

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 13-889

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

BRIEF OF THE FLORIDA BAR

Lori S. Holcomb
Florida Bar No. 501018
Director, Client Protection
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 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	1
ARGUMENT	2
I. COMPARISION OF HB 7037 AND THE PROPOSED OPINION.	2
CONCLUSION	12
CERTIFICATE OF SERVICE	13
CERTIFICATE OF COMPLIANCE.....	16

TABLE OF CITATIONS

Statutes

§468.4334, Fla. Stat.	2
§713.13, Fla. Stat.	8
§713.20, Fla. Stat.	8
Ch. 2014-146, Laws of Florida	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

Rules

R. Regulating Fla. Bar 10-9.1(g)(4).....	1, 12
------------------------------------------	-------

STATEMENT OF THE CASE AND FACTS

On May 15, 2013, The Florida Bar Standing Committee on Unlicensed Practice of Law filed a proposed formal advisory opinion (hereinafter “proposed opinion”) regarding the activities of Community Association Managers (hereinafter “CAMs”). Several interested parties filed briefs in response to the proposed opinion. On April 29, 2014, The Florida Bar filed a Notice of Supplemental Authority attaching, a bill regarding CAMs passed by the 2014 Florida legislature. On June 16, 2014, Continental Group, Inc. filed a Notice of Supplemental Authority indicating that HB 7037, Chapter 2014-146 (hereinafter “HB 7037”) had been signed into law. *Ch. 2014-146, Laws of Florida*. Thereafter, on June 26, 2014, this Court ordered The Florida Bar Standing Committee on Unlicensed Practice of Law (hereinafter “Committee”) “to provide supplemental briefing regarding the newly enacted legislation.”

SUMMARY OF THE ARGUMENT

For the most part, HB 7037 does not modify the findings of the Committee set forth in the proposed opinion. When ruling on the proposed opinion, this Court may adopt, reject or modify the findings of the Committee and may look to the language of HB 7037 for guidance. *R. Regulating Fla. Bar 10-9.1(g)(4)*.

ARGUMENT

I. COMPARISION OF HB 7037 AND THE PROPOSED OPINION.

The following table compares the May 15, 2013, proposed opinion and HB 7037. The “activity” column sets forth the issues raised by the Petitioner, in the order addressed in the proposed opinion. The “proposed opinion” column sets forth the opinion of the Committee. The “HB 7037” column sets forth the language from HB 7037 or notes where HB 7037 is silent on the issue. The line references to HB 7037 correlate with the June 16, 2014, supplemental authority filed by Continental Group, Inc., a copy of which is attached hereto as Exhibit “A.” The last column is a comparison between the proposed opinion and HB 7037.¹

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
1. Preparation of a certificate of assessments due once the delinquent account is turned over to the association’s lawyer.	Activity is not the unlicensed practice of law; therefore, a CAM may prepare the certificate of assessment.	Allows CAM to prepare the certificate of assessment. (Lines 48-51)	Same -- both allow a CAM to prepare the certificate of assessment.

¹ HB 7037 contains many provisions that are not addressed in the proposed opinion. For example, Lines 68- 85 create new Florida Statute §468.4334 establishing professional practice standards and liability for CAMs. Items in HB 7037 not specifically raised in the proposed opinion are not discussed in the table.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
2. Preparation of a certificate of assessments due once a foreclosure against the unit has commenced.	Activity is not the unlicensed practice of law; therefore, a CAM may prepare the certificate of assessment.	Allows CAM to prepare the certificate of assessment. (Lines 48-51)	Same -- both allow a CAM to prepare the certificate of assessment.
3. Preparation of certificate of assessments due once a member disputes in writing to the association the amount alleged as owed.	Activity is not the unlicensed practice of law; therefore, a CAM may prepare the certificate of assessment.	Allows CAM to prepare the certificate of assessment. (Lines 48-51)	Same -- both allow a CAM to prepare the certificate of assessment.
4. Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members.	The drafting of these documents constitutes the unlicensed practice of law. However, a CAM can have input into the process.	No language in HB 7037 regarding this activity.	No comparison – HB 7037 is silent.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
5. Determination of number of days to be provided for statutory notice.	A CAM may make this determination if the determination does not require the CAM to interpret statutes, administrative rules, governing documents, or rules of civil procedure.	Allows CAM to determine the number of days required for statutory notice. (Lines 41-42)	Similar in that the proposed opinion allows the activity under certain circumstances. HB 7037 allows the activity under all circumstances.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
6. Modification of limited proxy forms promulgated by the State.	A CAM may modify the limited proxy form promulgated by the State if the modification is ministerial. However, if the interpretation of a statute or governing documents is required, the CAM would have to consult with a lawyer about the modification.	While HB 7037 allows a CAM to complete forms related to the management of the community association that have been created by statute or a state agency (Lines 45-47) modification of a form is not addressed.	No comparison -- the proposed opinion discusses <i>modification</i> of the form, but HB 7037 discusses <i>completion</i> of the form. Modification is not addressed in HB 7037.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
7. Preparation of documents concerning the right of the association to approve new prospective owners.	Generally not the unlicensed practice of law. However, if the preparation requires the exercise of discretion or the interpretation of statutes or legal documents, a lawyer should be consulted.	No language in HB 7037 regarding this activity.	No comparison – HB 7037 is silent.
8. Determination of affirmative votes needed to pass a proposition or amendment to recorded documents.	Generally not the unlicensed practice of law. However, if the determination requires the interpretation of statutes or legal documents, a CAM may not make the determination.	Allows CAM to calculate votes to approve a proposition or amendment. (Lines 44-45)	Similar in that generally both allow the activity. HB 7037 is less restrictive.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
9. Determination of owners' votes needed to establish a quorum.	Generally not the unlicensed practice of law. However, if the determination requires the interpretation of statutes or legal documents, a CAM may not make the determination.	Allows CAM to calculate the votes necessary for a quorum. (Lines 44-45)	Similar in that generally both allow the activity, however, HB 7037 is less restrictive.
10. Drafting of pre-arbitration demand letters required by 718.1255, Fla. Stat.	Activity is not the unlicensed practice of law; therefore a CAM may prepare the letter.	Allows CAM to prepare the pre-arbitration demands. (Lines 52-53)	Same -- both allow a CAM to prepare the pre-arbitration letter.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
11. Preparation of construction lien documents (e.g. notice of commencement, and lien waivers, etc.)	Preparation of the document constitutes the unlicensed practice of law.	Allows CAM to complete statutory forms related to the management of the community association that have been created by statute or a state agency. (Lines 45-47)	No comparison as the proposed opinion involves <i>preparation</i> of documents, however, HB 7037 authorizes the <i>completion of a statutory form</i> and creates statutory forms. ² While similar, the language is not the same.

² HB 7037 creates the following statutory forms: Release of Lien (Lines 102-134, 370-398 and 429-458), Delinquent Assessment (Lines 160-179 and 529-546), Notice of Intent to Record a Claim of Lien (Lines 216-240, 282-307 and 483-508) and Notice of Contest of Lien (Lines 343-355). Florida Statute §713.13 contains a Notice of Commencement form. Florida Statute §713.20 contains Waiver and Release of Lien forms. There may be other existing statutory forms relating to the management of a community association thereby falling within HB 7037.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
12. Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.	Preparation of a contract constitutes the unlicensed practice of law. Review, drafting and/or substantial involvement in the preparation or execution not discussed.	Preparation of a contract not discussed, however, HB 7037 allows CAM to negotiate monetary or performance terms of a contract subject to approval by the association. (Lines 51-52)	No comparison as activity discussed in proposed advisory opinion not addressed in HB 7037 and activities addressed in HB 7037 not discussed in proposed advisory opinion.
13. Identifying, through review of title instruments, the owners to receive pre-lien letters.	A CAM may identify who has owned the property over the years. However, a lawyer would need to make the legal determination of who must receive the letters.	No language in HB 7037 regarding this activity.	No comparison -- bill is silent.

ACTIVITY	PROPOSED OPINION	HB 7037	COMPARISON
14. Any activity that requires statutory or case law analysis to reach a legal conclusion.	Activity constitutes the unlicensed practice of law.	No language in HB 7037 regarding this activity.	No comparison -- bill is silent.

As noted in the table, for the most part HB 7037 does not modify the findings of the Committee set forth in the proposed opinion. Both the proposed opinion and HB 7037 allow a CAM to engage in the activities set forth in numbers 1, 2, 3, and 10. Similarly, both the proposed opinion and HB 7037 allow a CAM to engage in the activities set forth in numbers 5, 8, and 9 although the language of HB 7037 does not contain the caveat regarding the interpretation of statutes, rules or legal document discussed in the proposed opinion. HB 7037 is totally silent regarding the activities raised in numbers 4, 7, 13, and 14. As more fully discussed below, while at first glance it may appear that HB 7037 addresses numbers 6, 11, and 12, there are distinctions between the specific activities raised, and how they are addressed by the proposed opinion and the language in HB 7037. Therefore, HB 7037 is also silent on the specific activities addressed in numbers 6, 11, and 12.

Number 6 involves the modification of a proxy form promulgated by the State, therefore, the proposed opinion addresses the modification of the form. HB 7037 does not address modification of the proxy form, only preparation of the

proxy form by providing that community association management includes “completing forms related to the management of a community association that have been created by statute or by a state agency.” HB 7037 lines 45 – 47. Therefore, the activity raised in the proposed opinion, *modification* of the proxy form, is not addressed in HB 7037, *preparation* of the proxy form.

Number 11 is similar. The proposed opinion finds that the preparation of the construction lien documents, including the drafting of the notice of commencement form, is the unlicensed practice of law. HB 7037 provides that community association management includes “completing forms related to the management of a community association that have been created by statute or by a state agency.” HB 7037 Lines 45 – 47. Several statutory forms are created by HB 7037 and others already exist in Florida Statutes. Assuming the statutory forms are related to the management of a community association, HB 7037 authorizes a CAM to complete the statutory form. There is a difference in preparing or drafting a document, the activity addressed in the proposed opinion, and completing a statutory or other form. Consequently, the activity raised in the proposed opinion, *preparation of a document*, is not addressed in HB 7037, *completing a statutory form*.

The Committee’s response to number 12 is also not squarely addressed in HB 7037. Number 12 asks whether it is the unlicensed practice of law for a CAM

to engage in the preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc. The proposed opinion finds that it is the unlicensed practice of law for a CAM to prepare a contract. Drafting is the same as preparation. The remaining activities – review of a contract and/or substantial involvement in the preparation/execution of contracts – are not addressed in the proposed opinion.

On the other hand, HB 7037 discusses involvement in the preparation of the contract but does not discuss most of the other activities raised in number 12, including drafting a contract as addressed in the proposed opinion. Involvement in the preparation of the contract is discussed in Lines 51 – 52 of HB 7037 where it states that community association management includes negotiating monetary or performance terms of a contract subject to approval by an association. Preparation or drafting of the contract is not discussed. Therefore, the activity addressed in the proposed opinion, *preparation or drafting* of a contract, is not addressed in HB 7037, *involvement in the preparation* of a contract.

CONCLUSION

The proposed opinion asks 14 questions about the activities of CAMs. HB 7037 addresses some, but not all, of the activities. Pursuant to rule 10-9.1(g)(4) of the Rules Regulating The Florida Bar, after reviewing all of the objections, briefs

and replies filed in the matter, including the supplemental authority, this Court has the option to approve, modify or disapprove the advisory opinion and may look to HB 7037 for guidance when doing so.

Respectfully submitted,

/s/ Lori S. Holcomb

Lori S. Holcomb
Director Client Protection
Florida Bar No. 501018
The Florida Bar
650 East Jefferson Street
Tallahassee, Florida 32399-2300
850-561-5840

CERTIFICATE OF SERVICE

I certify that the original of this Brief has been filed via the statewide e-portal and true and correct copies were forwarded by U.S. Mail/Email to the following on this 28th day of July, 2014:

Ms. Margaret A. Rolando
Shutts & Bowen LLP
201 S. Biscayne Blvd., Ste. 1500
Miami, Florida 33131
(305) 379-9144
Email: 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

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

Jeffrey M. Oshinsky
Association Financial Services, L.C.
4400 Biscayne Blvd., Ste. 550
Miami, Florida 33437
(305) 677-0022
Email: joshinsky@afslc.com
Email: jeff@oshinskylaw.com

Mark R. Benson
4471 Harbortown Lane
Fort Myers, Florida 33919
(239) 489-0584
Email: mark@markRbenson.com

and by mail to:

Steve Caballero
2945 W. Cypress Creek Road, Ste. 201
Fort Lauderdale, Florida 33309
(800) 510-7787

/s/ Lori S. Holcomb

Lori S. Holcomb
Director Client Protection
Florida Bar No. 501018
The Florida Bar
650 East Jefferson Street
Tallahassee, Florida 32399-2300
850-561-5840
Primary Email: lholcomb@flabar.org
Secondary Email: upl@flabar.org

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/ Lori S. Holcomb

Lori S. Holcomb

Florida Bar No. 501018