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UNAUTHORIZED PRACTICE OF LAW: NEW APPROACH FOR GIVING GUIDELINES TO BE USED IN GENERAL BUSINESS TRANSACTIONS

In re The Florida Bar, 215 So. 2d 613 (Fla. 1968)

By joint petition and waiver of adversary procedural provisions,[1] the Florida Bar Association and a securities brokerage firm sought to resolve common areas of disagreement. Their petition was for a determination of whether certain of the firm's activities, performed in an advisory capacity incidental to its primary business, constituted the unauthorized practice of law. Pursuant to its exclusive jurisdiction over unauthorized practice of law cases,[2] the Florida supreme court rendered a consent decree[3] enumerating the permissible[4] and impermissible[5] activities of securities brokers and HELD,

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1. *In re* The Florida Bar, 215 So. 2d 613 (Fla. 1968).

2. [Hereinafter cited as UPL cases].

3. BLACK'S LAW DICTIONARY 499 (4th ed. 1951). A consent decree is: "One entered by consent of the parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proved."

4. *In re* The Florida Bar, 215 So. 2d 613, 614 (Fla. 1968). Securities brokers were allowed these activities: (a) ask specific facts regarding his customers' assets; (b) ask a duly licensed broker to (i) execute simple forms relating to transfer of ownership of securities; (ii) execute or help execute simple printed withdrawal and reinvestment plans supplied by mutual fund companies; (iii) execute or help execute simple printed forms setting up mutual funds for minors when no successor beneficiary or future interest is involved; (iv) complete other simple forms incidental to purchase or transfer of securities; (v) execute or help execute Internal Revenue service approved forms relating to the "Keogh" plan; (c) generally discuss the income and gift tax effects on sale, purchase, transfer, or ownership of investments; (d) give customers factual information needed for preparation of all tax returns; (e) inform customers of the common and usual methods of security ownership registration; (f) discuss registration of ownership of clients' investments with their attorneys; (g) assist clients' attorneys in specific distribution and liquidation of clients' estates, carrying out all of the attorney's specific instructions; (h) generally discuss federal and local estate and inheritance taxes with customers, without becoming specific; (i) lecture on finance, economics, investments, general principles of taxation, and common methods of security ownership; (j) in a general manner, discuss principles of law; (k) discuss the investment end of self-employed and corporate profit sharing and pension funds; (l) advertise services relative to individual financial analysis and general tax considerations of investments.

5. *In re* The Florida Bar, 215 So. 2d 613 (Fla. 1968). Securities brokers were denied these activities: (a) legally advising, directly or indirectly, in any matters concerning legal instruments or documents used in *inter vivos* or after death disposition of property; (b) advertising the services named in (a) above; (c) legally advising, directly or indirectly, of the consequences of joint ownership, holding property out of state, or the effect of Florida law on one no longer able to manage his affairs; (d) legally advising, directly or indirectly, of the use of different devices for disposing of property upon death; (e) sponsoring or holding meetings for discussion of the legal principles forbidden in (a) and (c) above; (f) offering, directly or indirectly, to give legal advice to anyone of the public; (g) offering estate analysis services that involve providing specific legal advice in relation to specific circumstances of a client's estate.

that securities brokers were perpetually restrained and enjoined from conducting the named unauthorized activities.[6]

With the exception of one Connecticut case,[7] there has been no previous judicial consideration of unauthorized practice of law by securities brokers. The securities business has always been one with many legal ramifications, and there has long been a need for authoritative decision concerning the legally permissible activity of stockbrokers incidental to their function of marketing securities. However, because of the omnipresence of law in practically all matters concerning securities transactions, any attempt to prescribe definitive bounds for the various agents of brokerage houses and mutual fund companies would seem to be a difficult task for the courts. In the investment realm only a thin line often separates businessmen functioning legally in their professional capacities and those participating in activities that constitute unauthorized practice of law.

Perhaps the greatest deficiency of lay specialists is their inability to see legal problems outside the area of their particular competence.[8] They possess expertise in a particular area that they may know, in legal terms even better than a practicing attorney; but they do not have the broad overview of the law so necessary to prevent legal contingencies from arising as a result of shallow legal perception.[9] Most bar associations recognize this view, but they are countered by an opposing argument that is essentially threefold: First, professional businessmen, such as realtors and stockbrokers, reasonably desire to give their clients the impression that they are completely capable of managing all business matters they conduct without any outside help.[10] Second, since bar associations have long allowed them to perform these borderline legal activities, it may be unjust to prevent them from continuing.[11] Closely related to this second argument is the contention that legal associations are not properly furnishing low-cost legal aid needed for menial legal tasks, and since this type work is almost clerical in nature, there is no harm in lay practitioners performing these acts as incidental to their primary business.[12]

Despite these arguments on both sides, and the fact that numerous professions are permitted to perform insignificant legal favors for their clients every day, there are many areas of business where lines should be drawn to prevent undue harm to the general public from unauthorized practice by those legally untrained.

The unauthorized practice of law area is exceedingly difficult to cover with a set of guidelines because of the fine distinctions that must necessarily

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6. 215 So. 2d 613 (Fla. 1968).

7. Grievance Comm. v. Dacey, 154 Conn. 129, 222 A.2d 339, 22 A.L.R.3d 1092 (1966).

8. Note, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331, 1334 (1966).

9. *Id.*

10. Note, *The Unauthorized Practice of Law in Florida*, 16 U. FLA. L. REV. 600, 605 (1964).

11. *Id.*

12. *Id.* Note, *supra* note 8, at 1364.

be made. The fact that impermissible activities are enjoined with the protection of the general public primarily in mind[13] must nevertheless be balanced with the layman's need for quasi-legal self-service without undue expense or loss of time. Some courts have allowed laymen to complete simple documents,[14] while others have prohibited all lay drafting of documents, regardless of the degree of difficulty.[15] The practice of laymen advising specifically on the particular facts of a customer's legal circumstances is scorned both by states that take the case-by-case approach[16] and by those laying down guidelines for an entire profession.[17] That the layman gives his legal aid free of any additional cost to his customer,[18] or in the form of suggestions with encouragement to consult an attorney,[19] does not prevent his acts from being unauthorized practice of law. The general approach established by the instant case and by most unauthorized practice of law decisions in other jurisdictions is that for a business activity to be allowed, the legal element must not only be incidental to the general activity but must be insubstantial; it must be general and not specific.[20]

Florida has a relatively short history of unauthorized practice of law cases. The first cases of unauthorized practice were instigated in 1934 and were unreported.[21] In 1939, the Florida supreme court established the policy that the judiciary had the inherent power to assume full responsibility for admissions, disbarment, and regulation of the unauthorized practice of law.[22] The power of the supreme court in this area is clearly delegated to the Florida Bar Association in article XVI, section 2, of the Integration Rule of the Florida Bar.[23] With the establishment of this authority and power in the judicial branch to enforce its decrees through injunction, fine, or incarcera-

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13. The Florida Bar v. Town, 174 So. 2d 395 (Fla. 1965); State *ex rel.* Florida Bar v. Sperry, 140 So. 2d 587, 595 (Fla. 1962); Kentucky State Bar Ass'n v. Holland, 418 S.W.2d 674 (Ky. 1967).

14. Merrick v. American Sec. & Trust Co., 107 F.2d 271, 277 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 216, 228-29, 276 N.W. 365, 369 (1937).

15. Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 251 P.2d 619 (1952). *Compare* State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *with* Pioneer Title Ins. & Trust Co. v. State Bar of Nev., 74 Nev. 186, 326 P.2d 408 (1958) *and* People v. Lawyers' Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940).

16. Grievance Comm. v. Dacey, 154 Conn. 129, 222 A.2d 339, 340 (1966); Green v. Huntington Nat'l Bank, 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965).

17. Oregon State Bar v. John H. Miller & Co., 235 Ore. 341, 385 P.2d 181 (1963); State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961).

18. Oregon State Bar v. John H. Miller & Co., 235 Ore. 341, 385 P.2d 181 (1963). *See also* Darby v. Mississippi State Bd. of Bar Admissions, 185 So. 2d 684, 685 (Miss. 1966); The Florida Bar v. Keehley, 190 So. 2d 173 (Fla. 1966).

19. Oregon State Bar v. John H. Miller & Co., 235 Ore. 341, 385 P.2d 181, 182 (1963).

20. *Id.*

21. Cutler, *The Development of Florida UPL Cases*, 39 FLA. B.J. 997 (1965).

22. *In re* Florida State Bar Ass'n, 134 Fla. 851, 186 So. 280 (1938).

23. Integration Rule of the Florida Bar, art. XVI, 2. provides: "The Florida Bar, as an official arm of this Court [Florida Supreme Court], is charged with the duty of investigating matters pertaining to the unauthorized practice of law."

tion[24] the Florida Bar, upon becoming fully integrated in 1949,[25] began to move slowly in the direction of limiting the existence of unauthorized practice of law by laymen. This resulted in the preparation of guidelines for use by the different professions in performing legal activities incidental to their business affairs.

Although Florida attorneys have initiated a number of unauthorized practice of law cases covering areas such as real estate transactions,[26] patent services,[27] business counseling,[28] title insurance,[29] out of state attorneys,[30] notaries public,[31] disbarred attorneys,[32] and estate planning services[33] their approach to this broad field has been a somewhat random case-by-case delineation, which has failed to draw firm lines for businessmen to use in their work. Except for the area of real property conveyancing,[34] this approach has left important gaps in the law. Two such untouched areas are in the realms of tax and estate law.[35]

Of the two important gaps in Florida unauthorized practice of law decisions, the one most in need of filling prior to the present case was that of estate planning. Although the area of income tax counseling involves many legal technicalities, there has been ample litigation in other states[36] to give certified public accountants in Florida fairly clear guidelines. In addition, closer cooperation exists between accountants and lawyers as exemplified by their joint publication of guidelines.[37]

The securities area, on the other hand, has shown little evidence of close rapport with the legal profession. There is no indication that brokers have been obstinate or hostile; rather they have not been presented with oppor-

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24. FLA. CONST. art. V, §23 (1885).

25. Petition of Fla. State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).

26. State of Fla. *ex rel.* Bodner v. Florida Real Estate Comm'n, 99 So. 2d 582 (Fla. 1956); Keyes Co. v. Dade County Bar Ass'n, 46 So. 2d 605 (Fla. 1950); Cooperman v. Guarantee Abstract Co., 5 Fla. Supp. 38 (6th Cir. 1953); Cooperman v. Guarantee Abstract Co., 3 Fla. Supp. 195 (6th Cir.1953).

27. State *ex rel.* The Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962), *rev'd*, 373 U.S. 379 (1963).

28. The Florida Bar v. Keehley, 190 So. 2d 173 (Fla. 1966); The Florida Bar v. Town, 174 So. 2d 395 (Fla. 1965); Petition of Kearney, 63 So. 2d 630 (Fla. 1953).

29. The Florida Bar v. Columbia Title, 197 So. 2d 3 (Fla. 1967); The Florida Bar v. McPhee, 195 So. 2d 552 (Fla. 1967); Dade-Commonwealth Title Ins. Co. v. North Dade Bar Ass'n, 152 So. 2d 723 (Fla. 1963).

30. Walker v. Walker, 123 So. 2d 692 (Fla. 1960).

31. The Florida Bar v. Fuentes, 190 So. 2d 748 (Fla. 1966).

32. The Florida Bar v. Roberts, 161 So. 2d 211 (Fla. 1964).

33. The Florida Bar v. Goodrich, 212 So. 2d 764 (Fla. 1968).

34. Keyes Co. v. Dade County Bar Ass'n, 46 So. 2d 605 (Fla. 1950); *cf.* Cooperman v. West Coast Title Co., 75 So. 2d 818, 819 (Fla. 1954).

35. Note, *The Unauthorized Practice of Law in Florida*, 16 U. FLA. L. REV. 600, 610, 618 (1964).

36. Gardener v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951); Agran v. Sharipo, 127 Cal. App. 2d Supp. 807, 273 P.2d 619 (Super. Ct. 1954); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943).

37. *Statement of Principles Relating to Practice in the Field of Federal Income Taxation*, 37 A.B.A.J. 517 (1951).

tunities to work with organizations of attorneys to determine their permissible activities. The present case has made a significant step toward erasing this area of uncertainty in the practice of law.

As above mentioned, there has been little investigation of securities brokers on the part of state bar associations. The primary reason the Florida and Connecticut bars sought judicial recourse against securities dealers was to prevent broker dealing in the estate planning area. Other bar associations have approached the estate planning problem with suits against life insurance companies[38] and bank trust departments.[39] The chief difficulty of regulating the practice of estate planning law by these different businesses seems to be that their agents find it easy to advise[40] their customers specifically on the results that different legal devices will have in the preservation and distribution of their estates. In some cases they draft the necessary legal documents as an activity incidental to their particular business.[41] Disturbed by these practices, the different policing organs of state legal systems have handled the problem through individual adversary cases,[42] declaratory judgments,[43] and consent decrees[44] that lay definite guidelines. Florida[45] and Oregon[46] appear to be taking the lead in the utilization of consent decrees in unauthorized practice of law controversies. This is the best way to meet the problem of informing the laymen of the particular services they may or may not offer their clients. In Florida, consent decrees will support application of the doctrine of res judicata[47] and will therefore provide precedent for subsequent judgments. In addition, consent decrees avoid much ill will.

The present case marks a significant step by the supreme court and the Florida Bar in establishing workable guidelines for the use of businessmen in conducting their daily activities that involve legal implications. Not only does it lay down workable guidelines for the Florida estate planners who are not members of the bar, but it also is a landmark in demonstrating that the Florida Bar, without compromising its principles,[48] can work with

38. The Florida Bar v. Goodrich, 212 So. 2d 764 (Fla. 1968); Oregon State Bar v. John H. Miller & Co., 235 Ore. 341, 385 P.2d 181 (1963).

39. Green v. Huntington Nat'l Bank, 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964); State Bar v. Conn. Bank & Trust Co., 145 Conn. 222, 140 A.2d 863, 69 A.L.R.2d 394 (1958).

40. Oregon State Bar v. John H. Miller & Co. 235 Ore. 341, 385 P.2d 181 (1963); State Bar v. Connecticut Bank & Trust Co., 143 Conn. 222, 140 A.2d 863 (1958); Grievance Comm. v. Dacey, 154 Conn. 129, 222 A.2d 339 (1966).

41. Grievance Comm. v. Dacey, 154 Conn. 129, 222 A.2d 339 (1966).

42. *Id.*; Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. 48, 273 S.W.2d 408 (1954).

43. State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *modified on rehearing*, 91 Ariz. 293, 371 P.2d 1020 (1962).

44. *In re* The Florida Bar, 215 So. 2d 613 (Fla. 1968); Oregon State Bar v. John H. Miller & Co., 235 Ore. 341, 385 P.2d 181 (1963).

45. *In re* The Florida Bar, 215 So. 2d 613 (Fla. 1968).

46. Oregon State Bar v. John H. Miller & Co., 235 Ore. 341, 385 P.2d 181 (1963).

47. 19 FLA. JUR. *Judgments and Decrees* §273 (1958).

48. Petitioners' Brief for Consent Decree at 9, *In re* The Florida Bar, 215 So. 2d 613 (Fla. 1968).