Electronically Filed 05/15/2013 10:12:06 AM ET

RECEIVED, 5/15/2013 11:59:37, Thomas D. Hall, Clerk, Supreme Court

THE FLORIDA BAR
STANDING COMMITTEE ON THE
UNLICENSED PRACTICE OF LAW

FAO #2012-2, ACTIVITIES OF COMMUNITY ASSOCIATION MANAGERS

_____/

PROPOSED ADVISORY OPINION

This proposed advisory opinion is only an interpretation of the law and does not constitute final court action.

May 15, 2013

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").[1]

The petitioner sought confirmation that the activities found to be the unlicensed practice of law in the *1996 opinion* (*The Florida Bar re: Advisory Opinion – Activities of Community Association Managers,* 681 So. 2d 1119 (Fla. 1996)) continue to be the unlicensed practice of law. Those activities (hereinafter "1996 opinion") include the following:

A. drafting of a claim of lien and satisfaction of claim of lien;

B. preparing a notice of commencement;

C. determining the timing, method, and form of giving notices of meetings;

D. determining the votes necessary for certain actions by community associations;

E. addressing questions asking for the application of a statute or rule; and

F. advising community associations whether a course of action is authorized by statute or rule.

[1] Although the request for opinion addresses CAMS specifically, the Standing Committee's opinion would apply to the activities of any nonlawyer.

The petitioner also asked if it was the unlicensed practice of law for a CAM to engage in any of the following activities (hereinafter "2012 request"):

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 members;

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 718.1255, Fla.

Stat.;

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.

Pursuant to Rule 10-9.1(f) of the Rules Regulating The Florida Bar, public notice of the hearing was provided on The Florida Bar's website, in The Florida Bar *News*, and in the *Orlando Sentinel*. The Standing Committee held a public hearing on June 22, 2012.

Testifying on behalf of the petitioner was 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. In addition to the petitioner, the Standing Committee received testimony from Mitchell Drimmer, a CAM; Jeffrey M. Oshinsky, General Counsel of Association Financial Services, a licensed collection agency; Andrew Fortin,

Vice-President of Government Relations for Associa, a community management company; Kelley Moran, Vice-President of Rampart Properties and a CAM; Robert Freedman, an attorney; Erica White, prosecuting attorney for the Regulatory Council of Community Association Managers located within the Department of Business and Professional Regulation; Jane Cornett, an attorney; Tony Kalliche, Executive Vice-President and general counsel for the Continental Group, a community association management firm; David Felice, an attorney, a CAM, and owner of a community association management firm; Christopher Davies, an attorney; Brad van Rooyen, Executive Director of the Chief Executive Offices of Management Companies; Victoria Laney; Alan Garfinkel, an attorney; and Michael Gelfand, an attorney. There were also several individuals present to observe the hearing.

In addition to the testimony presented at the hearing, the Standing Committee received written testimony which has been filed with this Court. Included in the written testimony was a form petition that was submitted by hundreds of homeowner and condominium associations. As the petitions are substantially the same, only one has been filed with the Court as part of the written testimony. By and large the testimony reflects the belief that the previous guidance provided by the Court in its *1996 opinion* provides adequate guidance in this area and another opinion is not necessary. The testimony also reflected their

concerns that too much regulation in this area will raise the cost of living in these communities and could potentially have a serious financial impact on community associations, property owners, and CAMS.

BACKGROUND

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. Written testimony of Dr. Anthony Spivey, Tab B. 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. There are over 18,500 individuals and over 1600 businesses licensed as CAMS in Florida. Written testimony of J. Layne Smith, Tab C.

1996 Opinion

When the Court considered the activities of CAMS in 1996, it relied on *Sperry*[2] to determine what activity constitutes the practice of law:

[2] *The Florida Bar v. Sperry*, 140 So. 2d 587, 597 (Fla. 1962), *vacated on other*

> [I]n 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.[3]

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.[4] 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.[5] As the opinion noted, failure to complete or prepare these forms accurately could result in serious legal and financial harm to the property owner.[6] Thus, the Court found the following activities when performed by a CAM would constitute

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grounds, 373 U.S. 379 (1963).
[3] *Id.*
[4] *1996 opinion* at 1123.
[5] *Id*. At 1123.
[6] *Id*.

the unlicensed practice of law:

- completing BPR Form 33-032 (frequently asked questions and answers sheet);
- drafting a claim of lien, satisfaction of claim of lien, and notice of commencement form;
- determining the timing, method and form of giving notice of meetings;
- determining the votes necessary for certain actions which would entail interpretation of certain statutes and rules; and
- answering a community association's question about the application of law to a matter being considered or advising a community association that a course of action may not be authorized by law, rule, or the association's governing documents.

The Standing Committee and Court found that those activities that were ministerial in nature and did not require significant legal expertise and interpretation or legal sophistication or training did not constitute the practice of law.[7] The Court found that the following activities when performed by a CAM would not constitute the unlicensed practice of law:

- completion of two Secretary of State forms (change of registered

[7] *Id.*

agent or office for corporations, and annual corporation report),

- drafting certificates of assessments,
- drafting first and second notices of date of election,
- drafting ballots,
- drafting written notices of annual or board meetings,
- drafting annual meeting or board meeting agendas, and
- drafting affidavits of mailing.

The Standing Committee and Court found that other activities existed in a more grey area and whether or not they constituted the unlicensed practice of law would depend on the specific factual circumstances.[8] The Court found the following activities to be dependent on the specific circumstances:

- modification of limited proxy forms promulgated by the state
- drafting a limited proxy form, and
- drafting documents required to exercise the community association's right of approval or right of first refusal on the sale or lease of a parcel

The Court found that modification of limited proxy forms promulgated by the State that involved ministerial matters could be performed by a CAM.[9] The Court found the following modifications to be ministerial matters:

[8] *Id* at 1122.
[9] *Id* at 1124.

- 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.[10]

For more complicated modifications, the Court found that an attorney must be consulted.

Regarding the drafting of a limited proxy form, the Court found that those items which were ministerial in nature, such as filling in the name and address of the owner, do not constitute the practice of law. But if drafting of an actual limited proxy form or questions in addition to those on the preprinted form is required, the CAM should consult with an attorney.[11]

The Court also found that the drafting of documents required to exercise a community association's right of approval or first refusal to a sale or lease may require the assistance of an attorney, since there could be legal consequences to the

[10] *Id.*
[11] *Id.*

decision.[12] Although CAMS may be able to draft the documents, they cannot advise the association as to the legal consequences of taking a certain course of action.[13]

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. The Standing Committee also felt that activities that were not addressed in 1996 should be addressed using the *1996 opinion* as guidance.

2012 Request

Petitioner's request set forth 14 activities. Each activity will be addressed.

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;

In the *1996 opinion* the Court found that the preparation of certificates of

[12] *Id*.
[13] *Id*.

assessments were ministerial in nature and did not require legal sophistication or training. Therefore, it was not the unlicensed practice of law for a CAM to prepare certificates of assessments.

None of the oral or written testimony provided a compelling reason why these certificates of assessment would warrant different treatment from those previously addressed by the Court in the *1996 opinion*. Thus, it is the opinion of the Standing Committee that a CAM's preparation of these documents would not constitute the unlicensed practice of law.

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 members;

In the *1996 opinion*, the Court held that the drafting of documents which determine substantial rights is the practice of law. The governing documents set forth above determine substantial rights of both the community association and property owners. Consequently, under the *1996 opinion*, the preparation of these documents constitutes the unlicensed practice of law.

Further, in *The Florida Bar v. Town*, 174 So. 2d 395 (Fla. 1965), the Court held that a nonlawyer may not prepare bylaws, articles of incorporation, and other documents necessary to the establishment of a corporation, or amendments to such documents. Amendments to a community association's declaration of covenants, bylaws, and articles of incorporation can be analogized to the corporate documents

discussed in *Town*. Therefore, it is the opinion of the Standing Committee that the Court's holding in the *1996 opinion* should stand and nonlawyer preparation of the amendments to the documents would constitute the unlicensed practice of law.

5. Determination of number of days to be provided for statutory notice;

In the *1996 opinion*, the Court found that determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes, administrative rules, governing documents, and rules of civil procedure and that such interpretation constitutes the practice of law. Thus, if the determination of the number of days to be provided for statutory notice requires the interpretation of statutes, administrative rules, governing documents or rules of civil procedure, then, as found by the Court in 1996, it is the opinion of the Standing Committee that it would constitute the unlicensed practice of law for a CAM to engage in this activity. If this determination does not require such interpretation, then it would not be the unlicensed practice of law.

6. Modification of limited proxy forms promulgated by the State;

In the *1996 opinion*, the Court found that the modification of limited proxy forms that involved ministerial matters could be performed by a CAM, while more complicated modifications would have to be made by an attorney.[14] The Court found the following to be ministerial matters:

[14] *Id*.

- 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.[15]

For more complicated modifications, the Court found that an attorney must be consulted. The *1996 opinion* did not provide any examples of more complicated modifications which would require consultation with an attorney. The Standing Committee believes this activity requires further clarification by example.

Using the examples given by the Court, the types of questions that can be modified without constituting the unlicensed practice of law do not require any discretion in the phrasing. For example, the sample form provided by the state has the following question: "Do you want to provide for less than full funding of reserves than is required by § 718.112(2)(f), Florida Statutes, for the next fiscal/calendar year? _____ YES _____ NO." There is no discretion

[15] *Id*.

regarding the wording, it is a yes or no question. The question could be reworded as follows: " Section 718.112(2)(f), Florida Statutes discusses funding of reserves. Do you want to provide for less than full funding of reserves than is required by the statute for the next fiscal/calendar year? _____ YES _____ NO." It is still a yes or no question. As no discretion is involved, it does not constitute the unlicensed practice of law to modify the question.

On the other hand, if the question requires discretion in the phrasing or involves the interpretation of statute or legal documents, the CAM may not modify the form. After the above question regarding the reserves the form states "If yes, vote for one of the board proposed options below: (The option with the most votes will be the one implemented.) LIST OPTIONS HERE." Listing the options would be a modification of the form. If what to include in the list requires discretion or an interpretation of statute, an attorney would have to be consulted regarding the language and the CAM could not make a change. For example, §718.112(f) has language regarding when a developer may vote to waive the reserves. The statute discusses the timing of the waiver and under what circumstances it may occur. As a question regarding this waiver requires the interpretation of statute, a CAM could not modify the form by including this question without consulting with a member of The Florida Bar. As found in the *1996 opinion*, making such a modification would constitute the unlicensed practice of law.

7. Preparation of documents concerning the right of the association to approve new prospective owners;

In the *1996 opinion*, the Court found that drafting the documents required to exercise a community association's right of approval or first refusal to a sale or lease may or may not constitute the unlicensed practice of law depending on the specific factual circumstances. It may require the assistance of an attorney, since there could be legal consequences to the decision. Although CAMs may be able to draft the documents, they cannot advise the association as to the legal consequences of taking a certain course of action. Thus, the specific factual circumstances will determine whether it constitutes the unlicensed practice of law for a CAM to engage in this activity.

This finding can also be applied to the preparation of documents concerning the right of the association to approve new prospective owners. While there was no testimony giving examples of such documents, the Court's underlying principal that if the preparation requires the exercise of discretion or the interpretation of statutes or legal documents, a CAM may not prepare the documents.[16] For example, the association documents may contain provisions regarding the right of first refusal. Preparing a document regarding the approval of new owners may require an interpretation of this provision. An attorney should be consulted to ensure that the language comports with the association documents. On the other

[16] *Id* at 1123.

hand, the association documents may contain a provision regarding the size of pets an owner may have. Drafting a document regarding this would be ministerial in nature as an interpretation of the documents is generally not required.

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;

In the *1996 opinion*, the Court found that determining the votes necessary to take certain actions – where the determination would require the interpretation and application both of condominium acts and of the community association's governing documents – would constitute the practice of law. Thus, if these determinations require the interpretation and application of statutes and the community association's governing documents, then it is the opinion of the Standing Committee that it would constitute the unlicensed practice of law for a CAM to make these determinations. If these determinations do not require such interpretation and application, it is the opinion of the Standing Committee that they would not constitute the unlicensed practice of law.

10. Drafting of pre-arbitration demand letters required by 718.1255, Fla. Stat.;

Under Section 718.1255, Fla. Stat., prior to filing an action in court, a party to a dispute must participate in nonbinding arbitration. The non-binding arbitration is before the Division of Florida Condominiums, Time Shares, and Mobile Homes (hereinafter "the Division"). Prior to filing the petition for arbitration with the

Division, the petitioner is required to serve a pre-arbitration demand letter on the respondent, providing:

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 the dismissal of the petition without prejudice.

In the *1996 opinion*, the Court found that if the preparation of a document requires the interpretation of statutes, administrative rules, governing documents, and rules of civil procedure, then the preparation of the documents constitutes the practice of law. It is the opinion of the Standing Committee that the preparation of a pre-arbitration demand letter would not require the interpretation of the above-referenced statute. The statutory requirements appear to be ministerial in nature, and do not appear to require significant legal expertise and interpretation or legal sophistication or training. Consequently, the preparation of this letter would not satisfy the second prong of the *Sperry* test, which requires that the person providing the service possess legal skill and a knowledge of the law greater than that possessed by the average citizen. For these reasons, it is the opinion of the

Standing Committee that the preparation of a pre-arbitration demand letter by a CAM would not constitute the unlicensed practice of law.

Moreover, an argument can be made that the activity, even if the practice of law, is authorized. As noted in the Petitioner's March 28, 2012, letter, the Division has held that the statute does not require an attorney to draft the letter. Formal Advisory Opinion request, Tab A. In *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980), the Court held that the legislature could oust the Supreme Court's authority to protect the public and authorize a nonlawyer to practice law before administrative agencies. As the Division of Florida Condominiums, Time Shares, and Mobile Homes has held that a nonlawyer may prepare the letter, the activity is authorized and not the unlicensed practice of law.

11. Preparation of construction lien documents (e.g. notice of commencement, and lien waivers, etc.);

In the *1996 opinion*, the Court found that the drafting of a notice of commencement form constitutes the practice of law because it requires a legal description of the property and this notice affects legal rights. Further, failure to complete or prepare this form accurately could result in serious legal and financial harm to the property owner.[17]

While the *1996 opinion* did not specifically address the preparation of lien waivers, the *1996 opinion* found that preparing documents that affect legal rights

[17] *Id* at 1123.

constitutes the practice of law. A lien waiver would certainly affect an association's legal rights. Further, as suggested by one of the witnesses, the area of construction lien law is a very complicated and technical area. Tr., p. 40, l. 10-19, Tab D. Therefore, it is the Standing Committee's opinion that the preparation of construction lien documents by a CAM would constitute the unlicensed practice of law.[18]

12. Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.;

In the *1996 opinion*, the Court found that the preparation of documents that established and affected the legal rights of the community association was the practice of law. Further, in *Sperry*, the court found the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, was the practice of law. Thus, it is the Standing Committee's opinion that it constitutes the unlicensed practice of law for a CAM to prepare such contracts for the community association.

13. Identifying, through review of title instruments, the owners to receive pre-lien letters;

The testimony on this subject was mixed. Some witnesses felt that this

[18] *In re Advisory Opinion – Nonlawyer Preparation of Notice to Owner and Notice to Contractor*, 544 So. 2d 1013 (Fla. 1989). the Court held that it was not the unlicensed practice of law for nonlawyers to complete notice to owner and preliminary notice to contractor forms under the mechanic's lien laws so those forms are not included in the current opinion.

activity was ministerial and would not be the unlicensed practice of law (Written testimony of Jeffrey M. Oshinsky, Tab E, Mark R. Benson, Tab F, and R. L. Reimer, Tab G), while others thought that this would constitute the unlicensed practice if performed by a CAM (Written testimony of Nicholas F. Lang, Shawn G. Brown, and Emily L. Lang, Tab H). However, none of the testimony defined what was meant by identifying the owners to receive pre-lien letters.

It is the opinion of the Standing Committee that if the CAM is only 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. This determination goes beyond merely identifying owners. It requires a legal analysis of who must receive pre-lien letters. Making this determination would constitute the unlicensed practice of law.

14. Any activity that requires statutory or case law analysis to reach a legal conclusion.

In the *1996 opinion* the Court found that it constituted the unlicensed 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. The court found that this amounted to nonlawyers giving legal advice and answering specific legal questions, which the court specifically prohibited in *The Florida Bar v. Raymond James & Assoc.*, 215 So. 2d 613 (Fla. 1968) and *Sperry*.

Further, in *The Florida Bar v. Warren*, 655 So. 2d 1131 (Fla. 1995), the Court held that it constitutes the unlicensed practice of law for a nonlawyer to advise persons of their rights, duties, and responsibilities under Florida or federal law and to construe and interpret the legal effect of Florida law and statutes for third parties. In *The Florida Bar v. Mills*, 410 So. 2d 498 (Fla. 1982), the Court found that it constitutes the unlicensed practice of law for a nonlawyer to interpret case law and statutes for others.

Thus, it is the Standing Committee's opinion that it would constitute the unlicensed practice of law for a CAM to engage in activity requiring statutory or case law analysis to reach a legal conclusion.

CONCLUSION

The findings of the Court in *The Florida Bar re: Advisory Opinion – Activities of Community Association Managers*, 681 So. 2d 1119 (Fla. 1996) should not be disturbed and answer many of the questions posed by the Petitioner. Areas which required clarification have been clarified by way of example using the *1996 opinion* as guidance. Similarly, activities that were not addressed in 1996 are

addressed using the *1996 opinion* and other case law as guidance. This proposed advisory opinion is the Standing Committee on Unlicensed Practice of Law's interpretation of the law.

Respectfully Submitted,

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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

VIA FEDERAL EXPRESS

March 28, 2012

Standing Committee on the Unauthorized Practice of Law
of The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Re: Unauthorized Practice of Law Concerns for the Benefit of Florida's Citizenry & Activities that Should Constitute the Practice of Law Submitted Pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar

Dear Members of the Standing Committee on the Unauthorized Practice of Law:

As the Chair and on behalf of the Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section"), I am sending you this request for an advisory opinion from the Florida Bar's Standing Committee on the Unauthorized Practice of Law (the "UPL Standing Committee") to determine whether certain activities constitute the unauthorized practice of law when performed by Community Association Managers. The Section's primary concern in raising these issues is the protection of the public.

The RPPTL Section identifies in this request certain activities occasioned by changes in Florida law which we believe your Committee has not previously considered, and we seek your guidance as to whether those activities constitute the unauthorized practice of law. In addition, the Section identifies in this request additional activities which we believe your Committee and the Supreme Court of Florida have previously considered, and we seek your confirmation that these actions continue to constitute the unlicensed practice of law.

We believe that clarification of these issues will serve to protect the public interest, will reduce harm to the public, and will supply needed clarification to board members, managers and attorneys involved in the area of community association law.

The last time some of these issues were fully reviewed by this Committee or by the Florida Supreme Court was in 1996 when the Court affirmed the proposed opinion of the Committee in The Florida Bar re: Advisory Opinion-Activities of Community Association Managers, 681 So.2d 1189 (Fla. 1996). Since that time there have been numerous revisions, year after year, to the chapters of Florida Statutes relevant to the operation of community associations and the licensing and conduct of community association management including, but not limited to, Chapters 718, 719, 720, 723, 617, and 468, Florida Statutes.

The Court's 1996 opinion determined that the following constituted the practice of law: i) drafting a claim lien; drafting a satisfaction of lien; ii) preparing a notice of commencement; iii) determining the timing, method and form of giving notices of meetings; iv) determining the votes necessary for certain actions by community associations; v) addressing questions asking for the application of a statute or rule; and vi) advising community associations whether a course of action is authorized by statute or rule. The Court further identified a "grey area" which involved activities that may or may not constitute the practice of law depending upon the relevant facts.

I. EXISTING ACTIVITY THAT CONSTITUTES THE UNLICENSED PRACTICE OF LAW INCLUDES OF PREPARATION OF CLAIM OF LIEN (AS SHOULD ALL SIMILAR ACTIVITY).

The Supreme Court has already determined that the preparation of a claim of lien for unpaid assessments is the practice of law. *The Florida Bar Re: Advisory Opinion-Activities of Community Association Managers,* 681 So.2d 1119 (Fla. 1996). Preparation of a claim of lien for unpaid association assessments is not merely a ministerial or secretarial act. If a non-lawyer prepares an association assessment lien, then the non-lawyer is engaged in the practice of law.

Yet, most collection activities are resolved long prior to the lien stage and no one is ensuring such charges are being tabulated in accordance with Florida law. Although there is no comprehensive definition of what constitutes the unlicensed practice of law, the courts consistently cite State ex rel. Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962) for guidance. See also The Florida Bar v. Neiman, 816 So.2d 587, 596 (Fla. 2002); The Florida Bar Re: Advisory Opinion Activities of Community Association Managers, 681 So.2d 1119 (Fla. 1996); The Florida Bar RE: Advisory Opinion-Non lawyer Preparation of Notice to Owner and Notice to Contractor, 544 So.2d 1013, 1016 (Fla. 1989); The Florida Bar v. Moses, 380 So.2d 412, 414 (Fla. 1980); The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1191 (Fla. 1978).

> "It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also ***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." *Sperry,* 140 So.2d at 591 (emphasis added).

The reason for prohibiting the practice of law by those who have not been examined and found qualified is "to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." Brumbaugh at 1189 (citing Sperry at 595).

The Supreme Court held that community association managers ("CAMs") who draft documents requiring the legal description of property or establishing rights of community associations, draft documents requiring interpretations of statutes and various rules, or give advice as to legal consequences of taking certain courses of action engage in the unlicensed practice of law. See Advisory Opinion-Activities of Community Association Managers.

As the Court noted, CAMs are licensed through the Department of Business and Professional Regulation's Bureau of Condominiums and require substantial specialized knowledge of condominium law and fulfill continuing education requirements. *Id.* at 1122. Additionally, the Court recognized that "CAM's are specially trained in the field of community association management." *Id.* at 1124. Notwithstanding CAMs' licensure and specialized training, the Court held that drafting a claim of lien must be completed with the assistance of a licensed attorney. *Id.* at 1123.

> "Drafting both a claim of lien and satisfaction of claim of lien requires a legal description of the property; it establishes rights of the community association with respect to the lien, its duration, renewal information, and action to be taken on it. The claim of lien acts as an encumbrance on the property until it is satisfied. ***Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney."*** ***Id.*** at 1123 (Emphasis added).

Similarly, applying the Court's logic to other community association activities, requires that only lawyers perform certain tasks.

By way of example, and often overlooked, to properly prepare a claim of lien, one must perform the following activity:

1) Interpret Section 718.116, Florida Stats. (or Section 720.3085, as appropriate);

2) Review the Declaration of Condominium (or Declaration of Restrictions, as appropriate);

3) Determine the relative rights of the association and owners regarding interest rates;

4) Determine if the association has the authority to charge late fees;

5) Determine the application of payments received per 718.116 or 720.3085, as applicable;

6) Determine any obligation to take payments;

7) Identify the record title holders;

8) Consider the application of Bankruptcy law and Fair Debt Collections Practices Act;

9) Interpret the delivery requirements and notice requirements for pre-lien letters;

10) Determine if fines, estoppel charges and other charges are both collectable and lienable;

11) Analyze the legal sufficiency of legal defenses and counterclaims of owners; and

12) Additionally, if one is collecting from a bank that is taking title, one must review the Declaration for Kaufman language (see Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), analyze lien priority issues, interpret Florida case law regarding joint and several liability issues, analyze unconstitutional impairment of contract rights issues under the recently-decided cases Coral Lakes v. Busey Bank, N.A., 30 So. 2d 579 (Fla. 2d DCA 2010) and Cohn v. The Grand Condominium Association, Inc., -- So. *3d* (No. SCIO-430, March 31, 2011), as well as conduct a third party taking title analysis under Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Assn., 895 So. 2d 1197 (Fla. 4th DCA 2005).

II. The Drafting Of The Pre-Arbitration Demand Letter Required By s. 718.1255.

The drafting of pre-arbitration letters should be considered the practice of law as it involves the interpretation of various statutes, and the application of those statutes to specific facts. The drafting of statutorily required pre-arbitration letters is complicated, even for lawyers. Section 718.1255, Florida Statutes, describes the "Mandatory Nonbinding Arbitration Program" administered by the Division of Florida Condominiums, Time Shares and Mobile Homes (the "Division"). Under section 718.1255(4)(b), Florida Statutes, prior to filing a petition for arbitration with the Division, the petitioner is required to serve a pre-arbitration demand letter on the respondent, providing advance written notice of the nature of the dispute, making a demand for specific relief, allowing the respondent a reasonable opportunity to comply, and stating an intent to file a petition for arbitration or other legal action if the demand is not met with compliance.

This particular issue is quite germane to the instant matter. By way of background, and not too long ago, a Division arbitrator held that because the law did not specifically provide an activity was the practice of law, such activity was not required to be performed by a lawyer. In Dania Chateau De Ville Condo Association v. Zalcberg, Arb. Case No. 2009-04-0877 (Whitsitt/Final Order of Dismissal/August 17, 2009), the Division arbitrator held, in relevant part, that

> "a pre-arbitration demand notice which demanded attorney's fees for the act of writing the demand letter was ineffective under the statute. There is no

requirement that an attorney prepare the letter and the statute does not authorize its inclusion into the demand letter."

A summary of the Division's arbitration decisions that evidence the legal complications surrounding all aspects of the statutorily required pre-arbitration letters all but demand such activities must be carried out by lawyers. A brief summary of several such cases follows:

1) Pre-arbitration demand letter which demands immediate removal of dog did not provide the unit owner with a reasonable opportunity to comply with the demand, and was insufficient statutory notice. Petition dismissed. Brickell Place Condominium Association v. Sanz, Arb. Case No. 2010-06-1240 (Campbell/ Final Order of Dismissal/ December 15, 2010).

2) Pre-arbitration demand requiring removal of trash on the outside patio within 7 days provides a reasonable opportunity for compliance. However, where letter simply provided that the failure to remove the trash would result in maintenance personnel moving it, letter did not put the owner on notice of impending legal action. Belmont at Park Central Condominium Association v. Levy, Arb. Case No. 2011-00-6468 (Lang/ Order Requiring Proof of Pre-Arbitration Notice/ February 11, 2011).

3) Where pre-arbitration demand letter in case where a tenant kept a prohibited dog provided that the failure to correct the problem would result in eviction along with all legal fees, or other legal action, since eviction is not available in arbitration, the letter failed to advise that arbitration would be pursued and the notice was inadequate under the statute. It was unclear in the letter whether the tenant or the dog would be evicted. Case dismissed. Biscayne Lake Gardens v. Enituxia Group, Arb. Case No. 2010-02-8314 (Lang/ Final Order of Dismissal/ July 1, 2010).

4) It is improper and contrary to the statute for the pre-arbitration demand notice to incorporate a demand for the payment of attorney's fees. Bixler v. Gardens of Sabel Palm Condo, Arb. Case No. 2010-03-1915 (Chavis/ Order to Amend Petition/ July 1, 2010).

5) Where the governing documents prohibited any dogs, pre-arbitration demand letter which offered to permit the owner to keep one illegal dog while removing other dog claimed to be a service animal and requiring a payment of $9,812 in attorney's fees to the association does not provide the unit owner with a reasonable opportunity to comply with the documents and was not a valid pre-arbitration demand letter. Boca View Condo Association v. Kowaleski, Arb. Case No. 2010-02-2907 (Chavis/ Order to Show Cause/ May 7, 2010).

6) Pre-arbitration demand notice which demanded $300 did not comply with the statute. Coach Houses of Town Place Condominium Association v. Koll, Arb. Case No. 2011-01-0234 (Lang/ Order to Show Cause/ March 9, 2011).

7) Pre-arbitration demand letter requirement is not a mere perfunctory step taken before a petition for arbitration is filed. Demand letter sent the same day as the mailing of the petition for arbitration did not afford respondents a reasonable opportunity to comply by providing the relief requested. Collonade Condominium Association v. Shore, Arb. Case No. 2010-01-1460 (Slaton/ Order to Show Cause/ October 15, 2010).

8) Posting a demand notice by attaching a copy of it to an unspecified place on the condominium property will not be considered adequate delivery of the notice. Decoplage Condo Association v. Abraham, Arb. Case No. 2009-041016.

9) Pre-arbitration demand notice that contained fair debt disclosure gives the impression that the letter was a debt collection effort instead of an enforcement effort. Case dismissed for lack of pre-arbitration notice. Eagles Point Condominium Association, Inc. v. Debelle, Arb. Case No. 2011-028477 (Jones/ Order to Show Cause/ June 16, 2011).

10) Where association did not name a co-owner of the unit as a respondent and did not evidently serve pre-arbitration notice on the co-owner, association ordered to show cause why the petition should not be dismissed. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Order to Show Cause/ February 16, 2010).

11) Petition dismissed for failure to join co-owner notwithstanding argument that the co-owner had failed to notify the association upon his acquisition of an interest in the unit in violation of the documents. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Final Order Dismissing Petition/ March 5, 2010).

12) Where association had knowledge that Jake the golden retriever had been "conveyed" to two individuals, "as joint owners, with right of survivorship," the failure to join both individuals and to provide pre-arbitration notice to each putative owner rendered the petition for arbitration, defective. Grove Island Association, Inc. v. Frumkes, Arb. Case No. 2011-01-1343 (Jones/ Final Order of Dismissal/ May 4, 2011).

13) Where pre-arbitration notice was addressed to "Terraind Gulf Drive" instead of the correct address Terrain de Golf Drive and where there was no proof that the pre-arbitration notice was actually received, the case was dismissed. Heatherwood Condominium Association of East Lake, Inc. v. Carollo, Arb. Case No. 2011-01-1495 (Lang/ Final Order of Dismissal/ June 20, 2011).

While this list of relevant decisions clearly evidences the need to ensure the pre-arbitration letters are drafted by lawyers, there are at least twenty more cases decided in the past two years that can be cited to illustrate this point. The need for clarification is *particularly important* because, as previously explained, the Division has specifically held in a final order that the statute does not require an attorney to draft this very important letter. As a result, non-

lawyers have accepted the Division's invitation and have begun producing these letters. It is very likely the public will be harmed because the letters will be rejected, and the petition for arbitration will be dismissed, resulting in a delay in the enforcement of the community documents and ultimately leads to increased legal expense by those who can afford it the least.

III. Other Activity That Should Constitute The Practice of Law.

There are other activities that go far beyond mere ministerial acts and are illustrative as the performance of services that can only be described as the practice of law. Determining "rights" under Florida statutes is most definitely the practice of law. Further, many of these activities generate fees, presumably, collected from unit owners or the association. Under what legal authority is the non-lawyer charging and collecting from condominium unit owners or homeowners' association parcel owners more than assessments, interest, late charges, costs and attorneys fees?

Each of the following activities should be clarified as an activity that can be performed for a Community Association only by a lawyer:

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 members.

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 quorum.

10) Drafting of pre-arbitration demands (see above).

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.

14) Any activity that requires statutory or case law analysis to reach a legal conclusion.

With the aforementioned in mind and pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar, the UPL Standing Committee may issue proposed formal advisory opinions concerning activities which may constitute the unlicensed practice of law. The RPPTL Section kindly requests that the UPL Standing Committee do so as noted herein.

IV. Final Considerations.

Simply put, many attorneys find they are devoting more and more resources responding to the types of issues noted in this request that would not have occurred, but for what appears to be the continued rendering of legal advice by non-lawyers.

With few exceptions, there remains great uncertainty as to which specific activities when performed by Community Association Managers, constitute the unlicensed practice of law. To provide greater clarity and protection of the public, we believe it is incumbent upon the UPL Standing Committee of The Florida Bar to bring these issues to the Supreme Court of Florida for the Court's consideration.

Very Truly Yours,

George J. Meyer, Chair
Real Property, Probate and Trust Law Section

Florida Department of
Business & Professional
Regulation

Division of Professions
Regulatory Council of Community Association Managers
1940 North Monroe Street
Tallahassee, Florida 32399-1040
Phone: 850.717.1982 • Fax: 850.921.2321

Ken Lawson, Secretary

Rick Scott, Governor

July 31, 2012

The Florida Bar
Standing Committee on the Unauthorized Practice of Law
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Response to the March 28, 2012 Request for an Advisory Opinion Regarding Certain Activities Performed by Community Association Managers Submitted by the Real Property, Probate & Trust Law Section of The Florida Bar

Dear Members of the Standing Committee on the Unauthorized Practice of Law:

My name is Dr. Anthony Spivey, and I am the Executive Director of the Regulatory Council of Community Association Managers (CAMS). CAMS and CAM Firms are licensed through the Department of Business and Professional Regulation (DBPR), Division of Professions, pursuant to. Chapter 468 – Part VIII (Sections 468.431 – Section 468.438, Florida Statutes), which provides the statutory authority governing CAMS, and Florida Administrative Code Chapters 61E14 and 61-20, which contains the administrative rules implementing the statutory provisions.

1996 FLORIDA SUPREME COURT DECISION

The DBPR has reviewed the 1996 Florida Supreme Court decision referenced by the Real Property, Probate & Trust Law Section, and agrees with the holding of the Court regarding the activity of CAMS. Based on our review of The Florida Bar re: Advisory Opinion – Activities of Community Association Managers, 681 So.2d 1189 (Fla. 1996), the Supreme Court made the following determinations with respect to CAMS:

- Ministerial actions taken by licensed CAMS which do not require significant legal expertise and interpretation do not constitute the unauthorized practice of law;
- CAMS can complete Secretary of State forms or change of registered agent or office for corporations and for annual corporation reports;
- CAMS can draft certificates of assessments, first and second notices of date of election, ballots, written notices of annual meeting, annual meeting or board meeting agendas and affidavits of mailing.

- CAMS should not complete BPR Form 33-032 because it requires the interpretation of community association documents and requires the assistance of an attorney. Note: Subsequent updates which do not modify the form can be completed without the assistance of an attorney.

- CAMS should not complete a claim of lien and satisfaction of claim of lien because of the substantial legal rights which are determined by these documents, the drafting of which must be completed with the assistance of a licensed attorney.

- CAMS should not draft a Notice of Commencement form because this notice affects legal rights, and failure to properly prepare this form accurately could result in serious and financial harm to the property owner.

- Determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes, administrative rules, governing documents and Rule 1.090(a) and (e) of the Florida Rules of Civil Procedure; accordingly, such interpretation constitutes the practice of law. CAMS should not engage in this activity.

- Determining the votes necessary to take certain actions – where the determination would require the interpretation and application both of condominium acts and of the community associations governing documents, also constitutes the practice of law. CAMS should not engage in this activity.

- CAMS should not 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. This amounts to non-lawyers giving legal advice, and answering specific legal questions, and clearly constitutes the practice of law.

- CAMS may perform ministerial functions relating a limited proxy form, such as filling in the name and address on a preprinted form; however, the drafting of an actual limited proxy form or answering questions in addition to those on the preprinted form should be handled by an attorney.

- CAMS may draft the documents required to exercise the community association's right of approval or first refusal to a sale or lease, with the assistance of an attorney, since there could be legal consequences to the decision; however, CAMS cannot advise the association as to the legal consequences of taking a certain course of action.

law. Section 468.431(2), Florida Statutes, provides that a CAM may engage in "other day-to-day services involved with the operation of a community association", and the above-referenced actions could be included as part of those "other day-to-day services".

#5. Determination of number of days to be provided for statutory notice.

#8. Determination of owner's votes needed to establish quorum.

#9. Determination of affirmative votes needed to pass a proposition or amendment to recorded documents.

Reasoning: CAMS are also very involved in communicating with Association members and the Association's elections process. Frequently, CAMS also conduct and/or run Association elections. Accordingly, above-referenced requests by the RPPTL to designate certain activities as the unlicensed practice of law, are concerning to the Department. Therefore, DBPR objects to the designation of these activities as being the unlicensed practice of law, because an attorney is not necessarily needed to perform these activities. Also, the description of the above-referenced activity is too vague, and could be open to interpretation regarding how the "determination" of owner's votes could be reached (i.e. – what if the Association determined how many votes were needed?).

#11 Designating the drafting of pre-arbitration letters by CAMS as the unlicensed practice of law.

Reasoning: The DBPR Division of Condominiums, Timeshares and Mobile Homes has specifically held in Final Orders that Florida Statute does not require an attorney to draft a pre-arbitration letter. Accordingly, the DBPR objects to the designation of this activity as being the unlicensed practice of law,

#7. Preparation of documents concerning the right of the Association to approve new or prospective owners.

#12. Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts.

Reasoning: CAMS often execute a variety of contracts on the behalf of an Association, to include maintenance, cable and construction contracts. Contracts are executed pursuant to the direction from the Association's Board of Directors, and CAMS are occasionally given the Power of Attorney to execute these contracts. Additionally, since the statute currently does not specifically prohibit this practice, the DBPR would object to the designation of this activity as being the unlicensed practice of law, because an attorney is not required to perform these type of activities.

DBPR RECOMMENDATIONS

Florida Administrative Code Chapter 61E14 provides for Pre-licensure Education and Continuing Education for CAMS and CAM Firm. DBPR is very willing to participate with other stakeholders, to include the RPPTL and the Division of Condominiums, Timeshares, and Mobile Homes, to ensure that all licensees are performing the necessary functions to benefit their Associations.

We appreciate the opportunity to provide commentary on this subject, and should you have any questions, please contact me at (850)717-1982 or our Prosecuting Attorney, C. Erica White at (850)717-1203.

Sincerely,

Dr. Anthony Spivey, DBA
Executive Director
Regulatory Council of Community Association Managers

Florida Department of
Business & Professional Regulation

Office of the General Counsel
J. Layne Smith, General Counsel
Professions Section
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Ken Lawson, Secretary

Rick Scott, Governor

September 11. 2012

The Florida Bar
Standing Committee on the
Unauthorized Practice of Law
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Request for an advisory opinion regarding certain activities performed by community association managers submitted by the Real Property, Probate & Trust Law Section of The Florida Bar

Dear Members of the Standing Committee on the Unauthorized Practice of Law:

My name is J. Layne Smith and I am General Counsel at the Department of Business and Professional Regulation. At the request of Brad Van Rooyen, I am forwarding the following information for your consideration:

1. On August 20, 2012, 18,511 individuals and 1,607 businesses were licensed as community association managers (CAMs); and
2. The Department's Office of the General Counsel (OGC) is responsible for administratively prosecuting CAMs' licensees. OGC cannot recall a CAM being accused of or prosecuted for the unlicensed practice of law.

Sincerely,

J. Layne Smith

Copy: Brad Van Rooyen

2011-2012

STANDING COMMITTEE ON UPL

FAO: #2012-2

IN RE:

The Florida Bar Request for Formal Advisory Opinion

Non-lawyer Assistance by Community Association Managers

Transcript of Proceedings held on Friday, June 22, 2012, commencing at 9:30 a.m., at the Gaylord Palms Resort & Convention Center, Sarasota 1 - 3 Room, 6000 West Osceola Parkway, Kissimmee, Florida, reported by Rita G. Meyer, RDR, CRR, CBC, CCP, Realtime Reporter and Notary Public, State of Florida at Large.

APPEARANCES:

LORI S. HOLCOMB, ESQUIRE
The Florida Bar - UPL Department
651 East Jefferson Street
Tallahassee, FL 32399

On behalf of the Florida Bar

COMMITTEE MEMBERS IN ATTENDANCE:

Mark J. Ragusa, Chairperson
Nancy M. Blount, Vice-Chairperson
Marcia Carrie Tabak, Vice-Chairperson
C.C. Abbott
William J. Banks
Carsandra Denyce Buie
Barbara Burke
Ghunise L. Coaxum
Barry M. Crown
Samantha S. Feuer
Dr. Rudolph J. Frei
Lawrence Gordon
Jeffrey M. Kolokoff
Gino Martone
Herbert Milstein
Nancy A. Murphy
A. Renee Pobjecky
Stephen J. Potter
Daniel J. Schevis
Martin J. Sperry

CHAIRPERSON: All right. At this time, I'm going to go ahead and open up the public hearing. It's 9:30, according to my watch. Hopefully, that's consistent.

I need to read a couple of preliminary statements as part of the public hearing process. The first is the immunity statement, and I will read this verbatim:

"During the time that this Committee is considering their questions by way of an advisory opinion, all investigations of community association managers will be held in abeyance. The files will remain open, but they will not be investigated. Any information which we learn at the hearing today through your testimony, will not be held against you. It will not be deemed an admission or evidence of unlicensed practice of law, and that information will not be sent to a circuit committee who may be investigating a case or a complaint.

This committee will not initiate an investigation to the activities of any organization or individual testifying today based solely on that testimony. However, if we receive a complaint on a specific incident, we will open a file. If we do not receive such a complaint and open a file, your

testimony will not be held against you; your testimony will not be deemed an admission or evidence of the unlicensed practice of law and it will not be sent to a circuit committee.

The reason for this ruling by the Chair is to encourage the full and candid testimony and disclosure of information so that this Committee can reach a determination on the issues."

We have a brief preliminary statement as well:

"This hearing is being held pursuant to Rule 10-9 of the rules regulating the Florida Bar. Pursuant to that rule, notice of this hearing was published in the Orlando Sentinel and the Florida Bar News. It was also posted on the Florida Bar's website."

The general question presented is whether certain activities, when performed by community association managers, constitute the unlicensed practice of law.

This hearing came about as a result of our receipt of a written request for a formal advisory opinion from the Petitioner, who is the Real Property, Probate and Trust law section of the Florida Bar. This standing Committee reviewed this request and voted to hold a public hearing. This

hearing is the initial action of the Committee and does not guarantee the issuance of an opinion.

Lori spoke briefly about the procedure for the hearing, but here is a reminder. The Petitioner, which is the Florida Bar section, will be the first to testify. They will be presenting evidence, through testimony and other materials, to start the public hearing. We will then take testimony from anyone who wishes to be heard.

If you wish to be heard, please sign up on the sign-up sheet outside. You will be given a chance to testify. The floor will be open up to the Committee members for questioning after or during the testimony of any witness.

As a formality, please identify yourself for the court reporter, providing simply your name; if you're here on behalf of an individual or entity or association, please tell us who that is along with the business address. If you have any written materials you want to provide to the Committee for consideration, please provide them to counsel, Lori Holcomb, who spoke earlier.

Your testimony will be limited in time, due to practical realities. This public hearing will close at 11:30. We have a full agenda in front of us and

we have a limited amount of time. If, for some reason, we cannot complete the testimony within that time period, we will address whether we will continue this hearing or take some other action which would allow the additional presentation of evidence. We do not want to curtail anyone's ability to provide testimony today, and we have also -- already received written materials as well.

We have to address any conflicts of interest amongst the Committee members. As a preliminary matter, I need to ask any members of the Committee to consider the question of conflict of interest. As you may be aware, Rule 10-9.1 (e) of the rules regulating the Florida Bar states:

"Committee members shall not participate in any matter in which they have either a material pecuniary interest that would be affected by the proposed advisory opinion or Committee recommendation or any other conflict of interest that should prevent them from participating. However, no action of the Committee will be invalid where full disclosure has been made and the Committee has not decided that the member's participation was improper."

At this time, I need to ask any member of the

Committee to indicate if they have anything they want to disclose on the Record, or otherwise indicate if they have a conflict.

Yes?

MR. MARTONE: I work for Bank Atlantic in Florida. I'm involved in the mortgage area of foreclosures. At times, we are adverse to HOAs as well as condo associations and other homeowner organizations, but nothing on point with this.

CHAIRPERSON: Do you believe you should be disqualified?

MR. MARTONE: No.

CHAIRPERSON: The Committee hearing the disclosure, does anybody believe that this member should be disqualified? And your name, please, identify for the Record. I'm sorry.

MR. MARTONE: Gino Martone.

UNIDENTIFIED SPEAKER: I can't hear.

CHAIRPERSON: Okay. Gino, you want to again advise what your disclosure was?

MR. MARTONE: Yes. I'm a non-attorney member who works for a bank in Fort Lauderdale, Florida. I work specifically with mortgages and foreclosures from time to time, and from time to time, we're adverse to condo associations and other homeowner

organizations.

CHAIRPERSON: Okay. Thank you.

MR. MARTONE: But nothing on point to what we're doing today.

CHAIRPERSON: Again, anybody have any questions with that disclosure?

(No Response)

CHAIRPERSON: Thank you.

We will ask witnesses to be sworn in prior to providing testimony. It is not mandatory. You do not have to be sworn in if you so select, but we would ask as a formality, that anyone wishing to testify, be sworn in. The court reporter will swear any witnesses in.

And again, from a procedural perspective, the Petitioner will go first. We will take people in the order, after the Petitioner and its one or two or more witnesses, present testimony. We will take testimony from anybody who has signed up. It probably, unless -- if we have the list -- in the order that you signed up. If you have any questions, let us know.

I suspect, at this point, this process will run orderly. That we will not have disruptions. We will not accept any banter back and forth between

anybody sitting here or on the Committee and a witness testifying.

The Committee will reserve the right to ask questions of anybody testifying for clarification or other purposes. I just want to avoid a situation where if you hear something you don't like, don't respond to the person testifying. I think everybody in here is a professional. I don't want this to turn into a kangaroo court. That's not what this is. This is a public hearing and I trust everybody in here will act professionally.

And with that -- I'm sorry. Yes, ma'am?

MS. TABAK: Yes, I'm Marcia Taback, Vice-Chair of this committee, and I have a couple of things to disclose.

First, I am deputy counsel to the Board of Realtors. Some realtors do hold CAM licenses. The position that I'm in, I don't advise CAMS on CAM matters, but I do advise realtors, I just want to make sure everybody is aware of that.

Secondly, I'm a member of the Real Property section of the Florida Bar, which brought this petition. And I have sat in Committee meetings where this has been discussed.

CHAIRPERSON: And knowing the rule, do you

think you have a conflict?

MS. TABACK: I do not think I have a conflict.

CHAIRPERSON: With that disclosure, does anyone on the Committee think that there's any type of a conflict?

(No Response)

CHAIRPERSON: Okay. Thank you, Marcia.

MS. BUIE: I'm Cassandra Buie and I am also a member of the Real Property Probate section. However, I do mostly probate law, in the area of probate law.

CHAIRPERSON: The three of you who have made full disclosures here, is there anything about the issues you gave disclosure on, that would in any way make it impossible or difficult for you to render an impartial opinion today?

MR. MARTONE: No.

MS. TABAK: No.

MS. BUIE: No.

CHAIRPERSON: No? Okay.

The court reporter has asked if you have a business card, as you come up to testify, if you could leave it with the court reporter. That will make life easier in preparing a record.

I will open it up to the Petitioner.

MR. MEZER: Morning, members of the Committee. My name is Steve Mezer. I'm an attorney with the Bush Ross law firm in Tampa. I'm here on behalf of the Petitioner. I'm the Chairman of the Condominium and Planning Development Committee, which is a committee of the Real Property Probate and Trust law section of the Florida Bar.

The Petitioner's presentation will be split into two portions. I'm going to give you some background information, placing the petition in its context. The actual substance will be given by attorney Scott Petersen, who will follow me.

The subject matter deals with community association property managers, meaning they manage community associations. Generally, that would include condominiums, which are governed by Florida Statutes Chapter 718; homeowners associations, which are governed by Chapter 720, timeshares and co-ops, to a lesser degree, in the State of Florida, but largely condominiums and homeowner's associations.

Each property is generally administered by a not-for-profit corporation governed by Chapter 617 of the Florida Statutes. Each one has a volunteer Board of Directors. Non-professional, non-trained individuals of various backgrounds, educations,

experiences, ages, attitudes and reliability. But they are all volunteers and they all have a fiduciary obligation to their membership. And it's important to keep in mind that we're dealing with peoples' homes. The largest, single investment most of them will have, and it's where they reside. And if they lose it, they lose a lot. If there's an injury to the home or to their title interest, it is a significant injury to the public.

In our practice, in my firm we have 900 associations that we represent, over 100,000 people -- in just one law firm in Tampa -- who are impacted by our practice. Most of the associations hire community association managers, and the association managers are licensed by the state under the Department of Business and Professional Regulation. There is a council of community association managers that governs the licensing.

In order to be a community association manager, you have to be eighteen years of age, good moral character, and you complete eighteen hours of pre-exam education. That's it. Then they take a test and they are licensed.

Each year they do a two-hour legal update. I'm a licensed provider for that education class.

Typically, it covers the statutory changes for the year. In other words, if there's a change in Chapter 718 or Chapter 720 or a change in the Florida Administrative Code, it's presented to the community association managers in two hours. There's no test, and then they leave.

After the class is given, we often get questions as to whether or not they fully understood, and candidly, it's not always perfect. But then again, it's not perfect for everybody. But that's the exposure to the law. No exposure to case law changes, no review of existing law. There have been laws that have been on the books since the 1960s. If you became a manager in 2011, you had to know basic understanding of that law, but there's no refresher ever again.

In 1996, the Florida Supreme Court took an opinion from this Committee and issued its decision. It's the Florida Bar, Re: Advisory Opinion, Activities Community Association Managers. It's a 1996 opinion at 681 So.2d. 1119. And it took many of the aspects of community association management and it divided them out into those things which do constitute the practice of law and those things which do not. And those things which do not were

typically ministerial things. Perhaps filling in a blank, taking a form and making something that was routine. And that was it. Everything else, because of the impact on the public, it would impact someone's rights, a decision to buy or sell property, their title, their home, was the unauthorized practice of law if it was engaged in by the property manager.

So we want to know a little bit about the background, and many of you may have received the responses. There were two that I saw. One is a form petition. One was a letter from one of the management companies, hopefully in your materials. They raised some of the points that are to be considered by the Committee. One is this form petition (indicating). We saw three of them. And it was interesting because two of them came from the Bonita Bay area and one came from Boca Raton. And they were virtually the identical, same font, same content, but across the state, and it's a form. And one of the issues for the Committee is the use of forms. And they used a form letter to respond to you.

But what's more important, one of the three that we received was signed by an entity, Hamptons

Community Association. So I went on the Secretary Of State's website, Division of Corporations to locate that entity. It doesn't exist. Not in that name. And this is part of the problem. Very simple. This gentleman, well meaning, did not even have the correct name of his entity. To the lawyers, we understand that's serious. To this gentleman, he, for whatever reason, took the short form. Candidly, as a practitioner, we see this all the time. I will get letterhead, business cards, contracts, titles to property that are not in the correct name of the entity.

Now, when this individual signs a contract in the name of Hampton's Community Association -- and for the Committee, I have the print out from the Secretary of State, which I can provide to the committee, showing it doesn't exist -- he incurs personal liability. There is no Hamptons Commons Association. And so, if that gentleman entered into a contract, he, a volunteer, you know -- and we thank the volunteers who serve on these community association boards -- would be incurring personal liability and the community association gets no protection whatsoever because it's not a party to the contract. And so, what would appear to be

simple things like filling in the name on a contract, isn't so simple.

One of the letters that I saw come in earlier in the week said that managers ought to be able to help draft simple amendments. And that sounds good. They ought to be able to do simple amendments. And they used the example of changing the weight of the acceptable pet within a condominium from twenty pounds to thirty pounds, changing the number from twenty to thirty. I've got one that's even simpler. Happened in a community in Pasco County. This has to do with an amendment to changing the threshold. The number of votes required to amend their documents. And they were looking at that and the document read, three quarters of the members at a meeting at which a quorum was present. That was the threshold. They had to get three quarters of the members at a meeting which a quorum was present, to approve an amendment. And so, they looked at that -- and this was done by the board, not by a manager -- and the board looked at that and said, that's not grammatically correct. Everybody knows if you have a prepositional phrase, you have to put a comma before the prepositional phrase. So they inserted a comma after the word "members". That,

obviously, is about the simplest amendment you could do.

Now, they did have a manager full time on site. And so what did they do? They amended it. They added the comma. They changed the phrase to, three quarters of the members, comma, at a meeting in which a quorum is present. They have now increased the threshold by hundreds of people and made it impossible to amend their documents in the future. Because of the economy, because of the social issues, everything else going on in that community, they will never ever be able to change their documents without a lot of work and a lot of expense, but it's grammatically correct, in their opinion.

So the harm to the public by making even a simple amendment is significant, and it's just the placement of a comma. Significant to the attorneys; apparently not so much to the Board of Directors.

In the written response that we saw to the Petition, the managers were arguing that since the boards can do it, we can help them do it. The point is, there is no provision in Florida law. There's no case, there's no rule that says that a volunteer, who's a board member of a not-for-profit

corporation, can give them legal advice. So the premise is wrong. To say that because the board members can do it, we can do it, too, and we ought to be there to help them because we have more experience, we being the managers. It's just not accurate.

When we look at the contracts, many of these contracts result in title issues. We have construction contracts, painting contracts; things like that. And as a result of the contract, they get a Notice of Commencement. And if the Notice of Commencement is not filled out correctly -- by the way, a Notice of Commencement is addressed in the 1996 Florida Supreme Court case, and it's still going on today, which is problematic -- but what's happening is the public records now have the wrong entity named and my clients get sued for things that are not their responsibility. We've been sued for events that occurred in the other end of the state because our name is in the public record somehow, and so we're getting sued. Again, harm to the public. Somebody is going to have a title issue in a mortgage foreclosure, or in an mechanic's lien foreclosure, because no one's paying attention to the details.

Another anecdotal incident happened in Pasco County two years ago. An association entered into a contract to paint the condominium. Routine business. Routine contract. Paint the condominium. A young man was painting above a balcony, got up there and he was painting above there and he slipped and fell right on to the balcony. He hurt his back and the boss said, go to the hospital. So he did. He went to the emergency room. They checked him out. He went home and died.

Well, the contract was not reviewed by an attorney and this particular contractor did not have Workers' Compensation insurance. There was no requirement that they comply with OSHA standards. Fortunately, that association was not sued, but the potential for the harm to the public was severe. This, of course, was the low bidder. In the exercise of fiduciary obligation of the board, they may have taken it a bit too far by taking the low bidder and not looking at the content of the contract, the need for insurance; things that an attorney probably would have gotten them through.

In one of the written responses, you saw -- in fact, it's in the Petition as well. Well, our manager is licensed and the attorney is licensed, so

we are protected. That's where the similarities end. They are both licensed. Managers operate under a contract. In their contract, almost universally -- and I checked with a couple of my colleagues around the state today just to make sure this was not unique to the Tampa Bay area -- their contracts provide for indemnification and a hold harmless. So if the manager makes a mistake, there's indemnification and a hold harmless provision. There's not one when you engage an attorney for the same project. And that's a large difference. The public is not protected when they are dealing with the manager for legal issues. They don't have the same type of assurance. They can have that manager's license suspended, revoked, something else, maybe even a fine to the state, but it's not going to help them when they are in the lawsuit.

I have a document -- I did make enough copies, perhaps, to pass this one around. This was called a Florida Bar contract, which is a Florida Bar approved contract, not Supreme Court form. Ms. Holcomb was referring to the fill-in-the-blank forms by non-lawyers, and there's a difference between Supreme Court approved forms and non-Supreme Court

approved forms. This would be a non-Supreme Court approved form. And this contract was modified by the property manager, and they added three words. And you'll see them penciled in there, "certification of occupancy". This had do with a homeowner's association where somebody bought an undeveloped lot, and said, why should I pay assessments? And they tried to negotiate and say, well, until you get the certification of occupancy, you don't have to pay. Which violated the declaration, violated the rights of all the owners, but as you can see, it's a relatively nominal amount. It's $34.75 a month. It could've been worse.

But after five years of litigation, appeals to the Second District Court of Appeal on the issue, they agreed to finally pay assessments because they had to under the declaration, notwithstanding this modification to the form. And it cost $25,000 for the association, and presumably almost that or more than that for the homeowner, who entered into this contract as modified by the property manager.

I have a property manager in Seminole, Florida who uses the same one-page contract for everything that comes into her communities. It was prepared by

an attorney. It's a fill-in-the-blank form. It has no specifications in it. It has what they are going to do, paint the building, the price, and where it is. But they use the same contract for hiring the CPA to do the tax return. We wouldn't sign it to be their attorney, and it's amazing that it's not the same contract they use for management, but it's out there.

I was speaking with attorney Gary Poliakoff with the Becker Poliakoff law firm, a statewide law firm, and he brought up the issue of what happened with Hurricane Andrew. He said a lot of property managers negotiated contracts, entered into contracts that were not enforceable, not valid, and caused harm in south Florida at the time of the emergencies. And again, large-dollar harm to the owners of these condominiums, residents in the homeowners associations.

In looking at what's happened since 1996, the dynamics have shifted. There's been a lot of competition between the property management companies. And again, you're going to hear today from some very fine property managers. Very skilled, very articulate, very experienced. But there are a lot more out there, there's probably

10,000 of them more out there who aren't here today, who again, are eighteen years of age and no education whatsoever. Required -- many of them do have college educations. Again, they're business people.

I've got a gentleman all the way in the back who's an attorney who's a property manager. They are out there, we understand. But rules have to be for the lowest common denominator. They can't be for the exceptions. There are people out there who actually do an excellent and fine job, and we appreciate what they do. But they are not every manager. And the rules have to be for everybody. And so, we have to make sure that the public is protected from the lowest common denominator, not from the top of the group, not from the very best.

At this point, I'm going to shift to Scott Petersen, who's going to give you the details of the 14 items that are on our Petition. Thank you.

CHAIRPERSON: Hang on one second. Do any Committee members have any questions of this witness?

MR. GORDON: I have a question.

CHAIRPERSON: Identify yourself.

MR. GORDON: Lawrence Gordon.

MR. MEZER: Yes, sir.

MR. GORDON: Is there any action that a manager can take that would be acceptable to you?

MR. MEZER: Those that are set forth in the Florida Supreme Court decision are as far as I would go -- and I would like to see a retraction on some of that -- because of what has happened. Conceptually, they got it right. Things that harm the public, clearly, they cannot do, but not recognizing that sometimes they are not even putting in their own name, or the placement of a comma, the gray area as to what is a minor amendment is a problem.

Ms. Holcomb told you about the new rule or, actually, it's relocating an existing rule. The restatement of the rule regarding use of forms. Thirty years of practice, and I don't know how long that rule has been there, but I've never seen a property manager use the rule. It would certainly be helpful for managers to comply with that rule, to put in the disclosure statement required by the rule.

You know, if you look at the tasks done by property managers, they do pest control, roof replacement, plumbing; accounting. They handle

these things. They have to be knowledgeable. Running meetings, rotary servicing, entry gates, tree maintenance, taking care of swimming pools, placing insurance. I don't see them out there doing those things, and I think that they would think twice about doing an electrical project, or doing something with the swimming pool chemicals. They ought to think twice about the things that should be done by an attorney and step back from those things and handle the things that they are supposed to be doing by way of administration. They leave pest control to the pest control operator; electrical to the electrician. They ought to rely upon the experts. Florida Statutes in 617, the Not-for-profit Corporation Act, says that a board member is indemnified if he or she has relied upon an expert in whom he or she has confidence. And I think if we delineate this a little more clearly for the public, for their protection, we'll all be better off.

Yes, ma'am?

CHAIRPERSON: Please identify yourself.

MS. TABAK: Marcia Tabak. Do you think an association would be better off if a community association manager could not do these things?

MR. MEZER: These things meaning?

MS. TABAK: The things on your list. I mean --

MR. MEZER: Yes.

MS. TABAK: There are many that would not hire an attorney to do them. So where does that leave the association?

MR. MEZER: Really, they should hire the attorney, just like they hire the electrician, the plumber, the pest control operator. They are all licensed professions. And they should defer to the attorney for their own good. The potential for harm to the public is in virtually every one of those activities. Scott is going to go down the list, and there are 14 of them. And I think that by giving clarification to those 14 we'll have a bright-line rule for the property managers.

There's an existing competition in the industry where an association is looking for a manager, and they say, well, will you rewrite our documents? Our last manager did. And if the board knew and the manager knew they couldn't rewrite the documents, and what happens, in practice, they will bring the amendments and say, hey, we changed the amendment, will you bless it? Meaning the attorney, will you bless it? That's assisting the manager in an

unauthorized practice of law. It puts the attorney in a bad position, because we don't have that bright-line rule out there, and there's this competition between the managers. They are going to lose the contract if they don't do it, or they are going to get a contract if they will do it, and it puts the attorney in a bad position, because he or she is being asked to assist in the unauthorized practice of law when the manager or board brings them a document and says, how did we do in the practice of law without having a license. And so, again, you're right, it's probably better just to say no to everything on that list.

CHAIRPERSON: Thank you.

MR. MEZER: Thank you.

MR. PETERSEN: Good morning. My name is Scott Petersen. I head the litigation department for the Sarasota office of the law firm of Becker and Poliakoff. Becker and Poliakoff is a statewide firm and, actually, we have offices outside the state as well. But we're a recognized leader in the area of community association law.

My firm represents approximately 4,000 community associations around the State, and we frequently assist the State Legislature and lobby

the State Legislature for changes to the various statutes that affect community associations.

I come here today as a representative of my firm, and I've incorporated in my remarks today, many comments from attorneys that practice in my firm around the state from their experiences in dealing with these issues.

Let me begin by telling you what I'm not here to do today. I'm not here as part of a turf fight with CAMS. This is not an effort by my firm or by any of the members of the section, to steal business from community association managers. At Becker and Poliakoff, we work with CAMS every day and assist them with the issues, problems and challenges they face in managing community associations. And frankly, CAMS have what I would call a thankless task in managing community associations. It's a difficult job and it's challenging and there are a lot of pressures put upon them by boards.

Part of what I'm doing here today is an effort to protect and assist CAMS in their duties. After the collapse of the housing bubble and the economic recession that followed, the impact on community associations, as you well know, has been great. As a result, CAMS are under increasing pressure from

Boards of Directors, to assume more and more managerial responsibilities at a lower cost. Primarily because of these financial pressures, they arise from members who are in foreclosure and not paying their assessments. Assessments are the lifeblood of community associations. When you have significant portions of people not paying their assessments, those community associations suffer greatly and it's very difficult to meet their obligations. As a result, boards are increasingly asking CAMS to perform tasks that are normally performed by lawyers. And not just compliance with statutes, but actual interpretation of statutes, preparation of legal forms, and giving what constitutes legal advice.

Boards may not fully realize the consequences of this save-a-penny-now, pay-a-pound-later strategy. But they surely do when an inadvertent mistake is made. I personally practice in the area of litigation and I can tell you in my experience, community associations spend a great deal more, in terms of money, over errors that could've been avoided had they consulted an attorney earlier on in the process.

Allow me, at this point, to comment a bit.

You'll hear from Mr. Andrew Fortin, Vice-President of Government and Public Affairs for Associa. He prepared a June 15, 2012 letter to this Committee. Mr. Fortin's position is that, basically -- not to take away from his remarks -- but basically, that the Supreme Court's opinion in 1996 is sufficient and fully covers the activities that I'll shortly outline.

Replete throughout Mr. Fortin's letter are exercitations to this Committee not to issue blanket rules, but instead, leave the decision on whether the practice of law to the individual facts and circumstances of each situation.

With due respect, I think that's the wrong approach. I think what's required instead are bright lines to set apart what CAMS can do and what attorneys can do. In that way, CAMS are able to resist pressure from boards who will increasingly ask them to perform what amount to duties that are the practice of law. Because they will be able to refer to a decision of the Supreme Court that outlines exactly what CAMS can do and exactly what attorneys can do.

Clearly delineated activities would give greater certainty to an area that's really rife with

uncertainty at this point. Bright lines will not only protect CAMS from potential liability for providing unauthorized legal advice, but it will protect many associations that may suffer harm as a result and protect the general public from the potential harm when community associations act on the unqualified advice of non-lawyers.

It is not to say that the activities I'll speak about will insure against errors. Lawyers make mistakes, just as everyone else does. The question for the Committee, however, is whether these activities are such that they require legal advice as to the association's rights and duties, for the preparation of legal instruments that grant or take away the association's rights, even if none of these activities actually involve appearing in a court of law.

As such, and consistent with this Committee's previous advice to the Supreme Court in 1996, allow me to outline some of the activities we believe shall be regarded as the practice of law. And I'm referring to the list on the Section's March 28, 2012 letter. There are 14 items. Let me go through the first three items as a whole. I'll read them out loud to the Committee:

Preparation of certificate of assessments due once the delinquent account is turned over to the association's lawyer. Preparation of certificate of assessments due once a foreclosure against the unit has commenced. And preparation of assessments due once a member disputes in writing to the association the amount is owed.

The potential harm to the public in these situations is potentially great. Preparation of a Certificate of Assessments Due is simply what's called an estoppel letter or a pay-off letter. And it's what are the amount of unpaid assessments, interest, attorney fees and late fees associated with that particular unit.

With the housing crisis and the increased importance of collection of past-due assessments, have come a number of changes to the statutes and a number of court decisions in recent years that substantially affect the community association's rights. For example, not only must one review the declaration to determine the interest rate or whether attorney or late fees are allowed, but the very question of whether the association may demand any past-due assessments at all has to be answered.

In a recent case called Coral Lakes, a bank

that had foreclosed refused to pay any past-due assessments to the association because the declaration included a statement that said, the first mortgagee was not liable for past-due assessments. That was contrary to the statute that said the bank was liable for past-due assessments. The court held that the contractual language of the declaration controlled and the bank, therefore, was not liable for any past-due assessments to the association. How many managers would know whether the declaration controlled in that instance or whether the statute controlled?

As a result of this decision, banks are increasingly fighting any demand for past-due assessments upon taking title at foreclosure. In fact, one of the dangers to the public and one of the dangers to community associations is, we're seeing banks file lawsuits -- not in this state yet, but in the State of Nevada -- against the associations who demand amounts that are greater than what are allowed by the statute. So the potential for liability in these situations is great.

Additionally, when owners dispute the past-due amounts, you have to look at federal law, the Fair

Debt Collection Practices Act. There's also a state law, the Florida Consumer Collection Practices Act, and those provide statutory protections to debtors that must be strictly observed. If they are not observed, the offending debt collectors can be liable for statutory damages of a thousand dollars per occurrence, as well as the debtor's attorney fees. The potential exposure for large community associations to potential class actions in this area is great.

Now, historically, the Fair Debt Collection Practices Act didn't apply to the collection of assessments. The law was changed in the late 90s. Now it does apply to the collection of assessments. Also historically, the collection -- the Fair Debt Collection Practices Act did not apply to associations that sought to collect their own debts or managers that sought to collect debts for associations, but they do apply to attorneys because we collect the debts of another entity.

Well, there's a very troubling case decided just last year, Morgan v. Wilkins, which for the first time in Florida, an entity collecting its own debt was declared to be a debt collector covered by the Fair Debt Collections Act. The trend in the law

is clearly towards the expansion of coverage of the Fair Debt Collections Act, and I believe it's only a matter of time before community association managers will have to abide by its restrictions as well.

We move to Number Four: The drafting of amendments and certificates of amendments that are recorded in the official records. The declaration of covenants, bylaws and articles of incorporation when such documents are to be voted upon by the members.

The drafting of amendments requires compliance with the statute governing amendments, a determination of the hierarchy of documents, insuring there are no conflicts between the declaration, the bylaws, the articles and the rules. Determining whether the language proposed is consistent with case law and prior administrative decisions of the Division of Land Sales in Tallahassee and determining what vote is required of the membership. Improperly drafted and approved amendments can lead to lawsuits from disgruntled members who oppose the amendments and force the association and its members to engage in protracted and expensive litigation. If the amendment in question is ultimately disapproved by the courts,

the effect on the association that had, up to then, been abiding by the amended language, can be jarring. Not to mention the fact that the association would then probably be responsible for the attorney fees for the disgruntled members. And who pays that? The members of the association do.

Number Five: The determination of number of days to be provided for statutory notice.

This is not merely -- statutory notice is not merely counting days on a calendar any longer. Depending upon what kind of notice the association is dealing with, even though they may, at first blush, look similar, they can be very different. For example, for fines, the statute requires what's called 14 days reasonable notice. For meetings, the statute requires notice be mailed 14 days in advance. Those sound the same, but in practice, they are different.

Additionally, the declaration, itself, may require different notices than what the statute requires. And again, what prevails? The statute or the declaration? That requires an interpretation of the law and is best done by a lawyer.

Certainly, no one is arguing that a CAM has to call an attorney before every meeting is noticed,

but the initial determination of what the proper notice is in that particular situation should be done by a lawyer. And after that, each separate occurrence, the CAM can certainly do that.

The modification of limited proxy forms promulgated by the state -- just to touch quickly on this one. Generally, modification of the state forms is a risky endeavor even when done by an attorney. But one thing in particular that came to mind was, if there were a number of questions asked on the proxy, there can be different voting requirements for each question. And that determination should be made by an attorney.

Number Seven: The preparation of documents concerning the right of the association to approve new prospective members.

This can be a very tricky area. This involves the disapproval of potential purchasers of a unit or a property. It gives rise to fair housing discrimination claims, which can embroil a community association in long and expensive litigation to resolve. A lawyer is required to review the governing documents to determine if the association has the power to make these sorts of determinations. Whether or not the association has the right of

first refusal to purchase the property in question if it disapproves of the prospective owner and whether and under what criteria the association could find a potential purchaser was not facially qualified under the declaration.

These are very difficult issues to resolve and the potential for getting it wrong is the danger to the association.

Let me talk about Eight and Nine together: Determination of affirmative votes needed to pass a proposition or an amendment to record a document and determination of owners votes needed to establish a quorum.

Again, this is not just a matter of math. It's not a matter of the counting. The association's lawyer must determine whether they are units owned by the association who have taken title after foreclosure. What impact does the association's title of particular units have on quorum. Also, members who don't pay their assessments and are more than 90 days delinquent, can have their voting rights suspended. What impact does that have on the quorum?

Additionally, lawyers must review the governing documents to determine whether a quorum, as Steve

was speaking of earlier, whether a quorum is percentage of all members or whether it's just those present and voting.

Again, improperly passed amendments or mistaken determinations of quorum can lead to litigation. Litigation expenses, especially when not planned for, can wreak havoc on community association budgets and all that comes back and falls back on the members.

Number Ten: The drafting of pre-arbitration demand letters. As noted in examples provided in the Section's March 28, 2012 letter to the Committee, pre-arbitration letters are literally a trap for the unaware. The Division of Land Sales in Tallahassee has very specific administrative rules that govern their preparation, as well as the applicable statutes. Violation of these provisions not only causes increased delay in the resolution of the problems complained of in the letter, but more expenditure and attorney fees in trying to cure the problems of an improperly drafted letter. The delays caused by having to redo and refile pre-arbitration letters can cause considerable harm on community associations. These disputes can be emotionally charged and very divisive in the

community and delays only exacerbate the problem. In some cases, delays can cause and expose the community associations to unforeseen damages.

There are many other circumstances that arise in these situations that are not cookie-cutter questions that can be easily determinable by reading the statute. A lawyer's help and advice is essential in the proper preparation of a pre-arbitration demand letter.

Let me briefly touch on 11: The preparation of construction lien documents. This could be an hour's worth of talking all on its own. But as a lawyer, I leave questions of dealing with Section 713, which deal with construction liens, to lawyers who are Board certified in construction law. It's a very complicated and technical area. And even though I practice in the area of real estate litigation, I generally don't wade into it because of its technicalities.

Number Twelve is a big item, and Steve touched on this a little bit. Let me expand his comments. The preparation, review, drafting and/or the substantial involvement in the preparation and execution of contracts, including construction contracts, management contracts, cable television

contracts.

Of all the activities listed, this is the probably the one where I see the most involvement by CAMS in advising the association of their legal rights and responsibilities. And their giving advice on the approval of contracts can have serious consequences to the association. Let me give some examples.

Construction contracts and cable T.V. contracts can be many tens of thousands of dollars or more. Obviously, the greater the amount of the contract, the greater the potential harm to the association if those contracts are improperly drafted. The greater the value of the contract, the greater the need to scrutinize what is many times the boilerplate language and the fine print forced upon you by a national company that is giving you a pre-printed contract drafted by their attorneys. But even more than that, even small contracts, you know, relatively small contracts can pose enormous problems when they go wrong.

For example, some laundry room facilities contracts are multi-year contracts that include onerous renewal provisions, that these provisions have repeatedly been upheld by the Florida courts,

but there's a very small window in which to either determine to renew or terminate. And if you don't make that window, that contract can renew for five years, ten years, fifteen years. And you can be locked into a contract with a service provider that is charging you a higher than market price and providing inadequate service. All because you missed a very small window to determine whether or not you were going to renew that contract.

One of my recent cases involved a client that signed a one-page vendor-drafted contract for approximately $20,000. The manager approved and advised the client to go ahead and sign that contract and they did not consult an attorney. Naturally, things went wrong. And the association came to us and tried to enforce the contract. Well, the problem with it is, it is a $20,000 contract. We can easily spend 5, 10, 15, $20,000 in litigation all over a $20,000 contract. And there's no provision in that contract for reimbursement for the attorney fees spent in litigation. That's the harm to the association.

CHAIRPERSON: Mr. Petersen, I might need you to move through the remaining points and wrap up.

MR. PETERSEN: Surely. Fourteen, I think is

obvious. It goes without saying. If a manager is asked to do interpretation of statutes, case law, administrative decisions, obviously, that's something that should go to the attorney. But it would be nice to have it in black and white for CAMS to point to a board and say, look, if I'm going to have to start going through the statutes and reading case law decisions, this is something that requires the advice of an attorney.

Obviously, in a great majority of cases, CAMS are already referring most or all of the activities I've listed above to the association attorney to handle. Association attorneys and CAMS must often work closely to resolve some of these issues as a CAM is usually better informed of the facts and the attorney is better informed of the law and how it applies in the situation. But there's no doubt that boards, in a rather short-sighted effort to save money spent on attorney fees at the front end, are asking their CAMS more and more often to render opinions and give advice about what are essentially legal matters. When the advice is mistakenly given or improperly applied, it often ends up costing community associations dearly in the end. Mistakes due to improper legal advice to community

associations, many of which have multi-million-dollar budgets, and affect hundreds of members and their families, not to mention the general public, lead to expensive and protracted lawsuits, decisive battles among owners and often increased assessments.

Accordingly, it's in the best interest of the lawyers, CAMS, community associations and general public, to have bright lines between what is and what is not the practice of law. A recommendation by the Committee that the aforementioned activities constitute the practice of law will provide the certainty that this area requires and ultimately provide greater protection for the rights and welfare of the public. Thank you for your time.

CHAIRPERSON: Any questions of this witness?

(No Response)

CHAIRPERSON: Thank you.

MR. PETERSEN: Thank you.

CHAIRPERSON: The next person that we have on the sign-up list is Mitchell Drimmer; is that correct?

MR. DRIMMER: Correct.

CHAIRPERSON: Thank you.

(Sworn by the court reporter)

MR. DRIMMER: Good afternoon, ladies and gentlemen; Mr. Chairman. Thank you for allowing me to address you this morning.

My name is Mitchell Drimmer and I am a community association manager, License Number 33686. I am also a senior executive at a company called Association Financial Services, a collection agency that serves community associations. But I have a second job. I do manage one community association. Not as Association Financial Services, but on my own. I do this for the love of the profession. I understand the business.

While it is quite true the state has a limited criteria regarding the level of education for community association managers, I cannot say that I ever met one that does not have at least some college-level education. Certainly all of them I know can read and write and are quite proficient in the use of a calendar. And when I say read, I mean read with comprehension.

Today you will hear both from attorneys and CAMS regarding a most important issue, called the unlicensed practice of law. I pray that today's testimony does not devalue itself into an us, meaning managers, vis-a-vis them, meaning attorneys,

skirmish as there can be no doubt that the issue here is what is the best interest of the people of Florida and members of the community associations in particular. And we're talking here of the public good.

But let me deviate a moment from my prepared comments. The first gentleman who was here, who spoke, provided you Hampton Lakes. It was a member of the association, a Board of Directors who made that mistake, not a community association manager. That was a very clear thing. 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.

Number two, the first gentleman who was here -- and I'm sorry, I don't know his name -- consistently referred to community association managers, what we believe to be community association managers, as property managers. We're not dealing here with property managers. Mr. Petersen, who just spoke, used the term CAM. CAM is a management specific licensed office by the State of Florida, community association management. A property manager is a realtor who will manage a specific property in a community association.

So right here, at this very podium, we have an attorney, two attorneys, who are confusing terminology here. Okay? That's quite a mistake. We're not talking about property managers. We're talking about community association managers.

I have read the letter by the Real Property Probate Trust section, and in the letter, there are 14 activities listed and suggested should be performed only by an attorney. As suggested, they are the practice of law. And as much as I would like to review each one of these activities, I know that my time here is limited. I will be brief; hence, I will only address a few of these activities and I promise I will be brief. I will be gone in a few moments.

Numbers One, Two and Three on the list deal with the preparation of Certificate of Assessments. Simply put, can a business -- and let's be very clear that a community association is nothing more than a business -- render an invoice for services provided? The answer is yes. And this is far from being the unlicensed practice of law. This is not a difficult task, nor does it require the rendering of a legal opinion. A Certificate of Assessments is nothing more than a ledger. A bill, as you would

have it, attesting to what is owed. What is on this bill is the maintenance fees that have been established by the association's board; the late fees, which are clearly laid out in every association's governing documents and bylaws, and the late interest, which are laid out in the association's governing documents. And if the governing documents are silent, they default to what the state says they can be in Statute 718.116 and 720.3085 for homeowners associations. 718 being condos.

Every community association manager knows that if the governing documents of an association do not specifically indicate a late fee, then no late fee can be charged. This is on the test. This is in the schooling that we receive. This is a very important question that's on the test.

And again, I assure you that it's not a difficult task and that's most certainly not in the realm of the practice of law. This is the simple art of bookkeeping, a subject matter taught and tested by the state.

Are mistakes made by managers? Most certainly, yes. Are mistakes made by attorneys? The answer again is, most certainly, yes. And although this

has nothing to do with this, I refer to the David Stern issues. Nobody is infallible. But the issue here is not infallibility, but whether preparation of these ledgers are the practice of law. And I suggest, humbly and with sincerity, that they are not the practice of law.

I would dare not practice law on behalf of the community association because part of my CAM training tells me the practice of law is a felony. A third-degree felony. And I do not wish to be guilty of a third-degree felony. So I most certainly would not attempt to practice law.

Number Five on the list deals with what I quote here, quote, the determination of number of days to provide by statutory notice. Again, Mr. Petersen discussed that. Once again, this is Community Association Management 101. And this task not only requires the ability -- only requires the ability to read, count and the use of a calendar. Every community association manager I know can recite the number of days required for notice of a board meeting. 48 hours for a board meeting, 14 days for a special assessment, 60 days for an election; 40 days before the election. This is 101. This is taught to us. This is in the governing documents.

It's not buried in legalese.

I'm sure that some witnesses today will bring piles of governing documents and dazzle you and razzle you and confuse you with what is legalese. And when I see legalese, something that I don't understand and would not comprehend, I will not touch it. I have and I believe all my colleagues in this industry have the good sense to defer this over to an attorney.

It is very simply put in the governing documents and law what is reiterated in the statutes. It's easier to understand the calendar days than some recipes for preparing dishes for a cookbook, and certainly not so difficult as to be classified the practice of law. And I mean the statutory notices. If some of the recipes my wife cooks were as clear or not as clear, she would need a lawyer to make me dinner every other night. These are simple ministerial tasks.

I'm wrapping up here. I will conclude by saying that community associations are, indeed, creatures of statute and often require the legal opinion of attorneys in order to function properly and in the best interests of the public. No person today in this room who's of sound mind can dispute

that fact. Lawyers are necessary in the life of the community associations and the business that they conduct. However, eliminating the most simple task of the community association managers in favor of lawyers is nothing more than a tax on the membership of a community associations and it is not in the public interest. It is additional cost to community associations. And some of the very same law firms who last year and the year before, asked, let us postpone the retrofit of sprinklers and let us postpone the retrofit of elevators and life safety issues because of costs involved. Some of the very same law firms that went to Tallahassee, that's in the public interest. And for saving a few dollars or maybe a lot of dollars to the community association, they were willing to put community association members literally in harm's way. But when it comes to their fees, no, no, no. Pay up.

It's a tax on the membership. The attempt to emasculate managers and marginalize their work flow is protectionism and an attempt to eviscerate the labors of one guild in favor of another. Lawyers and CAMS can and should work together. But 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.

Ladies and gentlemen, thank you for your time. I shall retire now unless you have some questions.

CHAIRPERSON: Any questions for this witness?

Actually, I have a question. Can you elaborate on the distinction between a CAM and a property manager?

MR. DRIMMER: Very good. A community association manager is a license, and I hold that license 33686. I am managing a community association. I manage the common areas. I manage the pool. I manage the common areas.

A property manager is not a CAM. A property manager, you need a realtor's license to have that. I, too, happen to have a realtor's license. And a property manager will manage an individual unit in a homeowner's association or in a condo. So let's say somebody buys a unit; they want to rent it out. They will hire a property manager to manage that specific property in the community association. And it has nothing to do with managing the common area. CAMS manage common areas. Property managers manage specific units in an association.

CHAIRPERSON: Yes, sir.

MR. ABBOTT: Colin Abbott. My question is related to your licensing. If an attorney makes a mistake, the Florida Bar will investigate. If a CAM makes a mistake, what does DPR do?

MR. DRIMMER: Well, they will investigate. They will fine the manager. They will remove the manager if they deem appropriate. Yes, there is -- the DBPR, I believe they call it lovingly, will -- there is, if you look on my record, you can look on my record. I have the DBPR cite and you will not see any complaints. But if you do see a complaint -- and this is an interesting issue -- if you see a complaint from five years back on the manager, it stays there. They try to have that removed. It stays there. And it's there and you can see if managers -- and what the punishment was and what the complaint was.

So, yes, I am held responsible and managers are held responsible to a higher authority. A state authority.

MR. GORDON: Lawrence Gordon again. Are CAMS generally required to carry errors insurance, liability insurance, and do most carry it?

MR. DRIMMER: Well, community association

management firms do carry certain insurances. Errors and omissions.

MR. GORDON: Right.

MR. DRIMMER: But again, I do not wish to speak towards the subject of indemnification because, guess what? I'm not an attorney. So I can't answer.

MR. GORDON: I'm asking --

MR. DRIMMER: Yes, they do.

MR. GORDON: Generally, they carry insurance?

MR. DRIMMER: Yes, they generally carry insurance for errors and omissions.

MR. GORDON: To cover their mess ups.

MR. DRIMMER: Right, to cover their mess ups. But again, there's an indemnification clause and just this particular question that you asked, I'm not prepared to answer what indemnification means. So I will not answer, you know, am I indemnified, I don't know. I have to speak to an attorney. And I have good enough sense to speak to an attorney to see if I am indemnified.

CHAIRPERSON: Mr. Milstein?

MR. MILSTEIN: Do you feel that eighteen hours of instruction is sufficient?

MR. DRIMMER: Eighteen hours of instruction --

and I will be quite -- I'm under oath here -- is absolutely not sufficient. However, if you work for a management company, you are not sent out to a hundred million dollar condo tower the day you received it. Management companies have many, many hours of instruction and many, many hours of training for association managers. And there are many, many, courses, CEU courses given and provided. I have to have twenty hours of courses. My legal update comes from Mr. Petersen's firm from Becker Poliakoff, which I have taken in 2011 and 2012. So I do sit on these legal updates that they do.

Eighteen hours, well, that's not -- I mean, to be become a realtor, I was required to sit in a classroom for a week. To become a manager, a community association manager, I was only required to sit in a classroom for eighteen hours and take a state test. But the state test did say, how many days do you require this; what is the interest? They did cover some of the basics and they did say, very clearly, practicing law is a third-degree felony. And they drilled that into our head quite often at the school that I was at, sir.

CHAIRPERSON: Any further questions?

(No Response)

CHAIRPERSON: Thank you, Mr. Drimmer.

MR. DRIMMER: Thank you very much, ladies and gentlemen.

CHAIRPERSON: Our next witness is Jeff Oshinsky.

(Sworn by the court reporter)

MR. OSHINSKY: Good morning, Committee members. My name is Jeff Oshinsky. I am a certified attorney in the states of Florida and New York. I also currently serve as the general counsel of Association Financial Services, which is a licensed collection agency here in the State of Florida.

I hope you had an opportunity or will have the opportunity to review the written response to the Section's requested for advisory opinion that I submitted. I'm not going to go into every detail. I will leave that up to you guys to read. However, there's a couple things or couple points that I want to make clear.

As an attorney, I agree, I wholeheartedly support the need to protect the public from those actions of people who are not attorneys that have substantial impact on rights and on important matters involving a community association. However, that said, I'm a bit -- I don't know if this is the right word, but I want to use the word offended to

some extent -- by the Section's request to basically take many actions that are ministerial in nature and require an attorney to do them. I think that they are, to some extent, taking the importance of an attorney and making it less important. Almost non-existent in many cases.

The activities -- let me be clear that the activities that are identified in the Section's letter as being the unauthorized practice of law, I don't believe that the Section has done its job of proving to this Committee in its letter or by its testimony this morning, that it satisfied the requirements set forth by the Florida Supreme Court in its advisory opinion in 1996. It has failed to show specifically, as set forth in the opinion, that there is significant harm to the public. They might have thrown out a couple instances, but quite honestly, I don't believe they've carried their burden of showing substantial harm.

I think they've also, to some extent, mischaracterized or failed to properly explain to this Committee what the Supreme Court's advisory opinion requires. The advisory opinion requires attorney assistance. Attorney oversight. It does not say it must be done by an attorney.

I also, to some extent, believe that they are, you know, from what I understand, attorneys, we go to school, we work hard, we learn, we practice. But there's a lot of people who are not attorneys who are not total idiots, that have the ability to look at a governing document and determine what the interest rate is that could be charged on a delinquent account. That can determine whether or not a late fee is due and payable on a delinquent payment.

I think that in terms of identifying the 14 items, I don't think they've carried their burden of showing there's any substantial harm to the public. I think many of those items are clearly ministerial. And not only that, but I would venture to guess that many of the items that they would suggest be done by attorneys would be done by paralegals, not by attorneys. I don't believe that an attorney should take his time, necessarily, to look at a governing document to determine the appropriate interest rate. Why can't that be done by an individual? Why can't it be done by a paralegal? And more importantly, if there's ever a question as to whether or not the CAM -- and let me just say, the purpose of my being here, I'm not here necessarily on CAMS. I'm here to

basically speak on behalf of the collection agency.

Now, the reason why I feel it's important is because 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 very good reasons, financial reasons. That these are purely -- these are purely ministerial items.

To the extent that there is a requirement or there's a legal right that's involved here or substantial harm, the CAMS should, and I agree, should seek counsel from the attorney. It does not say it should be done by the attorney. In fact, one of the gentlemen spoke about amendments to governing documents. I don't see a reason why a CAM or any other third party could not draft an amendment. Should it be reviewed by an attorney? Absolutely, it should be an reviewed by an attorney. It doesn't say it needs to be done by an attorney. And I think that's an important distinction that the Section fails to bring to this Committee's attention.

In any event, again, my point of view is that the opinion requires legal oversight. It does not require it to be done by an attorney. I think that CAMS, to the extent that they are doing things that have been requested once of an attorney, should be able to do it all the time. I believe that there should be bright lines. However, you can't say that reviewing a governing document to determine an interest rate is a bright-line test because you do it once and then you've got it; you can continue to do it. I shouldn't have to continue to talk to an attorney about that.

Again, the Florida Supreme Court advisory opinion uses the word assistance. It used the word oversight. It was not definitive, must be done by.

Again, in short, I think that the Committee needs to create bright lines. I think it's important to protect the public against the harms of people who are practicing unauthorized -- the unauthorized practice of law with respect to items that have significant legal consequences. Not things that are not significant.

The communities are already under severe financial stress. To request an attorney to do everything from scratch is just not practical. As

Mitchell had said, communities are putting off repairs to elevators; maintenance of important functions for the community.

To add another level here, the concept of pay now or pay later, it doesn't really make a lot of sense. Really, the associations need to manage budgets. They need to make sure that services are maintained. I think that CAMS have done these activities historically. I don't see this public outcry for the need that they've been screwing up so much that we need to change the way things are.

We think -- I think that the Supreme Court advisory opinion is clear. That in those areas that fit into the categories -- and they have three buckets -- ministerial, the gray area and things that were significant legal consequences, the significant legal consequences, again, should be involving attorney involvement, assistance and oversight. The ministerial needs to stay ministerial and should not be required to be done by an attorney.

Bright lines are great to have for other people to understand. It's not necessarily going to work in all these instances because, again, a lot of these things could be done once with the assistance

of an attorney; not required to be done by them. Thank you very much.

CHAIRPERSON: Any questions of this witness?

MS. TABAK: This is Marcia Tabak. I probably should have asked this of Mr. Petersen, but I knew his time was up and I don't know if you know the answer to this or not, but I'm going to pose it.

Could you tell us the difference between the preparation of a Certificate of Assessment versus the preparation of a Certificate of Assessment due once the delinquent account is turned over to the attorney?

MR. OSHINSKY: I don't think there's a difference, to be perfectly honest with you. The Certificate of Account is basically the unit ledger. How much is the assessment, was it paid on time, is there a late fee, is there interest calculated. I can tell you right now there's a case in Miami/Dade County which a law firm has been sued because they didn't calculate interest correctly. So this is not a legal issue. I mean, it may be talked to an accountant; things like that. The time that -- if this Committee is considering saying that preparation of a Certificate of Account is practice of law, then I think they need to look into those

collection agency activities that involve collection of medical claims. I mean, the collection agency is not going back to make sure that the services were rendered or whether or not HIPPA rules have been required or whether or not the insurance requirements have met.

I mean, the Certificate of Account is simply the preparation of a ledger, how much is due and owing. The time to hand it over to the attorney and the time the file goes to the attorney, it's the same thing. It's the same issue for me.

You know, many times estoppels are requested of associations where there's no information as to who that person is. It could be anybody. A third party interested in buying a property. It doesn't necessarily say that that person is the first mortgagee who would be entitled to the statutory cap. And again, for you lay people, there's a cap on the liability of first mortgagees once they take title. That information may not be available at that point in time. So really, to ask somebody like a CAM or a collection agency to have to dig in that legal analysis at that early point, that's just not practical. I mean, these things need to be turned around relatively quickly under statute, which

somebody requests an estoppel, they need to be delivered within a certain time period. And quite honestly, having attorneys do those types of things is just not practical.

I know my practice is fairly diverse and busy. I know there are a lot of other attorneys whose practices are diverse and busy. I think now where it gets into a little bit of the gray area, I think, is where the party has now identified itself as a first mortgagee and entitled to safe harbor protection.

And again, I'm not suggesting CAMS or collection agencies should be working in a vacuum. If there's a question as to the applicability of that safe harbor, they should be speaking to an attorney for counsel and assistance. I think they should still be able to maintain those ledgers and make the appropriate changes on the appropriate time when that is called into question.

I hope that answered your question.

MR. ABBOTT: Colin Abbott. Mr. Oshinsky, simple question. Do you think that the 1996 opinion provides a clear test? As an attorney, you know, we love tests.

MR. OSHINSKY: Yes, I do.

MR. ABBOTT: Does that test which area falls in which area, UPL or non-UPL?

MR. OSHINSKY: I think it is sufficient. I think that when somebody sees something that's ministerial, I think you know it's ministerial. I think that the areas where it's clearly involving a right, a property right, the filing of a lien, something that has significant legal consequences if there's a mistake made, should be -- again, it doesn't say done by. It says assisted by. And I think there's a gray area. Where people have to use their own intelligence to whether or not they want to seek counsel or not. I think the tests are clear and I think the opinion as written by the Supreme Court in 1996 does not need further modification.

MS. POBJECKY: Renee Pobjecky. Of the 14 items listed, do you believe any of those would constitute UPL?

MR. OSHINSKY: You know, to be perfectly honest with you, I'm here on behalf of the collection agency. I'm not necessarily involved in issues regarding notice of meetings and amendments of closing documents. I think there are areas where, again, if you apply the tests set forth by the Supreme Court, there are areas there that would

require assistance. You know, I don't want a CAM or a third party, necessarily, preparing an amendment to a governing document without running it by an attorney and say, hey, does this comply with the form? Because you've got to be right. You get to be rejected by the state as well if doesn't comply with the proper form.

But again, I think the areas that are identified there fall well within the statute -- I'm sorry, the advisory opinion of the Supreme Court and I think that those areas that involve substantial rights should involve attorneys. Not done by, but involve by attorneys. Thank you very much.

CHAIRPERSON: Thank you. We have Andrew Fortin.

MS. HOLCOMB: You win the traveling-the-furthest award.

MR. FORTIN: I would not miss the opportunity to work with you guys.

(Sworn by the court reporter)

MR. FORTIN: Good morning. As with the previous speaker, I think it's an appropriate disclosure to this Committee, seeing as what you do, that my name is Andrew Fortin. I'm a licensed attorney in the District of Columbia and the State of Virginia. I'm not a licensed attorney in the

State of Florida. Probably something relevant for you guys.

My comments are approximately six minutes, and I have just a few comments at the end. And it might be shorter than that because I had Big Gulp Diet Coke before I came here today, so we'll see where we go.

Good morning, Mr. Chairman and members of the Committee. My name is Andrew Fortin and I serve as Vice-President of Government Relations for Associa. Associa is the nation's largest community management company with 8,000 employees and 150 locations across North America. Associa has six management companies in the State of Florida that employ hundreds of managers, who serve thousands of Florida residents. And my oral statements today are offered in support of our written comments that we previously filed with Jeff. Congratulations to him.

In response to the Real Property Section's petition, Associa does not believe that there exists, nor has the Section provided sufficient evidence that would justify the reinterpretation of the principles set out in the 1996 advisory opinion on activities by community association managers. We do share the concern and we welcome the discussion

on how best to balance and clarify the roles of CAMS versus those of licensed attorneys, and we offer these comments today in support of that role.

In its 1996 advisory opinion, the Court laid out a concise analysis that categorized activities by CAMS into broad areas, and we've heard some of those by the previous speaker. Those areas are ministerial, gray areas -- or we refer to them -- I refer to them as transitional. Sounds a little bit more formal than gray -- and legal activities. And the court's analysis provides us guidance that we feel adequately addresses the issues raised by the Section.

First, it's clear from that opinion, that matters requiring ministerial acts by a CAM are allowable. This includes a broad range of tasks. Some as simple as updating an address on something like a collection letter, to more complex tasks like framing a yes-or-no question to present at a Board of Director's meeting. Or, in some cases, even drafting the right of first refusal or the right to approve language for -- or the right to approve a new resident in the community. So it created a pretty broad range of activities.

Beyond the ministerial, the Court has also

recognized that CAMS can and do engage in areas that touch on the law, these so called gray or transitional matters. The relevant analysis as articulated by the court in this matter, is that tasks which do not require a, quote, "significant legal expertise and interpretation", can be done by a community association manager. That determination is best applied on a factual basis.

Finally, the Court in its opinion, as you know, provided that certain enumerated tasks must be done with the assistance, emphasis added, of an attorney. The Court clearly noted in its opinion that the preparation of a claim of lien and satisfaction of the lien, quote, "must be completed with the assistance of a licensed attorney", and we find that this is pretty unambiguous and we don't think that that issue requires revisitation by this Committee or by the court.

On the other enumerated items related to the preparation of the claim of lien, the Court's current advisory opinion provides a practical analytical framework for managers to flag UPL issues. Such guidance helps provide a distinction between matters of reading comprehension and those that require legal interpretation or significant

legal interpretation. Under this analysis, classification of the 12 pre-lien related activities found in the Petition as work only to be performed by licensed attorney, we feel is impractical and unneeded.

The second proposed area that the Committee is reviewing is the drafting of pre-arbitration demand letters. The Section notes that under current precedent, the preparation of pre-arbitration demand letters do not necessarily require the assistance of counsel. In support of its Petition to the Committee, the Section provides citations to at least twelve cases of consumer harm and notes the existence of twenty such more cases.

That said, we think it's important that evidence of harm be provided before this Committee takes action, but at the same time, such harm should not be incidental. And while the Section has provided more than thirty instances related to non-attorney drafted pre-arbitration letters, that number 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.

Finally, the Petition seeks to clarify more

than 14 other activities as actions that can only be performed by an attorney. The activities under this section are broad, and in some cases, such actions have already been found not to be UPL by the Court. Absent substantial empirical evidence of consumer harm since that ruling, the Committee should reject the Petition to reclassify these broad categories as UPL.

Based on the above, Associa urges the Committee to take the following actions: First, reject blanket classifications of all, quote, similar activity and preparation of a claim of lien as UPL, as such activity is clearly covered by the existing advisory opinion.

Second, seek further qualification and quantification of the examples of consumer harm to better gauge the relevance of the data that has been presented; third, reject the unsupported request to reclassify 14 broad areas of activity by CAMS as UPL, as no evidence of consumer harm has been shown. And those matters are currently adequately covered by the advisory opinion.

And finally, and I think most importantly, this is what's expected of all of us as professionals, we encourage the Committee or the Section to work with

CAMS to establish a joint Bar CAM working group to serve as a venue to vet issues of mutual concern and building an understanding between these two critical regulated professions.

In conclusion, in the State of Florida, CAMS are regulated by the Department of Business and Professional Regulation. CAMS are required to complete at least twenty hours of continuing education every two years. And part of this requirement can include legal updates, as you heard other speakers talk about. CAMS are required to have a fundamental knowledge of statutes governing community associations in the state in order to perform their day-to-day jobs. As licensed professionals, CAMS are also subject to sanction or revocation of their licenses if they act beyond their authority or expertise. This is an important consumer protection mechanism that should not be overlooked in this process, nor should data on complaints filed against CAMS on allegations of UPL under this system. Either with the CAM council or with this body.

We hope that against this backdrop, that the Bar and/or this Committee will take a balanced approach guided by the practical and viable guidance

that we believe is currently in place.

Finally, we agree that the public is harmed by unauthorized practice of law, but we also believe that the public is equally harmed by the 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.

So thank you for your time and I have just two other comments related to some of the things that were said earlier.

First, it is noted and you guys had heard that community associations, as you know, are licensed professionals and they're subject to sanction by that body. An example was given and I have a question for you all. I don't think -- I don't know if you have to answer it or if you can answer it. But an example was given that many of our association management companies put an indemnification clause in their contracts with their association. And that was offered, I would guess, to say that, well, there's not really as much recourse as you might think there is. But my question for the attorneys in this room is, is a

contract for indemnification in the State of Florida, does that cover illegal acts by one of the parties to the contract? Because if the unauthorized practice of law is illegal, I would venture to guess that that would defeat any agreement to indemnify that other party.

The other thing that was brought up is that there should be a bright-line test. You know, I agree. I wish there's a bright-line test in everything in the law because my Bar exam would've taken ten minutes and not three days. The reason attorneys are a profession that is hard to become and difficult to do is because there's always gradations of things. And it would be great if we could put that bright-line test in place, but what that would do is it would just drive people away from us into self-management and then nobody would have access to helping these folks.

And then, finally, you know, we heard a lot today, and I think there's an area of agreement here, what I heard from the gentleman which kicked this off and from everybody else, the challenge necessarily isn't the CAMS. We're your gatekeeper. We see you as your partner, even though today we don't really feel like your partner. The challenge

is our boards and helping our boards make the right decisions on when to seek counsel. And that's going to happen by us working together. And we're attorneys. We get stuck in this adversarial system. I think there's where we're stuck today.

But what we need to do is, we need to find ways to argue to them, constricting our areas of activity is not going to solve the issues which we all think agree, or there's an implicit understanding in the statements I've heard today that these are decisions that are driven by the board and on cost matters. So we're your partners. We're your gatekeeper. We're the people who see these folks every day. And I think approaching this in a collaborative and cooperative manner, looking at the guidance that is in place now and ways to address that is the way that we're going to solve this issue as much as I would like a bright-line test for the reasons I specified.

So that wraps up my comments and I'm happy to take any questions that the Committee may have.

CHAIRPERSON: Any questions? Very briefly. Mark Ragusa. I read the written material and I heard your testimony today. Is it your belief that of the fourteen items referenced in the Petition,

none of them should be considered the unlicensed practice of law?

MR. FORTIN: You know, I was playing around with that and I believe it's Number Twelve. Can someone check this for me? Is Number Twelve the application of statutes and case law to specific facts?

MS. TABAK: Fourteen.

MR. FORTIN: Fourteen. Okay. It's Number Fourteen. I would say that one is, but again, as attorney and, you know, even somebody who wants that bright-line test, I'm driving down the highway, I'm late to get to the airport, I'm flying home to see my family this weekend. Flying home to see my family, driving really fast down the highway. I can look at the speedometer. I'm going 80. I look at the sign on the side of the road. It says 55. The cop pulls me over. He asks if I know if I was, you know, Mr. Fortin, how fast were you going? Do you know you're in violation of the law? Well, Your Honor, that would require me to apply facts -- statutes to the facts, and, you know, I can't do that. You know, I would be here for quite a while, I will would imagine somewhere in Orange County, in Orange County jail.

So I would say that one comes the closest. And I would say in most cases, the application of statute and case law to a specific set of facts to reach a legal conclusion, clearly, is the practice of law. And I would say everything else is going to depend on the circumstances.

You know, we have -- we got a great example and I appreciate that the two speakers on behalf of the Real Property Section, referenced the arguments that we put forth. You know, one is changing a -- drafting an amendment to change the weight restrictions for a dog from ten to twenty pounds. I think that can safely be done without an attorney. And it was offered up that that's the same thing as changing the voting percentages. And I disagree. I think changing the voting percentages is a little bit more complicated a task and that is something that we would want our managers to consult with an attorney to do. And I think for us, the bright-line test and what's dispositive in this process is, does the task require significant legal expertise and interpretation -- and this is also language that's in the advisory opinion -- how complicated is that task? And I think if you read that analysis, that that really does kind of address the issues that we

can't get in a bright-line test. That there are some things that, yeah, you don't need an attorney for and there are a lot that you do. And, you know, one of the things we have to understand as professionals is that the practice of law is not a fixed thing. It's something that is going to be changing all the time.

One of the things I did when I first got out of law school, because, you know, sometimes it's hard to find a job, you've got to pay those student loans, I reviewed documents. Lots of attorneys do that. Maybe between jobs, a lot of young people do that. That work now is done by computers. It's not done on a computer. It's done by a computer. So I was sitting in rooms with hundreds and hundreds of other attorneys and hundreds of boxes of corporate documents. Now all that is scanned and a computer reads it and some algorithm determines what's going on.

And it's hard to arrest a computer. So, you know, so that's probably an issue. So anyway, I think that answers your question.

CHAIRPERSON: Thank you.

MR. FORTIN: Thank you.

CHAIRPERSON: The next witness is Kelley Moran.

(Sworn by the court reporter)

MS. MORAN: Good morning. I have a prepared statement that will be short.

My name is Kelley Moran. I'm Vice-President of Rampart Properties and I'm here today representing our six associate companies in the State of Florida.

I've been a licensed manager of the State of Florida for the past seventeen years. I hold the designations of a Certified Manager of Community Associations and Association Management Specialist and a Professional Community Association Manager. I'm also Vice-Chair of the Regulatory Council, Community Association Managers for the State of Florida.

Thank you for allowing me to address the Committee today regarding unlicensed practice of law by CAMS in the State of Florida. As you know, in Florida, CAMS are a very highly regulated industry. We are licensed by the state and regulated by the DBPR. Our industry is very specialized in that we must have a working knowledge of the financial, administrative, physical and legal aspects of our associations. We are required, at a minimum, to obtain twenty hours of continuing education during each renewal cycle for our license. Part of these

CE credits relate to legal updates. CAMS must master the legislation entered into law each year so that we are aware of the laws that affect our associations. Consequently, our companies are committed to working with our association attorneys each year to bring these legislative updates to our clients so that they can be informed as volunteers for their communities. Therefore, we encourage our volunteer leaders to attend our legal update seminars, which are hosted by attorneys who specialize in community association law.

Furthermore, our company leaders regularly impress upon our managers the need for our clients to seek guidance from their attorneys on all legal matters relative to their communities that are outside the scope of the knowledge of our CAMS and do require legal interpretation. Our relationship with the attorneys that represent our associations are critical to the success of both professions.

As part of the specialized knowledge that CAMS are required to obtain and demonstrate are many tasks the Committee is seeking to have included in the unlicensed practice of law. We agree that the drafting of liens, pre-arbitration demand letters and those tasks that require significant legal

expertise and interpretation should be performed by an attorney. However, in the Committee's letter to the Florida Bar, additional tasks were noted that we feel do not fall under the unlicensed practice of law by CAMS. These tasks are purely administrative are fall under the education and regulation of CAMS as part of the specialized knowledge of community association management.

In this economy, the volunteer leaders of our management associations and the homeowners that live in these committees are faced with more challenges than ever before due to the decrease in collectible assessments, abandoned and vacant homes that are due to the foreclosure crisis, decreased property values and significant cash flow shortages which force our volunteer leaders to defer needed maintenance.

By mandating that administrative tasks currently conducted by CAMS become the unlicensed practice of law, the consumers, our homeowners will face even more economic hardships by requiring them to seek the advice of counsel for tasks currently handled by CAMS, based on their highly specialized knowledge of community association management.

I fear that should the Florida Bar uphold the Committee's recommendation that our volunteer

leaders, in an attempt to save money, will simply forego seeking the advice of counsel, and if CAMS are an unable to perform these management administrative tasks, the leaders of our managed associations will find themselves making uninformed and disastrous decisions for their communities.

These actions could have very serious unintended results which would definitely harm our Florida consumers who live in associations across the State of Florida.

In conclusion, as per our written testimony previously submitted, we encourage the Florida Bar to set up a joint task force of attorneys who specialize in community association law and experienced licensed community association managers to discuss these issues and bring about a mutual understanding and resolution to the issues at hand.

Thank you very much for allowing me to testify in front of the Committee this morning. I certainly appreciate your time and understanding, and if there are any questions that you may have, I'll be happy to answer them.

CHAIRPERSON: Any questions of this witness? Thank you, Ms. Moran.

MS. BUIE: I have one. What activities did you

say you -- Cassandra Buie. What activities do you believe fall under what should be consulted or --

MS. MORAN: That was really previously in our written statement from Mr. Fortin, were part of that statement. I really didn't address that in my --

MS. BUIE: I thought you said number -- the drafting of pre-arbitration --

MS. MORAN: Oh, yes. Mm-hmm. The drafting of pre-arbitration letters and the demand and the liens.

MS. BUIE: It was just two?

MS. MORAN: Mm-hmm.

CHAIRPERSON: Is that a yes?

MS. MORAN: Yes.

MS. BUIE: Thank you.

CHAIRPERSON: Anything else? Thank you very much.

MS. MORAN: Thank you.

CHAIRPERSON: Our next witness is Robert Freedman.

(Sworn by the court reporter)

MR. FREEDMAN: Good morning. My name is Robert Freedman. I'm with the Carlton Fields firm in Tampa. I'm not here for any clients of ours. I'm here just for myself and my other partners who

practice in this area.

I am a former chair of the Condominium and Planned Development Committee and as such, am a member of the Real Property Section. And I am very much in agreement with the positions that have been taken in reference so far by Mr. Mezer and Mr. Petersen.

I am not here as an association practitioner. I've been practicing for twenty-one years. I do not represent associations. I represent developers, or shall I say, I used to represent developers when we had developers. I now deal a lot with distressed assets both on buying and selling them. But my practice has been almost exclusively condominium, homeowners association and timeshare development.

And I'm here to reference that not every single project is the same that you can put on the four corners of any one document and be able to fill in a blank.

Let me give you two examples very quickly. A condominium project that was developed down in south Florida. A highrise condominium project. Three different managers were in this project over the course of five years. And I should say CAM managers. The word property management is often

used -- can mean two different things, I should say. It can mean the rental management like was referenced. It could also mean in a generic sense, community association managers. If I say property management, I'm talking about CAM management. That's just an old habit. I apologize.

Three different managers in five years. The first one was while the developer was in control of the Board of Directors. The second and third were after turn over occurred. All three managers made mistakes over the course of the years in interpreting interest provisions and calculation provisions in the documents because they did not understand how they played out. And none of them, including the manager who had been hired by the developer-controlled board, consulted counsel to check it. And they issued Certificates of Assessments due and said, here's how much it is, and they miscalculated the amount.

Now, certainly, there's an error that was made. No question. But three different managers made the same error. The document was clear. They were misunderstanding how it was to be applied based upon how the assessments were being collected. Just very quick, one quick example.

Another example is in the community -- in a community, large-scale community that has three different levels of assessments. You had a master association, you had a mid association, and then you had neighborhood associations below it. Three different declarations; three different associations.

A sale was going to occur. The CAM provided the Certificate of Assessments. Didn't include just the assessment on the lower level where the condominium unit existed. Included on that certificate, the amounts due to each of the other two upper assessments. The CAM did not provide management services to those other two associations. They had information, but they put it on there and they did not have the right information. It creates hullabaloos and problems when you're trying to sell property when there's purportedly a document that the title company is trying to collect at closing the right amount to make sure assessments have been made. Presumably, it looks right. Everything is filled out. But it has the wrong information in it because documents were misinterpreted and the CAM went beyond the scope of the one document that should have been looked at.

That same exact community, a claim of lien gets filed against a subdivision lot for failure to pay assessments. Included in that claim of lien were charges for the other two assessments. Yet the payment obligation was the individual's, not the individual associations.

Again, you have a claim of lien recorded against the lot which is defective. It creates all sorts of heartburn and all sorts of problems in terms of clean up by title companies; by the attorneys who have to get involved. We had to go to court to quiet title at the end of the day on this situation, because there was no way to really get it solved because the other associations were uncooperative. That adds significant expense to owners.

In my role as representing developers, it adds expense there as well and you might say, well, the developer is out there funding at the start. He's got such funding and providing monies to the association. Well, those monies have to get recouped somewhere. It's not just an unlimited bucket. So what happens, it goes to the cost of products and that increases cost to the owners. It also makes it harder to sell units. At times,

especially in this economy, it creates an imbalance that shouldn't be there.

All that has to happen is for that document to be properly prepared, and interpretation of three levels of documents to get the -- to know what you can say and what the right amounts are and the right information is not a ministerial act, in my opinion. It is far more than that. And to presume that you can just literally fill in a blank and calculate an interest charge, it isn't the same for every single project. Certainly for some it is. Certainly you can -- it's a very easy action to take. But to call it ministerial in all cases is certainly, in my opinion, a misnomer.

And I suggest that that is something that it goes beyond the scope of appropriate manager action and should be considered UPL if it's done by a CAM. And with that, those are my comments.

CHAIRPERSON: Do you have any questions for this witness?

(No Response)

CHAIRPERSON: Thank you.

The next witness is an Erica White -- or Eric White? Erica White.

(Sworn by the court reporter)

MS. WHITE: Good morning to the Chair and members. My name is Erica White. I'm the prosecuting attorney for the Regulatory Council of Community Association Managers located with the Department of Business and Professional Regulation. My job is to prosecute community association managers for violations of Florida Statute and our rules.

And I will not repeat what has already been stated here this morning, but our rules do provide for the Department to have the ability to prosecute CAMS for the unlicensed practice of law or any profession. So the Department does have an interest in what the unlicensed practice of law is as deemed by the Supreme Court and under the law. However, in doing my job, I do look at the statute. And I do think, and I have not heard that this morning, there are four basic things the statute says CAMS can do:

They can control or disburse funds of a community association. They can prepare budgets or other financial documents for a community association. They can assist in the noticing or conduct of community association meetings. They can coordinate maintenance for the residential development and other day-to-day services involved

with the operation of a community association.

I want to focus on the other day-to-day services because that's broad language. And there have been discussions about complaints from the members of the public. And I receive those, I review those, I talk to constituents; I see the complaints. The other day-to-day services, a lot of the other things that are referenced in the March 28th letter I believe fall under that.

In the interest of time, I will tell you, of 1 through 14, the ones that I have a concern with: 1, 2, 3, 5, 7, 8, 9 and 12. And I have a concern with those because when I see complaints against CAMS, CAMS are performing those functions. If they are looking at the Statute and/or the rule for guidance, the Statute is broad. These things could slip through the cracks. CAMS notice meetings. CAMS conduct elections. CAMS negotiate cable contracts. Sewer contracts, help, you know, construction contracts, and so I think there's room for interpretation.

Now, certainly, the Department is going to work with the Bar or other stakeholders, but to delegate those to be unlicensed activity, obviously, we want to know that. But I have a concern that the Statute

is broad. And if they are looking to the Statute or the rule, the Statute doesn't say that.

And in the interest of time, those are my comments. I did want to clarify something. The Department cannot remove a community association manager. All we can do is revoke their license. The association is responsible for removing a manager. And I'm happy to answer any questions.

MR. CROWN: Barry Crown. What's the level of complaints that you do receive and what is the average per year of number of revocations?

MS. WHITE: We currently have 440 complaints that are open against community association managers. We have a graduated disciplinary process, so there might be maybe one or two revocations a year. Because usually, if there's a complaint, there has to be several complaints against a manager before the Department will revoke the license.

MR. CROWN: Thank you.

CHAIRPERSON: Marcia?

MS. TABAK: Marcia Tabak. Just to reference that, how many CAM licenses are currently active in the state?

MS. WHITE: I do not have that information.

MS. TABAK: Roughly?

MS. WHITE: I mean, I would say maybe at least a thousand, if not more. I'm guessing on that. But it's a highly regulated industry, and there are a number of, to clarify, firms and managers. And sometimes managers can actually hold a manager's license and a firm license for the company.

CHAIRPERSON: Herb?

MR. MILSTEIN: Herbert Milstein. You said you have 441 active complaints and you had two revocations. If they are active complaints, the revocations would be prior cases. So how many cases do you normally have in the course of a year's time, closed cases, and how many revocations do you have?

MS. WHITE: To clarify, we have 440 open cases, but the number of complaints received is much more than that. Sometimes they are closed out before they get to the legal department. So the revocations would be discipline.

So usually, a license would not be revoked unless it was a very serious crime, like embezzlement, so on and so forth. By the time a person's license gets revoked, they've probably had several complaints against their license. But I can think of maybe two of that have happened in 2012.

MR. MILSTEIN: Let's switch the question. How

many actual complaints and how many letters or whatever you do, send out to the CAMS on a yearly basis?

MS. WHITE: I mean, I probably would say of the 440 cases, there could've been 600 complaints. Maybe 200 were closed before they got to Legal to determine if they were sufficient. Of those 440, we may close 50 percent of them that there's not legal sufficiency. But we have to do an investigation to determine what the violation is.

So I really don't have the numbers. I can certainly get that for you, but I'm not sure.

MR. MILSTEIN: You mean violations. We're dealing in semantics here. How many, not necessarily revocations, where something has been done to the CAMS, be it a letter of reprimand or anything else on something like this, on the average?

MS. WHITE: Maybe fifteen percent of the complaints we actually have discipline against the CAM. The rest are closed.

CHAIRPERSON: Lawrence?

MR. GORDON: As someone who's in the middle of this, who actually has kind of cleaning up, so to speak, do you think the problem is, or the perceived

problem is severe enough that any significant changes have to be made, or do you think that the system is pretty much okay, and maybe there's a little tweaking is all it takes?

MS. WHITE: I believe someone made a comment that the associations should be looked at and I would agree with that comment because the associations actually direct the CAM to perform certain functions.

Now, the drafting of certain documents, I have seen CAMS drafting Certificates of Assessments with the association's lawyer. But if the association directs them to do that, they may not know that is unlicensed practice of law. I think education and clarification in the area's needed. But to deem it right now the unlicensed practice of law, I have a concern with that.

CHAIRPERSON: Marty? Identify yourself.

MR. SPERRY: Martin Sperry. Just a quick question. Of the 400 complaints -- let's say the 600 and some from, you mentioned are disposed of before they become a recognized complaint, out of that 600, how many different people are you referring to? I mean, are a large number against one person, or do you generally have about 4 or 500

different people?

MS. WHITE: Of the 400, maybe 300 are different. And some are multiple from the same community or against the same association. So it's a combination. But each person in a community could file a complaint. And we treat each one as a separate complaint against the CAM or a CAM firm.

MR. SPERRY: Thank you.

MS. POBJECKY: Renee Pobjecky. It's kind of bouncing off what Lawrence said. If these fourteen items are declared UPL, do you think your complaints would decrease?

MS. WHITE: I think they might increase because CAMS are doing some of these things. And they are looking -- there's continuing education. They look to the Statute and if this is indeed the unlicensed practice of law, when I get a complaint and that's what it is, then we do have a provision for me to prosecute that. So I think that might increase.

CHAIRPERSON: Thank you.

MS. WHITE: Thank you, Mr. Chairman.

CHAIRPERSON: Jane Cornett.

(Sworn by the court reporter)

MS. CORNETT: Good morning, everyone. My name is Jane Cornett. I am an attorney. I practice in

Martin County, which is on the east coast. It's a small area. We also call it Hooterville. And I represent homeowner and condominium associations exclusively. I've been doing so for thirty-one wonderful years. I know you say she looks much too young for that, but it is true.

My perspective is perhaps a little bit different from the area of the state where I'm located. The first thing is that we don't deal, where I am, with large management companies. I have about 325 association clients, and I looked yesterday, and of that group, only 15 of the 325 are represented by large management companies. My clients are primarily working with either on-site individual managers, CAMS, or with small family-owned companies that maybe have four managers or ten managers. It's not the same kind of perspective as you see in a large city.

Now, as I said, I've been around for a while, so in 1996, when the prior order was issued, the managers with whom I worked -- and some of them I worked with for the whole thirty years; of course, they are much older than I am -- they were very pleased by that order because they could go to the president and say, look, I can't do that claim of

lien. It's right here in black and white. The Supreme Court said so. And so, that order was a great assistance to them. And I think perhaps the managers are missing an opportunity here. To have an advantage to be able to say to the boards who are pressuring them to do things, I'm sorry, I'd really like to help you, but I can't, because the Supreme Court said so.

I really find that the boards do pressure their management staff to do things that the management staff is not comfortable with. But also, isn't comfortable saying no because they don't have a good reason for saying no.

I do a seminar for clients in the area. And I have -- I do different ones and I have one that I call the Seven Deadly Sins. And this is the seven things boards shouldn't do. And number one is, call me before you sign the contract, not after. And number two is, don't practice -- don't pressure your managers to give you legal opinions, because that is a very, very common problem.

So I think this is really an opportunity to protect the managers, too, who are citizens of the state, just like everybody else. And I think it can be something that is advantageous to them.

I just want to make one little quick comment about the Certificate of Assessment idea. There's been a pretty consensus of folks or a number of folks that if you have to have statutory and case analysis to reach a legal conclusion, that that is something that is the practice of law. Well, if you have a Certificate of Assessment to be issued and the case is in litigation, there may well be statutory and case law that has to be applied before you can issue that Certificate of Assessment. It isn't just taking the number off the shelf. You have to look at who's asking for it.

And there was a comment about giving an estoppel to somebody when you didn't really know who that person was. You're not supposed to do that. There are laws in the State of Florida that limit who can have access to information about who's in arrears, so that should never occur. That should not be given out unless you have permission from the owner. So there's an example right there. Somebody just misunderstanding what the law requires.

From my vast experience, if you have any questions, I'll be more than happy to answer.

MS. TABAK: Does anyone have any questions of this witness?

(No Response)

MS. HOLCOMB: I get the hard pronouncing name. Next on the list is Tony K-A-L --

MR. KALLICHE: Kalliche. Thank you.

MS. HOLCOMB: Kalliche. Easy as pie.

(Sworn by the court reporter)

THE COURT REPORTER: Spell your last name.

MR. KALLICHE: K-A-L-L-I-C-H-E.

Mr. Chairman; members of the Committee, thank you for your time today and thank you as well for your service to the Bar and residents of the State of Florida.

My name is Tony Kalliche. I'm Executive Vice-President and general counsel for the Continental Group. We are 6,000 employees, community association management firm, largest in the State of Florida. We employ approximately 600 licensed community association managers. And we have offices throughout the State from the Panhandle all the way down to Miami.

Before I joined Continental ten years ago as Executive Vice-President and general counsel, I was a partner with Becker and Poliakoff. I was pleased to enjoy twenty-three years of practice there and was in charge of the firm's Miami office.

I have a unique perspective and I also, by disclosure, my wife is still an attorney with Becker and Poliakoff in their real estate department, and I am member of the Real Property Probate and Trust section of the Florida Bar as well.

I'm not going to regurgitate some comments I think may have very well made by the witnesses that preceded me. I will stand on the written testimony that we offered by way of our letter, which hopefully, you've all have or will have the opportunity to review.

The point that I think -- that was made best is that I don't really think the Bar has shown sufficient evidence of harm so as to justify the broad-reaching proposed changes to the 1996 Supreme Court opinion. I think we've worked with that Supreme Court opinion over the last fifteen, sixteen years. We have an understanding of what's allowed and what's not allowed. We don't want our managers practicing law. By no means do we want that. In our legal department, you know, we do spend time in counseling our managers. You know, I agree, eighteen hours of training to get a license is not a lot. The reality is, it's more than some attorneys would have that practice in this area. You don't

have to have any, as an attorney. Certainly you have to be trained to be an attorney, but you don't necessarily have to have any training in the field of community association law to hang out a shingle and be a community association lawyer. So, yeah, there is a need for more education. I do think that's a valid point. But I don't think the Bar has shown that there's evidence of sufficient harm that would justify modification or a need to expand the order that was issued by way of the Supreme Court's decision fifteen, sixteen years ago.

So with that being said, I know the Committee's time is short and I don't want to take up any more time. I'm happy to answer any questions that any of the members may have.

CHAIRPERSON: Any questions?

(No Response)

CHAIRPERSON: Thank you.

MR. KALLICHE: Thank you.

CHAIRPERSON: Just for informational purposes, we're going to go beyond 11:30. I recognize we have a number of speakers and we still want to hear from everybody. But I do not anticipate going beyond noon as we do -- we'll be very tight in our meeting. So the next speaker is David Felice.

(Sworn by the court reporter)

MR. FELICE: My name is David Felice. I'm a Florida attorney; happen to be a member of the Real Property section. Also a member of the Condominium and Planned Development section. I also happen to be the owner of Terra Management Services, which is a community association management firm. I happen to be a licensed community association manager in addition to being an attorney. So when I speak before you today, I'll try not to talk out of both sides of my mouth, you know, as an association manager and as an attorney.

I reviewed the correspondence that was submitted by my colleagues, and I tend to feel that it's overreaching. There's a lot of items that are listed here. The first three, for instance, Certificates of Assessments. I don't feel that those need to be prepared by an attorney. However, in prudence, I would suggest my managers contact an attorney for some information in completing the certificate.

For instance, in number one, it says the matter has already been turned over to the association's lawyer. Well, in certain cases, fees of the attorneys would be collectible back from a resident

or a member of the association. And those fees should rightly be put into -- should be something that we should be cognizant of when we're preparing certificates or ledgers for the association members.

When I look over these items, I see Number Four, which says I'm drafting an amendment to a declaration and it's an item that's going to be recorded or memorialized in the official records. I can see and feel that that should be something that an attorney does, just as I would have an attorney draft a deed or the claim of lien.

There's been other comments in regard to Number Fourteen, an activity that requires a statutory or case law analysis. Well, a lot of the statutes, the statutes regarding homeowners associations and community associations actually are, in large part, procedural. All right? And I don't feel it's necessary to go to an attorney every time I'm trying to -- every time one of my managers is trying to determine the procedure that he's supposed to follow at a meeting or how a letter should be sent out.

One of the things that isn't mentioned in this letter are pre-lien letters. Letters that would be sent out in advance of a lien. Those are things where the statutes actually are saying what the

contents of the letter needs to be, how many days it needs to be sent out before the lien is filed. And those 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.

There is a lot of talk about errors in documents. I happen to see the errors that attorneys make and I happen to see the errors that CAMS make. And I'm going to say that I find them on both sides. So I'm not quite sure that how many errors are made is the proper determination or is the most significant consideration in determining whether an item is the unauthorized practice of law.

I recently had a situation with one of my own association law clients, all right? And where I found an invalid document that had been filed back in 1983, which had been amended by four different attorneys on four different occasions through this year. So clearly, mistakes are made on both sides of the fence. And I don't think that that's the only -- the most important factor in determining whether or not you have the unauthorized practice of

law.

Lastly, I'd like to say that in regard to -- there was a comment made earlier, very much earlier about the Fair Debt Collections Act. Well, case law -- there are holdings that indicate that a community association manager or community association management firm is actually standing in the shoes of the association; and therefore, there's an exemption from the requirement of the Fair Debt Collections Act. As a homeowner's association, it's just a corporation. All right? A corporation has to act through somebody. It can act through its officers, it could act through its employees and it acts through its agents. We're just the arm of the association in carrying out what the association is dictating. And I believe that that's part of the analysis that went into determining that an association manager would be exempt from the provisions of the Fair Debt Collections Act when they are trying to do collection work on behalf of the association. So that's another consideration that the Committee needs to consider when it's determining what's the unauthorized practice of law.

To a large extent, companies should be able to carry out their business without the necessity of

going to an attorney every time they are trying to send out a bill or do other things that some people have said are ministerial, but that are done commonly in the conduct of the business in which they're in.

Lastly, education requirements. As a community association manager, we undergo twenty hours of training every two years. As an attorney, we undergo thirty hours of training every three years. I fail to see that there's less of a continuing legal education requirement. Two of the hours that we take as a CAM in those two-year periods have to be on legal, has to be on legal update, where we should be educated as to the changes in the law that are taking place.

I kind of feel that this whole thing, to me, has kind of a feeling of us-versus-them, which is something that is part of this that I really didn't like when I read it. I would -- if there's a general consensus in the legal community that CAMS are not educated enough, all right, or trained enough or they need additional training, I think that the focus would be more aptly spent in assisting in that regard and trying to insure that they are well trained and well educated as opposed

to trying to move the activities that we have in this letter to being considered legal activities, when I feel that many of them clearly are not.

That's all I have. If I can answer any questions for you.

CHAIRPERSON: Questions?

MS. TABAK: Yes. I wonder again, several of you have mentioned this, but I just am trying to make sure I understand clearly. Items One through Three. The difference in the preparation of the Certificate of Assessment when it's done versus when it's been handed over to an attorney. What is the difference?

MR. FELICE: Well, the difference is, basically, when it goes to an attorney, we're talking about a collection activity. I believe this is referring to the case where there's collection activity or where there's a delinquency. And the case has been turned over to an attorney for that purpose.

MS. TABAK: You're saying Item Three deals with the Fair Debt Collections Act?

MR. FELICE: Well, Item Three is talking preparation of a number of disputes in writing. The associations. Item Three is very simple. We send

out, how we would do this as an community manager is, let's say at the beginning of the year, we're going to send out coupons. All right? The coupon would indicate how much the person owes. Often a person doesn't think they owe what the coupon may say and they in and they have a dispute, so they question the amount of their bill. All right? So what's the community manager supposed to do at that point? They say, well, I'm sorry, we can't address that. You're disputing the amount that you owe. If they do it in writing -- let's say they did in writing. Is that something that we, as an association manager, should be able to resolve? I think it very well could be and we should be able to provide a Certificate of Assessments or a ledger that indicates the amount that they owe.

In Items One and Two, it's gone beyond that point. This, now the matter's been turned over to the association attorney. I still think that the manager could prepare the certificate, but I think that once it goes to the attorney, there may be other charges that the resident, that the member is responsible for.

MS. TABAK: And what would those other charges be?

MR. FELICE: Well, they could be, according to Florida Statutes, attorney's fees and the cost -- and certain costs of collection are things that a member may be responsible for. And those are things that would have to be considered. When it goes into the foreclosure action, there may be costs that the member is responsible for. And those are things that need to be considered.

So what I would say is that there has to be coordination going back and forth on Numbers One and Two between the manager and the attorney. And that's what happens in my management company. We have certain circumstances when matters are turned over to attorneys where the attorney sends them out. And if that's what our client, the association, prefers, we're very happy to do that. Often that's not what the association prefers. And in those cases, we coordinate with the attorney. The attorney will call us or we call them. We say, are there costs here? And here's a copy of the ledger that we have, is there anything in here that isn't included that should be included? In those cases, if there is something, we would go ahead and add it.

So I think -- I don't know that it's necessary that those items be performed by an attorney. I

think that, in fact, there maybe prudence would dictate we contact an attorney in some cases to make sure we have everything we should have in it.

CHAIRPERSON: Thank you, Mr. Felice.

Our next witness is Michael Gelfand.

MR. GELFAND: I was going to serve as the rebuttal, if I might be last then.

CHAIRPERSON: I will defer putting you last if you'd like. This is not -- this is a public hearing. This isn't a trial, so we're not going to have opening, close, rebuttal. If you'd like to go to end of the line, you're welcome to.

MR. GELFAND: If I may do so, I think that would be best. Thank you.

CHAIRPERSON: Certainly. Christopher Davies?

MR. DAVIES: It's still morning. Good morning, ladies and gentlemen. Thank you for the time. I'm going to be short.

(Sworn by the court reporter)

MR. DAVIES: My name is Christopher Davies. I'm an attorney with Cohen & Grigsby in Naples, Florida. I've been practicing in this area since 1985. I'm going to keep my remarks very short because we're short on time now.

I was a member in the early 90s of the Florida

Condominium Study Commission, for which we had a number of reforms by the Legislature due to the Condominium Act. And I wanted to offer some anecdotal evidence, if I may, and tell you a little story about some of my -- about what happened as a part of the Commission hearings that we had.

We went around the state to various cities and we listened to what was going on in the industry, be it the attorneys, the managers, directors, anyone was allowed to come to these. One of the things we heard about was abuse in the way that elections were conducted.

Elections of directors, in the early 90s, was able to be conducted by general proxy. And all that meant is that you just filled out a general proxy, signed it, and essentially, then that gave power to the board to pick who they wished to be on the next year's Board of Directors. And in most communities, this worked perfectly fine. There was no abuse. But in some communities, there was abuse, unfortunately. And the same guys got to be on the board year after year after year. They would go to these public hearings, and we would hear people who were on the board for a decade. Great service, didn't get paid to do it, it's an unthankful job.

But be that as it may, it wasn't particularly healthy for the community.

What we did, with the help of the Legislature, the Legislature passed the law that said you can't use general proxies in elections anymore under Chapter 718. We have to now use a double blind, a blind dual envelope system to preserve anonymity. And anyone is able to be a candidate for the board. You may not get elected, you may not get any votes other than your own, but anyone has the right to be on the board.

I was thinking about all of this stuff today and we could've come up and addressed the fourteen points again. You've had enough of that today. But I think the story that I want to share with you here, or the point of this is that what we did is we changed the playing field, because with the help of the Legislature, we created a new rule. Because what was working or what -- how elections were being conducted wasn't working.

I think what we have here today is a system that isn't quite working for lawyers, for CAMS, for members of the Board of Directors and for the general public, and it needs to be looked at again. And as Jane Cornett said, one of the witnesses you

heard from recently, she indicated that in 1996, when the Supreme Court ruling came out, it provided clarification. I think that's what we're really need here. We need some clarification on these fourteen points. It's not a turf war. We need to work together to where the goal here is to provide effective service to the community associations that all of us are involved with in some capacity or another. But I think it is incumbent upon this Committee to look at all those fourteen points and attempt to determine where you believe there is the unauthorized practice of law.

I, as a member of the Community Planned Development Committee, support the March 28th letter and the comments that are in there. I don't envy you your task, but it's important that there be clarification because rules that are clear and unequivocal, exist to level the playing field. And while there are a number of fine managers out there that do an outstanding job at times that are very, very difficult, managers, lawyers, and in particular, members of the Board of Directors, need to have a document that allows everyone to know where they stand.

Thank you for your time this morning, ladies

and gentlemen.

CHAIRPERSON: Thank you. Do we have any questions for this witness?

(No Response)

CHAIRPERSON: Thank you.

MR. DAVIES: Yes, sir.

CHAIRPERSON: Brad van Rooyen. I'm sorry if I missed that last name.

(Sworn by the court reporter)

MR. van ROOYEN: Ladies and gentlemen of the Committee, good morning. My name is Brad van Rooyen, and I'm the Executive Director of the Chief Executive Offices of Management Companies, and I'm here today representing the 500,000 households we represent in community associations in the state and the hundred of employed managers that we have.

The COMC and the Bar have something in common. We both have a passion and desire to make sure that the public's interest is protected. Over one million Floridians reside in HOAs and condos. Many of these are struggling financially due to foreclosures, declines in home values and the inability of owners to pay their dues. There's already an increased strain on associations to provide services with the limited budgets that we

have. The outcome of today's hearing could put these associations in a very tough position where they will be forced to raise dues on owners, many of them already struggling to pay these dues. The proposed restrictions will restrict association management companies from being able to offer affordable services to community associations and the many individual homeowners who make up those associations.

As you all are aware, we've heard today community association management companies and managers in the state are regulated. It's a regulated industry. And we have a level of potential through the DBPR that should be recognized.

The basis for these proposed changes are inconsistent with the overall public sentiment towards our industry services and are inconsistent with the freedom of associations to peacefully interact. I ask the members today of this Committee to consider the relatively small, one of the last in these thirteen cases cited in the request for the advisory opinion, in relation to the potential ongoing monthly costs of over one million homeowners in our state, will have a choice -- really no choice

but to pay higher monthly dues to cover increased legal costs.

In February of this year, we conducted a poll and the poll found that 86 percent of people surveyed in associations opposed greater regulatory control of associations. I think this gives rise to isolated anecdotal evidence to advocate for legislation that is unnecessary, costly and counterproductive. Unfortunately for homeowners, as HOAs dues rise, property values can sometimes go down. This situation has the potential to slow down a recovery of the housing industry that has been gaining strength and picking up over the past few months. And homebuyers take into account the total cost of ownership when they're going out to purchase. Association fees have the potential to substantially add to the cost owning a home in today's market.

We believe the unforeseen consequences of this proposition will be that communities that can least afford to alienate homebuyers by increasing their dues will be the ones that are going to be hit the hardest as demand slips, home values fall, creating a vicious cycle. And where the association dues rise and more homeowners find they can no longer

keep up, this raises the entire community's dues even further, which increases the risk of widespread default. The result is more homeowners are going to find themselves receiving letters from attorneys the associations are now required to hire to collect dues, and further raising legal costs and profiting one group at the expense of homeowners. None of this seems to in the interest of the public and places the courts in a position of promoting one profession over another. To say nothing of the precedent that this could set for other regulated professions in our state.

Thank you very much.

CHAIRPERSON: Any questions? Herb?

MR. MILSTEIN: You're taking fourteen points as a whole, but wouldn't even you agree that there is some items within that that do need changes?

MR. van ROOYEN: Yeah. You know, I've reviewed them. I spent quite a bit of time, you know, looking at how this applies to our firms that we represent; how they need to address this.

I think on items like Number Four, drafting of amendments, while the language could be prepared in, you know, combination of the manager and the board, defining what is going to be the necessary change

for them, I think it would be acceptable to possibly have language not making it the unlicensed practice of law, but maybe inserting language that would say that it needs to be reviewed by an attorney and maybe having some form of a certificate of evidence or a legal opinion that an attorney has reviewed it.

Look, I mean, let's be honest. This is a very contentious subject. Both sides have very good positions. I just think that by moving forward, the increased costs to the public, they are the ones that are going to bear the brunt of this. And when the market is struggling, if we have to lose our focus on keeping up with the community just maintaining a baseline, and now we're focusing on making decisions, is this the unlicensed practice of law or is this not the unlicensed practice? It's going to cause a disruption just to the regular practice of associations.

I also think Number Eleven, you know, that is something that, you know, in speaking with our companies in the group, that none of them have their managers conduct that. I mean, it all goes to an attorney. We understand that there are some things that we just don't do. It's just not good business practice. And that's what our group, the COC is

committed to doing is to having a set of guidelines that is the best practices for our industry. And we've all agreed that something like that is something that should be handled by an attorney.

I also think that Number Eleven, drafting of pre-arbitration demands, should include language that it has to be reviewed by an attorney. So another legal opinion that these demands have been reviewed so that they remain consistent with the documents.

MS. BUIE: Cassandra Buie. Do you believe that we should then make some type of clarification regarding these fourteen items?

MR. van ROOYEN: You know, given the cases that have been presented, I think that the previous recommendations by the Supreme Court are sufficient. I think that through working with the Department and with the continuing education practices of our industry, including these type of recommendations as part of our continuing education, you know, should be considered as part of what we look at for the upcoming continuing education hours. Maybe focusing on helping CAMS go through the test of, is this something we should do or should -- when do you, you know, immediately send it over to an attorney. I

think making a wholesale change of -- this is a lot of information to make a determination on, in our opinion. There's a lot to decide here. There's so many moving parts that to accomplish it, I think is going to take a very long time. It's going cause a lot of doubt. Association management firms might not want to expand, hire more people and make that commitment to those individuals and their families and their way of life until this type of question is answered, and which slows job growth; slows the overall economy.

CHAIRPERSON: Thank you.

MR. van ROOYEN: Thank you very much.

CHAIRPERSON: Our next witness is Victoria Laney.

(Sworn by the court reporter)

MS. LANEY: Thank you. I know the time is short. I'll be very quick. I want to give three examples of, if it's not unlicensed law, it should be.

First, I want to introduce myself by saying I have a Master's degree in business. I've lived in about seven HOAs in different states and various forms of governance. I have attended almost monthly training that's normally given to CAMS or homeowners

associations. Some of it sponsored by Becker and Poliakoff. Some of it by Associa. I'm going tomorrow morning for a three-hour legislative update. And I've been doing that for a number of years.

The CAMS, for example, in the last meeting, the CAMS stand silent as our association was going to pass a special assessment, which violates Florida Statute 720. And I spoke up and for that, of course, I'm vilified. But in that case, I wish the CAM would have given advice.

I also want to, before I do my other prepared remarks, I want to respond to the idea of governance by the DBPR. In my experience, it's a failure. And I've only had -- I've had two occasions, one of them, according to Florida Statute 720, late fees, if provided by the documents, are limited to twenty, $25 late fee. Our association started charging a $50 late fee on an $87 assessment. And if they couldn't pay the $50 late fee, it went to the attorney.

So right now, we have a woman in our neighborhood who owned her home free and clear, worth more than $200,000. They took her $425 in unpaid assessments, they turned it into $4500, and

they are foreclosing on her home and they will take it because of excessive late fees.

Did I complain to the DBPR? Yes, I did. And they said, you know what? It doesn't matter how much you charge, just don't call them late fees. And that decision was widely ridiculed. Of course, now they are still calling them late fees and they are still charging whatever they want. Our documents are only limited to eighteen percent interest. There's no late fee at all authorized by our documents. But they are going ahead and doing it and the DPBR won't do anything about that. If she wants to talk to me afterwards and do something about it, I would welcome that.

Now, let me just go to the three things that -- I'm truncating my original prepared remarks in regard to the time.

I was asked to testify on behalf of a widow who filed a complaint with the Florida Commission on Human Relations for familial discrimination for the actions of the CAM in her community. I consulted an attorney because I was elected to the board subsequent to having her ask me to testify in her behalf.

The things that the attorney did to her, if

they weren't unlicensed practice of law, they should be. For example, they told her that she couldn't run for the board because she was in litigation. She wasn't in litigation. You know, I won't go into the details due to time. They also did a late fee that they forced her to pay, claiming she didn't pay her assessment in time. I'm quoting her, I presented my canceled check to prove I paid the assessment by the deadline, but they refused to refund the late fee. And so, that's an example of things they did to her. I, after I consulted an attorney, paid it myself, because it wasn't an official board, I was testifying as an individual. They were livid at me for testifying in behalf of the widow. And this is what the CAM, the community association manager did.

In our homeowner association meeting where I was serving on the board, he asked for time and he says, your past actions have been tortious at best. You leveled innuendoes and accusations about us. You have counseled and represented residents -- I won't read them all in the interest of time. He compared my actions, he said in WWII, Hitler used the same conspiracy theories to condemn an entire culture. In the 60s, hatemongers used the same

tactics that you're using. And you can see where it got us. You know, he compared me to people who persecuted African-Americans. He said, I want to make myself very clear that if we have to, we're going to take legal action against you for those comments that you just brought into this discussion, where you threw a dispersion about discriminatory actions towards Southwest Property Management from another corporation where you represented yourself as a board member of this corporation. That's tortious.

Now, if what he said doesn't make a lot of sense, it doesn't make a lot of sense on several levels. And I disagree with the idea that they are educated. To my knowledge, he has no college education.

Anyway, basically, he references my testimony in the civil rights lawsuit. He claims it's tortious. He threatens me in front of the other community, in front of my board members and the other people in the neighborhood.

CHAIRPERSON: Ms. Laney?

MS. LANEY: I think saying it's tortious is a legal opinion.

CHAIRPERSON: Can I just get you to focus on the

general issue today as opposed to a unique issue or experience that you may have had? Again, the Committee needs to address the larger issue concerning the CAM activities that could constitute the unlicensed practice of law.

MS. LANEY: Okay. I will just -- I'll just stop.

CHAIRPERSON: Are you sure?

MS. LANEY: I know time -- yeah, I'll just stop.

CHAIRPERSON: Any questions for this witness?

(No Response)

CHAIRPERSON: Thank you.

MS. LANEY: Yeah. You know, I was going to give other examples. I think that, you know, I would complain about it if I thought it was unpracticed, you know, of --

CHAIRPERSON: You can still submit written submissions.

MS. LANEY: Pardon?

CHAIRPERSON: You can submit written material. The Committee will consider it.

MS. LANEY: Okay. Well, thank you for your time.

CHAIRPERSON: Thank you.

Next witness, Alan Garfinkel.

(Sworn by the court reporter)

THE COURT REPORTER: Spell your last name.

MR. GARFINKEL: G-A-R-F-I-N-K-E-L.

Good afternoon. Mr. Chairman; members of the Committee. My name is Alan Garfinkel and before I start, I was just telling my assistant back there that the last time I felt like I did something like this, I was in 10th grade in North Miami Senior High School and I totally forgot everything that I was going to say after I said, my name is Alan Garfinkel, and I'm running for your student body president.

But as a background, I'm founding partner of a law firm named Katzman, Garfinkel & Berger. We're a state-wide community association law firm. That's all we do. We don't represent banks, we don't represent developers, we just represent community associations.

We have offices all over the state. I live in Central Florida. I'm a life-long Floridian, but lived in Central Florida since 1987. Practicing law since 1989, for the last twenty-three years. I'm licensed in Florida; licensed in Tennessee. We have offices throughout the state. And there's lawyers

in our firm that are licensed to practice in approximately twenty jurisdictions, both federal and state.

In 2007, our law firm formed an organization, created an organization called CAN, which is a Community Advocacy Network, which is a state-wide not-for-profit organization dedicated to promoting positive community association legislation and protecting the lifestyle of private residential communities which are home to a significant percentage of Florida population.

Just to put it in perspective, there's approximately 60,000 community associations in the State of Florida. And if you average about five board members per association, it's approximately 300,000 volunteer board members that are responsible for making the management decisions for the individual communities.

The topic of unauthorized practice of law as it pertains to professional advisors, community association managers, assisting volunteer boards across Florida, is certainly worthwhile of your deliberation. However, I would urge the Committee to differentiate between practicing and following law, and we would further urge common sense and

practicality when crafting new rules in this regard.

I'm here as a lawyer that practices in this industry. And I'm here to speak against our law firm's own financial interests. It would behoove me personally, as a founding member of this law firm, to insure that every decision that governs community associations, has to go by my law firm, or a law firm that is like my law firm. But the reality is, is that there is a case on point relative to this issue. And the case on point that you all, I'm sure have read and understand, is the case of the Supreme Court, In Re: the Advisory Opinion Activities of Community Association Managers, and that could be found at 681 So.2d. 1119.

And the interesting thing about law is that it's governed by the principle of stare decisis and stare decisis is a common law term that was established in the 13th century, that provides that -- regarding judicial restraint, and it encourages judges to -- well, it not encourages judges, but judges are obligated to respect the precedents established by prior decisions. And in our reading of the statute, it seems that most of these issues have already been addressed by the court.

Practicing law is generally understood as appearing before the courts, and includes giving legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts. However, what it means to follow the law is as opposed to practicing law must be, in our opinion, defined in a common sense fashion. So, for example, does it really take a lawyer to read the bylaws and advise the community that 51 -- 51 is a quorum in a community with 100 units? We don't think so. If there is determination of affirmative votes or approving new owner documents can usually be categorized as following the law and the association, particularly governing documents, is quite different from drafting a document, drafting an amendment, preparing a lien, or preparing an arbitration demand letter. If there's an ambiguity or confusion on any approach, then obtaining advice from a Florida attorney in good standing is prudent and should be required. In the absence of any such ambiguity or confusion, a volunteer board and its manager must evaluate the risk of reward in the specific approach decision that is being considered and proceed in the best interest of the association

membership.

We believe that it's in the best interest of common interest ownership communities throughout Florida to allow reasonable and capable licensed CAMS and board members to exercise common sense and judgment in each particular situation when the contemplated activity constitutes following the law as opposed to practicing the law. It would not, in our opinion, be in the best interest of common interest ownership communities to create an arbitrary or petty list of activities or decisions that must have a legal opinion. More than half of the state's approximately 60,000 community associations have fewer than 50 units or lots. The UPL Committee should bear in mind that the potential economic impact of an ultimate decision on these small associations, should these boards feel they cannot act without the benefit of legal counsel on daily operational matters, and thus, refrain from acting altogether, to their community's detriment.

Now, here's the reality. We have several thousand community association files open in our law firm. And many of our associations that we represent are going through incredibly hard economic times. There's already a case on point that directs

these community associations in terms of what is practicing law and what is not practicing law.

Now, as an anecdotal matter, before coming to this hearing, I went ahead and I, notwithstanding practicing law for twenty-three years, I went ahead and I took the pre-licensure course. I wanted to see what it was all about. I took the eighteen-hour course and I attended it with the CAMS and went through the materials, which are extensive. And there was an extensive provision in there that all folks that have to submit to licensure, have to read and be prepared on, just like the Bar exam. And they have to study up on what is practicing law and what is not practicing law.

I will also tell you from an anecdotal point of view, that I am not aware of any industry in the State of Florida that has the economic incentive of education more than community association management firms. I'm not aware of any. It's interesting that most of these management firms have a -- notwithstanding their licensure requirement of having mandated twenty hours every other year, but the reality is, is that there's -- it's a very competitive market, like most of our markets are. And boards who decide who to go to is not just based

on price, it's based upon education. And so, what's very interesting to me as a practicing lawyer in this area is that the law firms that practice in this area and the management companies that practice in this area, their fundamental basis of marketing is about education. How our lawyers, how our managers are more educated and are up on the law. Our law firm spends a lot of money every year in terms of promulgating materials exclusively on education. And we do this for a variety of reasons. But we do this because we've been in the market for a long time and we understand that the market requires education.

And so, this is just -- it's a very interesting idea here where this Committee is tasked with a significant responsibility of protecting the public. To making sure that the community is advocated by folks that are licensed and are educated in this area.

And thank you to the Committee for allowing me to express our opinion. And if there's any questions, I'll be happy to answer or my partner, Ray Piccin, from our Naples office, will answer as well.

MR. ABBOTT: Colin Abbott. My question is the

1996 opinion that you cited --

MR. GARFINKEL: Yep.

MR. ABBOTT: -- they mentioned there was some gray area. Do you think that that gray area has expanded and now, since then, to require a new opinion or do you think that as an attorney, do you think that that meets the test as the other participants?

MR. GARFINKEL: Yeah. I think that this opinion, which was produced or issued in 1996 -- and it's interesting, because it was nearly a unanimous opinion. One judge was recused, but the other courts unanimously concurred. And this is a -- we've both read opinions that are ambiguous and seem to leave a lot of gray areas. In our opinion, this is a pretty exhaustive listing of topics and, specifically, as I was sitting down here, I counted that there were twenty-three issues that were specifically addressed in the 1996 opinion.

So, again, this is, you know, from our perspective, there's existing doctrine there, and I think that the Supreme Court is obligated, obviously, to follow its prior ruling. And we would encourage the Committee to apply common sense and not mandate every single thing as to be required of

a legal opinion.

CHAIRPERSON: Thank you.

MR. GARFINKEL: Thank you.

CHAIRPERSON: Mr. Gelfand, you're our last witness who has signed up. You'll have five minutes.

(Sworn by the court reporter)

MR. GELFAND: Five minutes? Good afternoon now. My name is Michael Gelfand. I'm a Board certified real estate attorney. My practice happens to involve primarily the representation of condominium associations, homeowner associations, property associations and unit owners.

I'm currently the Secretary of the Real Property Probate and Trust Law section and I've just been elected as the new Director of Real Property division for the Florida Bar Real Property, Probate and Trust Law sections. I'm the former chair of the Condominium Committee and so that you know a little bit more about the background of the Committee. The Committee is truly a one place where folks have dialogue. The Committee is made up of attorneys representing not only associations and unit owners, but also developers and as you heard, attorneys, who represent management companies.

Decisions from that Committee come from a consensus. The Committee does not move forward unless there is a consensus of the members of that Committee. And members truly debate what occurs there.

It's interesting, of all the folks you heard here, and I wasn't going to say until a few moments ago, you have not heard from a board member or an association president. I'm not quite certain Ms. Laney's background, but I presume that from what I heard, she was a director. So far, from the folks that are on the ground, you have heard literally the horror stories. We've heard also from Mr. Oshinsky, who talked about the severe financial distress.

What we have here in many situations are Board of Directors who are saying to managers, we need you to do this because we want you to do it because we don't want to pay the attorney. What we have here is the classic situation of penny wise and pound foolish.

You heard from the DBPR member. This leads to complaints because when you are penny wise and pound foolish, then the errors occur. Someone wise told me, Michael, sit down, don't worry about this. If this continues, it will generate tremendous amounts

of business for you. It's in your economic self-interest to let managers continue to practice law.

We heard a few moments ago, a suggestion to you that you should utilize as a test, a balance between risk versus reward. I would suggest to you, your entire history here as this Committee has not been balancing risk versus reward. That is the antitheses of what this Committee does.

If we're dealing with less cost, and if that actually was the test, certainly it makes more sense to have an attorney review a document, particularly a contract, particularly a -- especially a contract, before it takes action because afterwards, it's far more expensive. Of course, with attorneys, you have conflict of interest issues and attorneys are trained in those; managers are not.

Bottom line, what we have here is, this Committee, almost as a parent, needs to be able to say to the CAMS, this is how you can say no to the board members. They need you to do that so they can say to the board members, just the way the board members have finally learned now, CAM managers cannot notarize a document when the president is on vacation in Long Island. Those situations are

finally ended, but that's because folks have told them, no, you can't. It's criminal conduct.

On the concept that associations hire individuals because of their education background, I will tell you as someone who's represented associations as well as unit owners for quite some time, most associations don't see who their actual on-site manager is when they hire a management company. They hire the company. The on-site is a side. When the on-site is there and does a good job and learns the nuts and bolts, then the on-site moves to another person; another community, all right, and someone else is placed in, sometimes after a brief interview, but certainly not reviewing the educational background.

We talked about or we heard about cooks. All right. You take a recipe and you move forward. I happen to be the cook in my household. I know that when I take the recipe, it requires interpretation. The law is a classic situation of a good cook taking a recipe and interpreting it as to what the needs are for the time. And this isn't just boiling water we're talking about. We heard about if you send a bill, we're not suggesting sending a bill does this. If this is a simple matter of a ledger printed out

from a computer saying what is due on an association assessment, that's simple. Nothing needs to be done. We're not talking about transferring the ledger into a bill format. Please, do not let that red herring change or undermine the thought process here.

We've heard that managers have a fundamental knowledge of the law. But they have a highly specialized knowledge from the two-hour session every year. Those sessions -- and I've taught them -- are there to identify what issues are and not to teach CAM managers how to be lawyers.

When we deal with contracts also, a particular one are amendments. Amendments are contracts that affect real property. They affect not just the association, but every owner in the community, every resident in the community, and also, especially in this day and age, it interferes with the transfer of property in the future and it impacts lenders. The unforeseen effects, what lawyers look for all the time, is critical to that.

Let's talk about these Supreme Court decisions. We've heard about the '86 amendment. We haven't heard a whole lot, Ms. Holcomb introduced the Supreme Court decisions recently in April. I've got

a few copies of it. I tried not to destroy paper and trees and all that. If you have a chance, what I've done, my colleagues have done, is we've taken the critical portions of, I believe it was a 60-some-odd-page opinion, and just have given you the rule portion of it if you haven't seen it.

The April 12th, 2012 bi-annual rules opinion by the Supreme Court, as Ms. Holcomb noted, prohibited even the sales of forms by attorneys. Why is that? Because that requires legal knowledge as to which forms are appropriate. Note that the opinion requires or limits individuals to who can complete forms and what can be done. The fax must be from the person the form is being created for. The person completing the form cannot interpret documents. Cannot undertake the analysis to complete those forms.

I'll also note that the forms require the name, address and phone number of the form person. Why is that? That is so when there's a UPL issue, it can be followed up and also, there can be prosecution afterwards. And of course, none of the items that we're seeing from the managers involved this.

The test, when you read the opinions, is not evidence of harm. If that was, my response would

be, with all respect to the Chair, how much time do you have here for the rest of the year. It is really anticipated harm. You're here, as has been explained to me, as I understand from speaking with many of you, is to avoid harm from happening to the public. And this is not a plebiscite. I can't verify that 86 percent figure of everyone in the State of Florida, but the Court does not wait until they hear from what the public says or harm that occurs.

I will say that courts in other areas have rejected this ministerial notion that's been set forth. We have a concept in Florida of sovereign immunity. When can you sue the state for when a city or a county doesn't do their job. And it used to be on the basis of the city was doing something that was ministerial, sweeping the street, for example, that would be the basis of a suit. The Supreme Court found that the label of ministerial is not sufficient. All of did was lead to more claims and more litigation. The threshold for you is, I would suggest, is whether there is a legal analysis. Once it becomes legal analysis, this is not a matter of negotiation between the parties.

I would also suggest also, that when we talk

about simple statutory review, take a look, if you have a chance, at 720.306. That's the statute that governs homeowner association, members meetings. It specifically provides that a quorum at a members' meeting cannot be more than 30 percent. That overrules association documents. Many association managers get that wrong. And if you're not at meetings all the time, if you're not involved in public speaking at them, that is something that is critical to what the associations do to do it right in the first place.

Very briefly, last week, just before I left my office, I received an amendment. A manager was involved in the drafting of it. No attorney. Very simple. The suggestion to you has been let the managers prepare the Certificate of Amendment. In this one, they had the wrong name on the association. Not just a technical issue, but the wrong name. Those of you who are involved in real estate matters know, the wrong name means it's not indexed by the Clerk properly, which means that new buyers, new buyers, a buyer will not find a Certificate of Amendment; will not be placed on notice of it. It had improper execution. No witnesses. Was not done -- was not executed in the

form of a deed as required by the statute. On that basis, even if it had the right name under the recording statute, it was not entitled to be recorded and would not provide legal notice to anyone who purchased there afterwards. Beyond that, the form, itself, did not comply with the association's documents. The form of text for the amendment language, did not conform with either the Condominium Act or the document, itself.

If that wasn't enough, they amended the bylaws to add a use restriction, and a restriction goes in a declaration of covenants. Those of you who heard from organizations, you know that bylaws set procedures; that covenants and the declarations set forth what you can and cannot do to the property.

CHAIRPERSON: Thirty seconds.

MR. GELFAND: Note the 1996 opinion, questions and answers are not permitted to be completed. The form, if you look at what's required for questions and answer documents, that is exactly what the managers are seeking to do.

What we're looking at now is -- and we're talking about regulators doing their job. They have had only two revocations in the last year. Think about how many managers you've read about in the

newspaper that have been convicted of embezzlement or stealing in the last year. And you know that the managers are not being regulated by this.

I will note that when the first two speakers spoke, there's a question as to whether that indemnity or insurance and the attorney for the first speaker then spoke. And you still don't know whether they have insurance and indemnity. I will say that the contracts that I have seen, the managers require the associations have insurance and there indemnities.

CHAIRPERSON: Thank you.

MR. GELFAND: Please let them know how to say no. This isn't a fight with good managers who know how to do it. This is the simple document that they need to review.

I appreciate your time and your patience. Thank you very much.

CHAIRPERSON: Thank you.

(Applause)

(Proceedings concluded at 12:30 p.m.)

CERTIFICATE OF REPORTER

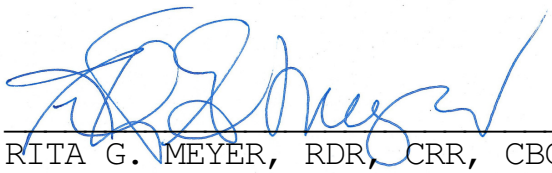
STATE OF FLORIDA:

COUNTY OF ORANGE:

I, RITA G. MEYER, RDR, CRR, CBC, CCP, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing transcript is a true and correct record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties, attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 14th day of July, 2012.



RITA G. MEYER, RDR, CRR, CBC, CCP

ASSOCIATION FINANCIAL SERVICES

4400 Biscayne Blvd
Suite 550
Miami, Florida 33137

June 14, 2012

VIA EMAIL
Standing Committee on the Unauthorized Practice of Law
of the Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399

Re: Request for Advisory Opinion on the Unauthorized Practice of Law Submitted by the Real Property, Probate & Trust Law Section of the Florida Bar

Dear Members of the Standing Committee on the Unauthorized Practice of Law:

I am currently serving in the capacity of Executive Vice President – Legal Affairs and General Counsel for Association Financial Services, L.C., a Florida limited liability company ("AFS"). AFS is a duly licensed consumer collection agency focusing on providing collection services to community associations (homeowner associations and condominium associations) in the States of Florida and Colorado. AFS is regulated by the Florida Office of Financial Regulation (the "OFR"). I have been admitted to practice law in the State of New York since 1991 and in the State of Florida since 1998.

The letter (the "Response") is being submitted in response to certain portions of that certain request submitted by the Real Property, Probate & Trust Law Section of the Florida Bar (the "Petitioner"), dated as of March 28, 2012, seeking an advisory opinion from the Standing Committee on the Unauthorized Practice of Law (the "UPL Standing Committee") finding that the performance of certain activities by Community Association Managers ("CAMs") constitute the unauthorized practice of law. Although AFS does not serve as a CAM and the Petitioner's request does not specifically address activities of licensed consumer collection agencies, I believe that a response is necessary given that many of the actions sought to constitute the unauthorized practice of law by CAMs could very well be deemed to apply to the activities of consumer collection agencies, including AFS, focusing on collection of delinquent accounts receivables of community associations.

General Standard.

As a member of the Florida Bar, I strongly believe that all citizens of the State of Florida deserve, and should be protected against, persons performing activities which constitute the unauthorized practice of law. However, as noted by the Florida Supreme Court in *The Florida Bar Re: Advisory Opinion-Activities for Community Association Managers*, 681 So.2d 119 (Fla. 1996), the actions to which such protections should apply are those which require "significant legal expertise and interpretation" and/or could "significantly affect an individual's legal rights". Id. at 1123. Accordingly, actions such as drafting and recording claims of liens constitute the practice of law because drafting of a claim of lien requires a legal description of the property and establishes rights of community associations with respect to liens, their duration, and actions to be taken because the claim of lien acts as an encumbrance on the property until satisfied.

Ministerial Activities Should Continue to be Permitted to be Performed by CAMs.

As noted by the Petitioner, the Florida Supreme Court has found that with respect to the preparation of claims of liens, ***"[b]ecause of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney."*** Id. at 1123 (Emphasis added). Using the foregoing analysis, the Petitioner makes the argument that many of the tasks currently performed by CAMs (and for the purposes of this Response, licensed collection agencies), are such that they should only be performed by attorneys. Including in such "critical tasks", the Petitioner includes the following actions:

(i) reviewing of the Declaration of Condominium (or Declaration of Restrictions, as appropriate);
(ii) determining the application of payments received pursuant to Sections 718.116 or 720.3085, as applicable;
(iii) determining the relative rights of the association and owners regarding interest rates;
(iv) determining whether the association has the authority to charge late fees;
(v) determining any obligation to take payments; and
(vi) identifying record title holders.

With all due respect to the Petitioner, I find it difficult to find any of the foregoing activities to fall within the parameters established by the Florida Supreme Court as noted above. Id. at 1123.

In fact, each of the foreoing activities is purely ministerial and do not rise to the level of requiring performance by an attorney.

One does not need a legal education to read an association's declaration of covenants to determine the annual interest rate chargeable on delinquent assessment payments or if the association is permitted to charge a late fee on a delinquent payment (and if so, the amount of such late fee). Similarly, one need not be an attorney to read the applicable Florida Statutes to follow the clear order in how payments received by an association or its agent should be applied. The review of one or more sections of a declaration of covenants for these puposes does not require legal training, expertise or interpretation. Similarly, any third party non-attorney can access a county's website to search, locate and identify the record holder of a property. What important "substantial rights" of associations are being jeopardized by permitting CAMs to continue to perform such activities? The answer is none. The taking of any of the foregoing activities 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).

Given the current 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 absolutley no legitimate reason why these tasks should be performed by an attorney at the detriment of the association's broader membership.

Other activities should not constitute the unauthorized practice of law.

The Petitioner is also seeking an advisory opinion finding the following activities the unauthorized practice of law:

(i) preparation of a certificate of assessments due once the delinquent account is turned over to the association's lawyer,
(ii) preparation of a certificate of assessments due once a foreclosure against the unit has commenced, and
(iii) preparation of a certificate of assessments due once a member disputes in writing to the association the amount owed.

For purposes of this Response, it is best to discuss each such activity separately.

a. **Preparation of a certificate of assessments due once the delinquent account is turned over to the association's lawyer.**

Preparation and maintenance of association unit ledgers do not constitute actions requiring legal oversight. These activities are purely ministerial and as such, have historically been conducted by CAMs, Certified Public Accountants and other agents of the association. The characterization of this activity should not change solely as a result of the turn-over of the file to an attorney. For purposes of maintaing a unit ledger, the CAM (or, for these purposes, collection agency) simply needs to be provided with the attorney's fees and costs in order to add them to outstanding amounts due and owing. Again, this is nothing more than a ministerial task, well within the ability of a CAM (or collection agency). Furthermore, it is often the CAMs responsibility to provide updated internal financial statements to the community members. Without properly having access to and including the fees incurred by the association's lawyer, the association could be mis-representing its financial position to its membership.

b. **Preparation of a certificate of assessments due once a foreclosure against the unit has commenced.**

Preparation of certificates of assessments due once a foreclosure matter is commenced similarly does not constitute an action requiring legal expertise. As discussed in (a) above, These activities are purely ministerial and as such, have historically been conducted by CAMs. In preparing a claim of lien and commencing a foreclosure proceeding, the attorney can (and should) confirm ledger amounts and, if necessary, request modifications. Additioanlly, CAMs can and should continue to maintain the applicable unit ledger by continuing to add additional assessments (and related amounts) and attorney fees and costs (as directed by the attorney). Again, this is nothing more than a ministerial task, well within the ability of a CAM (or collection agency).

c. **Preparation of certificate of assessments due once a member disputes in writing to the association the amount owed.**

As an agent for the association, a CAM (or for these purposes, a collection agency) should act in the best interests of its client, the association. Making a claim for the full amount due on a ledger before being provided with any information regarding the new property owner,

including whether such new property owner is a first mortgagee or third party purchaser, is consistent with the performance of these obligations. If the State of Florida would seek to prohibit these actions by a third person other than an attorney, it should similarly find the efforts to collect delinquent medical receivables prohibited activities. A third party collection agency seeking collection of delinquent medical receivables is not required to investigate the account receivable to confirm that medical procedures were performed or that insurance programs have been complied with properly.

The UPL Standing Committee should not summarily prohibit a CAM (or, for these purposes, a collection agency) from investigating and preparing a certificate of account after a member disputes such amount in writing without understanding what that dispute is focused on. What if the diputing member alleges that the ledger fails to reflect a payment or payments that were purportedly paid by the disputing member? Does this dispute require attorney involvement? Of course not! That said, to the extent that the member disputes amounts owed based on a failure to take into account safe harbor provisions, lien priority matters or other issues which clearly have legal consequences, then the CAM (or collection agency) should seek legal counsel. However, until such time as such issues are made clear to the CAM (or collection agency), such tasks should continue to be permitted to be performed by CAMs (and, for these purposes, collection agencies).

Only Legal Assistance Required.

Finally, the Florida Supreme Court in its opinion in the matter entitled *The Florida Bar Re: Advisory Opinion-Activities for Community Association Managers*, delinieated those activities which required the **assistance** of a licensed attorney. In this regard, the Florida Supreme Court did not unequivocably find that such actions had to be taken **by** such licensed attorney. The Petitioner in its request for an advisory opinion fails to take into consideration the possibility that any of the activities sought to constitute the unauthorized practice of law were subject of attorney assistance and/or oversight. Accordingly, the UPL Standing Committee should make it clear that any CAM (or for purposes hereof, any collection agency) who obtains legal assistance or oversight with respect to those matters having legal consequence to the association (including those matters sought to be prohibited by Petitioner in its request for an advisory opinion) should not constitute the unauthorized practice of law.

Final Considerations.

Notwithstanding the Petitioner's assertions that many attorneys are finding that they are devoting more and more resources responding to the types of issues described above, how would attorney's be able to handle such tasks if they were required to do them from the beginning? Not only is it unnecessary for attorneys to take control of non-significant ministerial activities but it is not cost effective for already financially strapped associations. There is no commercially reasonable rationale prohibitting CAMS (and collection agencies) from performing such activities. While the Petitioner would have the UPL Standing Committee believe that protection of the public is the ultimate goal, it is clear that is not the case after giving careful review to the Florida Supreme Court's findings in *The Florida Bar Re: Advisory Opinion-Activities for Community Association Managers.*

For the foregoing reasons, I believe that it is incumbent on the UPL Standing Committee to reject substantially all of the Petitioner's arguments on the basis and for the reasons set forth above.

Respectfully submitted,
ASSOCIATION FINANCIAL SERVICES, L.C.

By: _____
Jeffrey M. Oshinsky (Bar No. 143162)
EVP and General Counsel

Mark R. Benson
Community Association Manager
Expert Witness/Advocate
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June 15, 2012

Jeffrey T. Picker, Assistant UPL Counsel,
The Florida Bar
Standing Committee on the Unauthorized Practice of Law of The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Via Email to jpicker@flabar.org

Re: A CAM's response to the Unauthorized Practice of Law Concerns for the Benefit of Florida's Citizenry & Activities that Should Constitute the Practice of Law Submitted Pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar

Dear Members of the Standing Committee on the Unauthorized Practice of Law:

Please accept this as response to the Florida Bar's letter of March 28, 2012 from the Chair of the Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section"), addressed to the Members of the Standing Committee on the Unauthorized Practice of Law seeking a determination as to certain actions by Community Association Managers (CAM) to be classified as Unlicensed Practice of Law (UPL).

The actions of the Bar and their concern for protection of the public are admirable and commendable. However when definitions of ministerial, administrative and clerical actions by trained, licensed and professional practitioners of an occupation are challenged there is a natural reaction and questions are raised as to the need and resultant financial consequences of such definitions.

Professional counsel is imperative to protection of community associations and their members. But it must not be relegated to mundane, routine and everyday issues that misuse association assets.

As professionals in the community association field CAMs, attorneys and others are often referred to as stake-holders. The reality is that those who should receive the foremost consideration are the real stake-holders, the member/owners of units/homes in community associations.

This may well be the opportunity to examine and reexamine the current and past requests proffered by the Bar for restrictions on talented, conscience CAMs to the financial and operational detriment of millions of Floridians.

Note F.S. 468.431 states in part: "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..

As a matter of principle the CAM profession has no qualms with client associations paying for services for which costs are recoverable from offending or delinquent members of associations. The CAM's responsibilities are to their client, the community association and fulfillment of economical and proper duties. That is not to indicate a reluctance to engage counsel for areas of protection essential to real protection of association clients and their members.

The illogical, incongruous and strange real world practice is that a board member, with no credentials, experience or training, can initiate and pursue actions described without restraint or penalty. The training and education of the CAM dictates their responsibility to advise their client of the need for legal advice, yet the Bar would describe that as UPL. Remember there is no requirement that an association even have a CAM.

It is disappointing the Bar seems to have taken an adversarial stance against CAMs in this regard when a collaborative and positive initiative could provide additional protection and security for members of community associations. Educational requirements are always preferential to unreasonable restrictions. Amendments to F.S. 468 Part VIII COMMUNITY ASSOCIATION MANAGEMENT have been drafted to accentuate and expand educational requirements for CAMs and are awaiting legislative sponsorship. The Bar's support would be welcome.

There is a dichotomy of issues that deserve consideration.

Consider the opinion in *Sperry,* 140 So.2d at 591, "It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also *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."

And yet in Florida Small Claims Rules (below) we find the "cookbook" instructions for individuals and community associations to seek redress without the requirement of retaining counsel. So it is not an absolute.

RULE 7.010. TITLE AND SCOPE

(a) Title. These rules shall be cited as Florida Small Claims Rules and may be abbreviated "Fla. Sm. Cl. R." These rules shall be construed **to implement the simple, speedy, and inexpensive trial of actions** at law in county courts. (emphasis added).

(b) Scope. These rules are applicable to all actions at law of a civil nature in the county courts in which the demand or value of property involved does not exceed $5,000 exclusive of costs, interest, and attorneys' fees. If there is a difference between the time period prescribed by these rules and by

section 51.011, Florida Statutes, the statutory provision shall govern.

(c) FORM 7.350. CORPORATE AUTHORIZATION TO ALLOW EMPLOYEE TO REPRESENT CORPORATION AT ANY STAGE OF LAWSUIT

In every Florida jurisdiction we know of a CAM may be designated as an authorized employee. That is not meant to encourage any action by a CAM without the adequate training, experience and understanding of the liability of the undertaking. But it should not be an expanded principle to prohibit an action that is ministerial, administrative and economical being used **"to implement the simple, speedy, and inexpensive trial of actions."**

Before addressing other elements of the 1996 decision examine the contentions below as outlined by the Bar letter of March 28, 2012 that claimed they should be included as UPL. (Emphasis added for responses.)

I EXISTING ACTIVITY THAT CONSTITUTES THE UNLICENSED PRACTICE OF LAW INCLUDES PREPARATION OF CLAIM OF LIEN (AS SHOULD ALL SIMILAR ACTIVITY).

1) Interpret Section 718.116, Florida Stats. (or Section 720.3085, as appropriate);

Here we have an indication the Bar would classify comprehension of the written word as not acceptable if done by a CAM. If the written word is so incomprehensible how can we expect board members or unit owners to understand it? Attention to amending the statutes for clarification should be the first effort.

2) Review the Declaration of Condominium (or Declaration of Restrictions, as appropriate);

This is so overly broad as to paralyze the operation of any community association without an attorney as their manager.

3) Determine the relative rights of the association and owners regarding interest rates;

We can only guess this means the interest rate to be charged for delinquent accounts. Anyone with a credit card can determine interest rates.

The Condominium Act states in part; 718.116(3) Assessments and installments on assessments which are not paid when due bear interest at the rate provided in the declaration, from the due date until paid. The rate may not exceed the rate allowed by law, and, if no rate is provided in the declaration, interest accrues at the rate of 18 percent per year. . . .

The HOA Act states in part; 720.3085(3) Assessments and installments on assessments that are not paid when due bear interest from the due date until paid at the rate provided in the declaration of covenants or the bylaws of the

association, which rate may not exceed the rate allowed by law. If no rate is provided in the declaration or bylaws, interest accrues at the rate of 18 percent per year.

(a) If the declaration or bylaws so provide, the association may also charge an administrative late fee not to exceed the greater of $25 or 5 percent of the amount of each installment that is paid past the due date.

Who can't figure that out?

4) Determine if the association has the authority to charge late fees;

The public and CAMs are being demeaned when the Condominium Act clearly states in part; 718.116(3) . . . If provided by the declaration or bylaws, the association may, in addition to such interest, charge an administrative late fee of up to the greater of $25 or 5 percent of each delinquent installment for which the payment is late. Any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. The foregoing is applicable notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment. A late fee is not subject to chapter 687 or s. 718.303(4).

Once agin this is comprehension and not interpretation.

5) Determine the application of payments received per 718.116 or 720.3085, as applicable;

F.S. 718.116(3) again clearly states in part; . . . Any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. The foregoing is applicable notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment.

The CAM is generally charged with the accounting for the association. Would it then follow that neither the CAM nor the attorney has the capacity to do financial accounting and that it must therefore be done by a CPA?

6) Determine any obligation to take payments;

This question makes no sense. If the funds are owed apply them to the account. Often payments will be made in advance and they also would be applied to the account as prepaid if no balance was outstanding.

7) Identify the record title holders;

This is determined at the time a person buys a unit in the

association and is generally part of the package from the closing agent. It is also easily confirmed in publically available on-line County Official Records and the Property Appraiser's records.

8) Consider the application of Bankruptcy law and Fair Debt Collections Practices Act;

It is agreed that this is a specialized area of law that is best referred to counsel. But there is no restriction against a board member doing it without counsel.

9) Interpret the delivery requirements and notice requirements for pre-lien letters;

Again this is a cost recoverable from delinquent units and appropriate for counsel. But there is no restriction against a board member doing it without counsel.

10) Determine if fines, estoppel charges and other charges are both collectable and lienable;

Again this is a cost recoverable from delinquent units and appropriate for counsel. But there is no restriction against a board member doing it without counsel.

11) Analyze the legal sufficiency of legal defenses and counterclaims of owners; and

Again this is a cost recoverable from delinquent units and appropriate for counsel. But there is no restriction against a board member doing it without counsel.

12) Additionally, if one is collecting from a bank that is taking title, one must review the Declaration for Kaufman language (see Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), analyze lien priority issues, interpret Florida case law regarding joint and several liability issues, analyze unconstitutional impairment of contract rights issues under the recently-decided cases Coral Lakes v. Busey Bank, N.A., 30 So. 2d 579 (Fla. 2d DCA 2010) and Cohn v. The Grand Condominium Association, Inc., -- So. *3d* (No. SCIO-430, March 31, 2011), as well as conduct a third party taking title analysis under Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Assn., 895 So. 2d 1197 (Fla. 4th DCA 2005).

Again this is a cost recoverable from delinquent units and appropriate for counsel. But there is no restriction against a board member doing it without counsel.

II. The Drafting Of The Pre-Arbitration Demand Letter Required By s. 718.1255.

The Florida legislature addressed the need for a better dispute resolution and adopted;

718.1255 (3) LEGISLATIVE FINDINGS.—

(a) The Legislature finds that unit owners are frequently at a disadvantage when litigating against an association. Specifically, a condominium association, with its statutory assessment authority, is often more able to bear the costs and expenses of litigation than the unit owner who must rely on his or her own financial resources to satisfy the costs of litigation against the association.

(b) The Legislature finds that alternative dispute resolution has been making progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to court litigation. However, the Legislature also finds that alternative dispute resolution should not be used as a mechanism to encourage the filing of frivolous or nuisance suits.

(c) There exists a need to develop a flexible means of alternative dispute resolution that directs disputes to the most efficient means of resolution.

(d) The high cost and significant delay of circuit court litigation faced by unit owners in the state can be alleviated by requiring nonbinding arbitration and mediation in appropriate cases, thereby reducing delay and attorney's fees while preserving the right of either party to have its case heard by a jury, if applicable, in a court of law.

(4) MANDATORY NONBINDING ARBITRATION AND MEDIATION OF DISPUTES.—

The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation shall employ full-time attorneys to act as arbitrators to conduct the arbitration hearings provided by this chapter. The division may also certify attorneys who are not employed by the division to act as arbitrators to conduct the arbitration hearings provided by this section. No person may be employed by the department as a full-time arbitrator unless he or she is a member in good standing of The Florida Bar. The department shall adopt rules of procedure to govern such arbitration hearings including mediation incident thereto. The decision of an arbitrator shall be final; however, a decision shall not be deemed final agency action. Nothing in this provision shall be construed to foreclose parties from proceeding in a trial de novo unless the parties have agreed that the arbitration is binding. If judicial proceedings are initiated, the final decision of the arbitrator shall be admissible in evidence in the trial de novo.

(a) Prior to the institution of court litigation, a party to a dispute shall petition the division for nonbinding arbitration. The petition must be accompanied by a filing fee in the amount of $50. Filing fees collected under this section must be used to defray the expenses of the alternative dispute resolution program.

(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.

This again is a "recipe" to be used for the filing of a petition. The Bar "cherry-picked" 13 cases that were dismissed for not including all the necessary ingredients. The cases were dismissed without prejudice and could be easily corrected if necessary.

Considering the thousands of petitions filed by counsel and defended by counsel since the program started in 1992 it is noteworthy that 50% of the attorneys were wrong. Were the legal fees charged by the losing attorney refunded?

There is nothing in the record presented in the 13 cases cited that indicate a CAM was involved in the preparation of the petition.

III. Other Activity That Should Constitute The Practice of Law.

Each of the following activities should be clarified as an activity that can be performed for a Community Association only by a lawyer:

1) Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer.

   This is an accounting function that is a required part of the typical management contract. The attorney must timely advise the association of any and all charges so they can be added to the accounts receivable for the association financial report.

2) Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced.

   Again this is a cost recoverable from delinquent units and appropriate for counsel. But there is no restriction against a board member doing it without counsel.

3) Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed.

   Again this is a cost recoverable from delinquent units and appropriate for counsel. But there is no restriction against a board member doing it without counsel.

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 members.

Since this is an activity that can be performed by any unit owner, board member or copied from other documents the CAM cannot be held responsible by providing secretarial services in this regard. We agree it should be reviewed by counsel prior to recording.

5) Determination of number of days to be provided for statutory notice.

Notice for what? This is comprehension not interpretation. For instance:

718.112(2)1. Adequate notice of all board meetings, which must specifically identify all agenda items, must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting except in an emergency. . . .

718.112(2)1. . . . However, written notice of any meeting at which nonemergency special assessments, or at which amendment to rules regarding unit use, will be considered must be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property at least 14 days before the meeting.

718.112(2)3. The bylaws must provide the method of calling meetings of unit owners, including annual meetings. Written notice must include an agenda, must be mailed, hand delivered, or electronically transmitted to each unit owner at least 14 days before the annual meeting, and must be posted in a conspicuous place on the condominium property at least 14 continuous days before the annual meeting. . . .

718.112(2)(4)a. At least 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit, by separate association mailing or included in another association mailing, delivery, or transmission, including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election. Any unit owner or other eligible person desiring to be a candidate for the board must give written notice of his or her intent to be a candidate to the association at least 40 days before a scheduled election. Together with the written notice and agenda as set forth in subparagraph 3, the association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote, together with a ballot that lists all candidates. Upon request of a candidate, an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate at least 35 days before the election, must be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association.

710.306 (5) NOTICE OF MEETINGS.—The bylaws shall provide for

giving notice to members of all member meetings, and if they do not do so shall be deemed to provide the following: The association shall give all parcel owners and members actual notice of all membership meetings, which shall be mailed, delivered, or electronically transmitted to the members not less than 14 days prior to the meeting. Evidence of compliance with this 14-day notice shall be made by an affidavit executed by the person providing the notice and filed upon execution among the official records of the association. In addition to mailing, delivering, or electronically transmitting the notice of any meeting, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the association. When broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda.

6) Modification of limited proxy forms promulgated by the State.

The Limited Proxy form is provided by the State at this link: http://www.myfloridalicense.com/dbpr/lsc/documents/CO-6000-7SampleLimitedProxy62309.pdf

It is incongruous to imagine if the board requests the CAM add a question to a proxy that he cannot fulfill the ministerial function of adding it. The CAM does not initiate issues to the board but is charged and expected to advise based on experience and education.

7) Preparation of documents concerning the right of the association to approve new prospective owners.

In associations that have the right or responsibility to approve new prospective owners there is generally an application promulgated by the board or a screening company. The CAM performs as a conduit of the information to/from the board or screening company. Based on the decision of the board the CAM can and does prepare another generic form usually referred to as "consent to transfer" that is accepted by the title company.

8) Determination of affirmative votes needed to pass a proposition or amendment to recorded documents.

Florida Statutes again are quite clear as to the votes needed for certain actions and it requires comprehension not interpretation. As examples:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.—
(1)(a) If the declaration fails to provide a method of amendment, the declaration may be amended as to all matters except those described in

subsection (4) or subsection (8) if the amendment is approved by the owners of not less than two-thirds of the units. Except as to those matters described in subsection (4) or subsection (8), no declaration recorded after April 1, 1992, shall require that amendments be approved by more than four-fifths of the voting interests.

718.110(4) . . . A declaration recorded after April 1, 1992, may not require the approval of less than a majority of total voting interests of the condominium for amendments under this subsection, unless otherwise required by a governmental entity.

718.112(2)(h) Amendment of bylaws.—
1. The method by which the bylaws may be amended consistent with the provisions of this chapter shall be stated. If the bylaws fail to provide a method of amendment, the bylaws may be amended if the amendment is approved by the owners of not less than two-thirds of the voting interests.

720.306 (1) QUORUM; AMENDMENTS.—
(a) Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members shall be 30 percent of the total voting interests. Unless otherwise provided in this chapter or in the articles of incorporation or bylaws, decisions that require a vote of the members must be made by the concurrence of at least a majority of the voting interests present, in person or by proxy, at a meeting at which a quorum has been attained.

Encarta definition: Quorum: a fixed minimum percentage or number of members of a legislative assembly, committee, or other organization who must be present before the members can conduct valid business.

9) Determination of owners' votes needed to establish quorum.

Florida Statutes again are quite clear as to the votes needed for certain actions and it requires comprehension not interpretation. As examples:

718.112(2)(b) Quorum; voting requirements; proxies.—
1. Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members is a majority of the voting interests. Unless otherwise provided in this chapter or in the declaration, articles of incorporation, or bylaws, and except as provided in subparagraph (d)4, decisions shall be made by a majority of the voting interests represented at a meeting at which a quorum is present.

720.306(1) QUORUM; AMENDMENTS.—(a) Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members shall be 30 percent of the total voting interests. Unless otherwise provided in this chapter or in the

articles of incorporation or bylaws, decisions that require a vote of the members must be made by the concurrence of at least a majority of the voting interests present, in person or by proxy, at a meeting at which a quorum has been attained.

10) Drafting of pre-arbitration demands (see above).

See Number II above.

11) Preparation of construction lien documents (e.g. notice of commencement, and lien waivers, etc.)

Once again we are considering "cookbook" issues that are often only "fill in the blanks." There is nothing restricting a board member from completing the documents themselves. At least if a CAM is foolish enough to do it unprepared or practiced in such they could be civilly libel for any damages.

12) Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.

There is nothing to stop a board member from being the "world's foremost expert" to consider the documents themselves. At least if a CAM is foolish enough to do it unprepared or practiced in such they could be civilly libel for any damages.

13) Identifying, through review of title instruments, the owners to receive pre-lien letters.

This is information available in the County Official Records on-line.

14) Any activity that requires statutory or case law analysis to reach a legal conclusion.

Without a definition of "any activity" this is so overly broad as to dismiss it completely. Is the determination that driving over the speed limit is illegal a legal conclusion?

In general each of these activities when performed by counsel and not done properly do not provide the association recourse or recompense as it would if done by a CAM. The bar must provide reasonable avenues for redress by associations when their efforts are futile or wrong.

A CAM is contractually and statutorily liable for misconduct, gross negligence, misfeasance and malfeasance and the association has recourse in civil actions. Statistically there are more complaints against attorneys with the Florida Bar than against CAMs with the DBPR.

All the questions under consideration are already covered by Statute or the Florida Administrative Code, including but not limited to; "(i) Subsection 61E14-2.001(3), F.A.C.A licensee or registrant shall perform only those services which he or she can reasonably expect to complete with professional competence." The penalties can include much more effective and

serious consequences including fines up to $5,000 and revocation of license.

If we examine the 1996 opinion of the Court it appears some issues dismissed as ministerial or not UPL have been reintroduced as another attempt at CAM emasculation and unwarranted cost escalation for community associations. Here are issues addressed in 1996 with additional comments where reconsideration is required or appropriate.

The Court stated "We agree that those actions designated by the Standing Committee as ministerial do not constitute the practice of law." (Ed. From opinion "do not require legal sophistication or training.")

1) CAMs can complete the two Secretary of State forms--form CR2EO45 (change of registered agent or office for corporations)
2) Annual Corporation Report--because completion of those two forms does not require significant legal expertise and interpretation.
3) Similarly, 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
8) Drafting board meeting agendas,
9) Drafting affidavits of mailing

We also agree that those items so designated by the Standing Committee do constitute the unlicensed practice of law.

(Ed. The illogical, incongruous and bizarre real world practice is that a board member with no credentials, experience or education can initiate and pursue actions described without restraint or penalty. The training and education of the CAM dictates it is their responsibility to advise their client to seek legal advice yet the Bar would describe that as UPL. There is also no requirement that an association even have a CAM.)

Completion of BPR Form 33-032 (Frequently Asked Questions and Answers Sheet) requires the interpretation of community association documents. The decision to purchase a unit is often based largely on the information on this sheet. Because this form could significantly affect an individual's legal rights, misleading or incorrect information could harm the purchaser. Therefore, initial completion of this form requires the assistance of a licensed attorney. However, subsequent updates which do not modify the form can be completed without the assistance of an attorney.

Since this form is prepared by counsel at the time an association's declaration is drafted and is allowed to be updated by a CAM this provision is superfluous. Note the draft of the form herein included:

Name of Condominium Association

Q: What are my voting rights in the condominium association?
A:

Q: What restrictions exist in the condominium documents on my right to use my unit?
A:

Q: What restrictions exist in the condominium document on the leasing of my unit?
A:

Q: How much are my assessments to the condominium association for my unit type and when are they due?
A:

Q: Do I have to be a member in any other association? If so, what is the name of the association and what are my voting rights in this association? Also, how much are my assessments?
A:

Q: Am I required to pay rent or land use fees for recreational or other commonly used facilities? If so, how much am I obligated to pay annually?
A:

Q: Is the condominium association or other mandatory membership association involved in any court cases in which it may face liability in excess of $100,000? If so, identify each such case.
A:

Note: THE STATEMENTS CONTAINED HEREIN ARE ONLY SUMMARY IN NATURE. A ROSPECTIVE PURCHASER SHOULD REFER TO ALL REFERENCES, EXHIBITS HERETO, THE SALES CONTRACT, AND THE CONDOMINIUM DOCUMENTS.

1) Drafting a claim of lien.

Since this is a recoverable cost as part of the collection process we agree it is appropriate to refer to counsel. But there is nothing that prohibits a board member from undertaking the task.

2) Satisfaction of claim of lien requires a legal description of the property. Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney.

Since this is a recoverable cost as part of the collection process we agree it is appropriate to refer to counsel. But there is nothing that prohibits a board member from undertaking the task.

3) For the same reason, we agree with the Standing Committee that the drafting of a notice of commencement form constitutes the practice of law.

Since this is an "Office Depot" form it is simple to fill in the blanks using the legal description as provided by counsel for a minimal charge. There is no restriction if done by a board member.

4) Failure to complete or prepare this form accurately could result in serious legal and financial harm to the property owner.

Since this is an "Office Depot" form it is simple to fill in the blanks using the legal description as provided by counsel for a minimal charge. Whoever fills it out assumes responsibility for the undertaking.

5) Determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes.

While this question is again being addressed above (III 5)) it bears reexamination as to the real meaning of interpretation. The board is presumed to be able to make this decision and the CAM is expected to follow the direction of the board.

Here again is the obvious direction easily comprehended from statute;

718.112(2)1. Adequate notice of all board meetings, which must specifically identify all agenda items, must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting except in an emergency. . . .

718.112(2)1. . . . However, written notice of any meeting at which nonemergency special assessments, or at which amendment to rules regarding unit use, will be considered must be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property at least 14 days before the meeting.

718.112(2)3. The bylaws must provide the method of calling meetings of unit owners, including annual meetings. Written notice must include an agenda, must be mailed, hand delivered, or electronically transmitted to each unit owner at least 14 days before the annual meeting, and must be posted in a conspicuous place on the condominium property at least 14 continuous days before the annual meeting. . . .

718.112(2)(4)a. At least 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit, by separate association mailing or included in another association mailing, delivery, or transmission, including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election. Any unit owner or other eligible person desiring to be a candidate for the board must give written notice of his or her intent to be a candidate to the association at least 40 days before a scheduled election. Together with the written notice and agenda as set forth in subparagraph 3, the association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote, together with a ballot that lists all candidates. Upon request of a candidate, an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate at least 35 days before the election, must be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or

electronic transmission and copying to be borne by the association.

710.306 (5) NOTICE OF MEETINGS.—The bylaws shall provide for giving notice to members of all member meetings, and if they do not do so shall be deemed to provide the following: The association shall give all parcel owners and members actual notice of all membership meetings, which shall be mailed, delivered, or electronically transmitted to the members not less than 14 days prior to the meeting. Evidence of compliance with this 14-day notice shall be made by an affidavit executed by the person providing the notice and filed upon execution among the official records of the association. In addition to mailing, delivering, or electronically transmitting the notice of any meeting, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the association. When broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda.

6) Determining the form of giving notices of meetings requires the interpretation administrative rules.

What administrative rules?

7) Determining the form of giving notices of meetings requires the interpretation governing documents.

See Number 5 above.

8) Determining the form of giving notices of meetings requires the interpretation and rule 1.090(a) and (e), Florida Rules of Civil Procedure.

Any board member or CAM can count days on a calendar without requiring a "legal" opinion as to what date meets the minimum requirements of the notice requirements in 5).

RULE 1.090. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(b) Additional Time after Service by Mail. When a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon that party and the notice or paper is served upon that party by mail, 5 days shall be added to the prescribed period.

11) Determining the votes necessary to take certain actions--where the determination would require the interpretation and application both of condominium acts and of the community association's governing documents--would therefore also constitute the practice of law.

The assistance of a CAM when a board member can make determinations without the advice of counsel can not be grounds for UPL. CAMs are required to maintain continuing education that provides information relevant as to how to instruct the board as to the proper procedures. CAMs accept the responsibility for undertakings and if damages result the association has contractual recourse that is not available from counsel.

12) 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.

This is so overly broad and inclusive that a CAM can be criticized for recommending the board consult counsel for an opinion.

13) It also clearly constitutes the practice of law for a CAM to advise community associations that a course of action may not be authorized by law or rule.

This is so overly broad and inclusive that a CAM can be criticized for recommending the board consult counsel for an opinion.

The Court further opinioned:

"The remaining activities exist in a more grey area; the specific circumstances surrounding their exercise determine whether or not they constitute the practice of law."

1) 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).

a) This includes modifying the form to include the name of the community association;

b) This includes modifying the form to include phrasing a yes or no voting question concerning either waiving reserves

c) This includes modifying the form to include waiving the compiled, reviewed, or audited financial statement requirement;

d) This includes modifying the form to include phrasing a yes or no voting question concerning carryover of excess membership expenses;

e) This includes modifying the form to include phrasing a yes or no voting question concerning the adoption of amendments to the Articles of Incorporation, Bylaws, or condominium documents.

This accentuates recognition by the Court as to the ability of a CAM trained to "interpret" the requirements of content of a document.

7) As to more complicated modifications, however, an attorney must be consulted.

There is no indication as to what constitutes "more complicated modifications."

8) As to drafting a limited proxy form, those items which are ministerial in nature, such as filling in the name and address of the owner, do not constitute the practice of law.

There is no indication as to what would not be ministerial when Numbers 1- 6 above are deemed acceptable.

9) However, if drafting of an actual limited proxy form or questions in addition to those on the preprinted form is required, the CAM should consult with an attorney.

What other drafting would be unacceptable?

10) Drafting the documents required to exercise a community association's right of approval or first refusal to a sale or lease may also require the assistance of an attorney, since there could be legal consequences to the decision.

This is simple question that is determined by the board and not the CAM.

11) Although CAMs may be able to draft the documents, they cannot advise the association as to the legal consequences of taking a certain course of action.

Another contradiction if the Court allows the CAM to draft the above documents.

Conclusions:

The vast majority of community associations thrive in an atmosphere of congeniality and common interest. But it is the exceptions that accentuate the potential for improvement. Please accept my apology for any disrespectful inferences that may be inadvertently included. It is a personal expression of frustration and recognition of potential improvement of the current system.

Hopefully the Bar will accept this as a challenge to help improve the quality of life for millions of Floridians. Expansion of educational requirements for CAMs will provide the partnership necessary to alleviate any perceived stresses or conflicts.

Thank you for your consideration,

Mark R. Benson
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Community Association Manager
Past Chairman of the Florida Community Association Living Study Council
Past Member of the Regulatory Council of Community Association Managers
Past Vice-Chairman of the Advisory Council on Condominiums
Previous County Court Mediator
Community Association Expert Witness

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June 19, 2012

Mr. Jeffrey T. Picker, Assist. UPL Counsel
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

Dear Mr. Picker:

Written testimony was solicited pertaining to the hearing and subsequent actions to be taken regarding activities of Community Association Managers. Having worked in the business of providing management services in association with Atlantic Community Association Management and Accounting, Inc., located in Port Orange, Fl, and currently as a consultant for the same company for a total of thirty-two (32) years thus far, I wish to provide some testimony based on my experience.

General Comments: In this day and age of litigious conduct of many, it is obvious that when engaging in a business that potentially and frequently does step on the feelings and bank accounts of individuals, caution would need to prevail and many things should, thereby, be deferred to Legal Counsel. During my thirty-two (32) years, I have often consulted with legal counsel and advised Boards of Directors to do the same. There is also a practical consideration when endeavoring to make rules, because rules are arbitrary and often leave no room for the application of reason. Personally, I try to be guided by principles so that I can tailor fit an action to the needs of a situation.

When it comes to making rules I would like to believe (although I am not so naive) that rules would not be adopted before there is a need. Just because a petitioner requests rules should not require that arbitrary decisions be made. So the question needs to be asked, "in the areas of activity requested by the petitioner have there been serious problems caused by Community Association Managers (hereafter CAM(s))? What do the statistics or facts show as to problems caused? If there are none to be presented then would it not be safe to say, little or none? If there are few or none why change things?

I find it to be incongruous that the very thing that determines whether or not a person qualifies to be licensed as a CAM is the same thing he/she is, hereby, being prevented from practicing or using. Before a person can be a licensed manager he/she must pass an exam that is based on Florida Statutes and Bureau Rules to enforce the statutes. After completing this, the licensed manager is then further required to complete hours of continuing education to maintain the license, with a number of these hours of study devoted to the application of statutes/rules and again passing an exam. Then UPL Rules are promulgated to prevent the Licensed Manager from practicing what he/she learns or applying it in the realm that he/she works in daily. Does anyone see anything wrong with this picture?

Current UPL Rules: There is no question that activities involving lien preparation, satisfactions of liens, notices of commencement should be considered as a practice of law; and there is no question that there are certain paragraphs contained in covenants that were prepared by attorneys that were ensuring future business, although in my experience even the same attorneys after the fact could not explain the paragraphs. That aside, those of us who can pass an exam and find out what the statutes/rules say are certainly capable of determining how many days prior to an event notice should be given and various materials circulated. My whole point is that reason and a sound mind should prevail and attorneys do not corner the market on that. In other words we do not need nor should need rules for these things.

Petitioned Items #1,2, and 3: I have experienced attorneys making serious mistakes with these items. At the very least, Managers and bookkeepers need to be involved in the preparing of the secular part of these forms. After all they have this information at their fingertips with up to date records. That is how my company conducted business.

Petitioned Item #4: There should be no question that this should be carried out by Legal Counsel. From personal experience and as savvy as I am in working with documents it is easy to miss changing the wording in all of the places where an issue is addressed in the covenants. Here again, there should be a cooperative effort and an interaction between the attorney and manager when preparing the final draft.

Petitioned Item #5: We don't need an Attorney to explain this. This is drilled into managers by virtue of obtaining and maintaining a license.

Petitioned Item #6, 8, and 9: This should be one of those areas that a Manager should exercise discretion to decide whether or not he/she needs help with this. Most of the time, it is not difficult to couch a question for a vote on a proxy. As long as the proxy contains all of the elements required by the State, the manager should be allowed to do this. It certainly is not difficult to determine from documents/statutes votes needed to pass an amendment or establish a quorum.

Petitioned Item #7: No manager in their right mind should touch this one – definitely Attorney.

Petitioned Item #10: It should be discretionary for a manager to do this. Once it is decided to go through arbitration hand the file to an attorney for review and if needed a new letter can be prepared. In most cases that matter will go away and Legal Costs are saved.

Petitioned Item #11: I never heard of or know of an instance of an association or manager preparing a lien waiver. This is done by the vendor or provider always. It is important that it be in recordable form and a manager should be able to determine this. As to the Notice of Commencement it is a legal document that is to be recorded. I agree that attorneys should prepare it for the association, however, since most Notices of Commencement are prepared by Contractors who are obtaining permits it becomes a moot point.

Petitioned Item #12: Again this should be discretionary or a cooperative effort, because managers generally know better what needs to be addressed when preparing a contract. The legal issues in a contract can be addressed in the form of "boiler plate" and that can be easily inserted in a word processor. A good manager would likely consult with an attorney to make certain all of the legal issues are addressed. As to the work, however, the manager is in a far better position to determine what needs to be done and he should have control of that. This should definitely not become an arbitrary item.

Petitioned Item #13: Why would a manager ever lose track of the owners of a property? It is too easy to go online and check public records for this information. This is something my office did time and again. Again, the manager is in a position to prepare accurate information as to amounts owed, etc. If he wishes to have a letter in a particular format, then have an attorney prepare the format.

Petitioned Item #14: As to item fourteen (14), how do you determines or what is the criteria of the "any" activity that requires statutory or case law analysis to reach a legal conclusion? Furthermore, is not this subjective, and could it not be easily a matter of prejudice? How do you define any activity? This issue makes no sense, whatsoever, and I certainly hope it was not prepared by an attorney. If so the attorney should be disbarred.

Please be assured of my best wishes for an orderly, productive hearing and a reasonable conclusion of these issues.

Sincerely,

R.L. Reimer, CAM (#105)

RLR:r

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September 19, 2012

Nancy M. Blount, Esq.
Chair, Standing Committee
on the Unauthorized Practice
of Law of The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

RE: Proposal for Certain CAM Activities to be Classified or not classified as the Unauthorized Practice of Law

Dear Ms. Blount:

Our firm represents numerous community associations, primarily in the Tampa Bay area. In connection with our service to associations, we work with a great many community association managers and management companies. The purpose of this letter is to offer the enclosed Proposal for classification of specified community association manager (CAM) activities as either the unauthorized practice of law (UPL) or not UPL for consideration by the Standing Committee on the Unauthorized Practice of Law (UPL Committee) at its meeting on September 20, 2012.

This Proposal is made in response to the letter dated March 28, 2012 from George Meyer, Chair of the Real Property, Probate and Trust Law (RPPTL) Section of The Florida Bar, to the UPL Committee. The members of our firm are also members of the RPPTL Section. In the RPPTL Section letter, Mr. Meyers asks for an advisory opinion from the UPL Committee to determine whether fourteen (14) specified activities constitute UPL when performed by managers.

In the Proposal, each specified CAM activity is described substantially the same as that activity is described in the RPPTL Section letter, except for additional language describing variations of some activities that is underlined. Also, at the end of each activity description, we have indicated the number of the activity in the RPPTL Section letter. Some activities are included in both paragraph I (as not UPL) and in paragraph II (as UPL) based on the described variations.

In our experience, for many years, management companies have provided certificates of assessments (estoppels) and pre-lien

letters competently and efficiently at a reasonable cost to unit owners and homeowners. In the Proposal, we have identified the basic aspects of certificates of assessments (estoppels) (paragraph I, item 1) and pre-lien letters (paragraph I, item 9) as not UPL.

For certificates of assessments, the management company typically provides the information it maintains on delinquent assessments and any late fees and charges an estoppel fee, but only after consulting with the association's attorney to obtain the amounts of interest, attorney's fees and costs. This procedure ensures that the management company has the correct information for all charges.

For pre-lien letters, the management company typically sends the letter to the current owner(s) identified from the Association's records and charges a fee (paragraph I, item 9). The task of confirming the owner(s) from title instruments should be performed by the association's attorney and classified as UPL (paragraph II, item 6), but this service is only necessary if the management company's pre-lien letter does not produce payment and the account is turned over to the attorney.

In the Proposal, we classified amendments to documents, approval and disapproval of new owners, and review and drafting of contracts, as either not UPL or UPL depending on certain distinctions. We classified ministerial amendments to documents as not UPL (paragraph I, item 2) and all other amendments as UPL (paragraph II, item 1). We classified approval of new owners as not UPL (paragraph I, item 5) and disapproval of new owners as UPL (paragraph II, item 2). In addition, we classified review of contracts as not UPL (paragraph I, item 8) and drafting of contracts as UPL (paragraph II, item 5). In our experience, managers generally observe these distinctions.

The other activities that we classified as UPL are: drafting pre-arbitration demands (paragraph II, item 3), preparation of construction lien documents (paragraph II, item 4), and any activity that requires statutory or case law analysis to reach a legal conclusion (paragraph II, item 7).

The other activities that we classified as not UPL are: determination of number of days to be provided for statutory notice (paragraph I, item 3), modification of limited proxy forms promulgated by the State (paragraph I, item 4), determination of affirmative votes needed to pass a proposition or amendment to

recorded documents (paragraph I, item 6), and determination of owners' votes needed to establish a quorum (paragraph I, item 7). We have found that managers generally consult with the association's attorney when these activities require an interpretation of inconsistent or ambiguous provisions of the documents.

Managers are required to complete continuing education programs (often taught by attorneys) to maintain their CAM certifications and remain current on changes to pertinent laws and regulations. In our experience, managers seek to avoid the activities classified in the Proposal as UPL and seek to inform association officers and directors about the need for the association's attorney to perform those services. The activities classified in the Proposal as not UPL have been performed capably by managers and management companies for many years.

In our view, the classification of the subject activities as either UPL or not UPL as outlined in the Proposal has greatly benefitted unit owners and homeowners and their communities. The longstanding cooperation between attorneys and managers/management companies as to these activities provides a reasonable and beneficial framework for the classification of the activities. We believe that no public interest is served by requiring that attorneys must perform the activities classified in the Proposal as not UPL.

We appreciate the consideration of this Proposal by the UPL Committee and we urge the Committee to apply the classifications outlined in the Proposal to the specified CAM activities.

Sincerely yours,

Nicholas F. Lang Shawn G. Brown Emily L. Lang
NFL:ab
Enclosure