SUPREME COURT OF FLORIDA

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

No. SC13-889

BRIEF IN SUPPORT OF MOTION TO CLARIFY

/s/ Philip B. Whitcomb
Florida Bar 5703
8880 S. Ocean Dr. Unit #706
Jensen Beach, FL 34957
(609) 577-1938
pbwhitcomb@comcast.net

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STATEMENT OF CASE AND FACTS

This case involves the Florida Supreme Court's Opinion and Order dated May 14, 2015 No. SC13-889 __ So.3d __ (Fla. 2015) approving the Proposed Advisory Opinion FAO #2012-2 issued by The Florida Bar Standing Committee on the Unlicensed Practice of Law dated May 15, 2013. The Court's Per Curiam decision did not address with specificity or commentary the Proposed Advisory Opinion's determination that fourteen enumerated activities constituted the unlicensed practice of law when engaged in by community association managers. Movant seeks clarification by this Court solely that activities set forth in Paragraph 12 of the Committee's Proposed Advisory Opinion constitute the unlicensed practice of law.

Movant is a member of the Florida Bar and a member of a Florida condominium association's board of directors. Movant was just advised of the Court's Opinion and Order by the association's manager. Movant was not an interested party in the prior proceedings nor has filed or submitted any pleadings or documents. Movant submits this Motion as an individual Florida Bar member and not as a representative of any association or organization. Movant is not aware that any other interested party has filed any post Opinion and Order motions in this case. Movant asserts that blanket approval of Paragraph 12 of the Proposed Advisory Opinion is not in conformity with existing precedents on the unlicensed practice of law, creates unwarranted prohibition and confusion as to non-lawyer citizens rights to enter into lawful contracts, and therefore requires clarification by the Court.

ARGUMENT

THE COURT'S DECISIONS IN STATE OF FLORIDA EX REL. THE FLORIDA BAR v. SPERRY, STATE OF FLORIDA EX REL. THE FLORIDA BAR v. TOWN, AND FLORIDA BAR RE ADVISORY OPINION (1996) AND A REASONABLE INTERPRETATION OF PARAGRAPH 12 OF THE COMMITTEE'S PROPOSED ADVISORY OPINION DO NOT SUPPORT A DETERMINATION BY THE COURT THAT THOSE ACTIVITIES CONSTITUTE THE UNLICENSED PRACTICE OF LAW.

Movant's argument is straightforward and without artifice. Paragraph 12 of the Committee's Proposed Advisory Opinion sets forth that certain contractual activities engaged in by non lawyers constitute the unlicensed practice of law. Paragraph 12 states in its entirety:

> **Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.;**
>
> **In the 1996 opinion, the Court found that the preparation of documents that established and affected the legal rights of the community association was the practice of law. Further, in Sperry, the Court found the preparation of instruments, including contracts, by which legal rights are either obtained, secured, or given away, was the practice of law. Thus, it is the Standing Committee's opinion that it constitutes the unlicensed practice of law for a CAM to prepare such contracts for the community association. (bold added).**

The express terms of Paragraph 12, most importantly the terms **etc.**, and **substantial involvement in the preparation/execution of contracts** are impermissably overbroad and unduly vague of the contractual activity that constitutes the unlicensed practice of law. **(bold added)**. The Committee's reliance on Sperry is entirely misplaced and incorrect.

State of Florida ex rel. The Florida Bar v. Sperry 140 So.2d 587 (Fla 1962) involved the preparation and submission of contracts and documents specifically and solely related to patents by a non-lawyer individual who held himself out to the public as a patent attorney. The federal government's extensive statutory and regulatory framework including preemptive oversight by the US Patent Office controlled the entire spectrum of patent activities. The issue in Sperry was not whether the individual's patent activities concerned the practice of law. As the US Supreme Court noted:

We do not question the determination that under Florida law the preparation and prosecution of patent applications for others constitutes the practice of law. (citations omitted). Such conduct inevitably requires the practitioner to consider and advise his clients as patentability of their inventions under the statutory criteria, 35 U.S.C. Sections 101-103, 161, 171, as well as to consider the advisability of relying upon alternate forms of protection which may be available under statute law. It also involves his participation in the drafting of the specification and claims of the patent application, 35 U.S.C. Section 112, which this Court long ago noted 'constitute(s) one of the most difficult legal instruments to draw with accuracy,' (citation omitted). And upon rejection of the application, the practitioner may also assist in the preparation of amendments, 37 CFR Sections 1.117-1.126, which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art. 37 CFR Section 1.119. Nor do we doubt that Florida has a substantial interest in regulating the practice of law within the State and that, in the absence of federal legislation, it could validly prohibit non-lawyers from engaging in this circumscribed form of patent practice. Sperry v. State of Florida ex rel. The Florida Bar 373 U.S. 379, 383 (1963).

The Florida Supreme Court in deciding that the patent activity in Sperry constituted the practice of law in that factual setting stated:

Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here. Rather we will do so only to the extent required to settle the issues of this case.

It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal documents, including contracts, by which legal rights are either obtained, secured, or given away, although such matters may not then or ever be the subject of proceedings in a court.

We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if giving of such advice and performance of such services affect the rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one to another as a course of conduct constitute the practice of law.
State of Florida ex rel. The Florida Bar v. Sperry 140 So.2d 587, 591 (Fla 1962).

This oft cited Sperry standard must be considered and construed in its specific factual context and defined legal principles. The case involved a non lawyer individual holding himself out to the public as a patent attorney who for compensation would provide complicated and statutorily mandated patent services to another. Sperry does not hold and cannot be interpreted to prohibit contractual relationships and activities by non-lawyer citizens absent specific limiting and governing factors. Sperry certainly does not support the Proposed Advisory Opinion Paragraph 12 overreaching inclusion of normal contractual activities as constituting the practice of law, let alone the unlicensed practice of law. See also The Florida Bar v. Brumbaugh 355 So.2d 1186, 1191-1192 (Fla. 1978).

State of Florida ex rel. The Florida Bar v. Town 174 So.2d 395 (Fla. 1965) involved the preparation of a corporate charter and other contractual documents relating to incorporation and corporate business organization by a non lawyer individual holding himself out to the public who for compensation could perform such services. The Court noted that the corporate charter and other corporate contracts were controlled by Florida Statutes 608 and oversight by Office of Secretary of State. The activities and services provided by the non lawyer individual in Town were clearly governed by Florida statutory and legal requirements. The Town Court, after citing the Sperry standard, stated:

We are of the view that that the the preparation of charters, bylaws, and other documents necessary to the establishment of a corporation, being of the basis of important contractual and legal obligations, comes within the practice of law as defined in the Sperry case, supra. The reasonable protection of the rights and property of those involved requires that the persons preparing such documents and advising others as to what they should and should not contain possess legal skill and knowledge far in excess of that possessed by the best informed non-lawyer citizen.
State of Florida ex rel, The Florida Bar v. Town 174 So.2d 395, 397 (Fla 1965).

Sperry and Town involved identical factual predicates, i.e. preparation of contracts and provision of legal advice in specific statutory and regulatory governed legal disciplines by non-lawyer individuals who held themselves out to the public for compensation as being competent to perform such activities. The factual predicate in the Proposed Advisory Opinion Paragraph 12 does not remotely approach the practice of law definition and guidance provided and required by Sperry and Town. Therefore, without a complete analysis of the Sperry and Town qualifying criteria and a similar legal determination as reached in those decisions, the Proposed Advisory Opinion Paragraph 12 activities cannot be considered the unlicensed practice of law.

In The Florida Bar re Advisory Opinion--Activities of Community Association Managers 681 So.2d 1119 (Fla. 1996), the Court decided after a detailed analysis what enumerated contractual activities engaged in by CAMS constituted the unlicensed practice of law in the condominium/homeowner association context.

The activities enumerated principally related to completion of statutorily mandated pre-printed forms, lien matters, preparation of documents requiring statutory or regulatory interpretaton, and providing legal advice on what conduct is authorized by law or rule. The Court found some activities constituted the practice of law while others did not. The Court again cited the Sperry standard as controlling precedent and went on to note:

The remaining activities exist in a more grey area; the specific circumstances surrounding their exercise determine whether or not they constitute the practice of law.
The Florida Bar re Advisory Opinion 681 So.2d 1189, 1124 (Fla 1996).

The Court's Opinion and Order in Proposed Advisory Opinion No. SC 13-889 contained no analysis and discussion as in Sperry, Town, Brunbaugh and 1996 Advisory Opinion No. 86929. The activities in Paragraph 12 of the Committee's 2013 Proposed Advisory Opinion constituting the unlicensed practice of law require clarification by this court consistent with its prior precedents. Absent such clarification, purportedly prohibited and undefined contractual activities engaged in by ordinary non-lawyer citizens would be considered unjustifiably as the unlicensed practice of law.

There are profoundly and distinctly discernible differences between the factual predicates and governing legal principles established in prior Court precedents as contractual activities constituting the unlicensed practice of law and those overbroad and vague prohibitions set forth in Proposed Advisory Opinion Par agraph 12. **"Etc."** cannot under any circumstances in the contractual activity or relationship context be considered the unlicensed practice of law. Nor can the **"substantial involvement in the preparation/execution of contracts".** Yet those activities are what is now found to be and ordered by this Court to constitute the unlicensed practice of law. In addition, non-lawyer activity involving **construction contracts, management contracts, and cable television contracts** are proscribed and deemed unlawful in Paragraph 12 without any compelling statutory or legal rationale.

There must be a clear and recognized distinction between non-lawyer individuals engaging in their fundamental right to contract and providing legal advice interpreting statutes, regulations, and case law as they may pertain to complex contracts. This distinction is completely ignored in Proposed Advisory Opinion Paragraph 12. Moreover, it is difficult to fathom any contractual relationship that does not inherently involve some legal rights being **"either obtained, secured, or given away."** Sperry, supra at 591. That is why the Court requires consideration of all alleged activities constituting the unlicensed practice of law be limited to the specific factual circumstances of each case. Sperry, supra, Brumbaugh, supra, Town, supra.

One of the stated purposes and justifications of the Committee's Proposed Advisory Opinion was to provide a **"bright line"** for contractual activities deemed to constitute the unlicensed practice of law. Without any doubt, Paragraph 12 does not constitute a **"bright line"**. Rather it constitutes an impermissible and unrecognizable **"shade of grey"** that distorts any reasonable person's concept of what contractual activity is lawful. Furthermore, although Paragraph 12 of the Proposed Advisory Opinion is directed to community association managers, the clear implication is that actual application of its Paragraph 12 prohibitions will extend to average non-lawyer citizens who are not holding themselves out to the public for compensation as providing legal services. This extension to the condominium/homeowner association member or individual citizen who may interact with CAMS in the ordinary course of business by the Committee would appear to be unmistakeable.

Clarification by the Court of its approval of Proposed Advisory Opinion Paragraph 12 would be both enlightening and instructive to CAMS, property managers, and non-lawyer citizens. See generally The Florida Bar re Advisory Opinion—Non-lawyer Preparation of Landlord Uncontested Evictions 605 So.2d 868 (Fla. 1992), clarified, 627 So.2d 485 (Fla. 1993); The Florida Bar re Advisory Opinion—Non-lawyer Preparation of Leases 571 So.2d 914 (Fla. 1992).

CONCLUSION

For all of the foregoing reasons, the Court must grant the Motion and provide substantial clarification of its Opinion and Order approving Paragraph 12 of the Standing Committee's Proposed Advisory Opinion FAO #2012-2.

s/s Philip B. Whitcomb
Florida Bar 5703
8880 S. Ocean Dr. Unit #706
Jensen Beach, FL 34957
(609) 577-1938
pbwhitcomb@comcast.net

CERTIFICATE OF SERVICE

I certify that the Notice of Motion to Clarify, Motion to Toll Time, and Supporting Brief has been furnished to C.C. Abbott, Chair, Standing Committee on the Unlicensed Practice of Law upl@flabar.org John F. Harkness Jr., Executive Director jharkness@flabar.org; Lori S. Holcomb Director Client Protection ulp@flabar.org by email on June 28, 2015.

s/s Philip B. Whitcomb
Florida Bar 5703
8880 S. Ocean Dr. Unit #706
Jensen Beach, FL 34957
(609) 577- 1938
pbwhitcomb@comcast.net

CERTIFICATE OF COMPLIANCE

I certify compliance with Fla. R. App. P. 9.210 (b) (8) and Fla.R. Jud. Admin. 2.515, 2.516, and 2.520.

s/s Philip B. Whitcomb
Florida Bar 5703
8880 S. Ocean Dr. Unit #706
Jensen Beach, FL 34957
(609) 577-1938
pbwhitcomb@comcast.net