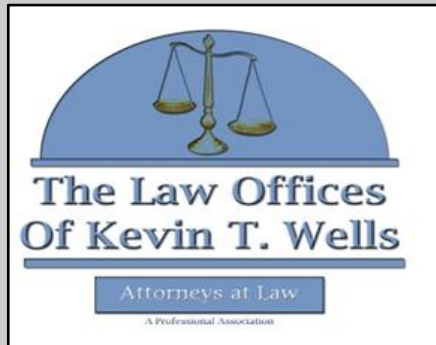


TOPIC TITLE: THE UNLICENSED PRACTICE OF LAW UPDATE

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SECTION 468.431(2), FLORIDA STATUTES

(2) “**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:

- (a) controlling or disbursing funds of a community association,
- (b) preparing budgets or other financial documents for a community association,
- (c) assisting in the noticing or conduct of community association meetings,
- (d) determining the number of days required for statutory notices,
- (e) determining amounts due to the association,
- (f) collecting amounts due to the association before the filing of a civil action,
- (g) calculating the votes required for a quorum or to approve a proposition or amendment,
- (h) completing forms related to the management of a community association that have been created by statute or by a state agency,
- (i) drafting meeting notices and agendas,
- (j) calculating and preparing certificates of assessment and estoppel certificates,
- (k) responding to requests for certificates of assessment and estoppel certificates,
- (l) negotiating monetary or performance terms of a contract subject to approval by an association,
- (m) drafting pre-arbitration demands,
- (n) coordinating or performing maintenance for real or personal property,
- (o) and other related routine services involved in the operation of a community association,
- (p) and complying with the association's governing documents and the requirements of law as necessary to perform such practices.

A person who performs clerical or ministerial functions under the direct supervision and control of a licensed manager or who is charged only with performing the maintenance of a community association and who does not assist in any of the management services described in this subsection is not required to be licensed under this part.

SECTION 468.436(2), FLORIDA STATUTES

(1) The department shall investigate complaints and allegations of a violation of this part, chapter 455, or any rule adopted thereunder, filed against community association managers or firms and forwarded from other divisions under the Department of Business and Professional Regulation.

...

(2) **The following acts constitute grounds for which the disciplinary actions in subsection (4) may be taken:**

(a) **Violation of any provision of s. 455.227(1).**

(b)

1. Violation of any provision of this part.

...

3. **Being convicted of or pleading nolo contendere to a felony in any court in the United States.**

...

7. **Violating any provision of chapter 718, chapter 719, or chapter 720 during the course of performing community association management services pursuant to a contract with a community association as defined in s. 468.431(1).**

...

SECTION 455.227(1), FLORIDA STATUTES

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

...

(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, **a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession.**

...

(i) **Failing to report to the department any person who the licensee knows is in violation of this chapter, the chapter regulating the alleged violator, or the rules of the department or the board.**

...

(o) **Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform.**

(p) Delegating or contracting for the performance of professional responsibilities by a person when the licensee delegating or contracting for performance of such responsibilities knows, or

has reason to know, such person is not qualified by training, experience, and authorization when required to perform them.

SECTION 454.23, FLORIDA STATUTES

Any person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in [s. 775.082](#), [s. 775.083](#), or [s. 775.084](#).

SECTION 468.4334, FLORIDA STATUTES

(1) A community association manager or a community association management firm is deemed to act as agent on behalf of a community association as principal within the scope of authority authorized by a written contract or under this chapter. A community association manager and a community association management firm shall discharge duties performed on behalf of the association as authorized by this chapter loyally, skillfully, and diligently; dealing honestly and fairly; in good faith; with care and full disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.

(2)(a) A contract between a community association and a community association manager or a contract between a community association and a community association management firm may provide that the community association indemnifies and holds harmless the community association manager and the community association management firm for ordinary negligence resulting from the manager or management firm's act or omission that is the result of an instruction or direction of the community association. This paragraph does not preclude any other negotiated indemnity or hold harmless provision.

(b) Indemnification under paragraph (a) may not cover any act or omission that violates a criminal law; derives an improper personal benefit, either directly or indirectly; is grossly negligent; or is reckless, is in bad faith, is with malicious purpose, or is in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

RULE 61E14-2.001(2), FL. ADMIN. CODE -- Standards of Professional Conduct.

Licensees shall adhere to the following provisions, standards of professional conduct, and such provisions and standards shall be deemed automatically incorporated, as duties of all licensees, into any written or oral agreement for the rendition of community association management services.

(2) **Professional Standards.** During the performance of community association management services, **a licensee shall do the following:**

(a) **Comply with the requirements of the governing documents by which a community association is created or operated.**

(b) Only deposit or disburse funds received by the community association manager or management firm on behalf of the association for the specific purpose or purposes designated by the board of directors, community association management contract or the governing documents of the association.

(c) **Perform all community association management services required by the licensee's contract to professional standards and to the standards established by [Section 468.4334\(1\), F.S.](#)**

(d) **In the event of a potential conflict of interest, provide full disclosure to the association and obtain authorization or approval.**

THE FLORIDA BAR: RE: ADVISORY OPINION – Activities of Community Association Managers, 681 So.2d 1119 (Fla. 1996).

Not the Practice of Law:

CAMs can complete the two Secretary of State forms-form CR2EO45 (change of registered agent or office for corporations) and Annual Corporation Report-because completion of those two forms does not require significant legal expertise and interpretation.

The Court found that the following activities when performed by a CAM would not constitute the unlicensed practice of law:

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

The Practice of Law:

Completion of DBPR Form 33-032 (Frequently Asked Questions and Answers Sheet) requires the interpretation of community association documents. The decision to purchase a unit is often based largely on the information on this sheet. Because this form could significantly affect an individual's legal rights, misleading or incorrect information could harm the purchaser. Therefore, initial completion of this form requires the assistance of a licensed attorney. However, subsequent updates which do not modify the form can be completed without the assistance of an attorney.

Drafting both a claim of lien and satisfaction of claim of lien requires a legal description of the

property; it establishes rights of the community association with respect to the lien, its duration, renewal information, and action to be taken on it. The claim of lien acts as an encumbrance on the property until it is satisfied. Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney.

Drafting of a notice of commencement form constitutes the practice of law. This notice affects legal rights as well. *See, e.g., § 713.135, Fla. Stat.* (1995). Failure to complete or prepare this form accurately could result in serious legal and financial harm to the property owner.

Determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes, administrative rules, governing documents, and **rule 1.090(a) and (e), Florida Rules of Civil Procedure**. Such interpretation constitutes the practice of law.

Determining the votes necessary to take certain actions-where the determination would require the interpretation and application both of condominium acts and of the community association's governing documents-would therefore also constitute the practice of law. *Id.*

It also clearly constitutes the practice of law for a CAM to respond to a community association's questions concerning the application of law to specific matters being considered, or to advise community associations that a course of action may not be authorized by law or rule. This amounts to nonlawyers giving legal advice and answering specific legal questions; this Court has specifically prohibited this behavior.

The Gray Areas:

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.

A CAM may modify BPR Form 33-033 (Limited Proxy Form) to the extent such modification involves ministerial matters contemplated by the description in **section 468.431(2)**. This includes modifying the form to include the name of the community association; phrasing a yes or no voting question concerning either waiving reserves or waiving the compiled, reviewed, or audited financial statement requirement; phrasing a yes or no voting question concerning carryover of excess membership expenses; and phrasing a yes or no voting question concerning the adoption of amendments to the Articles of Incorporation, Bylaws, or condominium documents. As to more complicated modifications, however, an attorney must be consulted.

As to drafting a limited proxy form, those items which are ministerial in nature, such as filling in the name and address of the owner, do not constitute the practice of law. However, if drafting of an actual limited proxy form or questions in addition to those on the preprinted form is required, the CAM should consult with an attorney.

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

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

THE FLORIDA BAR: RE: ADVISORY OPINION – Activities of Community Association Managers, 2015 WL 6510426 (Fla. 2015)

14 activities were discussed by the Florida Supreme Court and are addressed below.

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

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

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

In the *1996 opinion* the Court found that the preparation of certificates of assessments were ministerial in nature and did not require legal sophistication or training. Therefore, it was not the unlicensed practice of law for a CAM to prepare certificates of assessments.

It is the opinion of the Standing Committee that a CAM's preparation of these documents would not constitute the unlicensed practice of law.

4. Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members;

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

Further, in *Florida Bar v. Town*, 174 So.2d 395 (Fla.1965), the Court held that a nonlawyer may not prepare bylaws, articles of incorporation, and other documents necessary to the establishment of a corporation, or amendments to such documents. Amendments to a community association's declaration of covenants, bylaws, and articles of incorporation can be analogized to the corporate documents discussed in *Town*. Therefore, it is the opinion of the Standing Committee that the Court's holding in the *1996 opinion* should stand and nonlawyer preparation of the amendments to the documents would constitute the unlicensed practice of law.

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

In the *1996 opinion*, the Court found that determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes, administrative rules, governing documents, and rules of civil procedure and that such interpretation constitutes the practice of law. Thus, if the determination of the number of days to be provided for statutory notice requires the interpretation of statutes, administrative rules, governing documents or rules of civil procedure, then, as found by the Court in 1996, it is the opinion of the Standing Committee that it would constitute the unlicensed practice of law for a CAM to engage in this activity. If this

determination does not require such interpretation, then it would not be the unlicensed practice of law.

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

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

- modifying the form to include the name of the community association;
- phrasing a yes or no voting question concerning either waiving reserves or waiving the compiled, reviewed, or audited financial statement requirement;
- phrasing a yes or no voting question concerning carryover of excess membership expenses; and
- phrasing a yes or no voting question concerning the adoption of amendments to the Articles of Incorporation, Bylaws, or condominium documents.

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

Using the examples given by the Court, the types of questions that can be modified without constituting the unlicensed practice of law do not require any discretion in the phrasing. For example, the sample form provided by the state has the following question: “Do you want to provide for less than full funding of reserves than is required by § 718.112(2)(f), Florida Statutes, for the next fiscal/calendar year? ___ YES ___ NO.” There is no discretion regarding the wording, it is a yes or no question. The question could be reworded as follows: “Section 718.112(2)(f), Florida Statutes, discusses funding of reserves. Do you want to provide for less than full funding of reserves than is required by the statute for the next fiscal/calendar year? ___ YES ___ NO.” It is still a yes or no question. As no discretion is involved, it does not constitute the unlicensed practice of law to modify the question.

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

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

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

This finding can also be applied to the preparation of documents concerning the right of the association to approve new prospective owners. While there was no testimony giving examples of such documents, the Court's underlying principle that if the preparation requires the exercise of discretion or the interpretation of statutes or legal documents, a CAM may not prepare the documents. For example, the association documents may contain provisions regarding the right of first refusal. Preparing a document regarding the approval of new owners may require an interpretation of this provision. An attorney should be consulted to ensure that the language comports with the association documents. On the other hand, the association documents may contain a provision regarding the size of pets an owner may have. Drafting a document regarding this would be ministerial in nature as an interpretation of the documents is generally not required.

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

9. Determination of owners' votes needed to establish a quorum;

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

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

Under [Section 718.1255, Fla. Stat.](#), prior to filing an action in court, a party to a dispute must participate in nonbinding arbitration. The nonbinding arbitration is before the Division of Florida Condominiums, Time Shares, and Mobile Homes (hereinafter “the Division”). Prior to filing the petition for arbitration with the Division, the petitioner is required to serve a pre-arbitration demand letter on the respondent, providing:

1. advance written notice of the specific nature of the dispute,

2. a demand for relief, and a reasonable opportunity to comply or to provide the relief, and
3. notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute.

Failure to include the allegations or proof of compliance with these prerequisites requires the dismissal of the petition without prejudice.

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

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

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

8In the *1996 opinion*, the Court found that the drafting of a notice of commencement form constitutes the practice of law because it requires a legal description of the property and this notice affects legal rights. Further, failure to complete or prepare this form accurately could result in serious legal and financial harm to the property owner.

While the *1996 opinion* did not specifically address the preparation of lien waivers, the *1996 opinion* found that preparing documents that affect legal rights constitutes the practice of law. A lien waiver would certainly affect an association's legal rights. Further, as suggested by one of the witnesses, the area of construction lien law is a very complicated and technical area. (Tr., p. 40, 1.10–19.) Therefore, it is the Standing Committee's opinion that the preparation of construction lien documents by a CAM would constitute the unlicensed practice of law.

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

***10** 9In the 1996 opinion, the Court found that the preparation of documents that established and affected the legal rights of the community association was the practice of law. Further, in *Sperry*, the Court found the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, was the practice of law. Thus, it is the Standing Committee's opinion that it constitutes the unlicensed practice of law for a CAM to prepare such contracts for the community association.

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

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

It is the opinion of the Standing Committee that if the CAM is only searching the public records to identify who has owned the property over the years, then such review of the public records is ministerial in nature and not the unlicensed practice of law. In other words, if the CAM is merely making a list of all record owners, the conduct is not the unlicensed practice of law.

On the other hand, if the CAM uses the list and then makes the legal determination of who needs to receive a pre-lien letter, this would constitute the unlicensed practice of law. This determination goes beyond merely identifying owners. It requires a legal analysis of who must receive pre-lien letters. Making this determination would constitute the unlicensed practice of law.

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

In the 1996 opinion, the Court found that it constituted the unlicensed practice of law for a CAM to respond to a community association's questions concerning the application of law to specific matters being considered, or to advise community associations that a course of action may not be authorized by law or rule. The court found that this amounted to nonlawyers giving legal advice and answering specific legal questions, which the court specifically prohibited in *In re: Joint Petition of The Florida Bar and Raymond James & Assoc.*, 215 So.2d 613 (Fla.1968) and *Sperry*. Further, in *Florida Bar v. Warren*, 655 So.2d 1131 (Fla.1995), the Court held that it constitutes the unlicensed practice of law for a nonlawyer to advise persons of their rights, duties, and responsibilities under Florida or federal law and to construe and interpret the legal effect of Florida law and statutes for third parties. In *Florida Bar v. Mills*, 410 So.2d 498 (Fla.1982), the Court found that it constitutes the unlicensed practice of law for a nonlawyer to interpret case law and statutes for others.

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

As provided in Rule Regulating the Florida Bar 10-9.1(g)(4), the advisory opinion shall have the force and effect of an order of this Court and shall be published accordingly.

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

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Unlicensed Practice of Law

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