IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-889

THE FLORIDA BAR RE: ADVISORY OPINION
ACTIVITIES OF COMMUNITY ASSOCIATION MANAGERS

BRIEF OF INTERESTED PARTY
Community Associations Institute
In opposition to the Proposed Advisory Opinion

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STATEMENT OF INTEREST

Community Associations Institute ("CAI") is an international membership organization dedicated to building better communities. CAI and its more than 60 chapters provide education, tools and resources to the volunteers who govern communities and the professionals who support them. CAI's 32,000-plus members include community association volunteer leaders (homeowners), community managers, association management firms, community association attorneys, and other professionals who provide products and services to associations. CAI's vision is reflected in community associations that are preferred places to call home.

STATEMENT OF THE CASE AND FACTS

On March 28, 2012, pursuant to Rule Regulating The Florida Bar 10-9, The Florida Bar's Real Property, Probate & Trust Law Section petitioned the Standing Committee on Unlicensed Practice of Law (the "Committee") for an advisory opinion on the activities of community association managers ("CAM(s)"). App. at 1, *In Re: The Florida Bar Request for Formal Advisory Opinion Nonlawyer Assistance by Community Association Managers* (June 22, 2012) ("Proposed Opinion"). The petitioner sought confirmation that the activities found to be the unlicensed practice of law in *The Florida Bar re: Advisory Opinion – Activities of Community Association Managers*, 681 So. 2d 1119 (Fla. 1996) ("1996 Opinion") continue to be the unlicensed practice of law. Those activities include: (1) the drafting of a claim of lien and satisfaction of claim of lien; (2) preparing a notice of

commencement; determining the timing, method, and form of giving notices of meetings; (3) determining the votes necessary for certain actions by community associations; (4) addressing questions asking for the application of a statute or rule; and (5) advising community associations whether a course of action is authorized by a statute or rule.

The petitioner also asked if it was the unlicensed practice of law for a community association manager to engage in any of the following fourteen activities: (1) Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer; (2) Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced; (3) Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed; (4) Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the member; (5) Determination of number of days to be provided for statutory notice; (6) Modification of limited proxy forms promulgated by the State; (7) Preparation of documents concerning the right of the association to approve new prospective owners; (8) Determination of affirmative votes needed to pass a proposition or amendment to recorded documents; (9) Determination of owners' votes needed to establish a quorum; (10) Drafting of pre-arbitration demand letters required by section 718.1255, Florida Statutes; (11) Preparation of

construction lien documents (e.g. notice of commencement, and lien waivers, etc.); (12) Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.; (13) Identifying, through review of title instruments, the owners to receive pre-lien letters; and (14) Any activity that requires statutory or case law analysis to reach a legal conclusion. *Proposed Opinion* at 25-26.

The Standing Committee held a public hearing on June 22, 2012. App. at 2; Transcript of Proceedings at 4, *In Re: The Florida Bar Request for Formal Advisory Opinion Nonlawyer Assistance by Community Association Managers* (June 22, 2012). Testifying at the hearing were many attorneys, CAMs, and other interested individuals.

Steve Mezer, an attorney who is the chairman of the Condominium and Planning Development Committee of the Real Property Probate and Trust Law Section of The Florida Bar, and attorney Scott Peterson testified on behalf of the petitioner. (Tr. at 14-23). In addition to the petitioner, the Standing Committee received testimony from Mitchell Drimmer, a CAM (Tr. at 46-52); Jeffrey M. Oshinsky, General Counsel of Association Financial Services, a licensed collection agency (Tr. at 57); Andrew Fortin, Vice-President of Government Relations for Associa, a community management company (Tr. at 67-73); Kelley Moran, Vice-President of Rampart Properties and a CAM (Tr. at 79-80); Robert Freedman, an

attorney (Tr. at 84-87); Erica White, prosecuting attorney for the Regulatory Council of Community Association Managers located within the Department of Business and Professional Regulation (Tr. at 90-93); Jane Cornett, an attorney (Tr. at 97); Tony Kalliche, Executive Vice-President and general counsel for the Continental Group, a community association management firm (Tr. at 100); David Felice, an attorney, a CAM, and owner of a community association management firm (Tr. at 102-106); Christopher Davies, an attorney (Tr. at 111-113); Brad van Rooyen, Executive Director of the Chief Executive Offices of Management Companies (Tr. at 114-117); Victoria Laney; Alan Garfinkel, an attorney (Tr. at 128-130); and Michael Gelfand, an attorney (Tr. 136-143).

As well as the testimony presented at the hearing, the Standing Committee received written testimony. *Proposed Opinion* at 4. According to the Proposed Opinion, hundreds of homeowner and condominium associations submitted a form petition in the written testimony; however, only one petition was filed with the Court as part of the written testimony since the form petitions were substantially the same. *Id*. The majority of the testimony reflects the belief that the Court's 1996 opinion provides sufficient guidance in this area and another opinion is unnecessary. (Tr. 1). In addition, the testimony reflects the concern that too much regulation may raise the cost of living in these communities and could potentially have a serious financial impact on community associations, property owners, and CAMs. (Tr. 1).

Absent from the record sent with the advisory opinion was a February 14, 2013, letter signed by 3 industry organizations, 8 law firms, 1 industry partner, 37 licensed community association management companies, 1 legislator, and 554 community associations in Florida. This letter is included as Appendix A.

On May 15, 2013, as a result of the June 22, 2012, hearing, the Standing Committee on UPL submitted the Proposed Advisory Opinion.

SUMMARY OF THE ARGUMENT

CAI, on behalf of its 32,000 respective members, contends that the Proposed Advisory Opinion, FAO #2012-2, Activities of Community Association Managers, dated May 15, 2013, is unnecessary insofar as it purports to expand and clarify the Court's 1996 opinion, *The Florida Bar re: Advisory Opinion – Activities of Community Association Managers*, 681 So. 2d 1119 (Fla. 1996), because the 1996 Opinion provides sufficiently clear guidance for CAMs and remains applicable in the present. Despite the 1996 Opinion setting reasonable standards for the unlicensed practice of law, the Proposed Opinion attempts to expand the unlicensed practice of law to ministerial functions necessary for CAMs to conduct the day-to-day operations of the association, such as requiring a CAM to defer to an attorney in any instance requiring statutory reference, even where such reference is for nothing more than procedural guidance. Such expansion and attempted clarification provides more confusion than guidance and is not warranted as there has been presented no evidence of harm to community members

sought to be protected by the opinion. Additionally, the Proposed Opinion, if adopted, diminishes the public's confidence in the legal profession, as pointed out by several testifying witnesses. For these reasons, CAI prays that the court decline to approve the Proposed Opinion.

ARGUMENT

I. THE OPINION SHOULD BE REJECTED BECAUSE IT FAILS TO ADEQUATELY CLARIFY THE 1996 OPINION OR PROVIDE USEFUL GUIDANCE FOR CAMS.

In its 1996 Opinion, the Court explained that "there is no comprehensive definition of what constitutes the unlicensed practice of law." *1996 Opinion* at 1123. The Court then looked to *Sperry* for guidance. *Id*.; s*ee State ex rel. Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963) (holding that the practice of law includes giving legal advice to others as to their rights and obligations under the law and the preparation of legal instruments creating or transferring legal rights). The Court went on to explain that "ministerial [actions] do not constitute the practice of law," and detailed actions that were clearly the unlicensed practice of law, those that clearly were not, and those falling in the "grey area." The Proposed Opinion now seeks to expand upon the Court's black and white definitions, although these proposed distinctions seem to actually create more grey.

A. The 1996 Opinion Provides Sufficiently Clear Guidance for CAMs and Remains Applicable Today

In the 1996 Opinion, this Court provided ample guidance to CAMs regarding what constitutes the unlicensed practice of law in conducting community association management. *See 1996 Opinion*. The Court recognized that "CAMs are specially trained in the field of community association management," and only some areas in the field of community association management require assistance of an attorney. *Id.* at *1124.*

Section 468.431, Florida Statutes, defines community association management as:

> [A]ny 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 50 units or have an annual budget or budgets in excess of $100,000: 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.

See id. at 1122.[2] First, the Court clearly delineated those activities which are purely ministerial and do not constitute the practice of law. *Id.* at 1123. The Court

[2] It should be noted that Fla. Stat. 468.431 has been amended since the 1996 Opinion. Among other changes the statutory limit of fifty units was decreased to just ten and now reads as follows:

> (2) "Community association management" means 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 $100,000: 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. A person who performs clerical or ministerial functions under the direct

explained that such activities did not require significant legal expertise or legal interpretation. *Id*. Those practices are:

1. Completing Secretary of State form CR2EO45 (change of registered agent or office for corporations);
2. Annual Corporation Report;
3. Drafting certificates of assessments;
4. Drafting first and second notices of date of election;
5. Drafting ballots;
6. Drafting written notices of annual meeting;
7. Drafting annual meeting and board meeting agenda; and
8. Drafting affidavits of mailing.

Id. Then the Court also clearly stated which activities are the practice of law. *1996 Opinion* at 1123-24. Those activities considered the practice of law that may not be performed by CAMs are as follows:

1. Initial completion of BPR form 33-032 (Frequently Asked Questions and Answer Sheet);
2. Drafting Claims of Lien and Satisfactions of Lien;
3. Determining the timing, method, and form of giving notices of meetings;
4. Determining the votes necessary to take certain actions;

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supervision and control of a licensed manager or who is charged only with performing the maintenance of a community association and who does not assist in any of the management services described in this subsection is not required to be licensed under this part. (emphasis added).

5. Responding to a community association's questions concerning the application of law to specific matters;
6. Advising community associations that a course of action may or may not be authorized by law or rule.

Id. at 1123.

Finally, the Court identified activities that are neither purely ministerial nor the practice of law which may constitute practice of law depending on the circumstances. *1996 Opinion* at 1124. These activities require an ad hoc analysis under the test prescribed in *Sperry*, 140 So. 2d at 591. However, the Court's guidelines in determining what would constitute practice of law are sufficient for a trained and licensed professional, *i.e.*, a CAM, to determine what would constitute the unlicensed practice of law. The Court explained, by way of example, that:

> A CAM may modify BPR Form 33-033 (Limited Proxy Form) to the extent such modification involves ministerial matters contemplated by the description in section 468.431(2). This includes modifying the form to include the name of the community association; phrasing a yes or no voting question concerning either waiving reserves or waiving the compiled, reviewed, or audited financial statement requirement; phrasing a yes or no voting question concerning carryover of excess membership expenses; and phrasing a yes or no voting question concerning the adoption of amendments to the Articles of Incorporation, Bylaws, or condominium documents. As to more complicated modifications, however, an attorney must be consulted.

Id. Similarly, drafting a limited proxy form by filling in the name and address of the owner do not constitute the practice of law while drafting an actual limited proxy form or additional questions must be done with the assistance of an attorney.

Id. Moreover, the drafting of documents to exercise a community association's right of first approval may require assistance of an attorney because even though CAMs may be able to draft these documents, they cannot advise a community association of the legal consequences of taking a particular course of action. *Id.*

The Court also explained a few broad guidelines for CAMs to determine whether or not their conduct constitutes the unlicensed practice of law. The Court stated that giving legal advice as to rights and obligations under the law, preparation of contracts, responding to questions regarding the application of law to specific matters, and providing advice to community associations regarding whether a course of action may be authorized by law or rule would constitute the practice of law. *Id.* at 1123-24.

These black, white, and grey rules have stood for 17 years without issue. It was not a CAM that brought this petition to the standing committee. The testimony is devoid of any evidence showing that CAMs violate even the broad guidelines of the 1996 Opinion, and no CAM testified in support of the further clarification or expansion of the unlicensed practice of law. Therefore, the 1996 Opinion clearly provides sufficient guidelines to the CAMs as to what constitutes unlicensed practice of law.

B. The Proposed Opinion on Items 1 through 12 does Nothing More than Apply the 1996 Opinion or Other Law to Specific Conduct

Because the 1996 Opinion adequately sets forth a test to determine if an activity must be performed by an attorney, the Proposed Opinion, Items 1 through

12, does not add any new items as to what constitutes unlicensed practice of law by CAMs. The Proposed Opinion merely applies this Court's 1996 decision to the activities enumerated in the proposed opinion Items 1 through 12. The Proposed Opinion concludes that (1) Preparation of a Certificate of Assessments due once the delinquent account is turned over to the association's lawyer; (2) Preparation of a Certificate of Assessments due once a foreclosure against the unit owner is commenced; and (3) Preparation of a Certificate of Assessments due once a member disputes in writing to the association the amount alleged as owed; are not the practice of law because they are purely ministerial activities covered by the 1996 Opinion. *Proposed Opinion* at 10-11.

Next, the Proposed Opinion analyzes whether "[d]rafting of amendments (and certificates of amendment that are recorded in the official records) to declarations of covenants, bylaws, and articles of incorporation when such documents are to be voted on by the members" is the unlicensed practice of law because these tasks involve preparation of contracts and corporate documents, both currently disallowed by the 1996 Opinion and *The Florida Bar v. Town*, 174 So. 2d 395 (Fla. 1965). *Id.* at 11. The Proposed Opinion recommends simply that the 1996 Opinion on these issues should stand. *Id.* at 11-12. Similarly, the Proposed Opinion echoes the 1996 Opinion on whether determining the number of days to provide statutory notices is the practice of law. *Id.* The Proposed Opinion merely states that if determining the number of days for statutory notice requires statutory

interpretation, it would be the unlicensed practice of law, but if such interpretation was not required, a CAM may do the same. *Id.* at 12.

Then the Proposed Opinion discusses the modification of proxy forms promulgated by the State, *id.* at 12, and the preparation of documents concerning the right of the association to approve new prospective owners. *Id.* at 15. The discussion on these two matters again mirrors the 1996 Opinion, concluding that CAMs may rephrase questions that require no discretion; however, questions that require discretion in phrasing require legal assistance, and that CAMs may draft documents concerning approval of new owners but the "specific factual circumstances will determine whether it constitutes the unlicensed practice of law." *Id.* at 12-15. These provisions add nothing new to the existing standards pronounced by the 1996 Opinion.

The Proposed Opinion goes on to explain that the determination of affirmative votes needed to pass a proposition or amendment to recorded documents, and the determination of owners' votes needed to establish a quorum would be unlicensed practice of law if it requires the interpretation of statutes or the governing documents, again referring to long standing principles of the *1996 Opinion.* *Id*. at 16. The Proposed Opinion also finds that the preparation of pre-arbitration notices is not the unlicensed practice of law as the same is specifically allowed by both the 1996 Opinion and *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980). *Proposed Opinion* at 16-18. Further, the Proposed Opinion concludes

that the preparation of construction lien documents and the preparation of contracts constitutes unlicensed practice of law, both conducts specifically disallowed by *Sperry* and the *1996 Opinion*. *Id.* at 19. Each of these conclusions are simply reached by applying the principles stated in the 1996 Opinion or by applying current unlicensed practice of law principles found in other cases.

Therefore the Proposed Opinion does not supply any new guidance or create any class of activities that were not encompassed by the 1996 Opinion or existing case law. As such, the Court should reject the Proposed Opinion as to items enumerated 1 through 12.

C. The Proposed Opinion on Item 13. Identifying, Through Review of Title Instruments, the Owners to Receive Pre-lien Letters, is Vague and Unreasonably Expands the Unlicensed Practice of Law Beyond the Guidelines of the 1996 Opinion

The Proposed Opinion provides that a CAM may not make the determination of who owns a unit for purposes of drafting a pre-lien letter. However, section 718.121(4), Florida Statutes, requires that such a pre-lien notice only be sent to the "last address as reflected in the records of the Association." Similarly, section 720.3085, Florida Statutes, requires such pre-lien notice "[b]e sent . . . to the parcel owner at his or her last address as reflected in the records of the association." CAMs are required to maintain an accurate list of all owners and their mailing addresses as the association's official records. *See* Fla. Stat. §§ 718.111(12)(a)(7) and 720.303(4)(g). CAMs use an association's roster of owners for many reasons in the routine operation of the association such as: verification of

votes received in an election,[3] registering proxies at an annual meeting,[4] sending notices of Annual and other member meetings,[5] as well as noticing violations,[6] fines,[7] and other pre-legal disciplinary actions.[8] Identifying the current owner along with the mailing address of such owner is clearly ministerial in nature, as it involves only reading the association's own records, and no public records search should be necessary. Adopting this provision would surely lead to confusion as to whether a legal analysis is necessary in mailing these pre-lien letters.

The same logic used in the Proposed Opinion could be contorted to make even the most basic of CAM tasks an unlicensed practice of law violation. Would a CAM be allowed to draft notices of election, ballots, notices of annual or board meetings, and affidavits of mailing if the CAM was unable, as per this opinion, to determine who owns the unit and their address? How could the CAM insert eligible candidates for the election without knowing whether or not such interested candidates owned a unit in the association? How could a CAM swear to mailing notices to the proper addresses for the annual meeting or election without being able to determine the unit owners to receive such notice?

To solve these potential problems, the Proposed Opinion would necessarily be extrapolated to require that a CAM request that an attorney verify the unit

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[3] *See* Fla. Stat. § 718.112(2)(d)4a; Fla. Stat. §720.306(9)(a); Fla. Admin. Code Ann. r. 61B-23.0021.
[4] *See* Fla. Stat. § 718.112(2)(b); Fla. Stat. §720.306(8); Fla. Admin. Code Ann. r. 61B-23.0021.
[5] *See* Fla. Stat. § 718.112(2)(d)(3); Fla. Stat. §720.306(5).
[6] *See* Fla. Stat. § 718.303; Fla. Stat. §720.305.
[7] *See id.*
[8] *See id.*

owner roster before any use thereof. It can easily be said that it requires a legal analysis of who may vote, who may receive a fine, or who must receive notice of a meeting prior to the CAM conducting any such activities. Verifying the record title owner for every unit before a CAM could reference the unit owner roster would create quite the expense for the association.[9] The Interested Party fails to see any difference in the ministerial actions presented above and the preparation of pre-lien letters and in the Interested Party's experience, such tasks require the same training, skill, and ability as the other approved activities.

Because the identification of unit owners for the purpose of drafting pre-lien demand letters is a ministerial function requiring only reference to the Association's own roster of unit owners and mailing addresses, the addition of a restriction on the preparation of such documents and references to determining who owns the unit or conducting a title search prior thereto clearly creates confusion rather than clarification of what is the unlicensed practice of law. For this reason the Court must reject the opinion.

D. The Proposed Opinion on Item 14. Any Activity that Requires Statutory or Case Law Analysis to Reach a Legal Conclusion is Vague and Unreasonably Expands the Unlicensed Practice of Law Beyond Guidelines of the 1996 Opinion.

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[9] The expense of verifying the roster before an annual meeting would increase exponentially with the number of units in an association. For example, an association with 300 units would require significant attorney time to verify each owner as compared with an association with the minimum 11 units. Additionally, because attorneys often charge between $150.00 and $300.00 for each report with an opinion as to ownership interests and encumbrances on a property, this requirement would place significant burden on many associations with inexpensive annual assessments.

Item number 14 seeks to disallow any activity requiring statutory or case law analysis to reach a legal conclusion. As is explained in the Proposed Opinion, the Court previously held that it would be the unlicensed practice of law for a CAM to make applications of law to specific matters or advise associations whether a course of action may be authorized by law or rule. *See 1996 Opinion* at 1123. For 17 years, that language guided CAMs and attorneys alike regarding the unlicensed practice of law; however, the Proposed Opinion now seeks to add language banning any activity requiring statutory or case law analysis to reach a legal conclusion as the unlicensed practice of law. *See Proposed Opinion* at 20.

The insertion of this provision results in more confusion than clarification. The definition of what exactly the opinion means by "statutory analysis" is vague at best, this being the first reference to "analysis" in either the 1996 or 2012 opinions. The use of such a vague phrase will serve to confuse CAMs rather than provide guidance. Interpreting the remaining portion of this phrase "reach a legal conclusion" is similarly vague. The Proposed Opinion may be interpreted as expanding the 1996 Opinion definition to include any activity requiring statutory reference to determine a course of action, whether not such reference or course includes any legal interpretation. Such a broad and vague phrase serves not to clarify the unlicensed practice of law, but rather to confuse CAMs and attorneys alike.

First, judges make legal conclusions,[10] everyone else merely has opinions, attorneys included. However, if legal conclusions are possible by non-judges, these conclusions are reached every day in life. A person wondering how fast they may drive on a road requires the driver to make the legal determination that conditions are safe to operate at the posted speed. Such simple opinions are reached by nonlawyers day in and day out.

Similarly, businesses make legal decisions without consulting an attorney. As we know, businesses are run by people, and those people end up making the legal conclusion for the business. A manager of a small corner store decides how often to clean the floors to protect the shareholders, *i.e.*, the manager and manager's spouse, from slip and falls or whether the chicken offered is safe for human consumption. These daily decisions often require legal conclusions or opinions, which are made by nonlawyers for the corporation.

These simple determinations are made daily in the operation of a condominium. Is the person requesting a certificate of assessments a unit owner's designee?[11] May the association issue a violation for that overgrown hedge?[12]

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[10] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., http://thelawdictionary.org/conclusions-of-law (Defining a "Conclusion of Law" as the conclusion that is reached by a court after considering all of the presented facts in a case. It is also a statement of the law by a court.). *See also* THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/conclusion%20of%20law (last visited June 13, 2013).

[11] *See* Fla. Stat. § 718.116(8) ("Within 15 days after receiving a written request therefor from a unit owner or his or her designee, or a unit mortgagee or his or her designee, the association shall provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the unit owner with respect to the condominium parcel.").

[12] *See* Fla. Stat. § 718.303(1). ("Each unit owner, each tenant and other invitee, and each association is governed by, and must comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws which shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association […]").

Must the association get bids for lawn service expected to cost in excess of 10% of the annual budget?[13] Each of these questions requires reference to the statute for the proper guidance.

Accordingly, virtually any situation requiring reference to the statute or governing documents would seem to run afoul of such a broad "catch-all" statement, which is exactly how Mr. Felice interpreted this catch-all provision when testifying before the committee. He stated that it is not necessary to require CAMs to turn to attorneys for determining the procedure to follow at a meeting or how a letter should be sent. (App. at 2; Tr. at 103). Mr. Felice was correct: a CAM should not be required to seek counsel before reading the procedural portions of the statute. Would the solution be an attorney's opinion letter opining that the association follow the statutes and governing documents? Such advice is not necessary, as CAMs must adhere to the statutes and governing documents pursuant to their licensing requirements. *See* CS/HB 7119, 2013 Leg., Reg. Sess. (Fla. 2013) (to be codified at Fla. Stat. § 468.43(2)(b)7.) *See also* Fla. Admin. Code Ann. r. 61E14-2.001.

[13] *See* Fla. Stat. § 718.3026(1). ("All contracts as further described herein or any contract that is not to be fully performed within 1 year after the making thereof, for the purchase, lease, or renting of materials or equipment to be used by the association in accomplishing its purposes under this chapter, and all contracts for the provision of services, shall be in writing. If a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services, requires payment by the association on behalf of any condominium operated by the association in the aggregate that exceeds 5 percent of the total annual budget of the association, including reserves, the association shall obtain competitive bids for the materials, equipment, or services. Nothing contained herein shall be construed to require the association to accept the lowest bid.").

The Court has previously refused to extend such generalities to the unlicensed practice of law. *See Sperry,* 140 So. 2d at 591 (stating that "[m]any courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here. Rather we will do so only to the extent required to settle the issues of this case."); *See also Florida Bar v. Brumbaugh,* 355 So. 2d 1186, 1191–92 (Fla. 1978) (stating that any attempt to formulate a lasting, all-encompassing definition of practice of law is doomed to failure for the reason that under our system of jurisprudence such practice must necessarily change with the ever changing business and social order.

The Interested Party opposes the expansion or generalization of the existing unlicensed practice of law principles created through the 1996 Opinion because the current advisory opinion unnecessarily adds confusion rather than clarification as drafted. Accordingly, the Interested Party prays that the Court reject the Proposed Advisory Opinion.

II. THE PROPOSED OPINION MAKES NO FINDING OF SUBSTANTIAL HARM TO THE COMMUNITY TO JUSTIFY THE EXPANSION OF THE UNLICENSED PRACTICE OF LAW

"The single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." *Moses,* 380 So. 2d at 417. Virtually every decision regulating the unlicensed practice of law focuses on protecting the public from the harms of such unlicensed representation. In *The Florida Bar re: Advisory Opinion*

on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997), the Court determined not just that nonlawyer representatives were engaged in the unlicensed practice of law, but also that those representatives "post a sufficient threat of harm to the public to justify [the Court's] protection." *Id*. at 1181. The Court explained that such representatives were not supervised, not subject to discipline by a regulatory body, not required to meet any ethical standards, and were unsanctionable, despite "instances of misleading advertising, ineffective representation and the unethical conduct of nonlawyer representatives [being] prevalent." *Id*. Conversely, in *The Florida Bar re: Advisory Opinion--Nonlawyer Preparation of Residential Leases Up to One Year in Duration*, 602 So. 2d 914 (Fla. 1992), the Court found that there was no evidence of the public being harmed by real estate licensees drafting leases and attributed their finding to the education before and after licensure, recourse with administrative agencies, and possible restitution from the Real Estate Recovery Fund. *Id*. at 914-16. Therefore, the Court should determine whether or not the proposed actions may result in significant harm to those sought to be protected before expressing further restrictions on the activities of CAMs.

A review of the testimony and facts presented shows little threat of harm for the proscribed issues. The Proposed Opinion presents no evidence of any harm having been caused by any of the activities it seeks to restrict as the practice of law.

There is simply no reason presented as to why the Court should expand or specify these prohibitions.

Moreover, since CAMs are licensed, there is little risk of a problem arising. Similar to Real Estate licensees, a CAM license requires education and continuing education, is overseen by a regulatory agency, and one of a CAM's duties is to procure insurance coverage that should adequately protect the Association and its members from harm.

First, CAMs are required to engage in 18 hours of prelicensure education. *See* Fla. Admin. Code. r. 61E14-1.001. This education is described as follows:

> (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%;

Id. After completing this educational requirement, CAMs must pass an examination of these topics with a score of 75% or higher. Once licensed, CAMs must biennially complete a minimum of 20 hours of continuing education with very specific requirements for various topics. *See* Fla. Admin. Code. r. 61E14-4.001. CAMs must also maintain standards of professional conduct or face disciplinary action by the division. *See* Fla. Admin. Code. r. 61E14-2.001. These standards include duties of honesty, competence, and due professional care among several others. *Id.* Additionally, violations of the CAM statute are a criminal offense. *See* Fla. Stat. § 468.437. It should be quite clear that CAMs, like Real Estate licensees, are overseen by a regulatory agency and required to maintain a certain level of educational requirements in the areas of association management, thus minimizing the risks of harm to the community.

The specific conducts prescribed by the Proposed Opinion are also insulated from causing harm to the community. For example, Item 13 of the Proposed Opinion requires an attorney to determine the owner of a unit for the purpose of a pre-lien letter; however, even if a mistake is made by a CAM in determining who should receive a pre-lien letter, there is no threat of any substantial harm to the association or its members. The letter is a condition precedent to further legal action and counsel for the association should review such conditions prior to filing any lien. A mistake in the pre-lien letter would serve no harm other than a 30-day delay in filing the lien, where the attorney would either issue or direct the CAM to

issue a corrected pre-lien demand to remedy the deficiency. Such minor harm surely cannot justify the requirement for all such letters to be initially drafted by an attorney.

David Felice testified that the statutes regarding associations are largely procedural. (App. at 2; Tr. at 103). He went on to explain that it is not necessary for a manager to go to an attorney every time that manager needs to review the procedures for a meeting or sending a letter. (Tr. at 103). He further emphasized that CAMS are capable of doing pre-lien letters without incurring the expense and time delay often associated with seeking legal advice.

The Court has a long history of allowing certain activities that appear to be the practice of law slide by due to their relative simplicity and limited risk of harm. For example, corporations may represent themselves in small claims actions. *See* Fla. Sm. Cl. R. 7.050(a)(2). This rule allows an officer or employee of a corporation to represent the corporate entity in small claims court despite such employee not being a licensed attorney. *Id*. As community associations are not-for-profit corporations, this rule would similarly apply to it in small claims situations. It would be rather interesting to see a CAM represent an Association at a trial in small claims court on a $300.00 issue that the Proposed Opinion declares to be the unlicensed practice of law. Such small claims representation could involve the case law and statutory analysis and the presenting of legal opinions to the court. However, the Court has already declared that due to the low

jurisdictional ceiling for damages and informalities found in small claims court, that lay persons could adequately represent corporate entities. Therefore, the little threat of harm related to inadequate representation is offset by the perceived cost savings to the corporations in such actions.

Without evidence showing that the threat of harm justifies the remedy of declaring these actions as the unlicensed practice of law, the Court should refrain from imposing such burdens upon the association and its unit owners.

III. THE PROPOSED OPINION DIMINISHES CONFIDENCE IN THE LEGAL PROFESSION

The Court maintains high standards for attorneys in all aspects of practice to foster public confidence in the profession, among many other reasons. *See generally Life Care Centers of America, Inc. v. Chiles,* 674 So. 2d 873, 875 (Fla. 1996) (stating that it is the long standing goal of this Court to foster public confidence in the legal profession); *Rosenberg v. Levin,* 409 So. 2d 1016 (Fla. 1982) (stating the court's "broad objective of fostering public confidence in the legal profession"); *The Fla. Bar v. Doe,* 550 So. 2d 1111 (Fla. 1989) (stating the Court's "broad objective of fostering public confidence in the legal profession"). *See also, In re Amendments to The Rules Regulating The Fla. Bar-Advertising,* 971 So. 2d 763, 783 (Fla. 2007); *The Fla. Bar v. Kavanaugh,* 915 So. 2d 89, 94 (Fla. 2005); *Myers v. Siegel,* 920 So. 2d 1241 (Fla. 5th DCA 2006). The Proposed Opinion may operate to erode the public's confidence in the legal profession.

Mitch Drimmer, CAM, testified that the Proposed Opinion eliminated one of the more simple tasks of a CAM [pre-lien letters] at the monetary expense of CAMS and in favor of attorneys. (App. at 2; Tr. at 51-52). Mr. Drimmer states the opinion of many CAMs that think the legal profession is merely protecting itself and the lawyers' businesses by adding legal duties to community association management at the expense of CAMs. *Id.* Alan F. Gomber references the legal profession as a "fraternity" seeking "extra money." (App. at 166). David Del Brocco wrote that he sees the Proposed Opinion as an attempt to drive more revenue to attorneys. (App. at 169). Maggie Bomwell states her opinion that the Proposed Opinion is "just another attempt by the legal profession to put their hands into the pockets of HOAs for their own financial gain." (App. at 178). Despite the Standing Committee's best intentions, if Mr. Drimmer, Mr. Gomber, Mr. Del Brocco, and Ms. Bomwell think this Proposed Opinion is a ploy to earn legal fees, other CAMs and members of the public will surely think the same.

If the Bench and Bar are being assaulted from all angles, with or without justification, the lawyers involved are "charged with an even greater measure of responsibility than is usual in order to re-establish public confidence in the legal profession and the administration of justice." *State ex rel. Florida Bar v. Calhoon*, 102 So. 2d 604, 608 (Fla. 1958). Because the Proposed Opinion has been attacked by the public, with or without justification, the Court must be take greater care to

protect and re-establish the public confidence when considering the Proposed Opinion.

As explained in Section II, there is little threat of harm to associations and its members by CAMs engaging in the proscribed conduct. Without this substantial harm, the Court lacks justification to the public that these activities must be conducted by a licensed attorney. Without such justification, as the testimony and record shows, CAMs and association members may conclude that the lawyers promulgating this opinion were protecting their finances at the expense of the associations, thus diminishing the public's confidence in the legal profession. Therefore, the Court should decline to adopt the Proposed Opinion for public policy reasons.

CONCLUSION

The proposed expansion and/or clarification of the Court's 1996 Order is not warranted where there has been presented no evidence of substantial harm to the community members sought to be protected by the opinion. Furthermore, the Proposed Opinion provides little clarification to the 1996 Opinion, but instead adds more confusion and ambiguous language regarding the interpretation of the unlicensed practice of law. For these reasons, CAI and its 32,000 CAM, attorney, and public members pray that the court decline to approve the Proposed Opinion and instead affirm the 1996 Opinion.

CERTIFICATE OF SERVICE

I certify that a copy of this Brief in Opposition was sent by Email to the following, on this 14th day of June, 2013:

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CERTIFICATE OF COMPLIANCE

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

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