

ORIGINAL

THE BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF
THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATION, :

Relator, :

09-1640

Case No. UPL 08-02

v. :

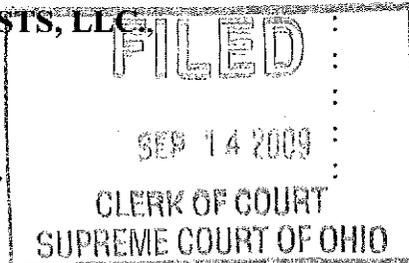
FINAL REPORT

AMERICAN FORECLOSURE :

SPECIALISTS, LLC. :

Proposed Resolution,
Gov.Bar R. VII(5b)

Respondent. :



I. PROCEDURAL BACKGROUND

This matter was initiated on or about December 11, 2008, when Relator, the Ohio State Bar Association, filed a complaint alleging the unauthorized practice of law against Respondent, American Foreclosure Specialists, LLC. The Complaint alleges that Respondent engaged in the unauthorized practice of law by advising, counseling, and representing two Ohio residents while attempting to negotiate a modification of their delinquent mortgage. The Complaint further alleges that Respondent prepared an Answer that was filed in the related foreclosure case in Crawford County Common Pleas Court and received payment for its services.

On January 20, 2009, Respondent filed a Motion for Definite Statement. Relator did not respond to the Motion. On May 21, 2009, this matter was assigned to a panel consisting of N. Victor Goodman (Chair), C. Lynne Day, and James W. Lewis.

The parties jointly filed a Motion to Approve Consent Decree, Memorandum in Support of Proposed Consent Decree, and Proposed Consent Decree on June 4, 2009. The Panel considered the parties' filings via teleconference on June 26, 2009, and determined that the Proposed Consent Decree did not contain a sufficient admission that the conduct alleged in the Complaint was the unauthorized practice of law. The Panel also found that the parties' filings failed to discuss the applicability of civil penalties. Accordingly, through a letter dated July 1, 2009, the Panel asked the parties to refile a proposed consent decree that contains the appropriate admission and a memorandum in support that discusses civil penalties.

On August 7, 2009, the parties filed a revised Proposed Consent Decree and a Memorandum in Support of Motion to Approve Consent Decree. The Panel considered the parties' new filings during a teleconference on August 17, 2009. Finding that the August 7, 2009, Proposed Consent Decree and Memorandum in Support comply with the Panel's revision requests, the Panel unanimously agreed to recommend acceptance of the Proposed Consent Decree to the Board. To correct a typographical error in the August 7, 2009, Proposed Consent Decree, the parties filed a second Revised Proposed Consent Decree on August 24, 2009.

At its meeting on August 27, 2009, the Board formally considered this matter. By a majority vote, the Board granted the parties' Motion to Approve Consent Decree and also approved the Revised Proposed Consent Decree. As required by Gov.Bar R. VII (5b)(D)(1), this Report will set forth the Board's reasons for recommending that the Court approve the Revised Proposed Consent Decree.

II. FINDINGS OF FACT

A. Relator is a bar association whose members include attorneys-at-law admitted to the practice of law in Ohio and who practice throughout Ohio. Relator is authorized to pursue this action against Respondent under Gov.Bar R. VII.

B. Respondent, a limited liability company, is not, and has never been, an attorney admitted to practice, granted active status, or certified to practice law in Ohio pursuant to Gov.Bar R. I, II, VI, IX, or XI.

C. The Complaint alleges that during 2007 and 2008, Respondent rendered legal services in Ohio by advising, counseling, and representing Scott R. Heffernan and Patricia A. Heffernan in attempting to negotiate a modification of their delinquent mortgage. The delinquent mortgage was the subject of foreclosure case number 08-CV-0033 in Crawford County Common Pleas Court. (Complaint ¶ 5(A)).

D. The Complaint alleges that as part of Respondent's representation of the Heffernans in the defense and proposed modification/work out of their foreclosure and delinquent mortgage, the Heffernans paid Respondent \$ 995.00. (Complaint ¶ 5(B)).

E. Respondent drafted and prepared a court pleading and instructed the Heffernans to file it in their foreclosure case, number 08-CV-0033, in Crawford County Common Pleas Court. (Proposed Consent Decree ¶ 1; Complaint Exhibit A).

III. CONCLUSIONS OF LAW

A. The Supreme Court of Ohio has original jurisdiction regarding admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. Section 2(B)(1)(g), Article IV, Ohio Constitution; *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 501 N.E.2d 617; *Judd v. City Trust & Sav. Bank* (1937), 133 Ohio

St. 81, 12 N.E.2d 288. Accordingly, the Court has exclusive jurisdiction over the regulation of the unauthorized practice of law in Ohio. *Greenspan v. Third Fed. S. & L. Assn.*, Slip Opinion No. 2009-Ohio-3508, at ¶ 16; *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, at ¶ 16.

B. The unauthorized practice of law is the rendering of legal services for another by any person not admitted or otherwise authorized to practice law in Ohio. Gov.Bar R. VII(2)(A). “[T]he practice of law includes conducting cases in court, preparing and filing legal pleadings and other papers, appearing in court cases, and managing actions and proceedings on behalf of clients before judges, whether before courts or administrative agencies.” *Cleveland Bar Assn. v. Coats*, 98 Ohio St.3d 413, 2003-Ohio-1496, at ¶ 3; citing *Richland Cty. Bar Assn. v. Clapp* (1998), 84 Ohio St.3d 276, 278, 703 N.E.2d 771; *Cincinnati Bar Assn. v. Estep* (1995), 74 Ohio St.3d 172, 173, 657 N.E. 2d 499.

C. With limited exception, a corporate entity may not give legal advice to another, directly or indirectly, through its employees or attorney employees. *Judd* at 88, 12 N.E.2d at 291-2.

D. Respondent engaged in the unauthorized practice of law by drafting and preparing a court pleading and providing it to Respondent’s customers, the Heffernans, with instructions to file it in their foreclosure case, number 08-CV-0033, in Crawford County Common Pleas Court.

IV. PRINCIPAL TERMS OF CONSENT DECREE

The principal terms of the August 24, 2009, Revised Proposed Consent Decree between Relator and Respondent are as follows:

A. Respondent, its successors and assigns, and its officers, members, agents, representatives, and employees, are permanently enjoined from providing legal advice and drafting and preparing court pleadings for and on behalf of residents of the state of Ohio.

B. Respondent, its successors and assigns, and its officers, members, agents, representatives, and employees are permanently enjoined from providing legal services, including the drafting of court pleadings or providing legal advice to Ohio residents or otherwise engaging in the unauthorized practice of law in the state of Ohio.

C. Respondent agrees to refund the sum of \$ 995.00 to Scott A. Heffernan and Patricia A. Heffernan, which represents the fee paid by the Heffernans to Respondent.

D. No civil penalty is to be imposed against Respondent.

V. **PANEL ANALYSIS**

A. **Review of the Revised Proposed Consent Decree Using Factors in Gov.Bar R. VII (5b)(C)**

When evaluating a proposed resolution, in this case a consent decree, the Board is required to consider the factors set forth in Gov.Bar R. VII(5b). The Panel reviewed the parties' proposed resolution using the factors stated in Section 5b and made the following determinations:

1. The proposed resolution is submitted in the form of a consent decree;
2. Respondent admitted to the material allegations of the unauthorized practice of law as stated in the Complaint in regard to drafting court pleadings;
3. The public is sufficiently protected from future harm as Respondent has ceased the prohibited conduct and agreed to refund its \$995.00 fee to the Heffernans;

4. Respondent has agreed to cease and desist all activities that constitute the unauthorized practice of law;
5. The Proposed Consent Decree resolves material allegations of the unauthorized practice of law as it contains admissions by Respondent;
6. The Proposed Consent Decree furthers public policy by requiring Respondent to take steps to rectify the effects of its actions;
7. The parties' collaborative efforts to resolve this matter via a consent decree resulted in a cessation of the unauthorized practice of law and the victims of Respondent's conduct will receive a refund of the fee paid to Respondent. This collaboration furthers the purposes of Gov.Bar. R. VII, prevents protracted litigation, and is consistent with the Supreme Court's approach to case resolution set forth in S.Ct.Prac.R. XIV(6).

Based upon these findings, the Panel recommended that the Proposed Consent Decree be considered and approved by the Board.

B. Applicability of Civil Penalties Based on Factors in Gov.Bar R. VII (8)(B) and UPL Reg. 400

When determining whether to recommend that the Supreme Court impose civil penalties in an unauthorized practice of law case, the Board is required to base its recommendation on the factors set forth in Gov.Bar R. VII (8)(B) and UPL Reg. 400(F). Additionally, UPL 400(F)(3) and (4) specify mitigating factors the Board may use to justify a recommendation of no civil penalty or a less severe penalty and aggravating factors the Board may consider in favor of recommending a more severe penalty. Relator does not recommend a civil penalty in this case and the Panel scrutinized this recommendation by applying the general, mitigating, and

aggravating civil penalty factors of Gov.Bar R. VII(8)(B) and UPL Reg.400(F). The Panel's analysis is described below.

1. General Civil Penalty Factors

In regard to the general civil penalty factors listed in Gov.Bar R. VII (8)(B)(1)-(5) and UPL Reg. 400(F)(1) and (2), the Panel made the following determinations:

- a. Respondent cooperated fully with Relator's investigation in this matter;
- b. The record does not contain any evidence of flagrancy;
- c. Respondent engaged in a single act of unauthorized practice of law and the record fails to indicate that Respondent's actions in this matter constitute its standard business practice;
- d. While the Heffernans' property was eventually sold at a sheriff's sale, the record fails to contain evidence that Respondent's actions caused the sale to occur.
- e. Relator has not sought the imposition of a civil penalty;

2. Mitigating Civil Penalty Factors

Applying the mitigating factors of UPL Reg. 400(F)(4)(a)-(g), which are the basis for a recommendation of no civil penalty or a less severe penalty, the Panel made the following determinations:

- a. Respondent has ceased the conduct at issue;
- b. Respondent admits the allegations regarding the preparation of a court pleading as stated in the Complaint;
- c. Respondent admits its preparation of a court pleading constitutes the unauthorized practice of law;

- d. Respondent agrees to the imposition of an injunction against future unauthorized practice of law;
- e. The record fails to contain any evidence of a dishonest motive by Respondent;
- f. Respondent has agreed to rectify the consequences of its unauthorized practice of law by providing restitution to the victims of its unauthorized practice of law;
- g. Respondent has not had other penalties imposed for the conduct at issue.

3. Aggravating Civil Penalty Factors

Applying the aggravating factors of UPL Reg. 400(F)(3)(a)-(g), which may justify a more severe penalty, the Panel made the following determinations:

- a. By receiving a \$ 995.00 fee from the Heffernans, Respondent received some benefit from its unauthorized practice of law;
- b. Respondent's unauthorized practice of law included the preparation of a legal instrument for filing with a court.

4. Conclusion Regarding Civil Penalties

The Panel found that the application of the general civil penalty factors to this case supports Relator's recommendation that a civil penalty should not be imposed against Respondent. The Panel also found that the mitigating civil penalty factors outweigh the two aggravating factors. While Respondent received a fee for its services, Respondent has agreed to provide a refund. In addition, even though Respondent prepared a legal instrument in the form of a court pleading, Respondent has ceased this conduct, admitted the conduct constitutes the unauthorized practice of law, and agreed

not to prepare court pleadings, give legal advice, or provide legal services in the future. Therefore, the Panel agreed with Relator that civil penalties are not warranted in this case.

VI. BOARD RECOMMENDATION

As indicated previously, the Board formally considered this matter on August 27, 2009. Due to a conflict, Commissioner Kevin L. Williams recused himself and did not participate in the Board's deliberations or vote. By majority vote, the Board adopted the findings of fact and conclusions of law of the Panel. Also by majority vote, the Board adopted all of the Panel's recommendations.

The Board hereby recommends that the Court approve the Proposed Consent Decree in the form submitted by the parties (Exhibit "A") and issue the appropriate order as specified in Gov.Bar R. VII(E)(2).

VII. STATEMENT OF COSTS

Attached as Exhibit "B" is a statement of costs and expenses incurred to date by the Board and Relator in this matter.

**FOR THE BOARD ON THE UNAUTHORIZED
PRACTICE OF LAW**



Frank R. DeSantis, Chair

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Final Report was served by certified mail upon the following this 14th day of September 2009: American Foreclosure Specialists, LLC, 10314 North 138th East Avenue, # 103, Owasso, Oklahoma, 74055; Jeffrey J. Jurca, 6797 North High St., Suite 314, Columbus, Ohio 43085; Robert C. Meyer, 4518 Fulton Dr., NW, P.O. Box 35548, Canton, Ohio, 44735-5548; Eugene P. Whetzel, Esq., Ohio State Bar Association, 1700 Lake Shore Drive, Columbus, OH 43204; Office of Disciplinary Counsel, 250 Civic Center Drive, Ste. 325, Columbus, OH 43215; Crawford County Bar Association, 112 East Mansfield Street, Suite 200, Bucyrus, Ohio 44820-2352.



Michelle A. Hall, Secretary
Board on the Unauthorized Practice of Law

services, including the drafting of court pleadings or providing legal advice to Ohio residents or otherwise engaging in the unauthorized practice of law in the State of Ohio.

4. American Foreclosure Specialists, LLC agrees to refund the sum of Nine Hundred Ninety Five Dollars (\$995.00) to Scott A. Heffernan and Patricia A. Heffernan, which sum represents the fee paid by Scott A. Heffernan and Patricia A. Heffernan to Respondent, American Foreclosure Specialists, LLC.

5. Pursuant to Gov. Bar R. VII Sec. 8 (B) and UPL Reg. 400(F), no civil penalty is to be imposed for the reasons that:

a. Respondent fully and completely cooperated in the investigation of this complaint and admitted engaging in the unauthorized practice of law;

b. Only one instance of the unauthorized practice of law was committed;

c. Respondent has never previously been charged with the Unauthorized Practice of Law;

d. American Foreclosure Specialists, LLC agrees to refund to the affected third parties the fees charged by American Foreclosure Specialists, LLC.

RELATOR, OHIO STATE BAR ASSOCIATION

Telephone Approval 7/3/09/RCM
Eugene P. Whetzel (0013216)

OHIO STATE BAR ASSOCIATION

1700 Lake Shore Drive

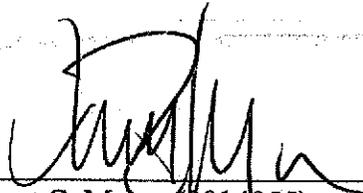
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**BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
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Exhibit "B"

STATEMENT OF COSTS

Ohio State Bar Assn. v. American Foreclosure Specialists, LLC

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To date, no expenses have been incurred.