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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 13-889

THE FLORIDA BAR

RE: ADVISORY OPINION
ACTIVITIES OF COMMUNITY
ASSOCIATION MANAGERS

**BRIEF IN OPPOSITION TO THE
PROPOSED ADVISORY OPINION**

Jennifer A. Winegardner, Esq.
Bar No. 133930
THE CHASE LAW FIRM
1535 Killearn Center Blvd., A1
Tallahassee, FL 32309
Telephone: 850-385-9880
Facsimile: 850-422-0072
Jwinegardner@chasefirm.com

*On behalf of The Continental Group,
Inc., Associations, Inc., and CEOMC
Florida, Inc.*

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STATEMENT OF THE CASE

By letter dated March 28, 2012, the Real Property Probate & Trust Law Section of The Florida Bar (“Real Property Section”) requested the Standing Committee on the Unauthorized Practice of Law of The Florida Bar (“Standing Committee on UPL”) to seek an Advisory Opinion from this Court. (App 1). The Real Property Section requested a determination of whether fourteen specific activities constitute the unauthorized practice of law when performed by community association managers, commonly called CAMS.

On June 22, 2012, and pursuant to Rule 10-9 of the rules regulating the Florida Bar, the Standing Committee on UPL heard testimony from interested parties on the issue of whether the specified fourteen activities, when performed by CAMS, constitutes the unauthorized practice of law. (App 2; Tr. at 4).

On May 15, 2013, and as a result of the June 22, 2012, hearing, the Standing Committee on UPL submitted a proposed advisory opinion at which this brief is directed. For the reasons more fully set forth below, interested parties The Continental Group, Inc., Associations, Inc., and CEOMC Florida, Inc., companies performing community association management in the State of Florida, oppose the proposed Advisory Opinion because it seeks to needlessly clarify an existing Advisory Opinion without any showing of need for such clarification.

STATEMENT OF THE FACTS

The Real Property Section of the Florida Bar requested that the Standing Committee on UPL seek clarification of *Fla. Bar Re: Advisory Opinion—Activities of Comt. Ass’n Managers*, 681 So. 2d 1119 (Fla. 1996) (the 1996 Advisory Opinion) concerning fourteen separate activities that, if performed by CAMS, may constitute the unauthorized practice of law. These activities are:

	Proposed UPL Activity
1.	Preparation of a certificate of assessment after the account is turned over to the association’s lawyer
2.	Preparation of a certificate of assessment once foreclosure against a unit has commenced
3.	Preparation of a certificate of assessment once a member disputes the amount due in writing
4.	Drafting amendments (and certificates of amendment recorded in the public records) to governing documents
5.	Determining the number of days required for statutory notice
6.	Modification of limited proxy forms promulgated by the state
7.	Preparation of documents concerning the association’s right to approve new owners
8.	Determination of the votes needed to pass a proposition or amendment to recorded documents
9.	Determination of number or owners’ votes required to establish a quorum

10.	Drafting pre-arbitration demand letters
11.	Preparation of construction lien documents (i.e., notice of commencement, lien waivers)
12.	Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television, etc.
13.	Identifying through review of title instruments which owners are to receive pre-lien letters
14.	Any activity that requires statutory or case law analysis to reach a legal conclusion

On June 22, 2012, the Standing Committee on UPL heard testimony from interested parties and accepted written submissions on the above matters. On May 15, 2013, the Standing Committee on UPL proposed the Advisory Opinion at issue here, specifying, however, that “no changes are needed to the 1996 opinion,” but some of the activities “need clarification.” (Proposed Opinion at p. 10).

A. Summary of the Evidence

At the June 22 hearing, the Standing Committee on UPL accepted both live and written testimony.

The Department of Business and Professional Regulation (DBPR), the regulatory body over CAMS, submitted two letters. The first letter dated July 31, 2012, states that some of the activities the Real Property Section claims are UPL

are activities CAMS are approved to engage in both by statute¹ and regulation.²

(App 3). For example, CAMS are heavily involved in election activities.

Determining the number of days required for statutory notice of an election, how many members constitute a quorum, and the votes needed to pass an issue, are part of a CAM'S day-to-day management activities. (App 3). Additionally, DBPR has already reviewed and issued a final order stating that a CAM may draft a pre-arbitration letter. (App 3). DBPR also objected to the classification as UPL the preparation of documents involving the right to approve new owners, and preparing, reviewing, and executing contracts. (App 3).

In a separate letter dated September 11, 2012, DBPR's General Counsel stated that as of August 20, 2012, there were 18,511 individuals and 1,607 businesses licensed as CAMS, and that the General Counsel's office could not recall a single CAM being accused of or prosecuted for UPL. (App 4).

Witnesses testifying in favor of a revised or clarified Advisory Opinion were attorneys practicing community association law at some of the State's largest community association law firms. Witnesses offered anecdotes, often of association board members—not CAMS—engaging in management activities without the assistance of counsel or a CAM. The testimony is summarized as follows:

¹ Chapter 468, Florida Statutes.

² Chapter 61-20, Florida Administrative Code.

* Steve Mezer, a Tampa attorney with the Bush Ross law firm, states his firm represents over 800 condominium and homeowners' associations. Mr. Mezer testified that he saw three forms that were used by a Committee and were signed by an association with an error in the signature block. (App 2; Tr. at 14-15). The errors appear to have been made by the association, however, and not a CAM. Mr. Mezer objects to CAMS drafting simple amendments. He shared an anecdote of an association board member (not a CAM) adding a comma and changing the meaning of a covenant to the association's detriment (App 2; Tr. at 16). He objects to CAMS negotiating contracts for services because he once saw a contract for painting that was poorly drafted, and he believes that CAM contracts contain indemnification and hold harmless provisions that protect CAMS from mistakes, which attorneys do not have. (App 2; Tr. at 19-20). Finally, he shares a story told to him by a colleague regarding unenforceable contracts CAMS negotiated prior to 1992's Hurricane Andrew that became a problem in the aftermath of the hurricane. (App 2; Tr. at 22-23). Any problems arising from those pre-1992 contracts are presumed addressed in this Court's 1996 Advisory Opinion.

* Scott Peterson, a litigation attorney for Becker & Poliakoff, represents approximately 4,000 community associations. (App 2; Tr. at 27-28). He believes there is a need for bright line rules (App 2; Tr. at 30), and states that the "potential

harm to the public in these situations is potentially great.” (App 2; Tr. at 32). Mr. Peterson shared his concern regarding a CAM preparing certificates of assessment because in Nevada, banks are suing associations for making wrongful demand. (App 2 Tr. at 33). He also believes that CAMS will eventually be required to comply with the Fair Debt Collection Practices Act.³ (App 2; Tr. at 35). He objects to CAMS drafting amendments (App 2; Tr. at 35), calculating days and dates (App 2; Tr. at 36), modifying limited proxy forms (App 2; Tr. at 37), reviewing documents regarding an association’s right to approve new members or right of first refusal (App 2; Tr. at 38), determining a quorum and number of votes required (App 2; Tr. at 38), drafting pre-arbitration demand letters because a mistake can cause delay and disputes are emotionally charged (App 2; Tr. at 39-40), preparing construction lien documents (App 2; Tr. at 40), and preparing and executing contracts (App 2; Tr. at 41). However, Mr. Peterson assured the Standing Committee on UPL that this is not a turf fight with CAMS or to steal business. (App 2; Tr. at 28).

* Robert Freeman, an attorney with Carlton Fields, stated that he is very much in agreement with Mr. Mezer and Mr. Peterson. (App 2; Tr. at 84). He

³ *But see Harris v. Liberty Community Management, Inc.*, 702 F.3d 1298 (11th Cir. 2012) (holding that a CAM is not a debt collector under § 1692a(6)(F)(i) of the FDCPA).

shared a story of a high rise condominium development project in South Florida that had three different CAMS in five years that all made an error in calculating the assessment due. (App 2; Tr. at 85). He also shared a story about a large scale community with three different levels of assessments where the CAM provided a certificate of assessment on just one level (App 2; Tr. at 86), and recorded a lien that was defective (App 2; Tr. at 87).

* Christopher Davies, an attorney with Cohen & Grigsby, represents in excess of one hundred associations (App 2; Tr. at 110), and offers some “anecdotal evidence” that the system “isn’t quite working.” (App 2; Tr. at 111). He states: “It’s not a turf war.” (App 2; Tr. at 113).

* Michael Gelfand, a real estate attorney, states that CAMS need help telling Board members “no” when asked to perform legal acts. (App 2; Tr. at 136). He once saw a certificate of amendment with the wrong name on it, and it didn’t have proper execution. (App 2; Tr. at 141-142). He believes that DBPR regulators are not doing their job if there have been only two revocations of a CAM license in the last year. (App 2; Tr. at 143).

Witnesses opposed to any modification or clarification of the 1996 Advisory Opinion had a different view.

* Mitchell Drimmer, an executive with a company performing collection work for associations pointed out that Mr. Mezer’s anecdote about the

association submitting a document under the wrong name was an error caused by the association itself, not a CAM. (App 2; Tr. at 46). “And for the attorney to present that into evidence, in my idea, was misleading, because we’re not talking about board members and the unlicensed practice of law.” (App 2; Tr. at 46). He equated the preparation of a certificate of assessments as nothing more than an invoice rendered by a business, which does not require a legal opinion. “It’s a bill attesting to what’s owed.” (App 2; Tr. 47-48). Regarding the calculation of the number of days to provide notice, he states that “this is community association management 101.” (App 2; Tr. at 49). He objects to “eliminating the most simple task of the community association managers in favor of lawyers,” stating that this “is nothing more than a tax on the membership of the community associations and it is not in the public interest” and that “the monetary expense of reducing the scope of CAMS’ work flow in favor of an attorney is not in the public interest and will increase the cost of managing associations and perhaps even make managers more reluctant to perform their duties.” (App 2; Tr. at 51-52). Finally, he answered the question related to insurance: “community association management firms do carry certain insurances. Errors and omissions.” (App 2; Tr. at 53-54).

* Jeff Oshinsky, General Counsel of a different collection agency, is offended by the Real Property Section’s request because the Real Property Section has failed to show that there is significant harm to the public. (App 2; Tr. at 57).

* Andrew Fortin, attorney and VP Government Relations at Associa, a CAM firm doing business in Florida, stated that the Real Property Section presented no evidence to suggest any need for reinterpretation of 1996 Advisory Opinion. (App 2; Tr. at 67). Though the Real Property Law Section cited twelve cases of consumer harm and notes the existence of twenty more cases, “Such harm should not be incidental” and “should be examined in the context of the total number of such letters sent out each year, and even against the total number of complaints filed against attorneys for similar action.” (App 2; Tr. at 70). He reminded the Standing Committee that the public is also harmed by needless restriction of consumer choice. “When such competition is needlessly restricted by a self-regulatory body, it not only hurts consumers, but it also undermines our faith in the practice or the rule of law.” (App 2; Tr. at 73).

* Kelly Moran, Vice President of Rampart Properties, appeared on behalf of six associate companies. She stated that CAMS are highly regulated. (App 2; Tr. at 79). By making administrative tasks UPL, she stated, the consumers will face even more economic hardships. (App 2; Tr. at 80).

* Erica White, Prosecuting Attorney for Regulatory Council of Community Association Managers for DBPR, stated that the statute allows a CAM to do four basic things: (1) Control or disburse funds of an association; (2) Prepare budgets or other financial documents; (3) Assist in the noticing or conduct of

association meetings; and (4) Coordinate maintenance for the development and day-to-day services involved with operations. Performing day to day services is a broad obligation . (App 2; Tr. at 90). She sees complaints filed against CAMS and has concern with “numbers 1, 2, 3, 5, 7, 8, 9, and 12.” (App 2; Tr. at 90). At the time of her testimony, there were 440 complaints open. (App 2; Tr. at 91). “Maybe in 15 percent of the complaints” does DBPR actually discipline the CAM. (App2; Tr. at 93).

* Jane Cornett, an attorney, has represented associations for thirty-one years. She testified that CAMS are pleased with the 1996 Advisory Opinion because sometimes associations pressure CAMS to do more than ministerial activities. (App 2; Tr. at 97)

* Tony Kalliche, Executive Vice President and General Counsel for the largest CAM firm in Florida, former attorney with Becker & Poliakoff and current member of the Real Property Section of the Bar, testified that there was no showing of sufficient evidence of harm to justify the broad-reaching proposed changes to the 1996 Advisory Opinion. (App 2; Tr. at 100). Though a CAM is required to complete at least eighteen hours of training, an attorney can practice in this area without any specialized training. (App 2; Tr. at 100).

* David Felice, attorney and member of the Real Property Section, owns a CAM firm. He testified that the requested advisory opinion is

overreaching. (App 2; Tr. at 102). A CAM is capable of sending a pre-lien letter without resort every time to the cost and expense and time delay that is often associated with an attorney. (App 2; Tr. at 103-104). He stated that attorneys make errors as well as CAMS. (App 2; Tr. at 104). And he stated that there is case law that exempts CAMS from the fair debt collections practices act. (App 2; Tr. at 105). If there is a concern that CAMS are not trained enough, then additional educational requirements should be imposed. (App 2; Tr. at 106).

* Brad van Rooyen, Executive Director and CEO of a management company, represents over 500,000 households. He stated that there are over one million Floridians in an HOA or Condo Community. (App 2; Tr. at 114). These members are suffering financially because of foreclosures, decline in value, and an increased strain on associations' limited budgets. (App 2; Tr. at 114). The proposed expansion of UPL will prevent CAMS from providing affordable services and the proposed changes are inconsistent with overall public sentiment toward CAMS and with freedom of associations to interact. (App 2; Tr. at 115). With the Real Property Section's proposed changes, associations will be required to hire lawyers to send letters to its homeowners, raising legal costs and profiting one group at the expense of the homeowner. This is not in the interest of the public, and places courts in the position of promoting one profession over another, which could set precedent for other industries. (App 2; Tr. at 117).

* Alan Garfinkel, attorney at Katzman, Garfinkel & Berger, a statewide association law firm, urges common sense when crafting new rules (App 2; Tr. at 128). Though against his financial interest, he states “most of these issues have already been addressed by the Court” in the 1996 Advisory Opinion. (App 2; Tr. at 128). He urges the Standing Committee on UPL to allow reasonable and capable CAMS and Board Members to exercise common sense. (App 2; Tr. at 130).

In addition to the witness testimony, the Standing Committee on UPL received written submissions. These written submissions restated much of the witness testimony.

B. Standing Committee on UPL Findings

After hearing the testimony of witnesses and considering the written submissions, the Standing Committee on UPL published a proposed Advisory Opinion, ultimately filed in this Court on May 15, 2013, expressing a position on each of the fourteen activities presented by the Real Property Section. The activities and Standing Committee’s position on each are as follows:

	Proposed UPL Activity	Committee on UPL’s Findings
1.	Preparation of a certificate of assessment after the account is turned over to the association’s lawyer	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does not</i> constitute UPL
2.	Preparation of a certificate of assessment once foreclosure against a unit has	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does not</i>

	commenced	constitute UPL
3.	Preparation of a certificate of assessment once a member disputes the amount due in writing	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does not</i> constitute UPL
4.	Drafting amendments (and certificates of amendment recorded in the public records) to governing documents	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does</i> constitute UPL
5.	Determining the number of days required for statutory notice	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does</i> constitute UPL <i>if</i> conducting this activity requires the interpretation of a statute, rule, or the governing documents
6.	Modification of limited proxy forms promulgated by the state	This matter is addressed in the 1996 Advisory Opinion which determined that it <i>does not</i> constitute UPL if such modifications are ministerial; otherwise, if a modification is more complicated, then it <i>does</i> constitute UPL
7.	Preparation of documents concerning the association's right to approve new owners	The specific factual circumstances will determine whether this activity constitutes UPL
8.	Determination of the votes needed to pass a proposition or amendment to recorded documents	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does</i> constitute UPL if conducting this activity requires interpretation of a statute, rule, or the governing

		documents
9.	Determination of number or owners' votes required to establish a quorum	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does</i> constitute UPL if conducting this activity requires interpretation of a statute, rule, or the governing documents
10.	Drafting pre-arbitration demand letters pursuant to section 718.1255, Florida Statutes	This matter does not require the interpretation of a statute, rule or the governing documents, and therefore <i>does not</i> constitute UPL
11.	Preparation of construction lien documents (i.e., notice of commencement, lien waivers)	The 1996 Advisory Opinion determined that preparing documents that affect legal rights <i>does</i> constitute UPL; preparing lien documents fits within this prohibition. Therefore, this activity <i>does</i> constitute UPL
12.	Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television, etc.	The 1996 Advisory Opinion determined that preparing documents that affect legal rights <i>does</i> constitute UPL; preparing contracts fits within this prohibition. Therefore, this activity <i>does</i> constitute UPL
13.	Identifying through review of title instruments which owners are to receive pre-lien letters	Review of the public records is ministerial and <i>does not</i> constitute UPL; however, using that information to determine where to send a pre-lien letter <i>does</i> constitute UPL
14.	Any activity that requires statutory or case	This matter is addressed in the 1996 Advisory Opinion, which

	law analysis to reach a legal conclusion	determined that it <i>does</i> constitute UPL
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SUMMARY OF THE ARGUMENT

The Standing Committee on UPL’s petition to adopt its proposed advisory opinion should be denied. All of the activities that are the subject of the proposed advisory opinion are either specifically addressed in the 1996 Advisory Opinion or can be resolved with application of the test set forth therein. The 1996 Advisory Opinion provides clear and comprehensive guidelines applicable and adaptable to any situation. The proposed Advisory Opinion, although attempting to focus the guidelines, offers little or no clarification, definition, or further direction.

To the extent the Real Property Section advocates the expansion of the 1996 Advisory Opinion and the definition of UPL, this Court must balance the harm—or in this case, potential for harm since no actual harm has been demonstrated—against the restriction on competition. Since no actual harm has been evidenced, the Real Property Section’s advocacy for the expansion of what constitutes UPL seems motivated only by competitive strategy.

Finally, seeking a *clarification* of a seventeen year old Advisory Opinion based on the precise activities addressed in that opinion is contrary to the finality of judgment and procedural rules limiting time to request clarification. The appellate rules provide for a fifteen-day window for seeking clarification unless the

Court otherwise provides. In this case, the time to seek clarification of the Court's 1996 Advisory Opinion has long since passed.

ARGUMENT

I. THE 1996 ADVISORY OPINION PROVIDES CLEAR GUIDELINES FOR TESTING WHETHER A CAM ACTIVITY CONSTITUTES UNLICENCED PRACTICE OF LAW AND NO CLARIFICATION IS NEEDED.

Section 468.431(2), Florida Statutes, defines community association management as

any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of \$100,00:

- Controlling or disbursing funds of a community association'
- Preparing budgets or other financial documents for a community association;
- Assisting in the noticing or conduct of community association meetings; and
- Coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

The statute sets out four basic management areas: (1) control or disbursement of association funds; (2) preparation of budgets or other financial documents; (3) assisting in the noticing or conduct of association meetings; and (4) coordinating maintenance for the development and day-to-day services involved with operations. (App 2; Tr. at 89). The issue of whether a CAM engaging in the

statutory activities constitutes the unlicensed or unauthorized practice of law is not new. In fact, this Court reviewed and addressed specific management activities in its 1996 Advisory Opinion and identified three basic categories of activities: those that are purely ministerial, those that are the practice of law, and those that fall into a gray area where the facts are reviewed under the test set forth in *State ex rel.*

Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962) (defining the practice of law as representing another in court, giving legal advice as to rights and obligations under the law, and preparing instruments that affect legal rights).

The following activities were deemed purely ministerial and not the practice of law: completion of certain Secretary of State forms; drafting certificates of assessment; first and second notices of date of elections, ballots, written notice of annual meetings, meeting or board agendas, and affidavits of mailing. *1996 Opinion*, 681 So. 2d at 1123.

The following activities were determined to constitute the unauthorized practice of law: initial completion of BPR Form 33-032 (not subsequent updates), drafting a claim of lien and satisfaction of lien, drafting a notice of commencement, determining timing and method of giving notice of meetings, determining the number of votes necessary to take certain actions, responding to an association's questions concerning the law, and advising associations that an action is lawful. *Id.* at 1123-24.

Anything that is not purely ministerial or clearly the practice of law falls into a gray area that requires a fact-specific inquiry. For example, a CAM may modify a limited proxy form to include the name of the association or it may re-phrase a yes-or-no proxy question. *Id.* However, a CAM may not actually draft the limited proxy form or add questions to the pre-printed form. For that, the CAM must consult an attorney. *Id.* Likewise, a CAM may require the assistance of an attorney to draft documents required for an association to exercise its right of first refusal, and it certainly cannot advise the association as to the legal consequences of such document. *Id.*

Florida is at the legal forefront of this inquiry. Every state has addressed unauthorized practiced of law in statute or case law, but few states have addressed UPL in the context of an operating CAM. Arizona, for example, has only recently reconsidered whether a CAM may prepare and file mechanic's liens: it may not. (State Bar of Arizona UPL Advisory Opinion No. 12-01 (Mar 2012)).

However, in Florida, for the past seventeen years, CAMS have operated under the architecture of this Court's *1996 Advisory Opinion*. CAM activity is regulated by DBPR. Any member can file a complaint with DBPR, which has the authority to investigate and discipline a CAM for any unauthorized activity. (App 2; Tr. at 90-93). There has never been—to the General Council's knowledge—a

single complaint or prosecution against a CAM for the unauthorized practice of law. (App 4).

In order to be licensed, a CAM must complete specific educational requirements. Rule 61E14-1.001, FAC, provides for pre-licensure education requirements as follows:

(1) All community association manager applicants must satisfactorily complete a minimum of **18 in-person classroom hours** of instruction of 50 minutes each within 12 months prior to the date of examination. No applicant shall be allowed to take the licensure examination unless the applicant provides documentation of completion of the requisite prelicensure education. Each contact hour shall consist of at least 50 minutes of classroom instruction.

(2) The 18 hours of prelicensure education shall be comprised of courses in the following areas:

(a) **State and federal laws** relating to the operation of all types of community associations, governing documents, and state laws relating to corporations and nonprofit corporations – 20%;

(b) **Procedure for noticing and conducting community association meetings** – 25%;

(c) Preparation of Community Association Budgets and Community Association Finances – 25%;

(d) Insurance matters relating to Community Associations – 12%; and

(e) **Management and maintenance** – 18%;

* * *

(emphasis added). In addition, once the CAM has completed the eighteen hours of instruction, taken and passed the required exam, he or she is obligated to complete continuing educational units in subsequent two-year increments. Rule 61E14-4.001, FAC, sets the continuing educational requirements as follows:

(1) All community association manager licensees **must satisfactorily complete a minimum of 20 hours of continuing education.** ... No license shall be renewed unless the licensee has completed the required continuing education during the preceding licensing period.

(3) The 20 hours of continuing education shall be comprised of courses approved pursuant to Rule 61E14-4.003, F.A.C., in the following areas:

(a) **4 hours of legal update seminars...**

(b) 4 hours of instruction on insurance and financial management topics relating to community association management.

(c) 4 hours of instruction on the operation of the community association's physical property.

(d) 4 hours of instruction on human resources topics relating to community association management. Human resources topics include, but are not limited to, disaster preparedness, employee relations, and communications skills for effectively dealing with residents and vendors.

(e) 4 hours of additional instruction in any area described in paragraph (3)(b), (c) or (d) of this rule or in any course or courses directly related to the management or administration of community associations.

(emphasis added).

While continuing educational efforts required by a CAM do not guarantee a CAM will never make a mistake or that no complaints will be filed, CAMS carry errors and omissions policies (App 2; Tr. at 53-54), and this is a highly regulated industry. (App 2; Tr. at 91-92). DBPR is tasked to investigate, prosecute, and revoke a CAM license if justified. (App 2; Tr. at 91). In the approximately six hundred complaints that are filed in a year, only about fifteen percent made it beyond investigation and through to discipline. (App 2; Tr. at 93).

DBPR is the regulatory body over CAMS. It submitted written testimony and appeared at the hearing last summer. It objects to the proposed clarification of the 1996 Opinion that certain CAM activities be classified as UPL. (App 3). Of particular concern are the CAM activities done in the ordinary course of day-to-day management. (App 3). CAMS are integral in the election process, noticing meetings and overseeing the voting process. CAMS have been directly permitted by DBPR to send pre-arbitration letters; DBPR has stated in various orders that sending a pre-arbitration letter does not require the assistance of an attorney. (App 3). DBPR objects to the vague and overbroad proposed prohibitions on the grounds that the proposals will cause more confusion, not less. It is significant to this Court's consideration that the State's regulatory body overseeing CAM activities has taken a clear position against clarification on the basis that it simply is not needed.

This Court has recognized that when professional disciplines overlap, it “must try to avoid arbitrary classifications and focus instead on the public’s realistic need for protection and regulation.” *The Florida Bar Re: Advisory Opinion—Nonlawyer Preparation of Pension Plans*, 571 So. 2d 430, 433 (Fla. 1990). To that end, when a profession is heavily regulated, this Court has stepped back and acceded to the regulator. For example, when the Florida Bar’s Committee on UPL requested an advisory opinion declaring nonlawyer pension

plan providers to be engaging in UPL, this Court declined, in part on the basis that “the preparation of pension plans is substantially regulated” by federal statute. *Id.* at 431. *See also The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980) (state’s administrative agencies have authority to permit nonlawyers to practice before them). The Court’s goal in cases where professions overlap is to “avoid arbitrary classifications and focus instead on the public’s realistic need for protection and regulation.” *The Florida Bar re: Advisory Opinion–Non lawyer Preparation of Pension Plans*, 571 So. 2d at 433 (citing *Application of N.J. Soc’y of Certified Pub. Accountants*, 507 A.2d 711, 714 (1986)). In weighing the public’s need, this Court was “not convinced by the record that there exists a public need for the protection sought” and the proposed advisory opinion was rejected. *Id.* at 434.

Likewise, the record in this case does not demonstrate a need for the *clarification* being sought. Not a single UPL complaint has been evidenced. (App 4). And the parade of horrors that the Real Property Section’s witnesses presented were often anecdotal renditions of mistakes made by the association board members themselves or, interestingly, by the association’s attorneys. As one witness—a lawyer who represents associations—testified, associations are not required to complete a single hour of legal education in this specific area. CAMS, on the other hand, must complete an eighteen hour course, pass an initial exam, and complete an additional twenty hours of continuing education every two years

specific to the exact duties they are hired to perform and statutes and regulations to which they must adhere. (App 2; Tr. at 100). Any tales of harm shared were certainly not demonstrably the fault of a CAM engaging in UPL. In fact, there was no evidence that actual harm was caused to an association or association members that fell outside of DBPR’s regulatory jurisdiction, or was caused by any failure of the *1996 Advisory Opinion*. There was no injury complained of that will be remedied by this Court issuing a *clarification* of the binding *Advisory Opinion*. It is telling that the Standing Committee on UPL admits it does not seek to change the 1996 Opinion: “It is the opinion of the Standing Committee that no changes are needed to the 1996 Opinion...” (Proposed Op at 10). The proposed clarification causes more confusion than clarification.

The following chart extends the Real Property Section’s proposal, and compares each line-item request against the Standing Committee’s findings, the currently binding 1996 Advisory Opinion, and DBPR’s stated objections.

	Proposed UPL Activity	Committee on UPL’s Findings	1996 Advisory Opinion	DBPR’s Position
1.	Preparation of a certificate of assessment after the account is turned over to the association’s	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does not</i> constitute UPL	“drafting certificates of assessment...do not require legal sophistication or training” and do not constitute the practice of law. 681 So. 2d at	CAMS often work closely with an Association’s attorney who might direct the CAM to “prepare” the Certificate of Assessment, which could violate the

	lawyer		1123.	statute's permission to engage day-to-day services
2.	Preparation of a certificate of assessment once foreclosure against a unit has commenced	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does not</i> constitute UPL	"drafting certificates of assessment...do not require legal sophistication or training" and do not constitute the practice of law. 681 So. 2d at 1123.	CAMS often work closely with an Association's attorney who might direct the CAM to "prepare" the Certificate of Assessment, which could violate the statute's permission to engage day-to-day services
3.	Preparation of a certificate of assessment once a member disputes the amount due in writing	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does not</i> constitute UPL	"drafting certificates of assessment...do not require legal sophistication or training" and do not constitute the practice of law. 681 So. 2d at 1123.	CAMS often work closely with an Association's attorney who might direct the CAM to "prepare" the Certificate of Assessment, which could violate the statute's permission to engage day-to-day services
4.	Drafting amendments (and certificates of amendment recorded in the public records) to governing documents	This matter is addressed in the 1996 Advisory Opinion which determined that it <i>does</i> constitute UPL	"if drafting of an actual limited proxy form or questions in addition to those on the pre-printed form is required, the CAM should consult with an attorney." <i>Id.</i> at	

			1124.	
5.	Determining the number of days required for statutory notice	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does</i> constitute UPL <i>if</i> conducting this activity requires the interpretation of a statute, rule, or the governing documents	“Determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes...such interpretation constitutes the practice of law.” 681 So. 2d at 1123.	CAMS communicate with Association members on election process and run elections; an attorney is not needed to perform these activities; the prohibition is too vague
6.	Modification of limited proxy forms promulgated by the state	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does not</i> constitute UPL if such modifications are ministerial; otherwise, if a modification is more complicated, then it <i>does</i> constitute UPL	“A CAM may modify BPR Form 33-033 (Limited Proxy Form) to the extent such modification involves ministerial matters...to include the name of the community association; phrasing a yes or no voting question.” <i>Id.</i> , at 1124.	
7.	Preparation of documents concerning the association’s right to approve new	The specific factual circumstances will determine whether this activity constitutes UPL	“Drafting the documents required to exercise a community association’s right of approval...may	CAMS often execute maintenance and other contracts at the Board’s direction and are occasionally given

	owners		also require the assistance of an attorney. Although CAMS may be able to draft the documents, they cannot advise the association as to the legal consequences...” <i>Id.</i> at 1124.	POA to do so. The statute does not prohibit this practice.
8.	Determination of the votes needed to pass a proposition or amendment to recorded documents	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does</i> constitute UPL if conducting this activity requires interpretation of a statute, rule, or the governing documents	“Determining the votes necessary to take certain actions—where the determination would require the interpretation and application of [the law] and governing documents—would therefore also constitute the practice of law.” <i>Id.</i> at 1123.	CAMS communicate with Association members on election process and run elections; an attorney is not needed to perform these activities; the prohibition is too vague
9.	Determination of number or owners’ votes required to establish a quorum	This matter is addressed in the 1996 Advisory Opinion which determined that it <i>does</i> constitute UPL if conducting this activity requires interpretation of a statute, rule, or	“Determining the votes necessary to take certain actions—where the determination would require the interpretation and application of [the law] and governing documents—	CAMS communicate with Association members on election process and run elections; an attorney is not needed to perform these activities; the prohibition is too

		the governing documents	would therefore also constitute the practice of law.” <i>Id.</i> at 1123.	vague
10.	Drafting pre-arbitration demand letters pursuant to section 718.1255, Florida Statutes	This matter does not require the interpretation of a statute, rule or the governing documents, and therefore <i>does not</i> constitute UPL	App 3 (“DBPR specifically held in a FINAL ORDER that the statute does not require an attorney to draft this letter”). <i>In Re: Petition for Arbitration: Dania Chateau Deville Condominium Association, Inc. v. Zalcborg</i> , Case No. 2009-04-0877 (“There is no requirement that an attorney prepare the [pre-arbitration] letter.”).	DBPR has specifically issued final orders stating that the statute does not require an attorney to prepare a pre-arbitration demand letter
11.	Preparation of construction lien documents (i.e., notice of commencement, lien waivers)	The 1996 Advisory Opinion determined that preparing documents that affect legal rights <i>does</i> constitute UPL; preparing lien documents fits within this prohibition.	“Drafting both a claim of lien and satisfaction of claim of lien requires a legal description of the property...the drafting of them must be completed with the assistance of a licensed	

		Therefore, this activity <i>does</i> constitute UPL	attorney...For the same reason...the drafting of a notice of commencement form constitutes the practice of law” <i>Id.</i> at 1123.	
12.	Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television, etc.	The 1996 Advisory Opinion determined that preparing documents that affect legal rights <i>does</i> constitute UPL; preparing contracts fits within this prohibition. Therefore, this activity <i>does</i> constitute UPL	When “substantial rights...are determined by...documents, the drafting of them must be completed with the assistance of a licensed attorney.” <i>Id.</i> , at 1123.	CAMS often execute maintenance and other contracts at the Board’s direction and are occasionally given POA to do so. The statute does not prohibit this practice.
13.	Identifying through review of title instruments which owners are to receive pre-lien letters	Review of the public records is ministerial and <i>does not</i> constitute UPL; however, using that information to determine where to send a pre-lien letter <i>does</i> constitute UPL	An attorney is not required when an activity “does not require significant legal expertise and interpretation.” <i>Id.</i> , at 1123.	

14.	Any activity that requires statutory or case law analysis to reach a legal conclusion	This matter is addressed in the 1996 Advisory Opinion, which determined that it <i>does</i> constitute UPL	It also clearly constitutes the practice of law for a CAM to respond to a community association's questions concerning the application of law to specific matters being considered, or to advise community associations that a course of action may not be authorized by law or rule. <i>Id.</i> , at 1123.	
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The proposed Advisory Opinion is unnecessary. It solves no evidenced problem of UPL and is rejected by DBPR, the regulatory body overseeing CAMS with independent authority to prosecute any CAM engaging in UPL. (App 2; Tr. at 95). The proposed clarification solves a phantom problem and may cause more confusion not less. For these reasons, the proposed Advisory Opinion seeking to clarify the *1996 Advisory Opinion* should be rejected. As has been the case since CAMS' inception, any injured party has the option of seeking relief through the thorough and active DBPR regulatory process.

II. EXPANSION OF THE 1996 ADVISORY OPINION AND THE DEFINITION OF UPL UNFAIRLY AND UNNECESSARILY RESTRICT COMPETITION

The Real Property Section's objection to CAMS sending pre-arbitration demand letters is a glaring example of its overreach. Sending a pre-arbitration demand letter is a simple ministerial task, (App 2; Tr. at 50) and mistakes are equal opportunity for associations, members, or lawyers and CAMS alike. In its initial request, the Real Property Section presented a list of thirteen instances (claiming there were twenty others) where DBPR dismissed an arbitration because of a faulty pre-arbitration notice.⁴ In light of the approximate one-million Florida residents who live in a community association (App 2; Tr. at 114), the number of erroneous pre-arbitration demand letters should be viewed in context of the total number sent,

⁴ Prior to any court litigation, the parties must engage in nonbinding arbitration before DBPR. Section 718.1255(4)(b), Florida Statutes, requires the petitioning party—whether a member or an association—to make pre-arbitration demand as follows:

(b) The petition must recite, and have attached thereto, supporting proof that the petitioner gave the respondents:

1. Advance written notice of the specific nature of the dispute;
2. A demand for relief, and a reasonable opportunity to comply or to provide the relief; and
3. Notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute.

Failure to include the allegations or proof of compliance with these prerequisites requires dismissal of the petition without prejudice.

and particularly those sent by CAMS. It is a significant note that, out of the thirteen dismissed arbitrations the Real Property Section held up as examples of a CAM causing injury to an association or its members, in four of those instances, the pre-arbitration demand was prepared by an attorney. In the remaining instances, the orders do not indicate who prepared the demand letters. Even if a CAM did send the others, any defect is curable. The damage suffered from this, according to the testimony of Mr. Peterson, is: delay causing emotional upset, and added costs in curing the defect (which the lawyer stands to benefit from). (App 2; Tr. at 39-40).

Despite the emotional toll that delay of resending a pre-arbitration letter might cause, DBPR clearly recognizes the value the association derives by relying on its CAM to perform this service. (App 3). In fact, because a CAM is permitted to send pre-arbitration letters, DBPR refuses to permit the automatic taxing of attorneys' fees in arbitration for this particular activity. *In Re: Petition for Arbitration: Dania Chateau Deville Condominium Association, Inc. v. Zalcborg*, Case No. 2009-04-0877. Perhaps the Real Property Section's frustration has less to do with protecting associations and members from erroneously prepared pre-arbitration demand letters than with advancing a judicial fix to an administrative hurdle those attorneys experience in getting fees paid.

While there clearly are circumstances requiring the knowledge and skill of a practicing attorney, consumers generally benefit from the non-lawyer competition to provide many services. For example, a certified public accountant can represent individuals before the IRS. *The Florida Bar v. Sperry*, 363 U.S. 379 (1963). A nonlawyer may represent an entity in an administrative proceeding. *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980). A nonlawyer can prepare a pension plan. *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Pension Plans*, 571 So. 2d 430 (Fla. 1990). A nonlawyer licensed real estate agent may prepare a contract for sale of real estate. *The Florida Bar Keyes Co. v. Dade County Bar Association*, 46 So. 2d 605 (Fla. 1950). Title insurance companies may conduct closings and prepare documents incident to the issuance of title insurance. *The Florida Bar v. McPhee*, 195 So. 2d 552 (Fla. 1967). A nonlawyer property manager may file court documents and appear in court on behalf of a landlord in an uncontested residential eviction proceeding. In *The Florida Bar Re: Advisory Opinion: Nonlawyer Preparation of Landlord Uncontested Evictions*, 605 So. 2d 867 (Fla. 1992) clarified, 627 So. 2d 485 (Fla. 1993). For mechanic's liens, a non-lawyer may prepare the statutory required notice to owner and notice to contractor. *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Notice to Owner and Notice to Contractor*, 544 So. 2d 1013 (Fla. 1989).

Although nonlawyers are permitted to perform the above legal activities, it was permitted only after review and under protest or challenge initiated by the Bar. “Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services.” Professor Catherine J. Lanctot, Villanova University Law School, “Regulating the Provision of Legal Services in Cyberspace,” remarks at the Federal Trade Commission Public Workshop on *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Internet Legal Services* (Oct. 9, 2002), available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/lanctot.pdf>.

The prohibition against the unauthorized practice of law should serve the public interest. The inquiry requires the consideration of both the harm a consumer may suffer if a nonlawyer performs certain tasks, as well as the benefits that a consumer accrues when lawyers and nonlawyers compete. *See, Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 689 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). The ultimate touchstone is the public interest, and the public interest is determined through balancing the risks and benefits to the public of allowing and disallowing such activities. *In re Opinion No. 26 of the Comm. On Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995).

Restrictions are generally considered harmful to the public. Accordingly, they are only justified by a showing that the restriction is necessary to prevent significant consumer harm and are narrowly drawn to minimize anticompetitive impact. *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (“Absent some countervailing procompetitive virtue,” an impediment to “the ordinary give and take of the market place ... cannot be sustained under the Rule of Reason.”) (internal quotations and citations omitted). Here, however, there has been absolutely no showing of public harm. Indeed not a single complaint against a CAM for the unauthorized practice of law has been made to the recollection of DBPR’s General Counsel. (App 4). Absent such a showing, it appears that the proposed *clarification* is a solution in search of a problem.

The evidence submitted to the Standing Committee on UPL provided no instance of actual harm suffered as a result of a CAM engaging in the unauthorized practice of law. If the Court were to adopt the proposed clarification to the *1996 Advisory Opinion*, it potentially regulates many activities, effectively advancing the interests of one industry over another without any measurable protection of the public. As Jeff Oshinsky testified:

I think that if you take the items that are being done now by CAMS that are being sought to be protected against or to require attorney supervision, those things logically will apply to collection agencies. Estoppel letters, maintaining ledgers, things like that that have historically been done by CAMS, are now also being done by collection agencies, for a very good reason, financial reasons.

(App 2; Tr. at 59). Thus, activities performed by CAMS as well as collection agencies and accountants are at risk of being labeled UPL. The public benefits from free and unfettered competition. “[U]ltimately, competition will produce not only lower prices but also better goods and services.” *National Soc’y of Prof’l Eng’rs*, 435 U.S. at 695. It should be left to the consumer to decide, based on need, cost, convenience, and ability, whether to engage a CAM or lawyer to provide nonlawyer services, specifically because the nonlawyer services at issue already clearly, specifically, and thoroughly addressed by this Court in the *1996 Advisory Opinion*.

CAMS generally provide services under a management contract. The services offered to community association clients are encompassed within that management contract. If a community association is forced to engage the services of a lawyer to, say, prepare a pre-arbitration demand letter, it will be paying twice for the same service, thereby increasing the association’s budget demand. The additional costs are essentially incurred by the members themselves. As Mitchell Drimmer testified,

Eliminating the most simple task of the community association managers in favor of lawyers is nothing more than a tax on the membership of the community associations and it is not in the public interest...the monetary expense of reducing the scope of CAMS’ work flow in favor of an attorney is not in the public interest and will increase the cost of managing associations and perhaps even make managers more reluctant to perform their duties.

(App 2; Tr. at 51-52).

When nonlawyers compete with lawyers to provide services that do not require formal legal training, consumers may consider all relevant factors in selecting a service provider: cost, convenience, and the degree of assurance necessary that the tasks performed are sufficient and correct. By prohibiting CAMS from providing certain services, lawyer fees will not be checked by cross-profession competition. The mere lack of nonlawyer competition will encourage higher legal fees. Consequently, even associations that prefer to use attorneys for certain services are at risk for paying higher legal fees, which is what happened in New Jersey where nonlawyers did not provide real estate closing services. The New Jersey Supreme Court found that an attorney's real estate closing fees were much lower in southern New Jersey, where closings conducted by non-lawyers were commonplace, than in northern New Jersey, where lawyers conducted almost all of the closings. *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344, 1349 (N.J. 1995).

CAMS compete with lawyers in areas other than fees. They may be able to offer lay services—like filing a pre-arbitration or pre-lien letter—in a more timely manner. David Felice testified that pre-lien letters are “things I believe that a community association manager and a community association management firm are capable of doing without having to resort every time to the cost and expense

and time delay that is often associated with going to an attorney.” (App 2; Tr. at 103-104) (emphasis added).

A significant flaw in the Standing Committee on UPL’s proposed advisory opinion in seeking clarification of this Court’s 1996 Advisory Opinion is the Standing Committee’s failure to make a finding or make an assessment of how CAMS providing the delineated services actually hurt Florida community association members. A restriction on CAMS to the extent sought here should be made only with a credible showing of need to protect the public from actual harm, and even then should be narrowly drawn. However, the record fails to show any need and the limitations proposed make the 1996 Advisory Opinion less clear, more confusing, and open the door to a wider application.

III. THE PETITIONER’S REQUEST FOR CLARIFICATION OF A SEVENTEEN YEAR OLD ADVISORY OPINION BASED ON THE PRECISE ACTIVITIES ADDRESSED IN THAT OPINION IS PROCEDURALLY BARRED

Florida Rule of Appellate Procedure 9.330 states that a motion for clarification may be filed within fifteen days of an order, or within such other time set by the Court. (Fla. R. App P. 9.330(a)). Here, the Standing Committee requests a clarification, stating that “the Standing Committee felt that in order to provide further guidance to CAMS and members of The Florida Bar, some of the

1996 activities which are part of the current request needed clarification.”

(Proposed Opinion at 10).

The Standing Committee on UPL does not offer this Court any new or different activities to review that have not been addressed directly or otherwise within the framework of the *1996 Advisory Opinion*. The Standing Committee plainly admits that it only seeks to clarify that opinion. This Court should not extend the fifteen-day window for seeking clarification, and the Standing Committee on UPL has no authority to exempt itself from the appellate rule. While there is precedent for extending the time period to seek clarifying of an Advisory Opinion outside of the fifteen day window provided for in the appellate rules, it is limited to a situation where the Court, by written order, has invited additional comments within one year. *The Florida Bar Re: Advisory Opinion – Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 605 So. 2d 868, 871 (Fla. 1992) (“Interested parties may file comments with this Court addressing unforeseen public harm that may result from the activities we have authorized in this opinion.”). In that case, the Court determined that property managers could appear in court on behalf of a landlord and prosecute an uncontested residential eviction. The Court invited comment to explore the unanticipated consequences of allowing nonlawyers to appear in court

on behalf of property owners. One year later, the Court issued a second opinion, stating:

Subject to reconsideration one year from the date of our decision, the Court authorized property managers to complete, sign, and file complaints for eviction and motions for default and to obtain final judgments and writs of possession on behalf of landlords in uncontested residential evictions for nonpayment of rent.

The Florida Bar re Advisory Opinion – Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions, 627 So. 2d 485, 486 (Fla. 1993).

In this Court's *1996 Advisory Opinion*, it provided no extension of the time for seeking clarification. There was no invitation made to review written comments submitted after the opinion was issued. Indeed, there was no attempt until this past year.

Both the CAM industry and the legal industry have been operating under the guidance of the *1996 Advisory Opinion* for seventeen years. The Standing Committee's attempt to clarify the 1996 Opinion does not offer sufficient rationale for such a need, and even renders the Opinion less clear. Though no harm to the public has been expressed, to the extent any CAM engages in the unauthorized practice of law, there are two state regulatory bodies set up for the purposes of investigating, prosecuting, and sanctioning such behavior: DBPR or, of course, the

Florida Bar's Standing Committee on UPL. The proposed Advisory Opinion is not what will protect the public from UPL, the in-place state regulatory bodies will.

The integrity of the Appellate Rule setting a fifteen-day window of time to seek clarification should be honored. The Standing Committee on UPL should not be encouraged to petition this court to revisit long-standing precedent in search of clarification.

CONCLUSION

For the reasons set forth above, Movants object to the proposed advisory opinion because the proposed opinion seeks an unnecessary clarification of this Court's 1996 Advisory Opinion, *The Florida Bar re: Advisory Opinion - Activities of Community Association Managers*, 681 So. 2d 1119 (Fla. 1996), without any showing that the unauthorized practice of law is occurring as a result of the 1996 Advisory Opinion being unclear, or that any harm, need, or confusion is occurring within the industry.

Expanding the definition of UPL to include traditionally performed ministerial activities will have a chilling effect on cross-professional competition between CAMS and lawyers without any substantiated benefit to the public.

Finally, accepting a petition to clarify long-standing precedent seventeen years later is outside the mandate of rule 9.330(a), Florida Rules of Appellate Procedure.

For these reasons, this Court should decline to adopt the proposed Advisory Opinion.

Respectfully submitted,

/s/ Jennifer A. Winegardner
Jennifer A. Winegardner, Esq.
Bar No. 133930
THE CHASE LAW FIRM
1535 Killearn Center Blvd., A1
Tallahassee, FL 32309
Telephone: 850-385-9880
Facsimile: 850-422-0072
Jwinegardner@chasefirm.com

On behalf of The Continental Group,
Inc., Associations, Inc., and CEOMC
Florida, Inc.

Certificate of Service

I certify that a copy of this Brief in Opposition was sent by Email to the following, on this 13 day of June, 2013:

The Florida Bar
Standing Committee on
The Unlicensed Practice of Law
651 E. Jefferson Street
Tallahassee, FL 32399-2300
Email: upl@flabar.org

Mr. William F Belcher, Chair
Real Property, Probate and Trust
Law Section
540 4th St N
Saint Petersburg, FL 33701-2302
(727)821-1249
Email: wfbelcher@gmail.com

Nancy Munjivoi Blount, Chair
Jeffrey T. Picker, Esq.
Lori S. Holcomb, Esq.
The Florida Bar
Email: jpicker@flabar.org

By: /s/ Jennifer A. Winegardner
Jennifer A. Winegardner

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14- point font.

By: /s/ Jennifer A. Winegardner
Jennifer A. Winegardner