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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

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

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ARGUMENT[1]

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.

In addition to the arguments raised in the objectors' comments, the Bar's brief itself establishes why the PAO should be disapproved.[2] The Bar states that

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[1] Citations are to the Appendix filed with FAS and Ms. Zack's Initial Objections Brief and 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. References to the Supplemental Appendix filed with this Brief are to [SA] and page number. The Bar's answer brief is referenced as the "Bar's brief" or [Bar Br.]. FAS and Ms. Zack's Initial Objections Brief are referenced as "FAS's Initial Brief" or [FAS Br.]. The unlicensed practice of law is referenced as "UPL." The Proposed Advisory Opinion is referenced as the "PAO."

[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. 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

"the activity set forth in the question is not [UPL]." [Bar Br. at 16.] Contrary to the Bar's statement, the PAO does not say the activity in the question is not UPL. The PAO says the answer to the question is generally no but can be yes—depending on the amount of control. The Bar's statement that the activity in the question is not UPL can only be read as a concession that the Bar meant to be clearer in the PAO as to the answer to the question. This underlies the essence of everything wrong with the PAO and why it should be disapproved in its entirety—it gives no guidance, is confusing, and is not limited to specific conduct.

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

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 Bar's brief addresses this issue at pages 17-19. The Bar states that, when the transcript of the May 2, 2014 hearing is "read as a whole," it is clear the UPL Committee directed Bar staff to draft a PAO addressing a scenario where control by a nonlawyer could constitute UPL. [Bar Br. at 17.] The Bar is incorrect. As stated in FAS's initial brief, the UPL Committee voted to answer the question with a "yes" or "no" vote—and then voted overwhelmingly to answer the question with a "no" vote. [A4 at 136.] After that vote was taken, the Bar staff stated the opinion would provide

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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).

"discussion" of "litigation liaison(s)." *Id.* at 136-37. Including "discussion" does not change the fact the UPL Committee unquestionably voted that the conduct stated in the question does not constitute UPL. [A4 at 129-136.] And the Bar itself apparently reads the PAO as answering the question in the negative based on its concession that the conduct in the question is not UPL. [Bar Br. at 16.]

At the June 2014 meeting, Bar staff briefly went over the PAO as written, incorrectly telling the UPL Committee:

> [T]he committee voted to answer that that question would not be the unlicensed practice of law under certain circumstances; whereas in other circumstances, it could be the unlicensed practice of law.

[SA 7.] Bar staff then discussed the draft PAO, again erroneously telling the Committee that it voted to answer the question consistent with the explanation set forth in the PAO. *Id.* at 8-19. Following that, even though the PAO was <u>not</u> consistent with the explicit vote taken at the May 2, 2014 hearing, one member stated: "I've read this, listened to your explanation, [and] find it to be representative of what this committee concluded at the last session." *Id.* at 18. Based on this, the UPL Committee approved the PAO. *Id.* at 19. Thus, in accepting the PAO, the UPL Committee was acting under the mistaken assumption that the PAO accurately reflected its earlier vote at the May 2, 2014 hearing when, in fact, it did not. Accordingly, the PAO should be disapproved.

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

The PAO does not address "specified" conduct and potentially places every non-lawyer litigation liaison, including lawyers not licensed in Florida, 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 and guidance as to whether certain specified conduct constitutes UPL. The Bar's brief addresses this issue at pages 11-14.

The Bar misstates FAS and Ms. Zack's argument. The Bar says those objecting to the PAO are arguing that the UPL Committee failed to make specific factual findings. It then says that, because it is not a fact-finding body, it cannot do so. This is not the argument made by FAS and Ms. Zack nor most objectors. Instead, the argument is that, consistent with every prior UPL advisory opinion, *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 907 (Fla. 2010), requires a finding that specified conduct constitutes UPL and the PAO fails to address any specified conduct.

Under the circumstances of this case, the UPL Committee could not give guidance as to specified conduct because the questions presented in the Petition requesting the PAO contained no specified conduct. Indeed, one of the primary reasons the federal district court concluded Petitioners failed to state a claim for

UPL in their amended complaint was because their allegations contained no facts. "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 (emphasis omitted).] Petitioners' request for the PAO suffered these same flaws—which led the UPL Committee to issue the PAO here, which does not, and could not, address "specified conduct" as required. Moreover, the only evidence before the UPL Committee was presented in the form of affidavits from FAS and Ms. Zack and their expert, which establish no UPL occurred. [A1; A11.] Those affidavits further establish that all actions taken by FAS and its employees were done at the instruction of the client—the Receiver. [A11 at 5-7.]

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 In Other Tribunals.

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. The Bar's brief addresses this argument at page 15. The Bar's argument firmly establishes why the PAO is fundamentally flawed.

The Bar states: "The [PAO] finds that it is not [UPL] for a nonlawyer company or its in-house counsel, who is not licensed to practice law in Florida, to control, direct, and manage Florida litigation on behalf of the nonlawyer company's third-party customers when the control, direction and management is directed to a member of The Florida Bar who is representing the customer in the litigation." [Bar Br. at 15.] If the PAO ended there, the PAO would be giving concrete guidance to trial courts in UPL civil actions. But, like the PAO, the Bar's next sentence states: "However, the [PAO] goes on to find that the activity could be [UPL] under certain circumstances." *Id.*

The problem is, the PAO gives no guidance as to what those "certain circumstances" are because it does not apply its findings to any specific conduct. It simply references the *Neiman*[3] decision—and the federal district court has already determined that the conduct in *Neiman* is distinguishable from the conduct here, which is a concrete finding the Bar ignores. Accordingly, by failing to address "specified conduct" the PAO unconstitutionally vests the power to say what is or is not UPL in "fact finders," who are to opine, based on an undefined scale of when "control" is too great, that conduct is or is not UPL. For this reason alone, the PAO should be disapproved.

[3] *Fla. Bar v. Neiman,* 816 So. 2d 587 (Fla. 2002).

II. THE PAO 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 misstates the law regarding the distinct roles of attorneys and clients and clients' designated agents, who may step into the clients' shoes and act on their behalf. The Bar addresses this issue at pages 16-17 and 19-25.

First, the Bar says the PAO does not involve the unique relationship between insurers and insureds. [Bar Br. at 16]. This statement is directly refuted by the PAO itself, which does not contain an exemption for insurers and explicitly references "services provided by a risk manager, third party administrator, adjuster or nonlawyer agent." [PAO at 16.] Surely the Bar is aware that risk managers, third party administrators, and adjusters almost always function on behalf of an insurer or a self-insured entity. The very fact the Bar fails to distinguish the roles these various parties play when acting on behalf of others establishes that the conclusions in the PAO are misplaced and misconstrue the role of clients, their agents, and lawyers. In addition, the litigation coordination at issue here was pursuant to contract and a believed-duty to defend based on relationships between an indemnitor and indemnitee, which is very similar to the relationship between an insurer and an insured.

Second, the Bar argues that the PAO properly construes the distinct roles of lawyer and client and that the PAO simply addresses the roles of litigation liaisons.

[Bar Br. at 19-25.] The Bar is wrong on both counts. As to the distinct roles of lawyers and clients, the Bar repeats the mistake it made in the PAO by concluding that "the legal decisions must be made by the lawyer… ." [Bar Br. at 20.] To the contrary, as outlined extensively in FAS's initial brief, the lawyer exercises independent judgment by analyzing the law and reaching legal conclusions and recommendations; but it is the client (or its designated agent) who determines whether those recommendations should be implemented and acted upon. [FAS Br. at 30-35.]

As to the role of a litigation liaison, the Bar improperly conflates UPL and professional ethics. As the Bar concedes, client decision-making functions are contractually delegated every day in a wide-variety of contexts, including, as here, the nursing home industry. [PAO at 12, 16-17.] If the Florida attorney believes the client's delegated agent is taking action that is harmful to the client, the Florida attorney separately may have an ethical issue. However, a separate ethical issue for the Florida attorney does not mean the client's agent is engaging in UPL if the agent is acting through a licensed Florida lawyer.

The Bar disagrees, arguing that adopting the PAO only up to the finding that the activity is not UPL would be wrong because that would fail to recognize that there are instances where a nonlawyer is engaging in UPL even when a Florida lawyer is involved if "control" is too great. [Bar Br. at 24-25.] The Bar states that

without the instruction of "too much control equals UPL," the non-lawyer in *Neiman* would have been able to continue to run the law office, collect fees, and cause great public harm; the litigants in *We The People*[4] would have been allowed to continue to practice law and give legal advice because they employed a member of the bar; and nonlawyers running the living trust mill in *American Senior Citizen's Alliance*[5] would still be producing invalid trust documents because Florida lawyers were involved in the review process. [Bar. Br. at 24-25.] Again, the Bar is incorrect. In each of those cases, there was no allegation that a client had delegated the client-making functions to a third-party; those cases all involved nonlawyers partnering with lawyers and holding themselves out to offer legal services for a fee—those cases did not involve third-party litigation liaisons with delegated authority to act on behalf of the client in managing litigation.

The Bar also further attempts to justify its reliance on *Neiman*, stating that *Neiman* illustrates when "control" is so great that it constitutes UPL. [Bar Br. at 22.] As noted in FAS's initial brief, the word "control" does not appear anywhere in *Neiman*. [FAS Br. at 37.] *Neiman* involved a non-attorney felon partnering with an attorney and holding himself out as an attorney in soliciting business and

[4] *The Fla. Bar v. We The People Forms and Service Center of Sarasota, Inc.,* 883 So. 2d 1280 (Fla. 2004).
[5] *The Fla. Bar v. Am. Senior Citizen's Alliance, Inc.,* 689 So. 2d 255 (Fla. 1997).

splitting profits. As noted, the federal district court explicitly distinguished the alleged conduct here and in *Neiman.* [FAS Br. at 36 (citing A2 20-21).]

Finally, the Bar says that *The Florida Bar v. Savitt,* 363 So. 2d 559 (Fla. 1978)—on which FAS and Ms. Zack relied to show the alleged conduct at issue is not UPL—is totally different, but, in any event, supports the PAO. [Bar Br. at 22-23.] The Bar is incorrect, and ignores the key parts of *Savitt*.

The *Savitt* decision involved a multi-state law firm, and the analysis in *Savitt* is instructive here. As set forth in FAS's initial brief [at 35-36], this Court recognized in *Savitt* that it is not UPL for non-Florida lawyers or personnel acting on behalf of a client 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"—which is exactly what occurred here. *Savitt*, 363 So. 2d at 560; *see also id*. at ¶ 2.(a). The Bar says "*Savitt* finds that the Florida lawyer must supervise the activities of the non-Florida lawyer," [Bar Br. at 22-23], but that is not what *Savitt* said. *Savitt* actually said non-Florida lawyers could not "exercise supervisory control over <u>any associate</u> operating on a permanent basis out of the Florida office who is a member of The Florida Bar with respect to matters essentially involving Florida law" for Florida residents or businesses. 363 So. 2d at 560.

Thus, the Bar's concerns have no merit. However, FAS and Ms. Zack have not asked this Court to adopt the PAO in part. For the many reasons set forth in their initial brief and this reply brief, they strongly believe that the only proper course of action is to disapprove the opinion in its entirety.

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 stated in FAS and Ms. Zack's initial brief, 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. The Bar did not address this issue, and FAS and Ms. Zack rely on the arguments made in FAS's initial brief at 38-39.

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.

The UPL Committee was without authority to issue the PAO because Petitioners neither moved to "stay" nor "voluntarily dismissed" the UPL Civil Action as required by Rule 10-9.1(c). The Bar's addresses this argument at pages 5-7. The Bar asserts the fact the underlying lawsuit was involuntarily dismissed is

inconsequential because issuance of the PAO is consistent with this Court's decision in *Goldberg.* This ignores that the amendment to Rule 10-9.1(c), adopted by this Court in 2012, two years after the decision in *Goldberg*, expressly states that the underlying lawsuit must be "stayed" or "voluntarily" dismissed. *In re: Amd. to the Rules Reg. the Fla. Bar – 10-9.1*, 82 So. 3d 66 (Fla. 2012). This Court made a conscious decision to amend the rule with this language, and it did so for good reason.

It seems clear that the rule was intended to avoid giving a litigant two bites at the same apple. If a litigant files a lawsuit alleging that the defendant engaged in UPL, and the defendant timely raises a *Goldberg* defense, the plaintiff must make an election. If the plaintiff wants an opinion from the UPL Committee under *Goldberg*, the plaintiff must obtain a stay or take a voluntary dismissal. Rules Reg. Fla. Bar 10-9.1(c). Alternatively, if the plaintiff elects to litigate without going to the UPL Committee, he or she has failed to comply with the *Goldberg* procedure and the protection of the rule is lost.

The obvious intent of the rule is to prevent exactly what happened in this case. The plaintiff should not be allowed, as here, to proceed in the following manner: litigate in a trial court and lose; then go to the UPL Committee to argue the same UPL question; then have an appeal to this Court and; then if this Court's

opinion is favorable to the plaintiff, go back to the trial court and do it all over again.

Plainly the rule was written to force an early election by the plaintiff to choose his or her forum: court or UPL Committee. Although the Bar may disagree with the rule as amended[6], it cannot ignore binding language in rules when making decisions—otherwise the rules are rendered meaningless and chaos will result. All Petitioners had to do was ask the federal district court to stay or voluntarily dismiss the case while they sought an advisory opinion. They refused to do so—instead electing to litigate the UPL lawsuit on its merits. The Bar offers no good reason why Petitioners should be afforded a second bite at the apple after they have already litigated and lost.

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

The PAO should be disapproved because <u>other</u> cases involving the same parties, same issues, and similar legal theories were not stayed or voluntarily

[6] As the Bar's staff counsel advised the UPL Committee, the Bar's view is that this Court's 2012 amendment to the UPL rules is a mere "technicality," which is simply "incorrect the way it's written." [A19 at 54]. The Bar's brief doubles-down on this position, consistently grounding its arguments in *Goldberg* itself, while at best minimizing (or at worst, ignoring) the plain language of Rule 10-9.1. Simply put, *Goldberg* was not this Court's final word on the UPL advisory opinion process no matter how much the Bar now believes this Court was "incorrect" in amending the rule as it did.

dismissed during the course of the UPL Committee proceedings. The Bar's brief addresses this issue at pages 7-10. The Bar asserts that, as long as the other lawsuits do not involve UPL, those lawsuits need not be stayed or voluntarily dismissed. The Bar stresses that, because other lawsuits do not involve the unlicensed practice of law, the fact those lawsuits involve allegations regarding the "practice of law" is irrelevant. This ignores that the very first determination in both the UPL determination and the malpractice lawsuit is whether the alleged conduct is or is not the "practice of law." Thus, a determination as to whether conduct is the practice of law in the PAO directly impacts other pending cases brought by Petitioners against FAS and Ms. Zack. It also ignores that the filing of a UPL advisory opinion request can indeed be used, as it was here, as a tactical tool in the many cases between the parties.

At pages 10-11, the Bar also incorrectly asserts it had independent authority to issue the PAO because once the underlying litigation was dismissed, the UPL Committee had independent authority to issue the PAO even if it were not a proper *Goldberg* request. Rule 10-9.1(c) states that "[n]o opinion shall be rendered with respect to any case or controversy pending in any court or tribunal… ." As established in FAS's initial brief, issuance of the PAO directly impacts two cases alleging malpractice or breach of fiduciary duty, which remain pending in federal court—thus the UPL Committee had no independent authority to issue the PAO.

CONCLUSION

For the foregoing reasons and those in FAS's initial brief, FAS and Ms. Zack respectfully request that this Court disapprove the PAO in its entirety.

Respectfully submitted,

/s/ Katherine E. Giddings

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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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