prejudice. [A2.]

Specifically, in the UPL Civil Action, Federal District Court Judge James S. Moody, Jr. entered an extensive 24-page order which distinguished the

[4] During the time the UPL Civil Action was pending, the Trustee and THMI reached an agreement with the other FAS in-house attorney (now former employee), which included a dismissal of all cases against her with prejudice. *Id*. Notably, her name is not mentioned in the petition to the UPL Committee. [A1; A23 at 3.]

Trustee/THMI's "novel" allegations from ten prior decisions[5] of this Court on the unlicensed practice of law relied upon by the Trustee and THMI and dismissed the UPL Civil Action, finding:

- No Florida case, including this Court's decision in *The Florida Bar v. Neiman,* 816 So. 2d 587 (Fla. 2002), supports a finding that the alleged conduct constitutes the unauthorized practice of law. [A2 at 10-22.] [Notably, the PAO at issue relies almost exclusively on the *Neiman* case.]
- Petitioners did not allege that FAS or Ms. Zack drafted any corporate or contract documents, advertised as a law firm, represented THMI in litigation, held themselves out to opposing counsel as THMI's Florida legal counsel, or collected fees under the guise of being lawyers. [A2 at 11-13.]
- Petitioners did not allege that FAS is in the business of maintaining lawyers as full time employees for purposes of practicing law and "the differences between the structure and practice of FAS and [corporations in the business of practicing law] are glaring." And "FAS certainly would continue to exist

[5] The federal district court explicitly distinguished the conclusory factual allegations here from: *The Fla. Bar v. Town*, 174 So. 2d 395 (Fla. 1965); *Tannenbaum v. Gerstein,* 267 So. 2d 824 (Fla. 1972); *The Fla. Bar v. Gordon,* 661 So. 2d 295 (Fla. 1995); *The Fla. Bar v. Warren,* 655 So. 2d 1131 (Fla. 1995); *The Fla. Bar v. Consolidated Business & Legal Forms, Inc.,* 386 So. 2d 797 (Fla. 1980); *The Fla. Bar v. Glueck,* 985 So. 2d 1052 (Fla. 2008); *The Fla. Bar v. Hunt,* 429 So. 2d 1201 (Fla. 1983); *The Fla. Bar v. We The People Forms & Serv's Center of Sarasota, Inc.,* 883 So. 2d 1280 (Fla. 2004); *The Fla. Bar v. Neiman,* 816 So. 2d 587 (Fla. 2002); *The Fla. Bar v. Dale,* 496 So. 2d 813 (Fla. 1986). [A2 10-22.]

in the absence of the alleged advising and directing of THMI's defense in the Florida litigation." [A2 at 15.]

- Petitioners allegations that FAS performed legal services for third parties in exchange for a fee were insufficient because "[n]ot only does FAS still exist to provide mostly non-legal services, Plaintiffs allegations are once again conclusory at best." [A2 at 16.] Judge Moody further found that the complaint failed to contain anything regarding *"How* does FAS 'hold itself out to the public as a provider of legal services.' " [A2 at 16 (emphasis in original).]
- "The amended complaint admits [FAS and Ms. Zack] did not appear as counsel of record before any Florida court." [A2 19.] Florida counsel "was at all times counsel of record." [A2 at 20.]
- "Notably absent are *factual allegations.* . . ." "The complaint states that [FAS and Ms. Zack] 'directed' and 'controlled' THMI's defense, but it fails to state how they did that or to whom they communicated these authoritative instructions." [A2 at 21-22.]

Based on his extensive findings that there were no grounds for any allegation of UPL under any Florida Supreme Court precedent, Judge Moody dismissed the complaint without prejudice. [A2 at 23.] He dismissed the case without prejudice so Petitioners could, if they so choose, request an advisory

opinion from the UPL Committee on their "novel" theory that conclusory allegations regarding direction and control – standing alone – constitute the UPL. [A2 at 4, 23 (emphasis added).] Otherwise, the case was to be dismissed with prejudice. [A2 at 23.] The UPL Civil Action remains involuntarily dismissed without prejudice at this time, pending a final determination on the PAO.

As to the First Malpractice Action, after the PAO was issued by the UPL Committee, the claims against Ms. Zack were *involuntarily* dismissed with prejudice over opposition by the Petitioners. [A20.] The claims against FAS in that action were stayed—again on motion by FAS and over the Petitioners' opposition—pending the conclusion of related proceedings in the Bankruptcy Court. [A20 at 2.] Petitioners were undeterred by the involuntary dismissals of the UPL Civil Action and the First Malpractice Action.

The Trustee and THMI filed a third complaint against FAS and Ms. Zack on December 31, 2013—this time in the Bankruptcy court. *See Scharrer v. Quintairos* (*In re Fundamental Long Term Care, Inc.*), No. 8:11-bk-22258, No. 8:13-ap-1176 (M.D. Fla. Bankr. filed Dec. 31, 2013) (the "**Second Malpractice Action**"). [A8.] Once again, in similar fashion, the Trustee and THMI alleged legal malpractice against Ms. Zack, and by extension, a breach of fiduciary duty against FAS for alleged legal services. *Id.* The Second Malpractice Action's allegations mirror the allegations in the UPL Civil Action and the UPL Petition for

an advisory opinion. [*Compare* A8 *with* A23, Exh. A *and* A23, Exh. B.] Despite efforts by Respondents (and continued opposition from Petitioners), the Second Malpractice Action remains pending while the UPL proceedings continue.

b. <u>The UPL Committee Proceedings</u>. After the UPL Civil Action was dismissed, the Trustee and THMI filed a petition for formal advisory opinion with the UPL Committee. [A15.] As in the UPL Civil Action, the UPL Petition attempts to portray FAS and Ms. Zack negatively, but the UPL Petition is noticeably devoid of any request directed to "specified conduct" as required by *Goldberg.* [*See* A15.] Instead, the UPL Petition requests an opinion on sweeping, general allegations of direction and control. [*See* A15.] It also omits significant information, such as the facts that an FAS attorney (not Ms. Zack) took her instructions from the THI Receiver and was serving as a litigation liaison; and Florida-licensed lawyers were engaged to handle the actual legal representation in all cases in Florida. [A15; A16; A17.]

After the UPL Petition was filed, and based on filings by FAS and Ms. Zack regarding the additional pending cases, the UPL Committee set the matter for a hearing to decide whether the petition complied with *Goldberg* and the rules promulgated thereunder. [A18.] In contesting the UPL Petition, FAS's and Ms. Zack's threshold argument was that, under *Goldberg* and the Rules Regulating the Florida Bar, the UPL proceedings could not go forward while the other lawsuits

involving the parties remain pending because there were identical claims at issue in the other lawsuits. [A19 at 27-42.] For instance, specific to the pending legal malpractice actions, FAS and Ms. Zack argued that, because a critical element of legal malpractice is the "practice of law," the UPL Committee was prohibited from moving forward unless that action was likewise stayed or voluntarily dismissed. [A19 at 34, 37.] FAS and Ms. Zack likewise argued it was inappropriate to proceed forward while there were pending cases directly impacting the facts alleged in the petition in support of the claim of UPL. [A19 at 27-36.] They also argued that, because the Rules state that any UPL action must be stayed or voluntarily dismissed, and because the UPL Civil Action was involuntarily dismissed over Petitioners' objection, Petitioners failed to comply with the Rules and the UPL Committee could not proceed to issue a PAO. [A19 27-42.]

The UPL Committee held a hearing on January 24, 2014, in which it voted to proceed with the PAO process based on its belief that, under *Goldberg*, it was required to issue a proposed advisory opinion regardless of the fact numerous lawsuits between the parties involving the alleged practice of law were not stayed or voluntarily dismissed. [A19 at 58-59.] The UPL Committee also summarily rejected the argument that it had no jurisdiction to issue the PAO because the underlying UPL Civil Action was involuntarily dismissed; not voluntarily dismissed as required by Rule 10-9.1(c). [A19 at 58-59.] The Florida Bar's UPL

Staff Attorney advised the UPL Committee that Rule 10-9.1(c)'s requirement that the underlying UPL Civil Action had to be stayed or voluntarily dismissed was "poor wording in the rule," stating further: "I just think that's a technicality, and I think the rule is incorrect the way it's written." [A19 at 54.]

After the UPL Committee voted to move forward, FAS and Ms. Zack filed an All Writs Petition with this Court in Case No. SC14-400, *Fundamental Administrative Services, LLC v. Scharrer*. [A6.] The All Writs Petition sought a stay or dismissal of the UPL action because the UPL Committee was without authority to proceed based on the circumstances of this case. [A6.] This Court dismissed the All Writs Petition "without prejudice to proceed in accordance with Rule Regulating the Florida Bar 10-9.1." [A7 (emphasis added).]

The UPL Committee subsequently held a public hearing on May 2, 2014, at which both oral and written comments were presented to the UPL Committee regarding the UPL Petition. [A4.] Of particular note was the testimony of Mr. Timothy P. Chinaris, former Ethics Director for The Florida Bar, former Chair of the Professional Ethics Committee of The Florida Bar, and current Professor of Law at Belmont University College of Law, where he teaches legal ethics. [A4 59-60.] Mr. Chinaris served as an expert on UPL for FAS. [A1; A4.] His affidavit, which is attached to the appendix served with this Brief, contains significant

discussion as to why the PAO should be disapproved. [A1.] Mr. Chinaris emphasizes that the type of services provided by FAS cannot be UPL, stating:

> There is no potential for public harm in the case before the Committee because the actions in the Florida litigation were conducted through licensed Florida lawyers. While litigation results may vary based on the tactical decisions of its clients, FAS was created specifically to provide administrative services to health care companies. Sometimes the administrative services include litigation coordination. Importantly, however, FAS always retains counsel licensed in the jurisdiction where its customer has been sued. In the cases referenced by the Petitioners, Florida lawyers were engaged to handle the defense of the lawsuits.
>
> Significant harm will occur if this Committee finds that the nursing home model for handling administrative and litigation support services constitutes UPL. Risk management companies, insurance adjusters, individuals with powers of attorney for elderly parents, and others are charged with providing litigation monitoring and coordination such as that provided here. If the nursing home model is UPL, then so too are all of these other activities in all of these other areas of business. In fact, under Petitioners' theory of what constitutes UPL, no client representative – whether a lawyer or nonlawyer – could ever make a decision concerning the client's defense. Clearly, the Florida Rules of Professional Conduct do not call for such a result since the Rules expressly require client input and approval.

[A1 at 7.]

Following public testimony, which included testimony from Petitioners' counsel, the UPL Committee held open deliberations. [A4 106-37.] The Committee recognized it could only address specified, hypothetical conduct and was not a fact-finding body. [A4 106-07.] The UPL Committee further recognized it could not answer the questions as presented because those questions

improperly asked the UPL Committee to determine whether FAS and Ms. Zack engaged in the unlicensed practice of law. [A4 106-07.] However, rather than recognizing that a PAO was inappropriate under such circumstances, and that the Committee had discretion to refuse to issue a proposed advisory opinion based on the Petitioners' failure to adhere to Rule 10-9.1(c)' procedures, the UPL Committee instead formulated the following broad, generic question to be addressed in the PAO —which contains no specific hypothetical conduct as required by *Goldberg* and the Rules:

> [W]hether a nonlawyer company engages in the unlicensed practice of law in Florida when the nonlawyer company or its in-house counsel, who is not licensed to practice law in Florida, controls, directs, and manages Florida litigation on behalf of the nonlawyer company's third-party customers when that control, direction, and management is directed to a member of the Florida Bar who is representing the customer in the litigation.

[A4 129.]

Following formulation of this question, the following motion was made by a UPL Committee member: "I move that this is not the unlicensed practice of law." [A4 at 133 (emphasis added).] After the motion was seconded, discussion ensued during which one UPL member stated: "I've been involved in a lot of corporate representations in other jurisdictions. And to say that this is UPL, you're going to hamstring businesses. Businesses just don't have the resources or the time to say, Hey, we can't delegate that to somebody." [A4 at 134.] Another member stated, "I

will also say that after 40 years of representing the third largest bank holding company in the United States, [] this is exactly what I did as a non-lawyer." [A4 134.]

The UPL Committee then voted in favor of the motion, with only one dissenting vote, finding the question should be answered in the negative. [A4 at 136.] After the vote to answer the question in the negative occurred, Florida Bar staff announced that the proposed advisory opinion would contain "discussion" of the use of "litigation liaisons." [A4 at 137.]

Florida Bar staff then drafted the PAO at issue, which was considered and approved with nominal discussion at the UPL Committee's June 27, 2014 meeting. [A3.] The PAO varies dramatically from the UPL Committee's decision at the May 2, 2014 hearing. The PAO states: "After debate, the [UPL Committee] voted to answer the question in the negative finding that, generally speaking, it does not constitute the unlicensed practice of law in Florida . . . ." [A3 at 9 (emphasis added).] The PAO then states, however, "there are circumstances where the opposite is true . . ." [A3 at 9.] The PAO holds that answer "is dependent on the facts and circumstances of the case" and "the role of the lawyer must be considered." [A3 9-10.] As noted above, this was contrary to the actual vote taken by the UPL Committee, in which the UPL Committee resoundingly voted to find that the question, as presented, should be answered with a simple "no."

The PAO recognizes that third-party litigation liaisons are common in the business world, explicitly referencing the nursing home industry, risk managers, third party administrators, adjusters, and nonlawyer agents. [*See* A9 at 12.] The PAO also concedes that third-party litigation liaisons "can manage, control and direct the litigation as long as the lawyer is acting independently and within the scope and objectives set by the client." [A9 at 13.]

But the PAO then compares the management, control and direction of a third-party liaison with the conduct at issue in *Neiman*—a decision which bears no resemblance to the actual facts and allegations at issue here, as even the federal district court recognized in explicitly distinguishing *Neiman* from the Petitioners' allegations here. [A2 at 10-22.] The PAO concludes that the issue of whether "control" constitutes the unlicensed practice of law is always a factual question to be decided by the trier of fact—thus interjecting a factual issue of control and the unlicensed practice of law into every case in which a third-party liaison, insurance adjuster, or similar professional manages and coordinates litigation.

STANDARD OF REVIEW

The Florida Constitution vests this Court with the exclusive authority to say what is or is not the unlicensed practice of law. *Goldberg*, 35 So. 3d at 906. Review of the PAO is *de novo* and this Court has the authority to approve, modify, or disapprove the advisory opinion. R. Regulating Fla. Bar. 10-9.1(g)(4).

SUMMARY OF ARGUMENT

The PAO should be disapproved because it is both procedurally and substantively flawed. This Court has not hesitated to disapprove UPL Committee proposed advisory opinions in the past and should do so here.

First, the PAO is improper because it does not reflect the UPL Committee's actual vote that the conduct in question does not constitute UPL. The UPL committee voted overwhelmingly to answer the question presented with a "no" vote, finding that the conduct alleged is not UPL. The subsequently drafted PAO does not reflect that vote. The PAO states that "generally" the question should be answered no, but sometimes it should be answered yes—depending on the amount of control exerted. Florida has long held that oral pronouncements made at a duly noticed hearing control over a written order that is inconsistent with those pronouncements. For this reason alone, the PAO should be disapproved.

Second, as this Court held in *Goldberg*, advisory opinions are to address whether "specified" alleged conduct constitutes UPL. This Court's prior advisory opinions all address "specified" conduct, such as whether it is UPL for tax professionals to give advice on pension plans and whether the preparation of "notice to owners" under the mechanic's lien law is UPL. This gives a bright-line test so it is clear as to what constitutes UPL and what does not.

The PAO at issue does not address "specified" conduct. It simply addresses a broad, generic question of whether "control, direction, and management" of litigation directed to a Florida licensed attorney handling the litigation is UPL; but even then, it does not find that such conduct is or is not UPL. Instead, it leaves the "ultimate" decision of whether such conduct constitutes UPL to the finder of fact—depending on the amount of control exerted. This potentially places every non-lawyer litigation liaison in the untenable position of engaging in UPL every time they disagree with the Florida lawyer's recommendations regarding a case. The PAO is unworkable and does not serve the purpose of UPL advisory opinions—which is to give notice as to whether certain specified conduct constitutes UPL.

Third, the PAO unconstitutionally vests in other courts the power to say what is or is not UPL. This Court has repeatedly and consistently held the Florida Constitution requires that this Court, and only this Court, has the power to say what is or is not UPL—to the exclusion of all others. The PAO states that "trial courts" are to "make the ultimate decision" as to whether conduct is or is not UPL. Making trial courts the "ultimate" decision-maker without any bright-line test as to when "control" constitutes UPL is contrary to the Florida Constitution and *Goldberg,* and divests this Court of the exclusive power to say when such conduct is UPL. Logically, because only this Court can say what is or is not UPL, the only proper way the PAO could be implemented would be for all trial court decisions

finding control does or does not constitute UPL to come back before this Court for a final determination.

Fourth, the PAO misstates the law regarding the distinct roles of attorneys and clients and/or those whom clients may charge with stepping into their shoes and acting on their behalf. The PAO says that only the lawyer can "exercise his or her independence of professional judgment and decide whether to follow that direction." [A3 at 13 (emphasis added).] An attorney must be free to exercise independent judgment on a recommended course of action, but the client or the client's agent must decide whether to expend the cost of taking that recommended action. The choice to take action is not solely the attorneys' choice. Yet that is exactly what the PAO holds.

The PAO reached this erroneous conclusion by relying upon *Neiman*. As the federal district court recognized, the PAO's reliance on *Neiman* in addressing this issue is totally misplaced. Neiman was a convicted felon who held himself out to the public as an attorney for seven years and retained an attorney on staff who he used to create a subterfuge that he was operating a legitimate law office. Neiman acted as an attorney in doing these things and improperly shared in the legal fees of his partner. The issue in that case was whether a non-attorney could partner with an attorney in a sham operation for the purpose of allowing the non-

attorney to recruit clients, share fees, and handle cases for those clients. That is not the case here.

Fifth, the *Goldberg* procedure itself violates due process because, at the time the alleged acts occurred, such conduct had not been declared to be UPL and, as the federal district court concluded, all indications at the time were that such acts did not constitute UPL.

Sixth, Rule 10-9.1(c) prohibits the UPL Committee from considering an advisory opinion request unless the underlying UPL civil lawsuit has been stayed or voluntarily dismissed without prejudice. The UPL Committee was without authority to issue the PAO because Petitioners neither moved to "stay" nor "voluntarily dismissed" the UPL Civil Action. Instead, after Petitioners filed their complaint in the UPL Civil Action and the case was considered on its merits—resulting in a finding that none of the alleged conduct constituted UPL—the UPL Civil Action was involuntarily dismissed. The very point of enacting the "stay" or "voluntary dismissal" portions of the rule was to allow parties to ask the UPL Committee whether something is or is not UPL before it is litigated on the merits. By allowing Petitioners to proceed with the PAO process, they are receiving a second, inappropriate bite of the apple.

Finally, the PAO should be disapproved because other cases involving the same parties, same issues, and similar legal theories were not stayed or voluntarily

dismissed during the course of the UPL Committee proceedings. Rule 10-9.1(c) requires a party to stay or voluntarily dismiss any case or controversy pending in any court or tribunal involving the practice of law before the UPL Committee can issue an advisory opinion. Because numerous other pending lawsuits between the parties were not stayed or voluntarily dismissed before the UPL Committee considered the question presented, the UPL Committee had no authority to issue the PAO.

For all of these reasons, this Court should disapprove the PAO.

ARGUMENT

I. THE PAO SHOULD BE DISAPPROVED. IT DOES NOT DETERMINE WHETHER SPECIFIED CONDUCT IS OR IS NOT THE UNLICENSED PRACTICE OF LAW. IT UNCONSTITUTIONALLY VESTS THIS COURT'S EXCLUSIVE POWER TO DETERMINE WHAT IS OR IS NOT UPL IN OTHER COURTS. AND IT IS CONTRARY TO THE UPL COMMITTEE'S VOTE THAT THE CONDUCT IN THE QUESTION PRESENTED DOES NOT CONSTITUTE UPL.

A. The PAO Is Inconsistent With The UPL Committee's Determination That The Conduct In The Question Presented Does Not Constitute UPL.

The UPL Committee unquestionably voted to take a "yes" or "no" vote in answering whether the conduct stated in the question constitutes UPL. [A4 at 129.] The UPL committee then overwhelmingly voted to answer the question with a "no" vote, finding that the conduct stated in the question in the PAO is not UPL. [A4 135-36.] After the UPL Committee's vote, Bar Staff announced that the PAO

would contain "discussion" and "guidance." [A4 137.] But the PAO went far beyond providing discussion and guidance; the PAO actually answers the question presented much differently than the UPL Committee's vote to answer the question "no." The PAO states that "generally" the question should be answered no, but sometimes it should be answered yes—depending on the amount of control exerted. [A3.]

Oral pronouncements made at a duly noticed hearing control over a written order that is inconsistent with those pronouncements. *See Hampton Manor, Inc. v. Fortner*, --- So. 3d ---, 2014 WL 3375027 (Fla. 5th DCA 2014) ("To the extent there is a conflict between the oral pronouncement and the written order, it is the oral pronouncement that controls"); *Verleni v. Dep't of Health*, 853 So. 2d 481 (Fla. 1st DCA 2003) (reversing final order that did not reflect actual basis for ruling made at the Board's hearing); *Ulano v. Anderson*, 626 So. 2d 1112 (Fla. 3d DCA 1993) ("Reversal is required where a final judgment is inconsistent with a trial court's oral pronouncements"); *Mahaffey v. Mahaffey*, 614 So. 2d 649 (Fla. 2d DCA 1993) (final judgment must be consistent with oral findings). For this reason alone, the PAO should be disapproved.

B. The PAO Does Not Determine Whether "Specified" Conduct Is UPL.

In *Goldberg*, this Court held "that the pleading [in a UPL civil proceeding] must state that this Court has ruled that the specified conduct at issue constitutes the unauthorized practice of law." 35 So. 3d at 907 (emphasis added). Although this Court did not rule on the alleged conduct before it, the alleged conduct was "specified," *i.e.*, whether preparing certain documents in the processing of mortgage loans and charging a fee for those documents constitutes UPL. *Id.* at 907. Consistent with *Goldberg*, each of this Court's previously issued advisory opinions on UPL have addressed whether certain "specified" conduct is UPL.

In *Florida Bar In re Advisory Op. HRS Nonlawyer Counselor*, 518 So. 2d 1270 (Fla. 1988), and *Florida Bar In re Advisory Op. HRS Nonlawyer Counselor*, 547 So. 2d 909 (Fla. 1989), this Court evaluated whether HRS "lay counselors" could prepare documents and present cases in court—determining in the 1989 advisory opinion that they could not.

In *Florida Bar In re Advisory Opinion – Nonlawyer Preparation of Notice to Owner and Notice to Contractor*, 544 So. 2d 1013 (Fla. 1989), this Court held that businesses do not engage in UPL in preparing and sending "notices to owners" and "notices to contractors" needed to secure mechanic's liens.

In *Florida Bar re Advisory Opinion – Nonlawyer Preparation of Pension Plans*, 571 So. 2d 430 (Fla. 1990), this Court disapproved the UPL Committee's

proposed advisory opinion, which concluded that designing and preparing pension plans and advising clients regarding such plans by nonlawyer tax professionals was UPL.

In *Florida Bar re Advisory Opinion – Nonlawyer Preparation of Residential Leases Up To One Year In Duration*, 602 So. 2d 914 (Fla. 1992), this Court took no position on the UPL Committee's recommendation that the preparation of residential leases be found to be UPL. Instead, this Court adopted a form lease, the preparation of which does not constitute UPL. *Id.* at 917-18.

In *Florida Bar re Advisory Opinion – Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992), this Court held that a nonlawyer's drafting, executing and funding living trusts constitutes the unlicensed practice of law but gathering the necessary information for a living trust does not.

In *Florida Bar re Advisory Opinion – Activities of Community Association Managers*, 681 So. 2d 1119 (Fla. 1996), this Court held that the completion of forms that require interpretation of legal community association documents constitutes UPL.

Finally, in *Florida Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997), this Court held that a nonlawyer's representation of parties in arbitration proceedings constitutes UPL.

All of this Court's prior advisory opinions address "specified" conduct and leave no discretion to a fact-finder as to whether that "specified" conduct is or is not UPL. A bright-line test exists for fact finders to follow. After all, the very purpose of an advisory opinion is to give meaningful guidance to the bench, bar, and public.

The PAO at issue does not give meaningful guidance. While it outlines the "specified" conduct as "control, direction, and management" of litigation directed to a Florida licensed attorney handling the litigation—the PAO does not find that such conduct is or is not UPL. Instead, it leaves the "ultimate" decision of whether such conduct constitutes UPL to the finder of fact. No bright-line test exists. No definition of "control, direction, and management" of litigation exists. No judge can review the PAO for guidance as to whether certain conduct constitutes UPL, no member of the bar can review the PAO to evaluate the propriety of a non-lawyers' actions, and no member of the general public can rely upon the PAO to structure their activities in conformity with the law. At bottom, the PAO simply says sometimes such conduct is UPL and sometimes it is not—depending on the amount of control, direction, and management exerted.

The PAO places every non-lawyer litigation liaison in a quandary—potentially putting them in the position of engaging in the unlicensed practice of law every time they disagree with the Florida lawyer's recommendations regarding

a case. The PAO is unworkable and does not serve the purpose of advisory opinions on UPL—which is to give notice as to whether certain specified conduct constitutes UPL. For this reason alone, the PAO should be disapproved.

C. The PAO Unconstitutionally Vests The Power To Say What Is Or Is Not UPL To Other Tribunals.

This Court has repeatedly and consistently held the Florida Constitution requires that this Court, and only this Court, has the power to say what is or is not UPL—to the exclusion of all others. *See, e.g., Goldberg*, 35 So. 3d at 907. This is the very reason why this Court enacted a process in *Goldberg* to allow parties to obtain a determination regarding whether alleged "specified" conduct constitutes UPL before a plaintiff can proceed in a UPL civil action for damages. The PAO unconstitutionally vests the power to say what is or is not UPL in "fact finders," who are to opine whether the conduct before them constitutes UPL based on an undefined scale of whether "control" is so great it constitutes UPL. The PAO itself states that "trial courts" are to "make the ultimate decision" as to whether conduct is or is not UPL—depending on the amount of "control" exercised by client's duly authorized representative. [A3 at 15.]

Making trial courts the "ultimate" decision-maker without any bright-line test as to when "control" constitutes UPL is contrary to the Florida Constitution and divests this Court of the exclusive power to say when such conduct is UPL. It will lead to inconsistent holdings and potentially interject the issue of control in

every case in which an agent has been designated to act as a liaison on behalf of someone else in working with Florida-licensed attorneys handing cases. Logically, because only this Court can say what is or is not UPL, the only proper way the PAO could be implemented would be for all trial court decisions finding control does or does not constitute UPL to come back before this Court for a final determination. For this reason alone, the PAO should be disapproved.

II. THE PAO SHOULD BE DISAPPROVED BECAUSE IT MISSTATES THE LAW REGARDING THE DISTINCT ROLES OF ATTORNEYS AND CLIENTS AND/OR THOSE CHARGED WITH STEPPING INTO THE SHOES OF AND ACTING ON BEHALF OF THE CLIENTS.

The PAO bases its conclusions that "control" can equal UPL on the distinctions between the role of a client and the role of the lawyer, summarily concluding that a client or the client's designated agent can set the "scope and objectives" of representation but only the lawyer can "exercise his or her independence of professional judgment and decide whether to follow that direction." [A3 at 13 (emphasis added).] This greatly misconstrues the law governing an attorney's exercise of independent professional judgment. In addition, the PAO's statement that the issue of "control" should be interpreted under this Court's decision in *Neiman* is dead wrong. [A3 at 13.] As the federal district court recognized, *Neiman* is not the appropriate case for comparison of the question presented. [A2 at 20-21.] Rather, this Court's decision in *Florida Bar v.*

Savitt, 363 So. 2d 559 (Fla. 1978), is a much more appropriate case for reviewing the conduct at issue, and that case establishes that the alleged conduct at issue is not UPL.

Independent judgment does not mean independent action. As the PAO recognizes, Rule of Professional Conduct 4-1.2 states in pertinent part that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation, and . . . shall reasonably consult with the client as to the means by which they are to be pursued." Further, the comments to that rule provide:

> [The client has] ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. . . . A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

R. Regulating Fla. Bar 4-1.2, cmt. Under this rule, the attorney is responsible for the technical and legal tactical issues while the client controls the purposes to be accomplished and the means to be used in pursuing those objectives. For instance, an attorney cannot file a specific action without the client's consent. *Florida Bar v. Hayden*, 583 So. 2d 1016, 1016-18 (1991). Likewise, a client should be able to control whether depositions and research should be conducted based on whether

the client wishes to incur the fees for that expense. Where a client has a designated agent charged with acting on its behalf by coordinating, monitoring, and managing litigation—and making decisions as to the cost of that litigation—the designated agent must work with the attorney in determining whether certain actions recommended by the attorney should be taken. In other words, the attorney must be free to exercise independent judgment on a recommended course of action, then the client or the client's agent must decide whether to take that recommended course of action. The choice to take action is not solely the attorneys' choice. Yet that is exactly what the PAO holds.

Rather than recognizing the ability of the client (or the client's agent) to work with the attorney in making decisions, the PAO gives carte blanche authority to the attorney to make all decisions regarding the litigation by holding it is UPL to interfere with an attorney's "independence of professional judgment." [A3 at 15.] The PAO erroneously equates independence of judgment with independence of action and misconstrues the roles of attorneys and clients.

Attorneys are certainly free to form and voice their professional judgment in order to provide the best advice to their clients. Conversely, clients, whether non-lawyers or attorneys, are free to decide what advice they will accept and what actions they will authorize. If attorneys are unimpeded by their clients' wishes

during the course of the representation, clients are effectively held hostage by their own counsel.

As stated in the Preamble to the Florida Rules of Professional Conduct, a "lawyer is a representative of clients" and, as a representative, "performs various functions," including adviser, advocate, negotiator, and intermediary. These valuable functions all require the exercise of independent professional judgment but should not be confused with the ultimate decision-making responsibility of the client or the client's designated litigation coordinator.

Obviously, a client's or client's agents' undeniable right to direct its litigation does not include the right to insist that its attorney provide a service that would conflict with the Rules of Professional Conduct. But as the Restatement of Law Governing The Conduct Of Lawyers states, clients and lawyers have broad freedom to work out allocations of authority, particularly in situations where the client is a sophisticated consumer of legal services. Restatement (Third) Governing Conduct of Lawyers § 21, cmt. c. "Different arrangements may be appropriate depending on the importance of the case, the client's sophistication and wish to be involved, the level of shared understandings between client and lawyer, the significance and technical complexity of the decisions in question, the need for speedy action, and other considerations." *Id.* Indeed, "[c]ontracts between clients and lawyers . . . may specify procedures for making decisions as well as the person

who is to decide." *Id.* (emphasis added). "In a litigation context, for example, there might be agreement that the lawyer will submit monthly litigation plans to the client for approval or that the lawyer will not take depositions without the client's approval." *Id.*

The key is that the allocation of responsibilities must not impair the attorney's ability to exercise independent judgment and then, using that judgment, recommend a course of action. But it is ultimately the client, or the client's designated agent, that makes the decision as to whether to proceed with that recommended course of action. In fact, a "lawyer who acts beyond [client] authority is subject to disciplinary sanctions and to suit by the client." *Id.* at cmt. b.

On the other hand, a lawyer is not required to carry out an instruction that the lawyer reasonably believes to be contrary to law or rules, unethical or objectionable. *Id.* at cmt. d. "A lawyer may advise a client of the advantages and disadvantages of a proposed client decision and seek to dissuade the client," but the lawyer "may not continue a representation while refusing to follow a client's continuing instruction." *Id.*; *see also* Fla. R. Prof. C. 4-1.16(a)(1) (lawyer must decline or terminate representation if the representation will result in violation of the Rules of Professional Conduct or law). Where the client has delegated to an agent the power to make such client-type decisions on whether to proceed with an attorney's recommended course of action, the agent stands in the shoes of the

principal. *See, e.g., King v. Young,* 107 So. 2d 751 (Fla. 1958); *Econ. Research Analysts, Inc. v. Brennan,* 232 So. 2d 219 (Fla. 4th DCA 1970). This is not the unauthorized practice of law.

In fact, a lawyer is prohibited from doing any of the following without a client's, or the client's designated agent's, approval: Settle a case, consent to summary judgment, dismiss a case, concede central issues, waive affirmative defenses, execute contracts, submit a case to arbitration, or waive a jury trial. Restatement (Third) Governing Conduct of Lawyers § 22, Rptrs. cmt. e. Certainly, a lawyer can recommend any of these to the client or client's designated agent, but the lawyer cannot act on those recommendations without first obtaining approval from the client or the client's designated agent. In the corporate context, often the company's agent is the company's general counsel or other in-house counsel directing litigation in other states. *See, e.g.*, Fla. R. Prof. C. 4-1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents") (emphasis added).

The PAO improperly concludes it is the lawyer who must make such determinations. This is contrary to firmly stated principles governing the relationship between lawyers and clients and those acting on behalf of a client, and infringes on the authority of clients to direct their lawyers as they deem fit.

Putting aside the misapprehension of the division of responsibility as between lawyer and client, the PAO ignores that the involvement of licensed Florida counsel vitiates any claim of UPL. Hypothetically, even if a client's agent were to propose legal documents or wording for consideration by a Florida-licensed attorney, it is not UPL if the Florida attorney adopts those suggestions. Precisely on this point, Judge Moody dismissed the UPL Civil Action and recognized that such acts were appropriate. The conduct here is much more akin to the conduct found not to be UPL in *Fla. Bar v. Savitt,* 363 So. 2d 559 (Fla. 1978).

In *Savitt*, this Court held it is not UPL for non-Florida lawyers or personnel acting on behalf of a client to deal with a Florida law firm in all respects, including discussion of, and advice upon, legal matters, preparation and review of legal documents, and any other act which may constitute the practice of law, so long as such activities merely constitute assistance to a member of the Florida bar and, if the result of such activities is utilized, it is the product of, or is merged into the product of, a member of the Florida Bar for which the Florida Bar member takes professional responsibility. 363 So. 2d at 560.

Moreover, this Court recognized in *Savitt* that it is not UPL for a client's agent to engage in professional activities that constitute 'coordinating-supervisory' activities in essentially multi-state transactions in which matters of Florida law are being handled by members of the Florida Bar. *Id.* This Court held it is not UPL

for a client's designated agent to communicate, consult and deal with the Florida lawyers responsible for the litigation, including discussion of, and advise upon, legal matters, preparation and review of legal documents, and any other act which may constitute the practice of law so long as such activities merely constitute assistance to a member of the Florida Bar and, if the result of such activities is utilized, it is the product of, or is merged into the product of a member of The Florida Bar for which the Florida Bar member takes professional responsibility. *Id.*

The PAO does not mention *Savitt.* [A3.] Instead, it relies on the *Neiman* decision. [A3 at 13-16.] As the federal district court recognized, *Neiman* is totally inapplicable. [A2 20-21.] Neiman was a convicted felon who held himself out to the public as an attorney for seven years and who hired an attorney on staff who Neiman used to create a subterfuge that he was operating a legitimate law office. *Neiman*, 816 So. 2d at 589. While this is an example of UPL it is wholly distinguishable from this matter. Although this Court, in *Neiman*, outlined many of Neiman's activities conducted in holding himself out to the public as a licensed lawyer, many of those activities, taken alone, are routinely handled by non-attorneys who are properly working as a liaison with Florida-licensed lawyers who are representing their client.

For instance, Neiman's activities included serving as a contact for conferences, addressing issues in discovery and settlement, working with the client on the strength and weaknesses of a case, actively participating in mediation sessions, and extensively involving himself in fee arrangements. *Id.* at 588. Risk managers, insurance claims adjustors, nursing home administrative companies, and parents acting on behalf of a child or a parent routinely handle all of these issues—but this does not constitute UPL when done in conjunction with a licensed Florida attorney who takes ultimate professional responsibility for the representation. The distinction is that Neiman held himself out and acted as a Florida-licensed lawyer in doing these things and then improperly shared in the legal fees from the representation. *Id.* at 598. Accordingly, his involvement in these activities constituted UPL. *Id.* at 598-600. Notably, the word "control" appears nowhere in the *Neiman* case—because control was not the issue. *See id.* The issue in that case was whether a non-attorney could partner with an attorney in a sham operation for the purpose of allowing the non-attorney to recruit clients, share fees, and handle cases for those clients.

Because the PAO wrongly outlines the law governing interaction between attorneys, clients, and litigation liaisons, it should be disapproved.

III. THE PAO SHOULD BE DISAPPROVED BECAUSE, AT THE TIME THE ALLEGED ACTS TOOK PLACE, FAS AND MS. ZACK HAD NO NOTICE THAT SUCH ACTS CONSTITUTED UPL AND AN AFTER-THE-FACT FINDING OF UPL VIOLATES DUE PROCESS.

As the federal court noted in dismissing Petitioners' UPL complaint, Petitioners' "novel" theory regarding FAS and Ms. Zack's alleged conduct has never before been declared to be UPL by this Court. [A2 4, 23.] The federal court also found this Court has never held that an out-of-state attorney's exerting "undue influence over local counsel of record" constitutes the practice of law. [A2 at 4.] Indeed, as noted, the alleged conduct here equates with the conduct in *Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978), that this Court held was not the unauthorized practice of law.

A post-conduct finding that the alleged acts constituted the unlicensed practice of law at the time they were committed—when all indications at that time were that such acts did not constitute the unauthorized practice of law—violates FAS and Ms. Zack's constitutional rights to due process. Were this Court to approve the PAO, FAS and Ms. Zack would have had neither prior notice that their conduct would constitute the unauthorized practice of law, nor an opportunity to structure their conduct and dealings accordingly. Such a finding also is the equivalent of an "ex post facto law," which is specifically prohibited by Florida's Constitution. *See* Art. I, § 10, Fla. Const.

Petitioners intend to use the requested advisory opinion to seek recovery of potentially billions of dollars from FAS and Ms. Zack—even though, at the time they allegedly committed the acts, case law indicated those actions did not constitute UPL. Allowing the PAO to stand—as to specific conduct alleged against FAS and Ms. Zack—rather than to hypothetical conduct on a going-forward basis, is unconstitutional. Moreover, for this reason, the *Goldberg* process is both unworkable and unconstitutional to the extent it allows litigants to seek a post-conduct declaration that the conduct is UPL and then use such a finding in litigation against defendants who had no notice that their conduct was UPL.

IV. THE PAO SHOULD BE DISAPPROVED BECAUSE CASES INVOLVING THE PARTIES WERE NOT STAYED OR VOLUNTARILY DISMISSED DURING THE COURSE OF THE UPL PROCEEDINGS.

A. The UPL Committee did not have authority to issue the PAO because the underlying proceedings were involuntarily, not "voluntarily," dismissed.

Before *Goldberg*, Rule 10-9.1(a)(2) and (c) provided:

> (a) **Definitions.**
>
> (2) *Petitioner*. An individual or organization seeking guidance as to the applicability, in a hypothetical situation, of the state's prohibitions against the unlicensed practice of law.
>
> (c). **Limitations on Opinions.** No opinion shall be rendered with respect to any case or controversy pending in any court or tribunal . . . .

In re Amendments to the Rules Regulating The Florida Bar—10.9.1, 82 So. 3d 66, 68 (Fla. 2012).

This was the rule prior to the *Goldberg* opinion that prevented the UPL Committee from getting entangled in pending litigation and avoided the risk that the UPL Committee advisory opinion process would be used as a tactical tool in litigation. However, the facts in *Goldberg* caused this Court to amend the rule. It is the amended rule which applies here.

In *Goldberg*, the plaintiffs filed two separate class actions in which customers of financial institutions sought to recover document preparation fees on the ground that the "specified conduct" at issue, *i.e.*, the preparation of such documents by clerical personnel for a fee, constituted UPL. 35 So. 3d at 906-07. Both the trial court and the Fourth District Court of Appeal dismissed the action, finding that this Court has exclusive jurisdiction to determine whether the alleged conduct constituted UPL. *Id.*

On review, this Court sought to resolve the quandary created by the facts of that case. This Court stated: "To state a cause of action for damages under any legal theory that arises from the unauthorized practice of law, we hold that the pleading must state that this Court has ruled that the specified conduct at issue constitutes the unauthorized practice of law." *Id.* at 907 (citation omitted). This Court recognized "a plaintiff will not be able to state a cause of action premised on

the unauthorized practice of law on a case of first impression (where this Court has not ruled on the actions at issue)." *Id*. at 908. Thus, in such cases, "the pleading may be dismissed without prejudice or the action may be stayed until a determination from this Court pursuant to the advisory opinion procedures of rule 10-9.1 or the complaint and injunctive relief procedures of rules 10-5, 10-6, and 10-7 of the Rules Regulating the Florida Bar." *Id*. (citations omitted).

Because rule 10-9.1(c) prohibited the UPL Committee from issuing an advisory opinion where a pending case or controversy existed between the parties, this Court in *Goldberg* directed The Florida Bar to propose a rule change allowing the UPL Committee to render a formal advisory opinion for a pending case or controversy when the Court has not previously determined whether "specified conduct" is the unlicensed practice of law. 35 So. 3d at 908. This Court subsequently amended Rule 10-9.1(c) by adding the following sentence: "However, the committee shall issue a formal advisory opinion under circumstances described by the court in [*Goldberg*], when the petitioner is a party to a lawsuit and that suit has been stayed or <u>voluntarily dismissed</u> without prejudice." *See In re Amendments to the Rules Regulating The Florida Bar—10.9.1*, 82 So. 3d at 68 (emphasis added). Although the *Goldberg* opinion does not say "voluntarily" dismissed without prejudice, the use of the term "voluntarily"

was inserted into the rule during the rule-making process that followed *Goldberg*—and "voluntarily" is the terminology approved by this Court.

Under Rule 10.9-1(c), the UPL Committee lacked authority to issue a PAO because Petitioners neither moved to "stay" nor "voluntarily dismissed" the UPL Civil Action. In fact, Petitioners pursued all three of their overlapping lawsuits at the same time as the UPL Petition and opposed dismissal in each matter.

In the UPL Civil Action, FAS and Ms. Zack moved to dismiss because their alleged conduct had never been found to be UPL by this Court. Even though Petitioners were placed on clear notice of their failure to identify prior decisions of this Court or opinions of the Florida Bar determining that the specified conduct alleged in the pleadings constituted UPL, Petitioners neither sought a stay of the UPL Civil Action nor exercised their right to unilaterally and voluntarily dismiss that action. Instead, FAS and Ms. Zack were forced to obtain an <u>involuntary</u> dismissal without prejudice over Petitioners' objections. In other words, Petitioners litigated their UPL case <u>on the merits and lost</u>—with the federal district court making extremely detailed findings why the alleged conduct <u>was not</u> UPL.

As the PAO reflects, the UPL Committee wholly disregarded the plain language and the rationale of the rule. Instead the UPL Committee was instructed by Bar Staff that the plain language of the rule was "incorrect the way it's written," just a "technicality," and that this Court did not intentionally include the word

"voluntarily" in Rule 10-9.1(c). [A19 at 54.] The UPL Committee's decision to proceed with issuance of a PAO under these circumstances was error. Following *Goldberg*, a detailed rule-making process occurred which culminated in this Court mandating the "stay" or "voluntarily dismissed" requirements. Because the underlying UPL Civil Action was not voluntarily dismissed and because FAS and Ms. Zack were forced to litigate the merits of that case before the dismissal without prejudice, the UPL Committee had no authority to issue the PAO at issue. For this reason alone, the PAO should be disapproved.

B. The UPL Committee Did Not Have Jurisdiction To Issue The PAO Because All Cases Between The Parties Involving the Practice of Law Were Not Stayed Or Voluntarily Dismissed Before the UPL Proceedings Were Initiated.

The clear intent of Rule 10-9.1(c) and this Court's decision in *Goldberg* is to require a party to stay or voluntarily dismiss any case or controversy pending in any court or tribunal involving the practice of law before the UPL Committee can issue an advisory opinion. As noted above, before *Goldberg*, Rule 10-9.1 (c) provided:

> (c) **Limitations on Opinions.** No opinion shall be rendered with respect to any case or controversy pending in **any** court or tribunal . . . .

See In re Amendments to the Rules Regulating The Florida Bar—10.9.1, 82 So. 3d at 68. Following *Goldberg*, this Court amended the rule to read as follows:

> (c) **Limitations on Opinions.** No opinion shall be rendered with respect to any case or controversy pending in **any** court or tribunal . . . . However, the committee shall issue a formal advisory opinion under circumstances described by the court in [*Goldberg*], when the petitioner is a party to a lawsuit and that suit has been stayed or voluntarily dismissed without prejudice.

Id.

By making this rule change, this Court obviously attempted to create a middle ground where litigation ceases pending the UPL Committee's determination of whether the alleged conduct at issue is or is not UPL. *Goldberg* makes clear that civil actions for legal theories premised on UPL cannot go forward unless this Court has made a determination that the activity at issue constitutes UPL. *See* 35 So. 3d at 907-08. But the facts in *Goldberg* did not encompass a situation where, as here, multiple lawsuits involving identical factual allegations and similar legal theories regarding the practice of law—whether authorized or unauthorized—existed. However, under *Goldberg's* reasoning and the other language in rule 10-9.1(c) setting forth a default or fallback rule that no opinion may issue with respect to any pending case or controversy, both the rule and *Goldberg* are logically read as precluding any and all lawsuits involving the same or similar allegations regarding the practice of law.

In voting to proceed with the PAO at issue despite the many pending lawsuits between the parties involving the same or similar allegations regarding the practice of law, the UPL Committee mistakenly relied on the *Goldberg* exception

in Rule 10-9.1(c) to the exclusion of the rest of the rule. [A19 at 52.] The rule's first sentence is both broad and clear: No opinion shall be rendered with respect to any pending case or controversy. The second sentence, which contains the *Goldberg* exception, allows the UPL Committee to issue an advisory opinion—but only if such cases are stayed or voluntarily dismissed. The UPL Committee's interpretation of the rule reads the *Goldberg* exception in isolation—without regard to the first sentence.

Requiring a stay or voluntary dismissal of all pending litigation furthers public policy. **First,** it precludes the use of The Florida Bar process to harass and intimidate defendants and as tactical resources in litigation, including as settlement leverage. **Second,** it promotes judicial economy and prevents defendants from being forced to litigate the same or similar issues in multiple forums simultaneously. **Third**, it prevents parties from having to litigate the same issues multiple times.

Because numerous other pending lawsuits between the parties were not stayed or voluntarily dismissed before the UPL Committee considered the question presented, the PAO should not have issued. For this reason alone, it should be disapproved.

CONCLUSION

For the foregoing reasons, FAS and Ms. Zack respectfully request that this Court disapprove the PAO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and appendices for same have been electronically uploaded to the e-Portal for the Supreme Court of Florida and that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Mail to Steven M. Berman, Shumaker, Loop & Kendrick, LLP, 101 East Kennedy Blvd., Suite 2800, Tampa, Florida 33602 (sberman@slk-law.com) (Petitioner seeking the PAO); C.C. Abbott, Chair, Standing Committee – Unlicensed Practice of Law, Florida Rural Legal Services, Inc., 3210 Cleveland Avenue, Ft. Myers, FL 33901 (colin.abbott@frls.org) (UPL Committee Chair); and Lori Holcomb, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 (lholcomb@flabar.org) (UPL Committee Staff Contact), on this 30th day of September, 2014.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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