

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-1510

THE FLORIDA BAR RE: ADVISORY OPINION -
SHORE v. WALL, et al.

ANSWER BRIEF OF THE STANDING COMMITTEE ON THE UNLICENSED
PRACTICE OF LAW OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND FACTS

The request for formal advisory opinion was brought pursuant to R. Regulating Fla. Bar 10-9.1 and *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905 (Fla. 2010). The request appears at Tab A of the proposed advisory opinion.¹ The petitioner, James Wall (hereinafter, “Wall”) is a defendant in a pending interpleader action filed by the Clerk of the Circuit Court of Manatee County (Case No. 2014 CA 3155). In Wall’s answer to the interpleader action, he asserted that Jupiter Asset Recovery, LLC (hereinafter, “JAR”) engaged in the unlicensed practice of law. The Circuit Court, citing *Goldberg*, found it did not have jurisdiction over the unlicensed practice of law claim and stayed the case pending a determination by this Court on whether JAR’s activity, as alleged in the interpleader case, constitutes the unlicensed practice of law.

Public notice of the hearing was published in the *Orlando Sentinel*, in The Florida Bar *News*, and on The Florida Bar’s website. On January 26, 2017, the Standing Committee held a public hearing to receive input from interested parties.

¹ Petitioner filed an unlicensed practice of law complaint/request for formal advisory opinion, which was originally investigated by the local circuit committee under R. Regulating Fla. Bar 10-5 and 10-6. Finding that respondent, Jeffrey Paine, and his company, Jupiter Asset Recovery, LLC, engaged in the unlicensed practice of law, the circuit committee offered respondent a cease and desist affidavit, which he refused to sign. Because there is no Florida case law on point, the local circuit committee closed its investigation and forwarded the request for formal advisory opinion to the Standing Committee on the Unlicensed Practice of Law (hereinafter, “Standing Committee”).

Several interested parties testified at the public hearing. The Standing Committee also received written testimony. The Standing Committee filed its proposed advisory opinion with this Court on August 15, 2017. Thereafter, interested parties filed briefs in response to the proposed advisory opinion.

The proposed advisory opinion is cited as Proposed Opinion, the page number is abbreviated as “p.” Global Discoveries, Ltd.’s Brief in Response to the Advisory Opinion is cited as Global Discoveries Brief, the page number is abbreviated as “p.” JAR/Paine’s Verified Response to Proposed Advisory Opinion is cited as JAR/Paine Response, the paragraph number is abbreviated as “para.”

SUMMARY OF THE ARGUMENT

This is a *Goldberg* formal advisory opinion request relating to the pending interpleader case, *Shore v. Wall, et al.*, Case No. 2014 CA 3155 (Fla. 12th Cir. Ct.). That case was stayed pending a determination by this Court regarding the unlicensed practice of law claim raised in the case. Therefore, only the specific activities of JAR/Paine, as alleged in *Shore v. Wall*, are relevant for purposes of the Proposed Opinion. The activities of other asset recovery companies are not at issue in *Shore v. Wall*, so it would be improper to consider such activities in the Proposed Opinion.

Ultimately, it will be up to the trier of fact, the judge in the pending interpleader action *Shore v. Wall, et al.*, Case No. 2014 CA 3155 (Fla. 12th Cir.

Ct.), to determine the facts in that case and the validity of the assignment between JAR and Wall and whether the contemporaneously executed contingency agreement results in JAR/Paine's representation of Wall in the interpleader action. The alleged facts in *Shore v. Wall* suggest that JAR/Paine did not take a full and complete assignment of all of Wall's interest in the tax deed surplus. As a result, any action JAR/Paine took to recover the surplus, it took not only on its own behalf, but on behalf of Wall as well, since Wall still had an interest in the litigation.

As this Court noted in *The Florida Bar re: Advisory Opinion – Scharrer v. Fundamental Admin. Servs.*, 176 So. 3d 1273, 1278 (Fla. 2015), while it is not the Standing Committee's role to sit as the trier of facts or to decide disputed facts, *Goldberg* authorizes the Standing Committee to determine whether the specific facts as alleged, if those facts are taken as true, would constitute the unlicensed practice of law. Essentially, Wall alleged that JAR/Paine held out as an attorney and as having special knowledge on how to recover excess proceeds for a tax deed sale, represented Wall in the interpleader action, and prepared legal documents for Wall which affected his important legal rights. In reviewing these alleged facts, the Standing Committee took as true those facts, and applied existing case law to the facts to opine that the activity in question constitutes the unlicensed practice of law.

While there are statutes in other areas (surplus foreclosure sale proceeds and unclaimed property held by the State) that permit certain activity in those areas, those statutes are irrelevant in this case because *Shore v. Wall* does not involve surplus foreclosure sale proceeds or unclaimed property held by the State. Therefore, the interested parties' reliance on those statutes to argue JAR/Paine's activity should be authorized is misplaced. The statute addressing the disbursement of proceeds from a tax deed sale does not authorize nonlawyers to engage in the alleged activity of JAR/Paine at issue in *Shore v. Wall*.

This Court has inherent jurisdiction under Art. V, § 15, Fla. Const., to prohibit the unlicensed practice of law. It undertakes this constitutional mandate by determining what activity constitutes the unlicensed practice of law through the advisory opinion procedures of R. Regulating Fla. Bar 10-9.1, or the complaint and injunctive relief procedures of R. Regulating Fla. Bar 10-5, 10-6, and 10-7. This Court does not violate due process or the Florida Constitution when it exercises its constitutional authority to prohibit the unlicensed practice of law.

The Proposed Opinion establishes the precedent required by *Goldberg* and will be the standard to be applied by the trier of fact in guiding the *Shore v. Wall* court on whether the defendants engaged in the unlicensed practice of law. The Standing Committee, therefore, requests that this Court adopt the Proposed Opinion.

ARGUMENT

I. THE ALLEGED FACTS IN *SHORE V. WALL* SUGGEST THAT JAR/PAINE DID NOT HAVE A FULL AND COMPLETE ASSIGNMENT OF ALL OF WALL'S INTEREST IN THE TAX DEED SURPLUS, SO THAT ANY ACTION IT TOOK TO RECOVER THE SURPLUS IT TOOK NOT ONLY ON ITS OWN BEHALF BUT ON BEHALF OF WALL AS WELL.

JAR/Paine claims that it received a full and absolute assignment of Wall's interest in the tax deed surplus. However, the facts alleged by Wall in the interpleader action, if true, suggest that there was not a complete or absolute assignment of all of Wall's interest in the excess tax deed surplus.

In addition to the Absolute Assignment, JAR/Paine had Wall contemporaneously execute an Agreement to assist Wall in obtaining the tax deed surplus from the Clerk and the court. In this contingency fee agreement, Wall retained an interest in the proceeds of the sale as he stood to gain 60% from any recovery. This was not a situation where Wall signed over all of his interests in the proceeds of the sale to JAR/Paine so that JAR/Paine became the party to the action. The effect of this Agreement was that when JAR/Paine filed an answer in the interpleader action, it was also representing Wall because Wall still had an interest in the litigation.²

² There is still an unlicensed practice of law problem for JAR/Paine's representation of Wall in the litigation even if JAR/Paine was represented by counsel in the interpleader case, as suggested on p. 5, n.3 of JAR/Paine Response, because a corporation may not practice law by hiring a lawyer to provide legal

Additionally, the letter Paine drafted for Wall to send to the attorney for the Clerk of Court in the interpleader action included the following language: “I understand that Jupiter has filed an Answer and Cross Claim in this matter which protects **my interest** in these funds.” (emphasis added). If Wall fully assigned his interest in the surplus funds to JAR/Paine, Wall would no longer have any interest in the funds, so this letter and above-quoted language would be unnecessary. This statement in the letter is an admission that there was not a full and absolute assignment of all of Wall’s interest in the surplus funds.

Further, the Agreement between Wall and JAR, executed contemporaneously with the Absolute Assignment, provides the following language: “Any and all expenses connected with acquiring surplus funds will be the exclusive obligation of JUPITER. Under no circumstances will SELLERS [sic] be liable for any payment, whatsoever.” If JAR had a full and complete assignment of Wall’s interest in the surplus tax deed proceeds, logically it would be JAR’s responsibility to pay the expenses for acquiring its funds. Thus, if Wall had truly assigned all of his interest in the tax deed surplus to JAR, then a provision as to the payment of expenses would not have been necessary.^{3 4}

services for its customers. *The Florida Bar v. We the People Forms and Service Ctr. of Sarasota*, 883 So. 2d 1280 (Fla. 2004).

³ JAR/Paine mischaracterizes the Standing Committee’s position regarding the assignment; it is not the Standing Committee’s position that JAR’s assignment was not a full assignment since the consideration was to be paid in the future, as

In different factual contexts, other states have found that a nonlawyer engaged in the unlicensed practice of law when it took purported assignments where the creditor (assignor) still retained an interest in the underlying debt (by receiving a percentage of any recovery) and the nonlawyer instituted and maintained legal action to recover the unpaid debt. *Alco Collections, Inc. v. Poirier*, 680 So. 2d 735 (La. Ct. App. 1st Cir. 1996); *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. A-1 Assocs., Ltd.*, 623 N.W. 2d 803 (Iowa 2001); *Bump v. Barnett*, 16 N.W. 2d 579 (Iowa 1944); *Cf. In re UPL Advisory Opinion 2002-1*, 277 Ga. 521 (2004) (nonlawyer collector who took assignment “for the purpose of collection only” where collector was to receive contingency fee upon collection and filed suit to collect debt engaged in the unlicensed practice of law).

suggested in JAR/Paine Response, paras. 16 and 24, but it is for the reasons set forth in Argument I, above, and in pp. 12-14 of the Proposed Opinion.

⁴ Despite the claim made by JAR/Paine in para. 21 of its Response, the validity of assignments for a tax deed surplus was not the issue in *Muntzing v. Global Discoveries, Ltd., LLC*, 112 So. 3d 690 (Fla. 5th DCA 2013). The issue for appellate review was whether the promissory note was required to establish a valid lien on the property or whether the mortgage itself was sufficient. The appellate court held that the mortgage itself constituted the lien on the property.

II. BECAUSE THIS IS A *GOLDBERG* FORMAL ADVISORY OPINION REQUEST, ONLY THE FACTS AT ISSUE IN THE UNDERLYING *SHORE V. WALL* CASE WERE RELEVANT AND CONSIDERED BY THE STANDING COMMITTEE IN ISSUING ITS PROPOSED OPINION.

In its Brief, Global Discoveries explains its and the industry's practices in asset recovery ⁵ and requests that this Court disapprove the Proposed Opinion and find that the practices at issue are not the unlicensed practice of law. Respectfully, the practices of Global Discoveries, or any other asset recovery company, are not relevant for purposes of this Proposed Opinion.

This is a *Goldberg* formal advisory opinion request, where the circuit court in the pending interpleader action, *Shore v. Wall, et al.*, Case No. 2014 CA 3155 (Fla. 12th Cir. Ct.), stayed the case to obtain a determination by this Court on whether the specific activities at issue in that case constitute the unlicensed practice of law. Therefore, as commanded by *Goldberg*, only the specific activities of JAR/Paine in *Shore v. Wall* are relevant for this Proposed Opinion, not the activities of other asset recovery companies. The Proposed Opinion is not an opinion on the activities of asset recovery companies, in general.⁶ The Proposed Opinion will be used by the *Shore v. Wall* trier of fact in determining whether the

⁵ “Global’s interest in this case is to inform this Court of industry practices that are far outside of the limited facts alleged in the underlying case[.]” Global Discoveries Brief, p. 1.

⁶ This is reflected in the case name, The Florida Bar re: Advisory Opinion - *Shore v. Wall, et al.*

activities of JAR/Paine at issue in that case constitute the unlicensed practice of law.⁷

Global Discoveries argues that the actions of asset recovery companies in recovering excess tax deed sale proceeds are ministerial in nature. The activities of JAR/Paine, as alleged in the interpleader action (Proposed Opinion, pp. 6-9), are hardly ministerial.⁸ They include holding out as an attorney and as having special knowledge on how to recover excess proceeds for a tax deed sale, representing Wall in the interpleader action, and preparing legal documents for Wall which affected his important legal rights (including the answer in the interpleader action and a letter to the Clerk's attorney, which Wall did not sign, which stated "I understand that Jupiter has filed an Answer and Cross Claim in this matter which protects my interest in these funds[]" and "Please consider this letter as notice that I shall not file a responsive pleading in this case and I consent to a default against

⁷ On p. 1 of its Brief, Global Discoveries states "The Standing Committee on the Unlicensed Practice of Law's Proposed Advisory Opinion ... is based upon its findings and conclusions that arise from the facts presented in the underlying case, *Shore v. Wall, et al.*, Case No. 2014 Ca 3155 (Fla. 12th Cir. Ct.)." That is the precise scope of a *Goldberg* advisory opinion.

⁸ To the extent that other asset recovery companies' activities are ministerial and do not require legal sophistication or training or involve the completion of forms, existing case law provides UPL guidance in this area. *See Florida Bar re: Advisory Opinion - Activities of Community Ass'n Managers*, 681 So. 2d 1119, 1123 (Fla. 1996); *Florida Bar re: Advisory Opinion - Activities of Community Ass'n Managers*, 177 So. 3d 941, 950 (Fla. 2015); R. Regulating Fla. Bar 10-2.2; *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978).

me in this case.”). These activities are not ministerial and, if true, would constitute the unlicensed practice of law for the reasons set forth in the Proposed Opinion.

III. THERE IS NO STATUTORY AUTHORITY WHICH AUTHORIZES NONLAWYERS TO ENGAGE IN THE ACTIVITY AT ISSUE IN *SHORE V. WALL*.

If an activity is the practice of law but the activity is authorized, the activity is not the unlicensed practice of law and may be engaged in by a nonlawyer. *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980). The briefs in opposition to the Proposed Opinion point out that statutes in other areas - surplus foreclosure sale proceeds and unclaimed property held by the State⁹ - permit certain activity in those areas. However, *Shore v. Wall* does not involve surplus foreclosure sale proceeds or unclaimed property held by Florida, so those statutes are irrelevant to the case at bar. Section 197.582, Florida Statutes (2017), addresses the disbursement of proceeds from a tax deed sale, and none of its provisions authorize nonlawyers to engage in the alleged activity of JAR/Paine at issue in *Shore v. Wall*.¹⁰

⁹ Sections 45.033 and 717.135, Fla. Stat. (2017), respectively.

¹⁰ JAR/Paine acknowledges in para. 19 of its Response that no provision in the statutory framework for tax deed surplus and its recovery authorizes a nonlawyer to act in a representative capacity when representing a claim holder.

IV. THE SUPREME COURT OF FLORIDA’S INHERENT JURISDICTION TO PROHIBIT THE UNLICENSED PRACTICE OF LAW PURSUANT TO ART. V, § 15, FLA. CONST., DOES NOT VIOLATE DUE PROCESS AND FLORIDA’S CONSTITUTION.

This Court has inherent jurisdiction to prohibit the unlicensed practice of law under Art. V, § 15, Fla. Const. R. Regulating Fla. Bar 10-1.1. As *Goldberg* dictates, this Court has exclusive jurisdiction to determine what activity constitutes the unlicensed practice of law, which it does through the advisory opinion procedures of R. Regulating Fla. Bar 10-9.1, or the complaint and injunctive relief procedures of R. Regulating Fla. Bar 10-5, 10-6, and 10-7. *Goldberg* at 908.

Most of the area of unlicensed practice of law has been developed by case law; there are over 230 reported unlicensed practice of law cases/opinions in Florida where this Court has found that specific activity constitutes the unlicensed practice of law. It defies logic to think that this Court violates Florida’s Constitution when it carries out its constitutional responsibility of prohibiting the unlicensed practice of law. Therefore, the argument that this Court violates due process and Florida’s Constitution in the advisory opinion process should be rejected.

CONCLUSION

The Proposed Opinion will establish the precedent required by *Goldberg* and be the standard to be applied by the trier of fact in guiding the *Shore v. Wall* court on whether the defendants engaged in the unlicensed practice of law.

While it is the view of the Standing Committee that specific proof of harm is not required in the advisory opinion process, the public harm present in this case is discussed in the Proposed Opinion at pp. 16-17. Although a finding of harm is not required to hold that an activity is the unlicensed practice of law, the harm and potential for harm supports the conclusions reached by the Standing Committee and the necessity of adopting the Proposed Opinion. The Proposed Opinion would protect the public from this harm.

The interested parties have not advanced any reason for this Court to limit the opinion of the Standing Committee. The Florida Bar Standing Committee on the Unlicensed Practice of Law, therefore, requests that this Court adopt the Proposed Opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Answer Brief has been furnished by U.S. Mail to: James Wall, 501 General Harris Street, Longboat Key, Florida 34228, and by email to: Kevin P. Tynan (ktynan@rtlawoffice.com) and Amy L. Dilday (adilday@mccumberdaniels.com, lboucos@mccumberdaniels.com, and eservice@mccumberdaniels.com) on this 21st day of December 2017.

/s/ Jeffrey T. Picker
Jeffrey T. Picker

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text herein is printed in Times New Roman, 14-point font, in compliance with Fla. R. App. P. 9.210.

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