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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
Association Financial Services, L.C.
In opposition to Proposed Advisory Opinion

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INTRODUCTION

Pursuant to rule 10-9 of the Rules Regulating The Florida Bar, The Florida Bar's Real Property, Probate & Trust Law Section petitioned the Standing Committee on Unlicensed Practice of Law ("the Standing Committee") for an advisory opinion on the activities of community association managers ("CAMS"). As noted in the proposed advisory opinion, although the request for opinion addresses CAMS specifically, the Standing Committee's opinion would apply to the activities of any nonlawyer including for these purposes, any collection agency retained by a community association to collect delinquent assessments and other related outstanding amounts.

BACKGROUND

As noted by the Standing Committee in the petition, CAMS are licensed through the Department of Business and Professional Regulation, Division of Professions, pursuant to Sections 468.431 – 468.438, Florida Statutes, and Florida Administrative Code chapters 61E14 and 61-20. State law defines community association management as including the following activities: "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." Section 468.431(2), Florida Statutes.

In 1996, the Florida Supreme Court found that "in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

Applying the test, the Court held that: [T]he practice of law includes the giving of legal advice and counsel to others as to their rights and obligations

under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.

The Standing Committee and Court found that those activities that required the interpretation of statutes, administrative rules, community association governing documents or rules of civil procedure constituted the practice of law. Drafting documents, even if form documents, which require a legal description of the property or which determine or establish legal rights are also the practice of law. As the opinion noted, failure to complete or prepare these forms accurately could result in serious legal and financial harm to the property owner.

It is the opinion of the Standing Committee that no changes are needed to the 1996 opinion and those activities found to be the unlicensed practice of law continue to be the unlicensed practice of law and those activities that did not constitute the unlicensed practice of law are still not the unlicensed practice of law. However, 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. In particular, in Item 13 of the proposed advisory opinion, the Standing Committee is seeking an order determining that identifying, through review of title instruments, the owners to receive pre-lien letters constituted an action which constituted the unauthorized practice of law.

AGRUMENT

It is the opinion of the Standing Committee that if a CAM is searching the public records to identify who has owned the property over the years, then such review of the public records is ministerial in nature and not the unlicensed practice of law. In other words, if the CAM is merely making a list of all record owners, the conduct is not the unlicensed practice of law. On the other hand, if the CAM uses the list and then makes the legal determination of who needs to receive a pre-lien letter, this would constitute the unlicensed practice of law. In the opinion of the Standing Committee, this determination goes beyond merely identifying owners. It requires a legal analysis of who must receive pre-lien letters. Pursuant to the Standing Committee, making this determination would constitute the unlicensed practice of law.

In effect, 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. It is this respondent's opinion that the Standing Committee fails to properly identify the standard required by Florida Statutes. Specifically, Florida Statute Section 720.3085 (homeowner associations) requires at a minimum a 45-day "pre-lien" letter to be sent by regular and certified mail to the owner at their mailing address as reflected in the association's records.[1] Similarly, Florida Statute Section 718.121 (condominiums), requires at a minimum a 30 day "intent to file a lien" letter to be sent regular and certified mail to the owner at their mailing address as reflected in the association's records.[2] If the mailing address is not the property, the notice

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[1] Section 720.3085(4) provides that "[a] homeowners' association may not file a record of lien against a parcel for unpaid assessments unless a written notice or demand for past due assessments as well as any other amounts owed to the association pursuant to its governing documents has been made by the association. The written notice or demand must:

(a) Provide the owner with 45 days following the date the notice is deposited in the mail to make payment for all amounts due, including, but not limited to, any attorney's fees and actual costs associated with the preparation and delivery of the written demand.

(b) Be sent by registered or certified mail, return receipt requested, and by first-class United States mail *to the parcel owner at his or her last address as reflected in the records of the association, if the address is within the United States, and to the parcel owner subject to the demand at the address of the parcel if the owner's address as reflected in the records of the association is not the parcel address*. If the address reflected in the records is outside the United States, then sending the notice to that address and to the parcel address by first-class United States mail is sufficient." (emphasis added)

[2] Chapter 718.121 of the Florida Statutes provides in pertinent part that "[e]xcept as otherwise provided in this chapter, no lien may be filed by the association against a condominium unit until 30 days after the date on which a notice of intent to file a lien has been delivered to the owner by registered or certified mail, return receipt requested, and by first-class United States mail to *the owner at his or her last address as reflected in the records of the association,* if the address is within the United States, and delivered to the owner at the address of the unit if the owner's address as reflected in the records of the association is not the unit address. If the address reflected in

must be sent regular and certified mail to the property address as well for both homeowner and condominium associations. Mailing addresses out of the country need be sent regular mail only. Nowhere in Section 718.121 (condominiums) or Section 720.3085 (homeowner associations) does it require a CAM or other third party to review the public records to determine the parties entitled to pre-lien notice or the address of any such receiving party.

As noted in the respondent's prior submission to the Standing Committee, one does not need a legal education to review the association's books and records to determine a unit owner's address for such notice. 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 the Standing Committee's proposed provision would surely lead to confusion as to whether such analysis is necessary in mailing these pre-lien letters.

Although applicable Florida laws provide that no lien may be filed before a pre-lien notice is provided to the owner of a unit, consistent with the 1996 Opinion, no important legal right is lost as a result of a CAM or other third party preparing such pre-lien notice. A lien can be filed by the association at anytime after the applicable waiting period provided for pursuant to Florida law. Moreover, given that the filing of the lien is an action that requires a licensed attorney, such attorney can determine if such pre-lien notice was provided in accordance with Section 718.121 or 720.3085, as applicable. If such notice was not properly provided, then notice can still be provided and a lien subsequently filed.

What important "substantial rights" of associations are being jeopardized by permitting CAMs to continue to provide pre-lien notices? The answer is none. The preparation and mailing of pre-lien notices does not require significant legal expertise based on a reasonable interpretation of the law and/or significantly affect an association's legal rights. These activities are purely ministerial and can and should easily be done by any third party (including in the case of an attorney or law firm, by a paralegal).

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the records is outside the United States, sending the notice to that address and to the unit address by first-class United States mail is sufficient. Delivery of the notice shall be deemed given upon mailing as required by this subsection. (emphasis added)

CONCLUSION

Given the continued distressed financial condition of a significant portion of associations throughout the State of Florida, the requirement that such tasks be performed by a legal professional is not financially feasible. Budget gaps for associations already exist. There is absolutely no legitimate reason why the preparation and mailing of pre-lien notices should be performed by an attorney at the detriment of the association's broader membership.

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 the Standing Committee's proposed provision would surely lead to confusion as to whether such analysis is necessary in mailing these pre-lien letters. Accordingly, for the foregoing reasons, Association Financial Services, L.C. hereby requests that the court reject the Standing Committee's proposed provision.

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CERTIFICATE OF SERVICE

I certify that a copy of this Response 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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