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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-13-889

FAO #2012-2, ACTIVITIES OF COMMUNITY ASSOCIATION MANAGERS

In Re the Proposed Opinion of the Standing Committee on the Unlicensed Practice of Law of the Florida Bar

BRIEF OF PETITIONER

Real Property, Probate, and Trust Law Section of the Florida Bar

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PREFACE

In this Brief, Petitioner Real Property, Probate & Trust Law Section of the Florida Bar is referred to as "Petitioner."[1] The Standing Committee on Unlicensed Practice of Law of the Florida Bar is referred to as the "Standing Committee." Community Association Managers are referred to as "CAMs." The terms "community association" or "community associations" refer collectively to Florida condominium associations, cooperative associations, and homeowners' associations as defined by Chapters 718, 719, and 720, Florida Statutes. References to Petitioner's Appendix are cited as "Appx. ##." The term "governing documents" refers to a community association's articles of incorporation, by-laws and declaration of covenants/condominium.

INTRODUCTION

Petitioner sought an advisory opinion from the Standing Committee to clarify whether fourteen (14) activities, common in the operation of a community association, constitutes the practice of law. Some of these activities are presented to the Court for the first time, but other activities were addressed in varying degrees in the Court's opinion in The Florida Bar re: Advisory Opinion-Activities of Community Association Managers, 681 So. 2d 1119 (Fla. 1996) (the "1996

1 This Brief is submitted solely by the Real Property Probate and Trust Law Section and is not submitted in the name of the Florida Bar. No annual membership dues have been expended in the preparation of the Brief.

Opinion"). The Court's analysis is necessary as to all fourteen (14) activities to protect the public from harm.

Issue[2]	1996 Opinion	Proposed Opn'n	Petitioner's Position
Question 1. Is preparing a certificate of assessments for a delinquent account UPL?	Ministerial and not UPL.	Agreed with 1996 Opinion.	Legal analysis required, not ministerial, is UPL. **(See Argument 1).**
Question 2. Is preparing a certificate of assessments at foreclosure UPL?	Ministerial and not UPL.	Agreed with 1996 Opinion.	Legal analysis required, not ministerial, is UPL. **(See Argument 1).**
Question 3. Is preparing a certificate of assessments after dispute in writing UPL?	Ministerial and not UPL.	Agreed with 1996 Opinion.	Legal analysis required, not ministerial, is UPL. **(See Argument 1).**
Question 4. Is drafting amendments to governing documents UPL?	May or may not based on facts.	Constitutes UPL, but 1996 Opinion should stand.	Statutory analysis required, is UPL **(See Argument 2).**
Question 5. Is determining the number of days required for statutory notice UPL?	Legal analysis required, is UPL.	Only UPL if requires legal interpretation.	Analysis of multiple sources of authority required, is UPL **(See Argument 3).**
Question 6. Is modifying limited proxy forms UPL?	Limited changes not, but complicated effort is UPL.	Agreed with the 1996 Opinion; requests further guidance.	Using any form other than State's is UPL **(See Argument 4).**

2 For brevity, "Issue" and conclusions are summarized from sources.

Issue[2]	1996 Opinion	Proposed Opn'n	Petitioner's Position
Question 7. Ispreparing documentsconcernin g rights to approve new owners UPL?	May or may not, based on facts.	UPL if involving legal analysis or discretion.	Requests specific guidelines in the area **(See Argument 5).**
Question 8. Is the determination of votes required to pass a proposition or amendment UPL?	Action is UPL.	Agreed with 1996 Opinion.	Requires analysis of multiple sources of authority, is UPL **(See Argument 6).**
Question 9. Is determination of the number of owners' votes needed to establish a quorum UPL?	Action is UPL.	Agreed with 1996 Opinion.	Requires analysis of multiple sources of authority, is UPL **(See Argument 6).**
Question 10. Is drafting pre-arbitration demand letters UPL?	If requires legal analysis, then UPL.	Not UPL because no statutory interpretation.	Requires complicated legal analysis, is UPL **(See Argument 7).**
Question 11. Is preparing construction lien documents UPL?	Preparation of Notice of commence ment is UPL. Lien waivers not considered.	Agreed with 1996 Opinion, Preparation of construction lien documents is UPL.	Requires complicated legal analysis, is UPL **(See Argument 8).**
Question 12. Is preparing, reviewing, and/or drafting, contracts UPL?	Preparation is UPL	UPL to prepare such contracts.	Agree; Requires legal analysis to review and prepare such contracts **(See Argument 9).**
Question 13. Is identifying who should receive a pre-lien letter UPL?	Pre-lien letters were not addressed	Mere public records search required, not UPL.	Requires legal analysis to ensure that the appropriate homeowner receives the letter at the appropriate address, is UPL **(See Argument 10).**

Issue[2]	1996 Opinion	Proposed Opn'n	Petitioner's Position
Question 14. Is itUPL to usestatutory/case law to reach legal conclusion?	Advice on application of law is UPL.	UPL to analyze law and provide opinion.	Request bright line rule **(See Argument 11).**

CAMs are licensed pursuant to Part VIII of Chapter 468, Florida Statutes. The phrase "community association management" is defined by §468.431(2), Fla. Stat. (2012), as follows:

> "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.

None of the fourteen (14) activities before this Court are recognized by§468.431(2), Fla. Stat., as community association management. No one may actas a CAM before first applying for licensure with the Department of Business andProfessional Regulation, passing an examination and background check, andobtaining a license.[3] There are continuing education requirements for

3 *See* Fla. Stat. §468.434; Fla. Stat. §468.433.

license

renewal.[4] Although CAMs are required to be licensed, the background requirements are minimal; a high school degree is not even required.[5]

Since the 1996 Opinion, the Legislature has significantly increased the regulation of community associations, with increasingly complex amendments to Chapters 718, 719, and 720, Florida Statutes. State and Federal agency regulation of communities have similarly increased. Related court decisions have multiplied. The changes to the statutes have been both procedural and substantive. Accordingly, Petitioner requested clarification and elucidation of the activities that may be performed by a CAM, and those which must be performed by a Florida attorney.

Petitioner's foremost concern continues to be the potential for harm to the public should a CAM perform the practice of law. Petitioner and its members are closely involved with the operation of community associations and CAMs throughout Florida and have firsthand knowledge of the many complex legal issues facing community associations, CAMs, and community association boards in their day-to-day operations. One of the primary purposes of Petitioner is to serve the public and its members by improving the administration of justice and advancing jurisprudence in the fields of real property, probate, trust, and related fields of law.

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4 *See* Fla. Stat. §468.4337.

5 See, s. 468.433, Fla. Stat. (2012). By comparison, see http://www.myfloridalicense.com/dbpr/re/LicensureInformation.html for the lengthy requirements for licensure as a real estate broker.

The issues presented are properly viewed against the backdrop of the relationship between the members of a community association and its elected volunteer board of directors. A fiduciary relationship exists between the directors and community association members.[6] Recognition must also be given to the nature of a community association including the mandatory nature of membership; the ability to assess members through assessments secured by a lien against the units; the statutory obligation of the community association to maintain official records and to make the records available to its membership; and the member's right to attend board meetings and to speak on agenda items. Some municipalities delegate municipal duties to community associations.[7] It is these aspects of community association operations that serve to distinguish this area of the law from other areas which appear superficially similar, but upon closer examination reveal the unique blend of laws, complex relationships and functions that apply only to community associations.[8]

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6 *See* Fla. Stat. §718.111(1)(a); Fla. Stat. §720.303(a).

7 *See, e.g.*, Appx. 256-61, 275-76, 328-37 (ST. JOHNS COUNTY, FLA., LAND DEV. CODE art. 5, §5.03.02(H) (2005); ST. JOHNS COUNTY, FLA., LAND DEV. CODE art. 5, §5.03.02(H) (2010)).

8 The Community Associations Institute estimates that Florida contains 14.2% of all community association in the United States, which is the highest concentration of community associations of any state, and that nationwide, 14% of all homes are located in community associations. See their web site at:http://cairf.org/foundationstatsbrochure.pdf.

Evidence was presented at the public hearing of actual harm to community associations and their members where legal advice was needed from a competent attorney, but was instead provided by a director or CAM.[9] The Standing Committee's hearing was abbreviated, limiting time for [10]testimony,[11] including limiting testimony to five minutes to respond to all prior speakers. The unlicensed practice of law has been shown to cause actual harm whether performed by a board member or a CAM. An opinion of the Standing Committee and of the Court providing direct guidance will serve both CAMs and community associations alike by defining the parameters of permissible operation. While the 1996 Opinion provided a valuable framework for addressing some of these issues, additional specific guidelines and mandates would serve the public interest in providing guidance on these questions, especially in light of the increased level of regulation.

9 Appx. 24-25, 27, 29, 41.
10 Appx. 13, where participants were told "Your testimony will be limited in time, due to practical realities."
11 Appx. 134, 142.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the Statement of the Case appearing on page 1 of the Brief in Opposition to the Proposed Advisory Opinion filed on behalf of the Continental Group, Inc., Associations, Inc., and CEOMC Florida, Inc. Further, Petitioner adopts the Statement of the Facts on pages 2-3 of that Brief in Opposition with the exception of the Summary of the Evidence beginning on page 3.

SUMMARY OF THE ARGUMENT

Activities undertaken by a CAM that require the application or interpretation of a statute or document to a particular set of facts amounts to advice or counsel to the CAM's community association and thus constitutes the practice of law and must be undertaken under the guidance of an attorney licensed in the State of Florida. Section 468.432, Fla. Stat., in describing the functions and purposes of a CAM, does not contemplate that a CAM will engage in the practice of law. Each of the 14 activities in the Petition requires legal analysis and a decision that requires legal knowledge and skills of an attorney.

An opinion of the Court clarifying these issues will prevent public harm and provide the guidance needed by community association boards, CAMs and attorneys.

1. UPL OCCURS IN THE PREPARATION OF A CERTIFICATE OF ASSESSMENT UNDER ENUMERATED FACTUAL SETTINGS.

[Proposed Opinion Questions 1-3]

Petitioner sought an opinion from the Standing Committee with regard to three distinct settings in which a certificate of assessments (a type of statement of account with legal significance creating an estoppel[12]) might be prepared. The first request was whether a CAM could prepare a certificate of assessments after a delinquent account had been turned over to association counsel for collection. The second request was whether a CAM could prepare a certificate once foreclosure proceedings involving that unit have been instituted. The third request was whether a CAM may prepare a certificate after the unit owner has disputed the amount owed. These special circumstances involve more than gathering information or calculating a total, but require the application of legal principals to a complex situation.

The Proposed Opinion, consistent with the 1996 Opinion,

withoutaddressing special circumstances, found that the preparation of a certificate ofassessments was ministerial in nature and did not require legal sophistication orlegal training.[13] Petitioner does not take issue with the conclusion that in the simple

12 Fla. Stat. §718.116(8); Fla. Stat. §720.30851.
13 Appx. 243-44.

circumstances considered by the Court previously, a CAM may and should prepare a certificate of assessments as a part of the job duties inherent in the position. But associations increasingly face special, complex circumstances such as a unit involved in a foreclosure or bankruptcy proceeding, or a dispute over the association's claim for assessments and other charges. In these special circumstances, the preparation of a certificate of assessments will not be ministerial .[14]

Where a unit owner has filed for bankruptcy protection, where an owner isin foreclosure, or where an owner or lender disputes the amounts owing, legaldeterminations are necessary. Issuing a legally incorrect certificate during abankruptcy proceeding will violate the automatic stay provisions of the BankruptcyCode, and may not only compromise the association's claim filed in the proceedingand subject the association to sanctions that will raise each association member'sassessments, but may also subject the individuals who were involved in the

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14 See, e.g., Ocean Trail Unit Owners Ass'n v. Mead, 650 So. 2d 4 (Fla. 1994) (demonstrating, in tandem with its companion cases, how legally complicated disputes over assessments actually may be).

certificate's[15] preparation to sanctions! In any of these special instances, the determination of which assessments are due, which are extinguished, which are lienable, and whether assessments owing may accrue interest, late fees, and attorney's fees, present questions of law requiring the application of state and federal statutes, regulations, and court decisions to the facts at hand.[16]

The determination of what is owed by any particular owner requires a legal interpretation of which statutes apply as well as how they apply. For example, whether interest and late charges are owed and if so in what amount, liability for attorney's fees, and which assessments are collectable and lienable are only a few of the tasks involved, all of which involve legal analysis. Similarly, where a unit owner or lender disputes the amounts owing because of a legal claim or defense, this dispute and its legal impact must be evaluated by an attorney.

The public interest is best protected when a community association only demands what is lawfully owed, no more, no less, and that amount requires legal analysis to determine.

2. THE DRAFTING OF AMENDMENTS TO DOCUMENTS CONSTITUTES THE PRACTICE OF LAW .

15 Appx. 200; *see also* 11 U.S.C. § 362 (2011); Fair Collection Practices Act, 15 U.S.C. § 1692(a)-(p) (2011) ; *In re Lickman*, 297 B.R. 162 (Bankr. M.D. Fla. 2003) (Association's sending a default notice or verbally threatening action against the debtor is a violation of the automatic stay); *In re Hawk*, 314 B.R. 312, 317 (Bankr. D.N.J. 2004) (Condominium association's collection of pre-petition assessments notwithstanding its knowledge of unit owner's Chapter 13 filing, constituted violation of the automatic stay. Because the condominium association acted with actual knowledge the Court could not annul the stay to validate its acts).

16 Id.

[Proposed Opinion Question 4]

Petitioner urged the Standing Committee to supplement the 1996 Opinion and find specifically that the drafting of amendments and certificates of amendment to governing documents that are recorded in a county's official records constitutes the practice of law. The Standing Committee found that governing documents "determine substantial rights of both the community association and property owners."[17] The Standing Committee further stated that "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."[18] Accordingly, the Standing Committee found that "[a]mendments to a community association's declaration of covenants, bylaws, and articles of incorporation can be analogized to the corporate documents discussed in *Town*,"[19] and thus constitutes the practice of law.

Nonetheless, the Standing Committee further stated that "the *1996 opinion* should stand," thereby creating the impetus behind Petitioner's request because the 1996 Opinion did not specifically address the drafting of amendments to governing documents. The question presented to the Court in 1996, and the only

17 Appx. 237.
18 Id.
19 Id. at 237-38.

question

addressed by the Court in the 1996 Opinion, is whether the "Modification of Department of Business and Professional Regulation Form BPR 33-033 (Limited Proxy Form) for a specific meeting (including modifying the form with the name of the association; the date, time and place of the meeting; phrasing yes or no questions on the issues of waiving reserves ….. and adoption of amendments to the Articles of Incorporation, Bylaws or condominium cooperative documents) constitutes the unlicensed practice of law."[20]

The 1996 Opinion differentiated between filling in the blanks of a form, and substantive legal drafting. The simple addition of facts to a limited proxy form promulgated by a state agency[21], "to the extent such modification involves ministerial matters contemplated by the description in section 468.431(2)"[22] could be performed by a CAM, and thus did not constitute the unlicensed practice of law. Such ministerial modifications were filling in the blanks, to "include the name of the community association; phrasing a yes or no voting question concerning either waiving reserves …… concerning carryover of excess membership expenses; and phrasing a yes or no voting question concerning the adoption of amendment to the Articles of Incorporation, Bylaws, or condominium documents."[23]

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20 1996 Opinion at 1221.
21 BPR Form 33-033.
22 1996 Opinion at 1124.
23 Id.

Drawing a distinction, the 1996 Opinion held firmly that "[a]s to more complicated modifications, however, an attorney must be consulted."[24] Neither the 1996 Opinion nor the Proposed Opinion addressed or defined what would constitute "more complicated modifications." Further, by failing to further define what would constitute a "more complicated modification" and by stating that the phrasing of a yes or no question concerning the adoption of an amendment to any of the governing documents is ministerial, the 1996 Opinion has been construed to authorize non-lawyers to draft amendments. The Proposed Opinion, while finding that the drafting of amendments to governing documents constitutes the practice of law, opened the door to confusion by also stating that the 1996 Opinion should stand. The 1996 Opinion did not specifically speak to the drafting of amendments, creating a grey area open for various interpretations. Petitioner asserts that allowing a CAM to function in this grey area would undoubtedly result in harm to the public. The 1996 Opinion should be clarified, and to protect the public, the Court should declare that drafting an amendment to governing documents constitutes the practice of law.

The drafting of an amendment to a governing document is a process that

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24 Id.

requires a drafting attorney to match defined words and phrases in the correct document, to identify all of the provisions to be amended, and to craft language compatible with the existing documents. Further, an attorney must review the community's documents, the Florida Statutes, and appellate decisions to determine whether such amendment may be legally enforced as proposed, and the vote required for approval. A legal review is required to ensure that such amendment does not contradict other provisions within the governing documents, Florida Statutes, federal law, or the state and Federal constitutions.[25] The drafting of amendments cannot be performed without this legal scrutiny and analysis.

An improperly drafted and approved amendment may also result in costly and protracted litigation from members who oppose the amendment. In the end, it is the members of the Association who will be responsible for the expense of litigation.[26] Even amendments to the governing documents that may facially appear to be simple, such as adding a comma, can have an unintended detrimental

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25 See Klinow v. Island Court at Boca W. Prop. Owners' Ass'n, 64 So. 3d 177 (Fla. 4th DCA 2011); *Woodside Vill. Condo. Ass'n v. McClernan*, 806 So. 2d 452 (Fla. 2002); *Everglades Plaza Condo. Ass'n v. Buckner*, 462 So. 2d 835 (Fla. 4th DCA 1985).

26 See Woodside Vill. Condo. Ass'n v. McClernan, 806 So. 2d 452 (Fla. 2002) (involving amendment challenge case involving extensive fees for the association and the Florida Supreme Court); *see also Ocean Trail Unit Owners Ass'n v. Mead*, 650 So. 2d 4 (Fla. 1994) (demonstrating that improper action by a board of directors will have the ultimate effect of forcing the members of the association to bear the expenses of litigation).

27 Appx. 24-25.

consequences for the association.[27]

Amendments to any community governing document can greatly affect the substantive rights of members to use and enjoy their property, as well as change the very definition of what they own as members.[28] The decision of whether to employ legal counsel or rely on a CAM is often made by the board, not by the association's members who bear the financial expense and risk of not obtaining legal advice and representation. This separation makes such issues different than many encountered because the affected parties, the members, have no say. The Board may believe it is doing what is best by saving legal expenses for the association by pressuring or permitting the CAM to draft amendments. Ultimately, the risk of protracted litigation outweighs the short term savings. The Board may have done a great disservice to the members they have been elected to serve simply because they may not have the knowledge or background to recognize the potential ramifications of their short-sighted decision.

Finally, neither the 1996 Opinion nor the Proposed Opinion addressedwhether the drafting of certificates of amendment intended to be recorded in aCounty's official records would constitute the practice of law. With regard to acertificate of amendment, which is required to be recorded before any amendment

28 Appx. 43-44.

to a governing document is deemed effective and enforceable; the certificate must be prepared in compliance with statutes[29] and the association's governing documents. The Certificate of Amendment is evidence of compliance with requirements of both statutes and the governing documents involving a legal analysis and a conclusion that can only be made by counsel.

3. DETERMINING THE NUMBER OF DAYS REQUIRED FOR STATUTORY NOTICE MUST BE PERFORMED BY AN ATTORNEY.

[Proposed Opinion Question 5]

In the 1996 Opinion, the Court stated that:

> 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), Florida Rules of Civil Procedure. Such interpretation constitutes the practice of law. See, e.g., Florida Bar v. Warren, 655 So. 2d 1131 (Fla. 1995).[30]

This ruling upheld the finding of the Standing Committee that determining the timing for notices and applying the law to a specific matter constitutes the practice of law.[31] There is no reason for the Court to retreat from its prior opinion.

The Proposed Opinion is inconsistent with the 1996 Opinion. The StandingCommittee proposed that such activity be determined to be the practice of law onlywhen determining the number of days "…requires the interpretation

29 §718.110, Fla. Stat.; *See also* §720.301(8)(a), Fla. Stat. (homeowners' association governing document amendments must be recorded.
30 1996 Opinion 1123.
31 Id. 1122.

of statutes,

administrative rules, governing documents or rules of civil procedure…."[32] This standard overlooks the fact that every determination of the legally required number of days requires an analysis of the governing documents and the applicable statutes as well as the facts because there are different notice periods for different types of meetings and not all governing documents contain the same notice provisions.

At the hearing before the Standing Committee, it was suggested that determining notice requirements was counting days, a simplistic task. A representative of Association Financial Services testified under oath that:

> 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…This is 101. This is taught to us. This is in the governing documents.[33]

Although this witness recognized that the unlicensed practice of law is a third degree felony, and stated "I would dare not practice law…," the same witness clearly did not consider calculating critical dates for his association clients to constitute the rendering of legal advice. This witness's erroneous legal conclusion, contrary to the 1996 Opinion, is a stark example of a non-lawyer's substantive legal interpretation errors, and naivete in simply relying on what he thinks is a statute's text without regard to applicable court opinions, including this Court's opinions!

32 Appx. 245.
33 Appx. 57.

A lawyer would know that the relationship between governing documents and statutes is not as simple as reading and counting. Legal analysis is required to reconcile inconsistencies between statutes, governing documents, and court decisions.[34] Understanding the relationships between these sources is difficult and is far from ministerial.

Despite this, the Proposed Opinion seeks to allow such decision-making without proper legal analysis. Adoption of the Proposed Opinion would make matters worse, as it will further the practice of CAMS rendering legal advice under the guise of performing, in their opinion, ministerial or procedural tasks.

The significant volume of appellate decisions on the calculation andmiscalculation of dates reveals the complexity of a task referred to by CAMs as"ministerial." By analogy, application of the three day notice requirement inChapter 83, Part II of the Florida Landlord Tenant Act is often before our courtssometimes involving experienced attorneys who miscalculate the statutory noticedates resulting in a dismissal.[35] This, in spite of the fact that the three day noticerequirement is governed only by statutory provision, whereas determining noticerequirements for community associations

34 *See, e.g.*, Fla. Stat. §718.112; Fla. Stat. §718.116.
35 See, e.g., *Investment & Income Realty v. Bentley*, 480 So. 2d 219 (Fla. 5th DCA 1985).

requires synthesis and interpretation of recorded covenants or declarations, articles of incorporation, bylaws, statutes, and

administrative rules, as well as amendments to all of the preceding.

Further, and most interestingly, the witness who testified that such calculations were ministerial revealed the danger of allowing CAMs to undertake such activities without independent legal advice. Another witness, when referring to statutory deadlines, stated that these deadlines were "[i]n the governing documents." These testimonies ignores the fact that the date deadlines referred to in his testimony are not always stated in community association governing documents, and, when stated, often differ from notice periods for specified activities set forth in the statute. When considering whether statutory notice requirements for community associations apply, a legal analysis must determine whether the statutory requirements are procedural or substantive and reconcile the governing documents with the Florida Statutes.[36]

4. THE MODIFICATION OF PROXY FORMS CONSTITUTES UPL.

[Proposed Opinion Question 6]

In the 1996 Opinion, the Court found that with respect to "…drafting

alimited proxy form, those items which are ministerial in nature, such as filling

inthe name and address of the owner, do not constitute the practice of law.

However,if drafting of an actual limited proxy form or questions in addition to

36 Maronda Homes Inc. of Florida v. Lakeview Reserve Homeowners Ass'n, Inc ___So.3d ____ 2013 WL 3466814 (Fla. 2013)

those on the preprinted form is required, the CAM should consult with an attorney. ” The Court

specified certain activities as ministerial in nature, and listed permissible modifications by a CAM to the pre-printed form promulgated by the State, and ruled that an attorney must be consulted for "more complicated modifications."[37]

The Standing Committee suggested that the Court confirm the 1996 Opinion and add examples of more complicated modifications to provide more guidance to CAMs.[38] Petitioner agrees with the Standing Committee.

To achieve clarity, Petitioner requests that the Court find that use and completion of any form, other than the limited proxy form promulgated by the State, except inserting items explicitly listed by the Court in the 1996 Opinion, be presumed to be non-ministerial and the practice of law.[39]

5. THE PREPARATION OF DOCUMENTS CONCERNING AN ASSOCIATION'S RIGHT TO APPROVE PURCHASERS INVOLVES THE PRACTICE OF LAW.

[Proposed Opinion Question 7]

Petitioner requested the opinion of the Standing Committee on whether aCAM may properly prepare documents in connection with a communityassociation's right to approve (or disapprove) prospective purchasers and tenants. The Standing Committee noted in its Proposed Opinion that the

37 Id.
38 Appx. 246.
39 Appx. 45.

1996 Opinion of

the Court found that drafting the documents required to exercise an association's right of approval or first refusal of a sale or lease may or may not constitute the practice of law depending on the factual [40]circumstances The Standing Committee concluded that if the preparation of documents relating to the approval process requires the exercise of discretion or the interpretation of statutes or legal documents, a CAM may not prepare these documents.[41]

Petitioner agrees with the Standing Committee, but urges the Court to issue specific guidelines. The process of approval of prospective purchasers first involves the legal determination of whether the governing documents in fact grant to the association the legal right to approve prospective purchasers. This determination requires a legal analysis of the governing documents for the community[42]

Once it has been determined that an association possesses a lawful right toapprove or disapprove prospective buyers and tenants, typically an association willrequire that prospective buyers and tenants submit an application. The drafting of

40 Appx. 248-49.
41 Id.
42 Appx. 45-46.

the application doubtlessly involves, at least in part, the practice of law. While certain parts of an application are ministerial in nature, such as the names of the applicants, prior addresses, bank information, and criminal history information, the inclusion of other parts of the form would intuitively require the assistance of counsel. For example, drafting waivers to protect the association from disclosure claims when obtaining credit and background reports, whether to include demographic information on race, nationality, handicap, religion, children in residence and ages, pets,[43] bankruptcy filing history, [44] and how to frame these questions, create complex legal issues with tangible, immediate, and cogent legal consequences. Once the application is established, a CAM may properly distribute the forms to appropriate applicants.

The final document involved with the application process, the writtendecision of the board, is fraught with legal consequence. A form may bedeveloped with the assistance of counsel that will allow the CAM to report thedecision of the Board to the applicant. The decision to accept or reject anapplication involves identifying the legal grounds upon which the

43 Such issues turn largely on the requirements of both the Federal Fair Housing Act, 42 U.S.C. § 3601-19, and the Florida Fair Housing Act, § 760.23, Florida Statutes. See *Sun Harbor Homeowners' Ass'n v. Bonura*, 95 So. 3d 262 (Fla. 4th DCA 2012), for an example of a community association being sued for fair housing violations.

44 11 U.S.C. § 362 (2011). For an example of a community association's issues with the automatic stay provisions, see *In re Nacinovich*, Case No. 12-30874 (U.S. Bankruptcy Ct., D.N.J, May 31, 2013).

association may

lawfully disapprove a purchaser or tenant. A determination must be made whether the Board has the legal duty to report the rationale of a denial, as well as and the method of reporting, with the goal of avoiding a [45]lawsuit

It follows from this Court's 1996 Opinion that only the attorney may counsel the Board on the legal grounds to disapprove an applicant, and how to accomplish this. These decisions necessitate the knowledge and application of state and federal statutes and case law and are fraught with the likelihood of triggering a discrimination complaint or lawsuit for discrimination or for interference with a contractual relationship.

6. THE DETERMINATION OF THE VOTES REQUIRED BY STATUTE OR DOCUMENTS TO AMEND THE DOCUMENTS OR TO ESTABLISH A QUORUM INVOLVES THE PRACTICE OF LAW.

[Proposed Opinion Questions 8-9]

In the 1996 Opinion, the Court stated that:

> 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), Florida Rules of Civil Procedure. Such interpretation constitutes the practice of law. See, e.g., Florida Bar v. Warren, 655 So. 2d 1131 (Fla. 1995).[46]

The issues for the Court's review are essentially the same as those posed in Argument 3. Just as with determining the number of days required for statutory notices, determining the votes required to pass a proposition, or amendment, or to

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45 Id.

46 1996 Opinion 1123.

determine a quorum may at first examination appear merely ministerial. However, this appearance does not abrogate the need for thoughtful legal analysis to prevent public harm.

Condominium and homeowner statutes are subject to almost annual revision by the Florida Legislature.[47] In addition, Florida courts are regularly called upon to interpret the laws pertaining to corporate governance, in general, and community associations in particular. Case law frequently discusses the application of statutes to existing declarations.[48] Finally, the Division of Florida Condominiums, Timeshares, and Mobile Homes (the "Division") periodically arbitrates and issues rulings on election disputes for community associations. As a result, applicable law relating to community associations is in constant flux and governing documents rarely conform to the laws in effect at any particular time.[49]

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47 For example, in 2013 alone, thirteen bills were proposed in the Florida Senate for condominium associations and three were passed. Three additional bills were proposed, with one passing, pertaining to homeowners' associations. Florida Legislature, *Regular Session – 2013 Subject Index* (June 17, 2013, 1:12 PM), *available at* http://www.leg.state.fl.us/data/session/2013/citator/Daily/subindex.pdf. Three additional bills were proposed in the Florida House of Representatives as well. http://www.myfloridahouse.gov/Sections/Bills/bills.aspx?SessionId=72.

48 *Coral Lakes Cmty. Ass'n v. Busey Bank, N.A.*, 30 So. 3d 579 (Fla. 2d DCA 2010); *Rosenberg v. Metrowest Master Ass'n, Inc.*, __So.3d ___, Case No. 5D12-4062 (Fla. 5th DCA 2013).

49 Appx. 20-21.

The calculation of a quorum is a legal issue confronting all participants.After analysis of the governing documents, one must then determine whether astatute or regulation alters the calculation[50] and if so, whether the statutoryrequirement is substantive or procedural.[51] CAMs frequently look only to thestatutes or governing documents to determine the number of members to constitutea quorum or the votes needed to pass an amendment.[52] Such an approach may beseemingly ministerial or mechanical, but can yield the wrong answer. Forexample, if a CAM may rely on §718.110, Fla. Stat. (2012), addressingamendments to the declaration, this approach will lead to association actioninconsistent with the law because §718.110(1), Fla. Stat. (2012) provides that thedeclaration may be amended in general upon the approval of two-thirds of themembers if the declaration fails to provide a method, while §718.110(4), Fla. Stat.(2012), provides that amendments that change fundamental property rights requirea 100% vote. Whether the amendment alters a fundamental property right calls fora legal analysis. Then add typical issues such as whether a requirement of

50 Compare, Charter Club of Naples Bay Owners Association v. Unit Owners Voting for Recall, Case No. 02-5360 (Fla. DBPR., Div. of Fla. Condo, Timeshare and Mobile Homes, Sept. 13, 2002, holding that where the bylaws required 5 days' notice for a board meeting, the bylaws conflicted with the statutory requirement of 48 hours, and the statute controlled.

51 Maronda Homes Inc. of Florida v. Lakeview Reserve Homeowners Ass'n, Inc ___So.3d ____ 2013 WL 3466814 (Fla. 2013).

52 Appx. 24.

two-thirds vote of the members calls for two-thirds of all voting members or only

two-thirds of a quorum present at the meeting.

The determination of the legal threshold for quorum and voting is a unique aspect of common ownership defined and regulated by a recorded declaration, articles of incorporation, bylaws, and statutes. In addition, the Division has ruled that certain amendments cannot be made absent approval of all members of an association even if the quorum and votes specified in the governing documents and statutes are achieved if the amendment impairs the basic rights of owners who purchased a condominium unit.[53] In other instances, certain changes cannot be retroactively applied, regardless of the approving vote, because of court opinions[54] and statutory requirements.[55] In all of these instances, a cursory review of a document to determine the required number or percentage, without assistance of counsel, will easily lead the association astray.

Many covenants specify a quorum requirement which is greater or lesser than the 30% specified by §720.306(1)(a), Fla. Stat. (2012). If a person were to refer only to the governing documents, the association could easily be misdirected

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53 In Re: Petition For Arbitration Luckhardt v The Shore Condo. Case No, 10-00-5216 April 9, 2010; In Re: Petition for Arbitration Lindback v Sand Pebbles of Islamorada Assn. Case No. 2004-2086 June 21, 2005; *See, e.g.*, Declaratory Statement, *Bay Pointe Studio Villas III Ass'n, Inc.*, Docket No. 2005-02-2392 (Fla. Dep't of Bus. & Prof. Reg., Div. of Fla. Condos., Timeshares and Mobile Homes Aug. 12, 2005) (requiring unanimous consent of all owners to provide for certain uses of the common elements).

54 See, e.g., Winston Towers 200 Ass'n v. Saverio, 360 So. 2d 470 (Fla. 3d DCA 1978).

55 Fla. Stat. §718.110(4).

and be wrongly advised that the quorum could not be achieved, when in fact the relationship between the statutes and governing documents may be such that the quorum requirements are different than they appear on the face of the governing document(s). Conversely, the quorum may be a number specified by a governing document, notwithstanding the otherwise clear statute that legally permits a lower number but which may be overridden by the association's governing document requirements.

Proper analysis of the quorum determination and the vote required to amend the governing documents, depends on the following factors as they may be applicable to a given set of circumstances:

- Verification that the association records include all amendments and supplements to the governing documents previously adopted;
- A determination of whether any prior "amendments" were lawfully effected;
- Review of the applicable provisions of Chapters 718, 719, 720 and/or 617;
- Review of the applicable provisions of Division rules, arbitration opinions and declaratory statements;
- Application of the rules of priority where there are internal inconsistencies in the governing documents, or the governing documents and Florida statutes, common law, and administrative regulations;[56]
- Review of applicable Florida appellate case law;
- Evaluation of the voting rights of certain members of the Association such as developers and delinquent owners are entitled to vote and whether their votes are counted towards a quorum;[57]
- A determination of whether the proposed change impairs rights of mortgagees, and requires mortgagee consent;[58]

56 *See Ass'n of Poinciana Villages v. Avatar Props., Inc.*, 724 So. 2d 585 (Fla. 5th DCA 1998).

57 Fla. Stat. §718.303(5); Fla. Stat. §720.305(4).

58 Fla. Stat. §718.110(11). Legislative changes even occurred in 2013 regarding this topic. See Fla. Stat. §720.306(1)(d).

Additional factors to be considered may include the past course of conduct of the association and whether any trial court decisions apply to a community.

There is simply no way anyone other than an attorney with knowledge and awareness of the interplay of real estate law, contracts, and corporate law, can ever accomplish the preceding.[59] The failure to consider applicable factors threatens public harm by endangering people's homes.

Rarely is there a single document or statute that provides legally accurate answers to even the most basic legal questions about voting. Erroneous recommendations from a CAM lead to recognizable harm to the public. If the community association fails to act in accordance with its governing documents and Florida law, it jeopardizes the validity of amendments to its governing documents, may impair the proper governance of the community, and may threaten and property values. This may lead to the impairment of the marketability of title, and may cause needless expenses to owners and to the association for repeated notices and votes, defending improper actions, and burdening the Division and courts with needless disputes.[60]

Unlike amendments or elections in a private corporation which, if improper,

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59 1996 Opinion at 1121-23 (recognizing that the use of statutes, administrative rules, governing documents, and rules of procedure is by definition the practice of law and pointing out that such behavior is specifically prohibited for nonlawyers).
60 Appx. 47.

adversely affect only the business owners, with respect to community associations, an association's misguided attempt to use a CAM for legal advice may adversely affect the property rights of all homeowners in the community. Given that some community associations have jurisdiction over thousands of members, the public harm is no less than what might occur if a municipal government acted without proper legal counsel.

7. A CAM MAY NOT PROPERLY PREPARE THE PRE-ARBITRATION DEMAND NOTICE REQUIRED BY STATUTE.

[Proposed Opinion Question 10]

The Standing Committee erroneously determined that a CAM may properly prepare the pre-arbitration demand notice required prior to the commencement of mandatory arbitration proceeding. The Division conducts a program of mandatory non-binding arbitration for certain disputes[61] between condominium associations and unit owners which is a condition precedent for filing the dispute in the courts.[62] The demand notice that is required to be served prior to the filing of a petition for arbitration is described below:

> 718.1255 Alternative dispute resolution; voluntary mediation; mandatory nonbinding arbitration; legislative findings.—
>
> (4)(b)The petition must recite, and have attached thereto, supporting proof

61 The initial determination of whether a particular dispute is subject to arbitration and thus requires the pre-arbitration demand notice involves the practice of law, the interpretation of the facts to the statutory jurisdictional parameters, an examination of Division precedent on the extent of its jurisdiction, and the analysis of case law defining the jurisdiction of the program.

62 See Fla. Stat. §718.1255(4).; *Habitat II Condominium, Inc. v. Kerr,* 948 So. 2d 809 (Fla. 4th DCA 2007).

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.

Where a pre-arbitration demand notice is deemed inadequate by the Divisionarbitrator, the penalty is swift, drastic, and expensive. The Division acting on itsown motion summarily dismisses the petition for arbitration,[63] which terminates thecase and forces the association to prepare and serve an additional demand noticecomplying with the statute and to stand in line once again by filing a new petitionfor arbitration, paying a new filing fee, and increasing the burdens on the Division. The resulting delay may prejudicially impact the association and its members.[64]Such examples include situations where there is an active water leak in a unit, orwhere a dangerous dog continues to reside on the premises

63 The final orders of the Division are summarized on its web site. See, the final order index shown below, and the case summaries assembled under the heading "Arbitration-Affirmative Defenses" which illustrate the dismissal of cases for lack of an adequate pre-arbitration demand notices. *Regular Final Order Index Vol. 1*, FLA. DEP'T OF BUS. & PROF. REG., DIV. OF FLA. CONDOS., TIMESHARES AND MOBILE HOMES (Jan. 1992 through Aug. 1997), *available at* http://www.myfloridalicense.com/dbpr/lsc/documents/volumeone.pdf

64 Appx. 48-49.

65 For an indication of why the period would be abbreviated in such situations, see *Sanzare v. Varesi*, 681 So. 2d 785 (Fla. 4th DCA 1996). In addition to abbreviated time, the association's attorney could identify other lawful conditions to protect his or her client. *See also Barwood Homeowners Ass'n, Inc. v. Maser*, 675 So. 2d 983 (Fla. 4th DCA 1996).

,[65] where a tenant of an

owner or an owner is engaging in activities that constitute a nuisance or a danger to the other residents, or where an association needs to obtain access to the unit to secure hurricane shutters in advance of a hurricane event. Thus, the failure to prepare and serve an adequate pre-arbitration demand notice may severely impact the legal rights, responsibilities and property interests of a community association, and may endanger the property and safety of the owners. Such cases also involve the significant property interests of persons who are not making the decision to rely on the interpretation or advice of the CAM. The legal impact of a dismissal of a petition for arbitration would typically result in a delay of months in obtaining access to the mandatory legal process.

Crafting the mandatory notice is not just a simple compliance demand. A pre-arbitration demand notice must adhere to the statutory requirements for such notice which entails interpretation of the law. The demand notice must provide a reasonable time deadline to provide the requested relief. Reasonable notice is a procedural due process concept of constitutional origin and magnitude.

Determining what is a reasonable period of time in which to cure the violation involves a legal analysis, applying statutory time periods to specific facts, including the nature of the violation, any emergency or special circumstances and, the threat presented to the residents or to the property. The reasonable time to remove an unauthorized dog may be a month; yet, if the dog is biting residents, the

time should be abbreviated. The time to fix a water leak in a unit will be more abbreviated than the time for gaining access for a routine inspection of the unit. What is a reasonable period of time is quintessentially a legal determination, dependent on all the facts and circumstances, and if found insufficient, it results in *sua sponte* dismissal of the association's petition.

The Division arbitrators have, through their decisions, developed an additional hurdle for the pre-arbitration demand notice not found in the statutes or regulations. Notice must not be "stale" in the sense that the period of time between service of the demand letter and the filing of the petition must not be unreasonably long.[66] If there is too long a delay the unit owner may be lulled into thinking that the association is no longer requiring compliance, resulting in the *sua sponte* dismissal of the petition for inadequate pre-arbitration demand notice.[67] Thus, legal analysis is required to both evaluate this "unwritten" Division-created requirement of timeliness and then to determine when a letter becomes "stale".[68]

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66 See, e.g., Order to Show Cause, *Plantation Vill. CO-OP, Inc. v. Patterson*, Case No. 2011-05-0975 (Fla. DPBR., Div. of Fla. Condos., Timeshares and Mobile Homes Oct. 11, 2011), *available at* http://www.myfloridalicense.com/dbpr/lsc/arbitration/allorders/2011050975.pdf.

67 See, e.g., Order to Show Cause, *Pardoe v. Sandy Cove Condo. Ass'n, Inc.*, Case No. 2010-05-1426 (Fla. DPBR, Div. of Fla. Condos., Timeshares and Mobile Homes Oct. 18, 2010) (14 months between pre-arbitration notice and petition); Final Order of Dismissal, *Biscayne Lake Gardens Building "B," Inc. v. Enituxia Group, Inc.*, Case No. 2010-02-8314 (Fla. DBPR, Div. of Fla. Condos., Timeshares and Mobile Homes July 1, 201) (ten months).

68 Id.

The Standing Committee also opined that since the Division has held in dictathat the pre-arbitration demand notice need not be prepared by an attorney, suchactivity is appropriate for a CAM to undertake, and is not unauthorized, citing theCourt's opinion in The Florida Bar v. Moses.[69] However, Moses is inapposite andis not a valid precedent for the proposition cited. In Moses , the Court ruled that theappearance of a qualified lay representative on behalf of a party pursuant tolegislative authorization contained in Chapter 120, Florida Statutes, did notconstitute the unauthorized practice of law, because the Legislature authorized suchpractice. The Court based its opinion in part on s. 120.62, Fla. Stat., providingthat a person in any agency proceeding has the right to be advised by counsel orother qualified representative in an administrative proceeding. First, there is nosimilar grant of authority contained in §718.1255, Fla. Stat. (2012).[70] Nonetheless,the Division permits qualified lay individuals to represent parties in arbitrationproceedings under Rule 61B-45.004, Florida Administrative Code. Thus, by rule,a qualified lay individual is permitted to appear in the arbitration proceeding in a

69 Appx. 251; *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980).
70 Ch. 120, Florida Statutes, does not apply to Division arbitration proceedings. See, s. 718.1255(4), Florida Statutes, providing that the arbitration final order does not constitute final agency action, as well as *Pollak v Bay Colony Club Condominium, Inc*., Arb. Case No. 99-1176 (Order on Motion to Strike, December 7, 1999) reported at page 20 of the following reporter: http://www.myfloridalicense.com/dbpr/lsc/documents/volumetwo.pdf

representative capacity on behalf of a party. However, even here the Divisionrequires significant pre-requisites, in that an application must be filed with thearbitrator, and the individual must be approved by the arbitrator considering on anindividual basis the complexity of the issues presented and the ability of theproposed representative. Pursuant to the rule, a CAM or other individual maybecome authorized to represent a condominium association in an arbitrationproceeding if the applicant demonstrates to the satisfaction of the Division that heor she possesses sufficient familiarity with the rules of procedure andunderstanding of the statutes involved. However, there is no rule allowing anon-lawyer to determine if the dispute is initially subject to mandatory arbitrationand to draft the pre-arbitration notice, which is essentially a charging documentwith great consequences. The issue of whether a CAM may properly represent aparty in adversary proceedings is not before the Court in this proceeding, was notpresented by petition to the Standing Committee, was not decided by the StandingCommittee, and is separate and apart from the issue of whether all CAMs maydraft a legal notice *in advance of legal proceedings*, which is the legal issuepresented here. There is nothing in §718.1255, Fla. Stat. (2012), Chapter 61B-45,Florida Administrative Code, or in the Moses opinion that addresses or permits

qualified lay individuals to perform activities in advance of the filing of a legal proceeding. The pre-arbitration demand notice is by definition an activity which is required to occur prior to the filing of the petition for arbitration. Neither the Legislature nor the Division rules authorize a qualified lay individual to engage in activities in advance of the filing of the petition for arbitration, which would otherwise constitute the unauthorized practice of law. Thus reliance by the Standing Committee on the Moses decision is misplaced. Representation by a lay representative in an administrative proceeding only occurs under Chapter 120, Fla. Stat. (2012)[71], or under §718.1255, Fla. Stat. (2012), where the authorizing agency has minimized the potential harm to the party through its express determination that a specific individual is duly qualified to represent the legal interests of a party.

In sum, virtually every aspect of the preparation and filing of a proper pre-arbitration demand notice involves or requires legal analysis and representation; and, a failure creates significant harm to the association, and thus involves the practice of law.

8. A CAM MAY NOT PREPARE CONSTRUCTION LIEN DOCUMENTS.

[Proposed Opinion Question 11]

71 See, Rule 28-106.106, Florida Administrative Code, which sets forth criteria for qualified representatives in proceedings under Ch. 120, Fla. Stat., which determine the substantial interests of a party. Standards of conduct for qualified representatives under Ch. 120 are set forth at Rule 61B-106.107, F.A.C.

Presently CAMs are not permitted to prepare Notices of Commencement. The 1996 Opinion determined that the drafting of a Notice of Commencement constitutes the practice of law, as the Notice affects legal rights, requires a legal description of the property, and results in serious legal and financial harm to the property owner, if prepared inaccurately.[72] Section 713.13(1)(a), Fla. Stat. (2012), requires that Notices of Commencement contain legal descriptions of the property involved and a description of the ownership interest in the site of the improvement, and the name and address of the fee simple title holder. In a condominium setting, the condominium association is usually not the fee simple title holder, thereby requiring a complicated description of ownership and the identity of the owners as a class for Notices of Commencement. If the condominium association owns a portion of the property, the legal description and identity of the owners becomes more complicated. The failure to complete this task properly in a condominium can subject the unit owners and the association to claims of serious legal and financial harm.[73]

The same is true for terminating Notices of Commencement. Pursuant to §713.132, Fla. Stat. (2012) owners may terminate the period of effectiveness of a Notice of Commencement by swearing under oath to a written Notice of Termination reflecting a number of complicated legal principals. First, the

72 1996 Opinion 1123.
73 Id.

signatory must specify that the notice applies to all of the real property subject to the Notice of Commencement or specify the portion of such real property to which it applies. In a condominium setting, work is frequently performed on multiple buildings or facilities. As work is completed in certain areas, while still ongoing in others, sometimes the parcels of property on which work was completed need to be partially released from the Notice of Commencement. In that situation, a Notice of Termination must specify the portion of the real property for which the Notice of Commencement is being terminated and the portion for which it remains.

Furthermore, a Notice of Termination must swear under oath that all lienors, including non-privity lienors, have been paid in full. Pursuant to §713.132(2), Fla. Stat. (2012), the owner has the right to rely on a contractor's payment affidavit for part of the information necessary to support that conclusion "except with respect to lienors who have already given notice" to owner. The Florida Statutes impose an independent obligation on the owner terminating a Notice of Commencement to verify that lienors, not in privity with the owner but who have served a notice to owner, have been paid in full, even if a contractor's sworn payment affidavit states to the contrary.

Finally, §713.132(3), Fla. Stat. (2012) prohibits an owner from terminating a Notice of Commencement except after completion of construction or after construction ceases before completion and all lienors have been paid in full or

pro-rata in accordance with the proper payment procedures of §713.06(4), Fla. Stat. (2012). The significance of proper payments is found in §713.06(3)(h), Fla. Stat. (2012), providing that, if an owner has made improper payments, the owner's real property shall be liable to all lienors who perfected their lien rights to the extent of the improper payments. Furthermore, the statute provides that some payments may be proper as to certain lienors, but improper as to others, in which event some lienors may have lien rights against the property to the extent of the improper payments, while others do not. The upshot of this is that, if a condominium association makes payments failing to comply with the statutory requirements, the individual unit owners' property will be subject to liens, even if the association had nevertheless paid its contractor all sums due.

Unanticipated legal liability arises on construction jobs where condominium associations pay their general contractors, who in turn fail to pay subcontractors or sub-subcontractors. In that scenario, even though the association paid the contractor, the association and the individual unit owners will be liable to pay the same amount again to subcontractors for liens merely because the association failed to comply with the proper payment procedures in the statute.

The complexity of the proper payment procedures is further illustrated

bythe statutory provision addressing the scenario when the remaining amount due

to

the general contractor is not sufficient to pay all unpaid lienors. Despite the fact that this scenario only arises in practice if improper payments have been made somewhere during the course of the construction project, the statute specifies a complicated procedure for pro-rata payments to unpaid lienors.[74] That statute creates separate classes of lienors and requires that all unpaid lienors within one class be paid in full before any member of the next class gets paid. This is a complicated analysis, requiring a thorough understanding of the Florida Construction Lien Law. Failure to strictly comply subjects unit owner property to liens, even if the association paid its contractor in full.

Administration of payment procedures on construction projects requires the receipt, interpretation, and understanding of releases of lien. Pursuant to §713.20(8), Fla. Stat. (2012), lien waivers or releases are enforceable in accordance with their terms. Florida law provides that contract principals apply in interpreting releases of lien. Consequently, the interpretation of releases obtained during the administration of payments on a construction project frequently requires application of legal contract interpretation principals which may be unfamiliar to CAMs where legally deficient releases have been delivered.

It should be noted that the condominium association usually administerscondominium property as agent of the various unit owners, who

74 See Fla. Stat. §713.06(4).

collectively own

the condominium property. The association does not own real property. CAMs are two steps removed from the owners, as they are independent contractors hired by the agent of the owners (the condominium association).[75] Hence, CAMs ought not be permitted to handle these complex construction documents and procedures on behalf of an entity that does not even own the property, especially given the ramifications of getting it wrong.

For all of the above-referenced reasons, associations and their member/owners may be properly protected only if payment procedures on construction projects, including the recording and terminating of Notices of Commencement, receipt of releases, and the assurance of proper payments to lienors, are performed by attorneys who understand Florida Construction Lien law and can perform the required analysis and make the legally correct recommendation.[76]

9. A CAM MAY NOT PROPERLY PREPARE, REVIEW, DRAFT, OR BE INVOLVED IN THE PREPARATION/EXECUTION OF CONTRACTS (INCLUDING CONSTRUCTION, MANAGEMENT, CABLE TELEVISION, AND OTHER CONTRACTS).

[Proposed Opinion Question 12]

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75 *Greenacre Prop., Inc. v. Rao*, 933 So. 2d 19 (Fla. 2d DCA 2006).
76 Appx. 48.

Petitioner urged the Standing Committee to supplement the 1996 Opinion and find specifically that the preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts including construction contracts, management contracts, cable television contracts, and the like constitutes the practice of law.[77] The 1996 Opinion established that the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instructions, including contracts, by which legal rights are either obtained, secured or given away constitute the practice of law. The Proposed Opinion cites to the 1996 Opinion, as well as The Florida Bar v. Sperry,[78] concluding that the preparation of contracts including construction contracts, management contracts, cable television contracts, etc. constitutes the practice of law but did not address whether the review or substantial involvement in the preparation/execution of contracts including construction contracts, management contracts, cable television contracts, etc. constitutes the practice of law.[79]

Petitioner agrees with the Proposed Opinion, but requests clarification andelucidation that providing legal advice and counsel to others as to their rights andobligations under a contract constitutes the practice of law. A

77 Petitioner does not believe that an attorney must be present for the actual execution of a contract.
78 140 So. 2d 587 (Fla. 1962).
79 Appx. 252.

construction

contract, management contract and cable television contract always provide for duties of the contractor/management company/cable company to the contracting party (the association) and further the duty/obligation of the association to pay for such services. Such contracts may also provide for cancellation or termination guidelines in addition to many other service specific obligations. It is impossible to review a construction contract, management contract, cable television contract, or other similar contract on behalf of another without providing legal analysis, advice and counsel as to the rights and obligations identified within such contract. Similarly, to participate in the analysis and advise whether another should execute a contract involves the interpretation of the contract, analysis of the law and a determination as to whether the contract meets the goals of the contracting party.[80]

A CAM is often asked to recommend a vendor to choose in a biddingprocess; a process that must involve a determination as to whether such vendor'scontract is legally enforceable as written and meets the goals of the association. ACAM is also often asked to provide advice as to the association's rights andobligations in the CAM's own contract with the association. Notwithstanding theconflict of interest, the CAM's providing an opinion as to an association's rightsand obligations pursuant to the

80 See The Florida Bar v. Hughes, 697 So. 2d 501 (1997).

CAM's own management agreement, the interpretation and analysis of the management contract undoubtedly constitutes the

practice of law. Such interpretation involves issues of insurance, workers' compensation, liability, indemnifications as well as special community association statutory contracting [81]duties..

Great harm to an association can occur when a non-lawyer analyzes a contract and recommends that an association enter such contract, asserting the contracts meet the association's goals, including legal obligations to members and owners.[82] There are many issues that an attorney will evaluate in a proposed contract in order to protect the association that are not instinctive to a non-attorney who simply lacks the knowledge, training and experience necessary to perform the analysis required. The legal ramifications of notice and cancellation provisions, the ability to recover attorney's fees and costs, and enforcement rights and remedies available are just a few legal issues that are common to most contracts. Attorneys have the training, knowledge and skills to recognize that the contract must correctly identify the parties, and are trained to understand the implication of rollovers,[83] indemnifications, waivers of jury trial, venue stipulations, termination provisions, and countless other contract provisions.

Thus, it is clear to Petitioner that the 1996 Opinion intended to establish not

81 § 718.3025, § 718.3026, and §720.305 Fla. Stat. (2012).
82 Appx. 49-50.
83 See, e.g., Palma Del Mar Condo Ass'n #5 v. Commercial Laundries of W. Fla., 586 So. 2d 315 (Fla. 1991).

only that the preparation of contracts for another involves the practice of law but likewise that the review or substantial involvement in the preparation of or recommendation to execute such contracts also constitutes the practice of law. Nonetheless, the 1996 Opinion and the Proposed Opinion do not specifically address the review, preparation of and recommendation to execute contracts including construction contracts, management contracts, cable television contracts, leaving an issue for the misinterpretation that the Petitioner requests be clarified.

10. DETERMINING WHICH OWNERS RECEIVE STATUTORY PRE-LIEN LETTERS INVOLVES THE PRACTICE OF LAW.

[Proposed Opinion Question 13]

Pre-lien letters are a creature of statute, effective October 1, 2008, as such, they were not addressed in the 1996 Opinion.[84] The Proposed Opinion correctly states that determining who should receive such letters requires legal analysis of the applicable statutes and governing documents. The Proposed Opinion did not recognize that the recipient of the letter must be determined to be the holder of legal title, a status and fact requiring legal analysis.

One must keep in mind that no two community association's governing documents are exactly the same. As a result, the use of certain pre-lien letters may be entirely appropriate for one association, but run afoul of the requirements of another. Legal analysis is required to determine the contents of the letter that each

84 Fla. Stat. §718.116 & 718.121; Fla. Stat. §720.3085 (2008)

individual owner should receive based on the statute and documents governing the association and that owner.

In some cases, the enforcement of an assessment, late fee, or interest may violate either the statutes or the governing documents. Failure to recognize such legal issues can result in significant harm to an association's interests. A proper pre-lien letter is a condition precedent to asserting a lien on the owner's property and, in turn, such is a condition precedent to foreclosure proceedings, or certain claims.[85] Therefore, if the required recipient of the letter is not properly determined, the association may be harmed. Also, an owner could be erroneously asked in the pre-lien letter to pay less than is legally owed and could pay in reliance on that letter to the detriment of the association.

All pre-lien notices to members are required to be sent to the "owner of record" or "unit owner" to their address as determined by the books of the association.[86] Identifying such an owner is more complicated than it may initially appear. "Unit owner" is defined in §718.103, Fla. Stat. (2012) as "a record owner of legal title to a condominium parcel."[87]

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85 Fla. Stat. §718.116(6)(b); Fla. Stat. §720.3085(5).*See also* Fla. Stat. §718.121.
86 Parcel owners are jointly and severally liable with previous parcel owners for all unpaid assessments due at the time of transfer. However, following a recent legislative amendment, a homeowners' association which owns a parcel is excluded from the definition of a previous owner who is jointly and severally liable with the new owner. Fla. Stat. §720.3085(2)(b). *See also* Fla. Stat. §718.121.
87 Fla. Stat. §718.103(28).

While associations maintain records,[88] in practice, such records are often inaccurate because of the increased use of legal entities and trusts, frequent sale and lease of units, death of an owner, and, owners may lawfully or unlawfully move in and out without notice of change of address or residency to the association. Sending such a letter to the wrong individual, such as a resident rather than the actual trustee owner, a partner, rather than the managing partner, or a relative rather than the personal representative of the deceased owner can have dramatic consequences for an association. First, it will likely result in the association not receiving the money it is owed. Second, it may run afoul of the law, such as automatic stay provisions in the Bankruptcy Code,[89] and subject the association to liability. Third, it compromises the ability of the association to assert its lawful claim against the correct party. Only through careful legal analysis can the association know who should receive such pre-lien notices. Pre-lien notices only protect the interests of the associations and the unit owners if they are delivered to those who are supposed to receive them, as a matter of law.

11. CAM ACTIVITY WHICH REQUIRES STATUTORY OR CASE LAW ANALYSIS TO REACH A LEGAL CONCLUSION INVOLVES THE

88 Fla. Stat. §718.111(12); Fla. Stat. §720.303(4).

89 11 U.S.C. § 362; *see also, In re Lickman*, 297 B.R. 162 (Bankr. M.D. Fla. 2003) (Association's sending a default notice or verbally threatening action against the debtor is a violation of the automatic stay); *In re Hawk*, 314 B.R. 312, 317 (Bankr. D.N.J. 2004) (Condominium association's collection of pre-petition assessments notwithstanding its knowledge of unit owner's Chapter 13 filing, constituted violation of the automatic stay. Because the condominium association acted with actual knowledge the Court could not annul the stay to validate its acts)..

PRACTICE OF LAW.

[Proposed Opinion Question 14]

Petitioner urged the Standing Committee to revisit the 1996 Opinion and find specifically that ***any*** activity that requires statutory or case law analysis to reach a legal conclusion would constitute the unlicensed practice of law. The Standing Committee agreed with the 1996 Opinion holding,[90] which remained consistent with the Court's prior holdings in The Florida Bar v. Raymond James & Assoc.[91] and The Florida Bar v. Sperry;[92] and, set the groundwork for The Florida Bar v. Warren[93] and The Florida Bar v. Mills.[94] In Raymond James & Assoc. and Sperry, the Court had established that if CAMs responded to a community association's questions concerning the application of law to a specific matter being considered or if they advised a community association that a course of action may or may not be authorized by law or rule that such actions would constitute the unlicensed practice of law.[95] After the 1996 Opinion, the Court went further and established that if a non-lawyer interpreted case law or statutes for others or advised another person or entity of its rights, duties and responsibilities under Florida law and statutes that the same constitutes the unlicensed practice of law.[96]

90 1996 Opinion 1123-24.
91 215 So. 2d 613 (Fla. 1968).
92 140 So. 2d 587 (Fla. 1962).
93 655 So. 2d 1131 (Fla. 1995).
94 410 So. 2d 498 (Fla. 1982).
95 *Raymond James & Assoc.*, 215 So. 2d 613 (Fla. 1968); *Sperry*, 140 So. 2d 587 (Fla. 1962).
96 *Warren*, 655 So. 2d 1131 (Fla. 1995); *Mills*, 410 So. 2d 498 (Fla. 1982).

Petitioner agrees with the Standing Committee and further asserts that it isimpossible to come to this conclusion without also agreeing that the determinationof the amount of assessments due once a delinquent account is turned over to anattorney, once a foreclosure has commenced, or once a member disputes in writing[97]the amount alleged to be owed also constitutes the unlicensed practice of law. Similarly, drafting, preparing or modifying any governing document will alwaysrequire an analysis of the facts, the governing documents and the applicable Floridalaws.[98] Finally, in order to make a determination as to the number of days to beprovided for a statutory notice or the number of votes needed to pass a propositionor amendment to the governing documents, one must analyze Florida statutes andconstitutional law,[99] in addition to a community association's governingdocuments. While most CAMs refer the issues above to an attorney, a bright linerule is necessary to protect the association membership from their boards, who,though well intentioned, pressure CAMs to perform legal services or CAMs whointentionally or inadvertently engage in the unlicensed practice of law. Similarly, abright line

97 Such disputes are heavily regulated under the Fair Debt Collection Practices Act, 15 U.S.C. §§1692(e),(g),(h) (2011).
98 Appx. 23, 24, 27, 29.
99 Cohn v. Grand Condo.Ass'n, 62 So. 3d 1120 (Fla. 2011); *Avila South Condo. Ass'n Inc. v. Kapa Corp.*, 347 So. 2d 599 (Fla. 1977).

rule will assist CAMs, whose industry has become highly competitive, by allowing those CAMs who are unwilling to cross into the grey areas of the

unlicensed practice of law to compete with those CAMs who are willing and do cross into such grey areas and beyond in order to increase their business.

CONCLUSION

The Legislature did not authorize a CAM to perform legal functions; instead, a CAM is authorized to prepare budgets, to assist in the notice and holding of meetings, to control and disburse funds, and to coordinate maintenance and other day-to-day operations. Petitioner requests that the Court confirm that the practices enumerated in Questions 1-14 are beyond the scope of the licensing statute, and involve the practice of law. Clarification and elucidation of these issues will benefit the public and protect it from harm.

CERTIFICATE OF COMPLIANCE

I certify that this instrument is in Times New Roman 14 point font, in compliance with Fla. R. App. P. 9.210.

CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Petitioner, Real Property, Probate, and Trust Law Section of the Florida Bar was sent by Email and US Mail to the following, on this _____ day of July, 2013: **Nancy Munjiovi Blount,** The Florida Bar, Standing Committee on the Unlicensed Practice of Law, Email: upl@flabar.org, **Jeffrey T. Picker,** The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, Email: jpicker@flabar.org, Secondary: upl@flabar.org, **Lori Holcomb,** Email: lholcomb@flabar.org, Secondary: upl@flabar.org, **Jennifer A. Winegardner,** For Continental and CEOMC, Email: jwinegardner@chasefirm.com, **Mauri Ellis Peyton, II,** For CIA, Email: mauri@peytonbolin.com, **David Mark Felice,** Email: dfelice@terralawfirm.com, **Jeffrey Michael Oshinsky,** Email: jeff@oshinskylaw.com, **Steve Caballero,** Exclusive Property Management, 2945 W. Cypress Road, Ste. 201, Fort Lauderdale, FL 33309, **Mark R. Benson,** Community Association Manager, 4711 Harbortown Lane, Fort Myers, FL 33919, Email: mark@markrbenson.com

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