

TGEGKGF.: B64235"36-45-54."Vj qo cu'F0J cm'Ergtm'Uwr tgo g'Eqrtv

**IN THE SUPREME COURT OF FLORIDA**

CASE NO.: SC13-889

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

---

ANSWER BRIEF OF THE STANDING COMMITTEE ON THE UNLICENSED  
PRACTICE OF LAW OF THE FLORIDA BAR

---

Jeffrey T. Picker  
Florida Bar No. 12793  
Lori S. Holcomb  
Florida Bar No. 501018  
The Florida Bar  
651 E. Jefferson Street  
Tallahassee, FL 32399-2300  
(850) 561-5840

*Counsel for The Florida Bar*

## **TABLE OF CONTENTS**

TABLE OF CITATIONS .....	ii
STATEMENT OF THE CASE AND FACTS .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
I.    Activities of a regulated industry or profession can be found to be the unlicensed practice of law.....	3
II.   It is not necessary to show public harm for an activity to be found to be the unlicensed practice of law.....	6
III.  The current opinion does not expand the 1996 opinion.....	10
CONCLUSION .....	13
CERTIFICATE OF COMPLIANCE.....	16

## **TABLE OF CITATIONS**

### **Cases**

<i>Goldberg v. Merrill Lynch Credit Corp.</i> , 35 So. 3d 905 (Fla. 2010) .....	4
<i>Keyes Co. v. Dade County Bar Ass’n</i> , 46 So. 2d 605 (Fla. 1950) .....	4
<i>The Florida Bar re: Advisory Opinion -- Activities of Community Association Managers</i> , 681 So. 2d 1119 (Fla. 1996) .....	3, 6, 10, 11, 12, 13
<i>The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselor</i> , 518 So. 2d 1270 (Fla. 1988) .....	5
<i>The Florida Bar v. McPhee</i> , 195 So. 2d 552 (Fla. 1967) .....	4
<i>The Florida Bar v. Moses</i> , 380 So. 2d 412 (Fla. 1980) .....	6, 7
<i>The Florida Bar v. Sperry</i> , 140 So. 2d 587, 591 (Fla. 1962), <i>judg. vacated on other grounds</i> , 373 U.S. 379 (1963) .....	7, 12

### **Statutes**

§468.431(2), Fla. Stat. ....	4
§718.1255, Fla. Stat. ....	12

### **Other Authorities**

Fla. Admin. Code R. 61E14-4.001 .....	6
---------------------------------------	---

### **Rules**

R. Regulating Fla. Bar 10-1.1 .....	4
R. Regulating Fla. Bar 10-2.1(a) .....	8
R. Regulating Fla. Bar 10-9.1 .....	1

### **Constitutional Provisions**

Art. V, §15, Fla. Const. ....	3
-------------------------------	---

## **STATEMENT OF THE CASE AND FACTS**

On March 28, 2012, The Real Property, Probate & Trust Law Section of The Florida Bar , pursuant to rule 10-9.1 of the Rules Regulating The Florida Bar, petitioned the Standing Committee on Unlicensed Practice of Law (hereinafter “the Standing Committee”) for an advisory opinion on the activities of Community Association Managers ( hereinafter “CAMs”). The request is set forth in the briefs of the interested parties and the Petitioner. The Standing Committee voted to hold a public hearing on the request. As the public hearing was held in Kissimmee, Florida, notice of the hearing was published in the Osceola edition of the Orlando Sentinel on May 18, 2012, in the May 15, 2012 edition of The Florida Bar *News*, and on The Florida Bar’s website.<sup>1</sup> In June 2012, the Standing Committee held a public hearing to receive input from interested parties. Several interested parties testified at the public hearing. The Standing Committee also received written testimony.<sup>2</sup> The Standing Committee filed its proposed advisory opinion with this Court on May 15, 2013. Thereafter, several interested parties and the Petitioner

---

<sup>1</sup> In response to the proposed advisory opinion Mark R. Benson suggests that the notice of the hearing was not sufficient. The notice provided by the Standing Committee was more than that required by rule 10-9.1. Therefore, sufficient notice was provided.

<sup>2</sup> The brief of the Community Associations Institute includes a letter dated February 14, 2013. That letter was not included in the written testimony as it was sent after the time for taking testimony closed. Although it was not included in the written testimony, it was presented to the Standing Committee prior to the issuance of the proposed advisory opinion.

filed briefs in opposition to the proposed advisory opinion.

The transcript of the public hearing is attached to the proposed advisory opinion at Tab D. Reference to the transcript will be cited as Opinion, Tab D. The page on which the testimony appears is abbreviated as p.. Line numbers are noted where appropriate. The proposed advisory opinion is cited as Opinion, the page number is abbreviated as p..

### **SUMMARY OF THE ARGUMENT**

The Supreme Court of Florida has exclusive jurisdiction to determine what activity constitutes the unlicensed practice of law. The authority of this Court extends to activities of a regulated industry or profession. Consequently, this Court has the authority to determine whether an activity performed by a CAM constitutes the unlicensed practice of law.

Case law sets forth a test to determine whether an activity constitutes the practice of law. While certain elements must be met when determining whether an activity is the unlicensed practice of law, a showing of public harm is not a requirement for such a finding. This is particularly so when this determination is made in the formal advisory opinion process. Although a finding of public harm is not required, the record shows the potential for public harm when a CAM engages in the unlicensed practice of law.

The potential for public harm also existed when this Court addressed the

issue of the unlicensed practice of law by CAMs in 1996 in *The Florida Bar re: Advisory Opinion -- Activities of Community Association Managers*, 681 So. 2d 1119 (Fla. 1996) (hereinafter “*1996 opinion*”). The current opinion does not expand the *1996 opinion*. 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. Some of the activities are clarified by way of example to provide further guidance to CAMs and members of The Florida Bar. Activities that were not addressed in 1996 are addressed in the current opinion using the findings from the *1996 opinion* and other case law from this Court.

## **ARGUMENT**

### **I. ACTIVITIES OF A REGULATED INDUSTRY OR PROFESSION CAN BE FOUND TO BE THE UNLICENSED PRACTICE OF LAW.**

Many of the briefs in opposition to the opinion point out that CAMs are regulated by the Department of Business and Professional Regulation. The argument is that since CAMs are regulated by a state agency, any findings regarding unlicensed practice of law by this Court are unnecessary and improper. These arguments are without merit.

Pursuant to article V, section 15 of the Florida Constitution, this Court has the “exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons so admitted.” From this exclusive grant of

authority this Court has inherent jurisdiction to prohibit the unlicensed practice of law as well as exclusive jurisdiction to determine whether specific activity constitutes the unlicensed practice of law. R. Regulating Fla. Bar 10-1.1; *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905 (Fla. 2010).

As this Court has the authority to define and prohibit the unlicensed practice of law, activities of a regulated industry or profession can be found to be the unlicensed practice of law. Previously, this Court has found certain activities of real estate licensees and title insurance companies, both regulated professions, to be the unlicensed practice of law. *Keyes Co. v. Dade County Bar Ass'n*, 46 So. 2d 605 (Fla. 1950) and *The Florida Bar v. McPhee*, 195 So. 2d 552 (Fla. 1967).

Therefore, even though CAMs are licensed through and regulated by the Department of Business and Professional Regulation, it is within the purview of this Court to determine whether an activity is the unlicensed practice of law. In fact, while the Department of Business and Professional Regulation prosecutes CAMs for violations of Florida Statutes and the Department's rules, including engaging in the unlicensed practice of law, the Department relies on this Court to define the unlicensed practice of law. (Opinion, Tab D, p. 89, lines 2 – 15).

The activities a CAM may perform are set forth in statute. Florida Statute section 468.431(2) authorizes CAMs to engage in the following activities:

- [1] controlling or disbursing funds of a community association,
- [2] preparing budgets or other financial

documents for a community association, [3] assisting in the noticing or conduct of community association meetings, and [4] coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

The statute permits a CAM to control or disburse funds, prepare budgets or other financial documents, assist in noticing and conducting of meetings, and to coordinate the maintenance and other day-to-day services of the association. The statute does not authorize a CAM to give legal advice to or provide legal services for the community association, nor could it as this Court's authority to regulate the practice of law can only be ousted in practice and procedure within administrative agencies. *The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselor*, 518 So. 2d 1270 (Fla. 1988). As the activities at issue here are not in the administrative arena, this Court has exclusive jurisdiction to define which activities performed by CAMs constitute the unlicensed practice of law and which activities are authorized.

In arguing that CAMs should be authorized to provide legal advice and services, several individuals pointed to what is required to become and maintain status as a CAM. To be licensed as a CAM, you only have to be 18 years of age, of good moral character, and complete 18 hours of pre-exam education. After passing the test you are licensed as a CAM. (Opinion, Tab D, p. 12). A CAM is not required to have a college degree or a high school diploma. Of the required 18

hours of pre-exam education – only 20%, or 3.6 hours, is on state and federal laws relating to operation of CAMs. The other 80% of education is on procedure for noticing and conducting meetings, preparation of community association budgets and community association finances, insurance, and management and maintenance. After being licensed, a CAM is required to take a 2-hour legal update seminar during each year of the biennial renewal period. Fla. Admin. Code R. 61E14-4.001. The educational requirements to be licensed as a CAM are not sufficient to allow a CAM to give legal advice or provide legal services to a community association. (Opinion, Tab D, p. 54, line 23 – p. 55, line 2; p. 100, line 22 – p. 101, line 7). Consequently, licensure is not sufficient justification for this Court to deviate from the *1996 opinion* and authorize a CAM to engage in activities that would otherwise be the unlicensed practice of law.

**II. IT IS NOT NECESSARY TO SHOW PUBLIC HARM FOR AN ACTIVITY TO BE FOUND TO BE THE UNLICENSED PRACTICE OF LAW.**

The rationale for prohibiting the unlicensed practice of law is the protection of the public. *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980). Several opponents of the opinion suggest that as there was no showing of public harm, a finding that the activity constitutes the unlicensed practice of law is improper. While the protection of the public is the rationale for prohibiting the unlicensed practice of law, harm is not a required element for a finding of unlicensed practice

of law.

That public harm is not an element necessary for a finding of unlicensed practice of law can be found in this Court's opinion in *The Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *judg. vacated on other grounds*, 373 U.S. 379 (1963), which developed the following three part test to determine whether an activity constitutes the practice of law: 1) does the advice or service affect important legal rights of a person; 2) does the protection of those rights require that the person giving the advice possess legal skill and knowledge of the law greater than that possessed by the average citizen; and 3) is the advice or service being provided by one for another? If the answer to these questions is yes, then the activity is the practice of law, and unless that activity is authorized it would constitute the unlicensed practice of law.<sup>3</sup> A showing of public harm is not required. If a showing of public harm was required before someone could be found to have engaged in the unlicensed practice of law, then a nonlawyer who represented personal injury victims in court and obtained successful results could not be prosecuted for unlicensed practice of law. Obviously, this cannot be the case.

It is the view of the Standing Committee that specific proof of harm is not required in the advisory opinion process. The Standing Committee has viewed the

---

<sup>3</sup> See *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980).

advisory opinion process as a vehicle to further refine the definition of the unlicensed practice of law which is based almost exclusively on case law. R. Regulating Fla. Bar 10-2.1(a). Although the Standing Committee elicits general testimony regarding public harm at the hearings, the Standing Committee does not ask for specific proof of public harm. Such proof is reserved for cases where an individual is being investigated and prosecuted for engaging in the unlicensed practice of law. Attempting to gather proof of specific instances of public harm rather than general statements regarding existing or potential public harm would be very difficult, and perhaps inappropriate, in the advisory opinion process as no complaint has been filed and an investigation is not taking place.

Notwithstanding that a showing of harm is not necessary for an activity to be found to constitute the unlicensed practice of law, the testimony did provide examples of harm. One witness testified about a painting contract an association entered into to paint the condominium. The painter fell off a balcony and died. The contract was not reviewed by an attorney and the contract did not call for the contractor to have Workers' Compensation insurance or to comply with OSHA standards. Fortunately, the association was not sued but the potential for severe harm existed. (Opinion, Tab D, p. 19).

Another witness testified about a CAM who advised an association to sign a vendor-drafted contract for \$20,000 and there was no review by an attorney. There

was a problem with the contract so the association consulted with an attorney about enforcing the contract. The cost to litigate made enforcement of the contract impractical, as there was no provision in the contract for reimbursement of attorney's fees. (Opinion, Tab D, p. 42).

A third example of harm involved a modification to a contract made by a CAM which violated the governing documents and which cost the association \$25,000 in legal fees, as the case was litigated for 5 years and appealed. (Opinion, Tab D, pp. 20-21).

Additionally, when CAMs engage in the unlicensed practice of law, there is a potential for public harm. As one witness testified:

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.

(Opinion, Tab D, p. 41, line 9 – p. 42, line 9).

This same witness provided the following testimony which demonstrates the potential for public harm:

When the [legal] 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.

(Opinion, Tab D, p. 43, line 22 – p. 44, line 6).

As the testimony shows, there is the potential for public harm when a CAM engages in the practice of law. Although a finding of harm is not required to hold that an activity is the unlicensed practice of law, the potential for harm supports the conclusions reached by the Standing Committee.

### **III. THE CURRENT OPINION DOES NOT EXPAND THE 1996 OPINION.**

Opponents of the opinion argue that this Court should not adopt the current opinion for one of three reasons: 1) the current opinion expands the *1996 opinion*; 2) the current opinion is not necessary as the *1996 opinion* provides sufficient

guidance; or 3) the current opinion is not restrictive enough. All of these arguments are without merit.

As the proposed advisory opinion makes clear, it does not change the *1996 opinion*. 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 (Opinion, p. 10). To provide further guidance to CAMs and members of The Florida Bar, some of the 1996 activities are clarified by way of example (Opinion, p. 10). Activities that were not addressed in 1996 are addressed in the current opinion using the holding from unlicensed practice of law case law and the *1996 opinion*.

An example of the clarification provided can be found in the discussion of the modification of the limited proxy form. In the *1996 opinion* this Court held 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. *681 So. 2d at 1124*. The Standing Committee felt that what was considered ministerial and what was a more complicated modification needed clarification by way of example. The proposed advisory opinion provides the example. The holdings of this Court remain the same. (Opinion, pp. 12 – 14).

Items not addressed in the *1996 opinion* include the preparation of pre-arbitration demand letters and the preparation of contracts. The preparation of the

pre-arbitration letter was not addressed in 1996 as the provision in Florida Statute section 718.1255, requiring pre-arbitration demand letters did not exist. Applying this Court's holdings in the *1996 opinion* and other case law, the Standing Committee found that the activity was not the unlicensed practice of law. (Opinion pp. 16 – 18).

Similarly, the *1996 opinion* did not address the preparation of contracts, an activity CAMs perform which is clearly the unlicensed practice of law, as it was not part of the question before the Standing Committee. (Opinion p. 19; Opinion, Tab D, pp. 40-41, 88-91); *The Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *judg. vacated on other grounds*, 373 U.S. 379 (1963). While this may be seen as an expansion of the *1996 opinion*, it is not. It is merely addressing an issue that was not raised in 1996 using well-established precedent to reach a conclusion.

Several interested parties argue that the current opinion is not necessary as the *1996 opinion* speaks for itself and does not need clarification. However, individuals testifying at the public hearing felt that the *1996 opinion* should be revisited and clarification by way of example be offered where necessary. As one witness testified, the *1996 opinion* was helpful to CAMs and issuing this opinion would similarly be helpful and would protect CAMs from boards that pressure them to provide services they should not be providing, such as legal services. (Opinion, Tab D, p. 95, line 24 – p. 97, line 25.) The Standing Committee agreed.

The Standing Committee also felt that questions not addressed in 1996 should be addressed using the *1996 opinion* and other case law as guidance.

While the interested parties find the proposed advisory opinion too restrictive, the Petitioner does not find it restrictive enough. The Petitioner argues that all of the fourteen activities constitute the unlicensed practice of law. The Standing Committee disagrees and requests that this Court adopt the opinion as proposed.

### **CONCLUSION**

Adopting the proposed formal advisory opinion will keep the status quo and provide additional guidance where necessary. The Petitioner and the interested parties have not advanced any reason for this Court to recede from the *1996 opinion* or to limit or expand the findings of the Standing Committee. The Florida Bar Standing Committee on the Unlicensed Practice of Law therefore requests that this Court adopt the proposed advisory opinion regarding the activities of Community Association Managers.

/s/ Jeffrey T. Picker  
Jeffrey T. Picker  
Florida Bar No. 12793  
Lori S. Holcomb  
Fla. Bar No. 501018  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, Florida 32399-2300  
(850) 561-5840  
Primary Email: [jpicker@flabar.org](mailto:jpicker@flabar.org)

Secondary Email: [upl@flabar.org](mailto:upl@flabar.org)

**CERTIFICATE OF SERVICE**

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

Ms. Margaret A. Rolando, Chair  
Real Property, Probate & Trust Law Section of The Florida Bar  
Shutts & Bowen LLP  
201 S. Biscayne Blvd., Ste. 1500  
Miami, Florida 33131  
(305) 379-9144  
Email: [mrolando@shutts.com](mailto:mrolando@shutts.com)

Jennifer A. Winegardner  
The Chase Law Firm  
1535 Killearn Center Blvd., A1  
Tallahassee, Florida 32309  
(850) 385-9880  
Email: [jwinegardner@chasefirm.com](mailto:jwinegardner@chasefirm.com)

Mauri Peyton  
PeytonBolin, PL  
4758 W. Commercial Blvd.  
Fort Lauderdale, Florida 33319  
(954) 316-1339  
Primary: [mauri@peytonbolin.com](mailto:mauri@peytonbolin.com)  
Secondary: [gian@peytonbolin.com](mailto:gian@peytonbolin.com)

David M. Felice  
Terra Law Firm, P.A.  
4809 Ehrlich Road, Ste. 105  
Tampa, Florida 33624  
(813) 374-2363  
Email: [dfelice@terralawfirm.com](mailto:dfelice@terralawfirm.com)

Jeffrey M. Oshinsky  
Association Financial Services, L.C.  
4400 Biscayne Blvd., Ste. 550  
Miami, Florida 33437

(305) 677-0022

Email: [joshinsky@afslc.com](mailto:joshinsky@afslc.com)

Mark R. Benson

4471 Harbortown Lane

Fort Myers, Florida 33919

(239) 489-0584

Email: [mark@markRbenson.com](mailto:mark@markRbenson.com)

and by mail to:

Steve Caballero

2945 W. Cypress Creek Road, Ste. 201

Fort Lauderdale, Florida 33309

(800) 510-7787

/s/ Jeffrey T. Picker

Jeffrey T. Picker

## **CERTIFICATE OF COMPLIANCE**

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

/s/ Jeffrey T. Picker

Jeffrey T. Picker

Florida Bar No. 12793

The Florida Bar

651 E. Jefferson Street

Tallahassee, FL 32399-2300

(850) 561-5840

Primary Email: [jpicker@flabar.org](mailto:jpicker@flabar.org)

Secondary Email: [upl@flabar.org](mailto:upl@flabar.org)