

BEFORE THE SUPREME COURT OF OHIO

Columbus Bar Association,

Relator,

-vs-

American Family Prepaid Legal Corporation,
et al.,

Respondent.

Supreme Court Case No. 2005-0422

Case No. UPL 02-10

From the Board of Commissioners on
the Unauthorized Practice of Law of the
Supreme Court of Ohio

**BRIEF OF AMICUS CURIAE OHIO STATE BAR ASSOCIATION IN SUPPORT OF
OBJECTIONS OF THE RELATOR, THE COLUMBUS BAR ASSOCIATION, AND IN
SUPPORT OF OTHER REMEDIES AND PENALTIES**

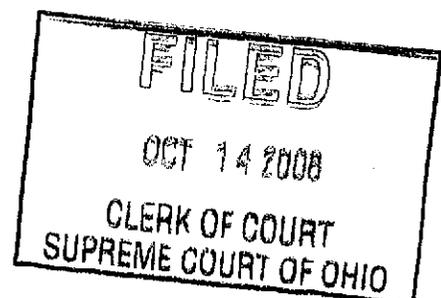
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Statement of Interest of *Amicus Curiae*

This is a trust mill case, and The Ohio State Bar Association (“Association”) supports the findings of fact and conclusions of law of the Final Report of the Board on the Unauthorized Practice of Law filed on August 26, 2008 finding extensive unauthorized practice of law and serious harm. However, the Association supports remedial action and penalties consistent with prior precedent of this Court and the requirements of UPL Reg. 400. The recommendations in the Final Report do not adequately protect the public.

The Association is an unincorporated association of more than 24,000 members, including lawyers, judges, law students, and paralegals. The lawyer members range from sole practitioners to members practicing in the nation’s largest firms. Its members include every branch of legal service.

The Association represents broad public interest, and brings significant experience and expertise to the case. First, and most important, members of the Association represent or advise victims of trust mills, and members representing victims have been among those who have brought the harm of trust mills to light. Second, the voluntary efforts of its members have given the Association significant expertise on the problems of trust mills. Through its Unauthorized Practice of Law Committee, the Association is actively involved in the investigation and, as appropriate, prosecution of individuals and entities that engage in the unauthorized practice of law. Members also work voluntarily for unauthorized practice of law committees of local bar associations. Finally, members may also advise clients concerning the unauthorized practice of law.

The Association and its constituencies view prosecution of persons engaged in the unauthorized practice of law as protecting the public from those who prey upon them.

Statement of Facts

The Association adopts the Statement of Facts of Relator, Columbus Bar Association, and adopts the defined terms used by the Relator. The following facts summarized from Relator's Statement of Facts are important to the Propositions of Law below.

1. Although calling themselves a prepaid legal services plan, the Respondents did not provide significant legal services beyond having non-attorneys market living trusts that may or may not have been needed by, or in the best interests of, clients.
2. Clients gave confidential information, ostensibly, to permit a lawyer to develop an estate plan. The information was disclosed to high pressure insurance sales personnel, who are not authorized to practice law, to sell annuities and other financial products and services.
3. The delivery of legal services was used as a pretext to get the high pressure insurance sales personnel into client homes, who then pressured clients to buy financial products and services using the confidential information.
4. The financial products and services were not needed or not in the best interests of the clients, especially many of the annuities sold.
5. Clients were misled into the belief that the financial products were advised as part of the legal services, thereby giving the financial services more credibility.
6. The individuals who are among the Entity Respondents knew that their activities constituted the unauthorized practice of law.
 - (a) They were heavily involved in the activities behind *Columbus Bar Ass'n v. Fishman*, 90 Ohio St. 3d 172, 2002-Ohio-7086, which resulted in the suspension of their then attorney.

- (b) At least one of the Entity Respondents has been enjoined from the conduct in issue in at least three other states.
 - (c) They signed a Consent Agreement with Relator agreeing not to perform the prohibited services.
 - (d) They agreed to a Consent Agreement not to perform the prohibited services.
7. The principles involved have moved to a new entity, Quest Financial.
 8. Real harm has been done to clients in far greater numbers than earlier Ohio trust mill cases.

Argument

Summary

The Court's final disposition of unauthorized practice of law cases usually implements two general purposes: remediation, both to help the victims and to prevent further abuse, and penalty, both to punish the unauthorized practice of law and to deter future unauthorized practice of law by the respondent and others. The recommendations in the Final Report do not implement these purposes because they dilute remedies and sanctions set by precedent. This hurts current victims and softens deterrence by giving the appearance that there is a softening of resolve to end the harm caused by trust mills. As a result, the recommendations in the Final Report should be modified to conform to precedent and UPL Reg. 400.

The final disposition of this case should also take into consideration the willful and malicious injuries that the Respondents caused their victims and the property of their victims [See, 11 U.S.C. § 523(a)(6)], and to the condition precedent to recovering under Ohio Rev. Code § 4705.07(C)(2).]

The final disposition should also clearly define the particular conduct constituting the unauthorized practice of law and the harm caused. This will better alert persons who may find themselves targets of such conduct, provide clear guidance to attorneys, and facilitate the volunteers who serve to prevent the unauthorized practice of law by helping them determine which matters to investigate and, as appropriate, to prosecute.

1. **Proposition of Law No. 1.**

A finding of unauthorized practice of law for conduct previously found by the Supreme Court of Ohio to constitute the unauthorized practice of law should result in remedies and penalties consistent with or more severe than the remedies imposed in the earlier case and with UPL Reg. 400 unless specifically stated findings justify lesser or different remedies and penalties.

This trust mill case involves conduct that has continued notwithstanding a consent agreement, prosecutions in other states, and this Court's very clear opinions in prior trust mill cases, particularly *Cleveland Bar Assn. v. Sharp Estate Serv., Inc.*, 107 Ohio St. 3d 219, 2005-Ohio-6267 and *Cincinnati Bar Assn. v. Kathman*, 92 Ohio St. 3d 92, 2001-Ohio-157. By comparison with *Sharp*, the conduct in this case is significantly more willful and malicious and involves many times more victims. Despite the clear precedent of *Sharp*, the remedial action recommended by the Board is less than that ordered in *Sharp*, and the penalties follow a significantly lesser standard than the penalties in *Sharp* or under UPL Reg. 400. There is no finding that explains why.

This apparent lessening of remedial action and penalties adversely affects the victims and reduces the deterrence of future misconduct by others. The public will have reduced confidence in the Court's willingness to protect it.

Specific remedial action and penalties will be discussed in separate sections below. However, this is the appropriate place to state clearly (repeat) that this case calls for stronger

remedial action and more severe penalties than the earlier cases. The conduct in this case appears to be significantly more malicious and willful, it has affected a many times greater number of victims, and it comes after clear warnings by the Court in earlier cases.¹

Consistency with *Sharp* and UPL Reg. 400 is important. For years, protection against the unauthorized practice of law was frustrated because there was no penalty - just an injunction. But those engaged in the unauthorized practice of law viewed injunctions as a cost of doing business, and not a deterrent - win or lose, violators were still ahead monetarily. After an injunction, business continued in a different entity until another case was filed, and then the process would be repeated, which happened here and is happening again with Quest Financial succeeding to AFPLC. Civil penalties following individuals, which were enthusiastically supported by the Association, change this dynamic. Now, real financial consequences can follow the individuals behind the schemes to deter the unauthorized practice of law. But such deterrence will only work if potential violators know that the penalties will be imposed consistently.

2. Proposition of Law No. 2.

The sale or attempted sale by a non-lawyer of non-legal goods and services in connection with providing legal services constitutes the unauthorized practice of law, and, where the lawyer providing the services does so knowing, or having reason to know, that such sale or attempted sale of non-legal goods and services has occurred or may occur facilitates the unauthorized practice of law, and the lawyer has an obvious conflict of interest that may not be avoided by consent.

The particularly pernicious evil presented by trust mills beyond the sale of unneeded living trusts by non-attorneys is the sale or attempted sale by non-attorneys of unneeded or harmful financial products and services as part of the delivery of legal services. Non-attorneys insert themselves between the attorney and the client, ostensibly to deliver the legal services

¹ See *Sharp*, 107 Ohio St. 3d at 222-23, 2005-Ohio-6267 at ¶15.

product. This intertwining makes the non-legal financial products and services falsely appear to be a part of the legal services thereby lending a false aura of propriety to the harmful products and services, and it betrays the standards that lawyers must meet to serve their clients. The goal is to use the legal services to make a profit for the non-attorneys regardless of the best interests of the client. In this case, clients were actually misled into believing that financial services had been advised as part of the legal services. Also in this case, the non-attorneys used confidential client information against the client to sell the unneeded and harmful products. This intertwining and the use of confidential information by non-attorneys for their benefit are the heart of a trust mill, and a stake must be driven through it.

There is no doubt that the intertwining of legal services with harmful non-legal services gives the false impression that the harmful non-legal services are part of the legal services and must, therefore, be good; otherwise an attorney would not be involved. There must be a clear statement to non-attorneys and attorneys that this is not permitted. For non-attorneys, tying non-legal goods and services to legal services must be treated as the unauthorized practice of law by the non-attorneys because it gives the impression that the non-legal products and services are part of the legal services, protected by standards set by the Court. For lawyers, tolerating such a connection impermissibly facilitates the unauthorized practice of law, and presents a conflict of interest that cannot be resolved by informed consent (which is never obtained in trust mill cases) in the manner contemplated by the Rules of Professional Conduct. The disclosure of confidential client information to use against the client must be stopped.

The earlier Code of Professional Responsibility would have clearly prohibited such conduct as a prohibited conflict of interest that could not be avoided under the "obvious standard", but the more liberal Rules of Professional Conduct do not do so as clearly. Compare

DR5-105(C) with Prof. Cond. R. 1.7(c) & 1.16(a).² Nevertheless, the conflict is so obvious, and so pernicious, and so confusing that a clear ruling declaring it prohibited is appropriate.

3. Proposition of Law No. 3.

An injunction against the unauthorized practice of law should include an injunction against the specific types of conduct found to constitute the unauthorized practice of law.

The Final Report included in its recommendations that “the Supreme Court of Ohio issue an order prohibiting the Entity Respondents and Individual Respondents from further engaging in the unauthorized practice of law in the future.” Such a general order is appropriate, but only if it includes prohibitions specifically describing each type of conduct found to be the unauthorized practice of law. See also Proposition of Law No. 2. An order including specific instances of conduct will better serve the following constituencies of the public:

- (i) Those members of the general public who may in the future be intended targets of prohibited conduct will have a clearer understanding of the potential for abuse and the potential danger that they face.
- (ii) The general public will have a clearer understanding of the types of practices involved in trust mills, and may better be able to avoid being victimized by such practices, and more alert to reporting them to the appropriate prosecutorial authorities.
- (iii) Persons involved in the enforcement of prohibitions on the unauthorized practice of law will have clearer direction that will facilitate the full and fair resolution of future cases more efficiently.
- (iv) Businesses desiring to comply with the law will have helpful guidance on the types of conduct that are prohibited.

In this case, such an order would be very helpful in dealing with the conduct of the Respondents in the future. The unauthorized practice of law in this case was conducted through two entities (“Entity Respondents”), at least one of which is now defunct. The Entity Respondents could not commit the unauthorized practice of law, except through human agents. The Respondents who are individuals (“Individual Respondents”) and other individuals

² Although parts of the Rules of Professional Conduct can probably result in a disqualification in some situations, e.g., Prof. Cond. R. 8(f).

employed by or otherwise working on behalf of the Entity Respondents committed the acts constituting the unauthorized practice of law. In fact, some of the individuals involved are now moving to a new entity. The Individual Respondents must be enjoined from further such conduct clearly and unequivocally so that they, future employers, and future enforcement activities (if any) may be better guided.

The Association has attached as Appendix A a sample order to illustrate its argument. Obviously, the actual form and substance is entirely within the Court's discretion, and the sample is proposed only as an illustration of the foregoing argument.

4. Proposition of Law No. 4.

Where a person has committed multiple instances of the unauthorized practice of law against multiple different victims, final disposition of the case should include remedial action for the victims following previous precedent unless specifically stated findings justify a different remedy.

Sharp provided remedies for the victims. The Final Report does not recommend any remedies for the many more victims in this case. Any final disposition of this case should include remedies for the victims. See also Propositions of Law 5 and 6.

This Court in *Sharp* sensibly required disclosure of all of the names and contact information for all of the trust mill's customers, with penalties for delaying disclosure. It also ordered that all customers be notified, and that the notice include a recommendation that they consult with a lawyer of their choice at the expense of the Respondents. No explanation is given why such a remedy is not available in this case, yet the harm caused in this case is greater and more than justifies the remedy.

Although actually getting the perpetrators to pay for such a remedy appears to be a problem based on the Court's docket entries in *Sharp*, at least the victims were informed and

have the recommendation to seek help. Here, the Final Report gives the victims nothing. Any final disposition should follow *Sharp*, at a minimum.

5. Proposition of Law No. 5.

Where a person has committed multiple instances of the unauthorized practice of law involving the same conduct against different victims, a finding of the unauthorized practice of law for one victim is effective for all of the victims of the person for purposes of Ohio Revised Code § 4705.07(C)(2), and for all victims of such conduct by other third persons.

This case illustrates the road block between victims of the unauthorized practice of law and remedies for them under Ohio Revised Code § 4705.07(C)(2).³ The statute does not allow a cause of action for the unauthorized practice of law until the Supreme Court finds that the conduct is the unauthorized practice of law. Such a determination relies entirely on a system of volunteer prosecutors, who must bring and prosecute cases at the expense of their clients and practices.⁴ Delays are inherent. Other claims must be delayed until the finding is made. The statute of limitations for other claims arising out of the same facts can expire before the unauthorized practice of law is determined.

If the other claims are filed before the unauthorized practice of law is found by the Supreme Court, the case could be completed before the Court makes its finding. If that happened, an unauthorized practice of law claim would then be barred by *res judicata*.

The problem is more acute for this case. The statute is not clear. It can be read to require a separate unauthorized practice of law prosecution for each victim before the victim has a civil

³ Ohio Rev. Code 4705.07(C)(2) should be replaced by Court Rule under the Court's exclusive plenary jurisdiction to better coordinate remedies for victims of unauthorized practice of law with the traditional Ohio civil justice system. In this case, many victims lost more than the fees paid for the living trusts, and a simple refund of fee will not be an adequate remedy for those victims. The law should not be thwart or delay their remedies through the civil justice system.

⁴ The Court recognizes the importance of pro bono work, but the suggested level of pro bono work pales in comparison to the toll volunteer UPL prosecutors face (and the consequences to their clients and practices) to fight a well financed case such as this one. If paid attorneys are used, the toll is great on the bar association sponsoring the prosecution. A well thought out process is essential to make such a system work. This requires clear guidance from the Court. The volunteers are often asked to exercise judgment and expertise at a very high level with very little guidance. It is an extraordinary effort.

claim. If such an interpretation were applied to this case and the thousands of victims, enforcement against the unauthorized practice of law in Ohio would grind to a halt from the overload. This would confound the civil justice system, and further victimize the victims. Only the wrongdoer would win. Because of its exclusive plenary jurisdiction, only the Supreme Court can fix the problem. No one else can.

The problem can be resolved by focusing on the crux of the statute⁵ – the required “finding by the Supreme Court”. Once the Supreme Court has found that particular conduct by one respondent constitutes the unauthorized practice of law for one victim, then that finding applies in all instances of such conduct by anyone against any victim. Thus, the Court should make either of the two following findings, preferably the first:

1. Once the Supreme Court finds that particular conduct by a person constitutes the unauthorized practice of law for one victim, that finding applies to any victim of that type of conduct by the respondent in the case and applies to all instances of that type of conduct by any other person against any other victim for purposes of Ohio Rev. Code § 4705.07(C)(2). Compare Ohio Rev. Code §§ 1345.02(c), 1345.07(A)(3)(c), and, especially, § 1345.09(B).
2. The findings that specific types of conduct constitute the unauthorized practice of law in this case apply to all of the Ohio customers of the Respondents for purposes of Ohio Rev. Code 4705.07(C)(2).

6. Proposition of Law No. 6.

Where a person has sought and received a legal opinion warning that a certain type of conduct constitutes the unauthorized practice of law, or has entered a consent agreement with Disciplinary Counsel or an Unauthorized Practice of Law Committee prohibiting such conduct, or has been the subject of an unauthorized practice of law proceeding for such in conduct in this or another state, or this Court in another case involving other persons has

⁵ Or a rule promulgated under the Court’s exclusive plenary jurisdiction to regulate the practice of law.

found that such conduct constitutes the unauthorized practice of law, but, the person nevertheless, commits multiple instances of such conduct, there is sufficient grounds to find that the person has acted willfully and maliciously, and is liable for willful and malicious injury to the victims and to the property of the victims.

The conduct of the Respondents caused willful and malicious injury to the victims and to their property. The Respondents sought and received numerous opinions cautioning that their conduct would constitute the unauthorized practice of law, yet they engaged in the conduct. The Respondents entered into a consent agreement with the Relator identifying the conduct constituting the unauthorized practice of law, but persisted in the conduct. The Respondents have been prosecuted in other states for such conduct, but persisted in it. This Court was very clear in *Sharp* on the conduct constituting the unauthorized practice of law, but they persisted in it. This is strong evidence of specific intent and an unrepentant attitude which justifies a finding that their liabilities to their victims are for willful and malicious injuries to the victims and to the property of the victims. See 11 U.S.C. § 523(a)(6).

7. Proposition of Law No. 7.

Penalties assessed for conduct that has been previously found by the Court to constitute the unauthorized practice of law should be either consistent with the penalties previously assessed or increased in view of the prior precedent, unless specific reasons for imposing lesser penalties are set forth in compliance with UPL Reg. 400.

This case presents a more aggravated and extensive violation of the prohibitions against the unauthorized practice of law than does the *Sharp* case. Moreover, after the *Sharp* case, UPL Reg. 400 was promulgated, and it provides for greater penalties than does *Sharp*. Yet the penalty recommended by the Board in this case is much less than that in the *Sharp* case. No finding explains the milder treatment.

The penalty imposed in the *Sharp* case was based on the fee Sharp Estate Service collected from each victim. The number of living trusts and estate plans sold by Sharp Estate Service in Ohio, 468, was multiplied by the fee, \$2,195. This totaled \$1,027,260.

In contrast, this case involves thousands of plans sold at a similar fee, but the penalty recommended by the Board is \$300,000 less without explanation. In contrast, UPL Reg. 400 permits a penalty up to \$10,000 per violation. Gov. Bar R. VII § 8(B). Items 2, 3, 4 and 5 of Gov. Bar R. VII § 8(B) seem particularly relevant, as ably argued by Relator. In particular Gov. Bar R. VII §8(B)(5) permits the consideration of other relevant factors. In this case, the intentional and willful misconduct is a very heavy factor after the Court's clear rulings in the *Sharp* and *Kathman* cases that justify, at a minimum, the same formula used in *Sharp*.

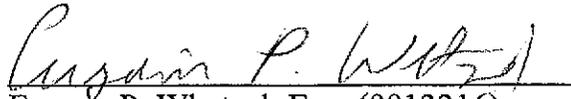
Conclusion

In summary, this case justifies remedial action and penalties that are much stronger than *Sharp*. It also affords an opportunity to clearly state the pernicious evil of trust mills beyond non-attorneys selling, advising, or doing anything else with respect to living trusts, and to state clearly that any attempt by non-attorneys to intertwine their products and services with legal services for their profit is prohibited.

Respectfully submitted,



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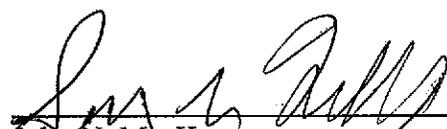
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served via U.S. mail this 13th day of October, 2008, upon the following:

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