


IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Re: ADVISORY OPINION

HRS NONLAWYER COUNSELOR

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CASE NO. 70,615

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

Robert M. Sondak, Chairman
200 S.E. 1st Street
Miami, Florida 33131
(305) 358-9300

Mary Ellen Bateman
UPL Counsel
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
1. Nature of the Case.....	1
2. Course of the Proceedings and Disposition.....	2
(a) Evidence as to public harm from HRS case workers practicing law in dependency cases.....	3
(b) Cost.....	7
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT	9
I. HRS CASE WORKERS ARE PRACTICING LAW.....	9
II. THE PRACTICE OF LAW BY HRS CASE WORKERS IS NOT AUTHORIZED.....	11
CONCLUSION	17
CERTIFICATE OF SERVICE.....	19
LETTER FROM JUDGE GELBER.....	Attached
LETTER FROM JUDGE GLADSTONE.....	Attached

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Florida Bar v. Brumbaugh,</u> 355 So.2d 1186 (Fla. 1978).....	11
<u>Florida Bar v. Columbia Title,</u> 197 So.2d 3 (Fla. 1967).....	14
<u>Florida Bar v. Moses,</u> 380 So.2d 412 (Fla. 1980).....	13,17
<u>Florida Bar re: Amendment to Rules Regulating</u> <u>the Florida Bar,</u> _____ So.2d _____ 12 F.L.W. 366 (July 9, 1987).....	14
<u>Florida Bar re: Rules Regulating the Florida Bar,</u> 494 So.2d 977 (Fla. 1986).....	1
<u>In the Interest of D.B.,</u> 385 So.2d 83 (Fla. 1980).....	10,11
<u>In the Interest of J.S.,</u> 444 So.2d 1148 (Fla. 5th DCA 1984).....	16
<u>Magnolias Nursing and Convalescent Center v.</u> <u>Department of Health and Rehabilitative Services,</u> 428 So.2d 256 (Fla. 1st DCA 1982).....	13
<u>Quinn v. Housing Authority of the City of Orlando,</u> 385 So.2d 1167 (Fla. 5th DCA 1980).....	13,14
<u>State ex rel The Florida Bar v. Sperry,</u> 140 So.2d 587 (Fla. 1962), <u>vacated on other grounds,</u> 373 U.S. 379 (1963).....	11
<u>FLORIDA CONSTITUTION</u>	
Art. V. Sec. 2.....	16
Art. V. Sec 20(b).....	15

STATUTES

Chapter 39, Fla. Stat.....	2,16,17
Fla. Stat. § 409.168(3).....	15

RULES

Rules of Judicial Administration

Rule 2.010.....	12
Rule 2.060(a).....	11,12
Rule 2.085(d).....	12

Rules of Judicial Procedure

Rule 8.590(f).....	14
Rule 8.630(d)(6).....	12
Rule 8.640.....	12,13
Rule 8.710(a)(5).....	12
Rule 8.710(b).....	12

Rules Regulating the Florida Bar

Rule 10-7.1(f).....	1
Rule 10-7.1(g)(2).....	1
Rule 10-7.1(g)(3).....	2

Small Claims Rules

Rule 7.050(a)(2).....	13
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STATEMENT OF THE CASE AND FACTS

1. Nature of the Case

This is a proceeding pursuant to Rule 10-7.1 of the Rules Regulating the Florida Bar. See The Florida Bar re: Rules Regulating the Florida Bar, 494 So.2d 977 (Fla. 1986). The Standing Committee on the Unlicensed Practice of Law (the "UPL Committee") received a request for an advisory opinion from the Department of Health and Rehabilitative Services ("HRS"). (Appendix B)^{1/} The UPL Committee gave public notice and held a public hearing pursuant to Rule 10-7.1(f), Rules Regulating the Florida Bar. The UPL Committee then issued a Proposed Advisory Opinion, which was filed in this Court on May 29, 1987. (Appendix A)

HRS has filed objections to the Proposed Advisory Opinion and its initial brief, which raises several legal and factual arguments. Pursuant to Rule 10-7.1(g)(2), the UPL Committee is responding to that initial brief.

The Rules Regulating the Florida Bar contemplate that after all briefs are filed with the Court, the Court may hear oral argument, after which the Court shall review the advisory opinion and any briefs or objections filed. The rules explain that:

^{1/} All references to the Record will be to Appendices A through K filed with this Court on May 29, 1987.

"Upon review, [the Court] shall approve, modify, or disapprove the advisory opinion, and the ensuing opinion shall have the force and effect of an order of this Court, and be published accordingly." Rule 10-7.1(g)(3), Rules Regulating the Florida Bar.

2. Course of the Proceedings and Disposition

The function of the UPL Committee under Rule 10-7.1 is to gather facts at a public hearing, and to apply those facts to the law to determine whether proposed conduct constitutes unlicensed practice of law as prohibited by statute, court rule and case law of the State of Florida. In this instance, HRS case workers, who are not lawyers, and who are not licensed to practice law, perform certain functions in dependency proceedings which the UPL Committee believes is the practice of law. The UPL Committee concluded that neither the Rules of Juvenile Procedure nor the Rules of Judicial Administration authorize HRS case workers to prepare court documents (e.g., dependency petitions; permanent commitment petitions; waiver of counsel stipulations; motions; plans of proposed treatment, training or conduct; performance agreements; and petitions for permanent commitment). Moreover, the UPL Committee concluded that those Rules do not authorize HRS case workers to represent HRS without a lawyer in court at hearings in which issues are raised that affect legal rights of any party. The UPL Committee further concluded that Chapter 39, Florida Statutes, on which HRS relies, cannot oust the Florida Supreme Court from its jurisdiction to regulate the practice of law in the courts, and that the sole source of authority on which

HRS case workers may rely to draft legal documents and appear in a representative capacity in court is the Rules of Juvenile Procedure.

The primary factual dispute raised by HRS in its brief appears to be whether "the use of lawyers in the dependency process will improve the system and protect the public...." (HRS Brief at 22) HRS asserts that this is not the case, and that "the public is best protected through well-trained dependency counselors presenting uncontested cases to the court." Id.^{2/} HRS also asserts that the cost of hiring additional lawyers is unlikely to be funded by the legislature, and would therefore adversely impact on other social programs. (HRS Brief at 42-44). As discussed below, the UPL Committee disagrees with HRS as to both issues.

(a) Evidence as to public harm from HRS case workers practicing law in dependency cases

The UPL Committee received extensive evidence at its public hearings. Judge Gladstone furnished more than a dozen examples of inadequately prepared documents authored by HRS case workers including detention petitions, waiver and consent forms, permanent placement plans, and performance agreements. (Appendix E) Judge Gladstone informed the UPL Committee that he had

^{2/} While admitting that HRS case workers presently are not adequately trained, HRS refers to the juvenile justice training academies, the first of which is scheduled to commence in September, 1987, as a means of providing training to HRS case workers. (HRS Brief at 48)

gathered these examples in a few weeks and that he sees serious mistakes by HRS case workers attempting to practice law on an almost daily basis. (Appendix C) The UPL Committee also heard other examples of HRS case worker errors from Daniel Dawson, Chairman of the Juvenile Rules Committee, who is an Assistant State Attorney in Orlando, practicing in the dependency area. (Appendix D) It was acknowledged by James Smart, Assistant State Attorney, that if attorneys were required to review and sign these pleadings and other legal documents, the incidence of these inadequacies would be drastically reduced. (Appendix D) In fact, Judge Gladstone informed the Committee that once he insisted that attorneys review these documents before they are presented to his court, the quality of practice improved dramatically. (Appendix C)^{3/}

The UPL Committee also received evidence that the inadequate performance by HRS case workers in court impacts upon

^{3/} HRS makes reference to the fact that according to the transcripts provided by Judge Gladstone (Appendices F-1 and F-2), there were attorneys representing HRS present at the hearings. (HRS Brief at 21 n. 4). It is clear from the transcript of the hearing in one of these instances, that an assistant state attorney attended that hearing because, for a month, HRS had not yet attempted a diligent search and inquiry of the father, and Judge Gladstone insisted that the State Attorney be present. In the other transcript it was a coincidence that HRS had an attorney present, who stepped in to prevent further harm once Judge Gladstone advised the case worker of her error. These transcripts do not support any suggestion by HRS that the presence of attorneys in court will not alleviate the present problems. The letter from Judge Gladstone which is attached to this Brief provides further background regarding these cases.

the children of this state who are involuntarily removed from their homes. The strict time limitations for concluding dependency cases are specifically designed to minimize the harm which comes to young children removed from their homes for long periods of time. If the amount of time between the initial detention of a child and the disposition of a dependency case is reduced, this will provide enormous social benefits.

The record in these proceedings has now been supplemented by the brief and appendix filed by Florida Legal Services, Inc., which contains further examples of public harm arising out of instances of HRS case workers attempting to practice law in dependency cases. Moreover, HRS has brought to this Court's attention the May, 1987 Administrative Order issued by Judge Graziano of the Seventh Judicial Circuit, which contains factual findings critical of the performance of HRS case workers reflecting "legally insufficient petitions filed in dependency matters"; "violation of time standards"; "failure to notify necessary parties"; "delays in proceedings which defeat the purposes of F.S. 39"; and "substantial harm due to improper separation or removal." The Order also plainly indicates that the mistakes made by HRS case workers were "problems that were avoidable." The Order prohibits HRS case workers from continuing to practice law in dependency cases, except as authorized by specific Rules of Juvenile Procedure.

In this same vein, the UPL Committee has received letters from Judges Gelber and Gladstone of the Eleventh Judicial Circuit. Because these letters address in detail the issues before this Court, the UPL Committee is attaching them to this Brief.

Judge Gladstone's letter provides further significant evidence of delay and harm caused by HRS case workers who are practicing law in dependency cases. According to information supplied to Judge Gladstone by HRS, the "average length of stay for a child in shelter" is "3 months." More than 1/3 of the children in shelter care in Dade County on June 30, 1987 were held there more than 21 days (the statutory maximum) without a trial on their dependency petitions. These delays not only harm young children by removing them from their homes for excessive lengths of time, but also result in overcrowding the available shelter care and foster care facilities in this state. Judge Gladstone's letter stresses that if lawyers were required to represent HRS in these cases, this unconscionable delay would be drastically reduced. While Judge Gelber's letter takes issue with the Proposed Advisory Opinion, he acknowledges the "vexing problem [of] the inability of HRS to provide adequate services in dependency cases."

The UPL Committee believes that HRS has not substantiated its position that "the public is best protected" by allowing HRS case workers to continue to practice law in

dependency cases. On this record, the UPL Committee adheres to its conclusions, supported by the finding by Judge Graziano that where HRS case workers attempt to practice law it results in "tragic harm [which] has been inflicted upon the helpless, neglected and abused children." As Judge Graziano correctly observes, dependency cases require familiarity with Chapter 39, the ability to draw complex contracts and the necessity of preparing pleadings and complying with all aspects of court procedures. It is apparent that HRS case workers do not have the ability to perform these functions and should not be permitted to continue to do so.

(b) Cost

As to the additional cost of hiring lawyers to represent HRS in dependency cases, the HRS estimate is based on the assumption that the State Attorney's Office will not supply the requisite legal assistance. However, in delinquency cases, the State Attorney's Office consistently appears in Court to represent HRS and the State. The State Attorney also currently furnishes counsel in "contested" dependency cases. If the State Attorney is required to furnish counsel in dependency matters outlined in the Proposed Advisory Opinion, the budgetary constraints on HRS should be unaffected. Even if HRS is required to hire additional contract attorneys, the cost of doing so, like the cost of all other HRS programs, should be funded by the legislature. The UPL Committee cannot foresee whether the

legislature would adequately fund the program, nor does it believe anyone else can make an accurate prediction. The UPL Committee heard differing opinions on this subject from Judge Gladstone, Betsy Webb, Daniel Dawson and James Smart, but all of those witnesses merely speculated as to the additional cost and the likelihood of funding. The UPL Committee submits that the fear of adverse legislative action should not influence this Advisory Opinion.

The HRS Brief ignores one aspect of cost which is brought out in Judge Gladstone's letter. HRS pays \$900 per month for each child placed in shelter care. While the issues raised in these proceedings should not be decided on speculation as to cost, there is plainly a substantial savings to be effected by reducing the delays which pervade the dependency system.

SUMMARY OF ARGUMENT

The Proposed Advisory Opinion found that HRS case workers are untrained and ill equipped to practice law in dependency cases, thereby causing extensive harm to abused and neglected children in this state. It is precisely this sort of harm which this Court's regulation of the practice of law is designed to avoid.

HRS case workers are not authorized to practice law in dependency cases. They are not appearing pro se, but rather in a representative capacity. Accordingly, except to the extent a

specific rule of this Court authorizes case workers to do so, they may not prepare and sign pleadings, present the legal position of HRS in Court, or otherwise practice law in dependency cases. With the exceptions noted in the Proposed Advisory Opinion, this Court has not granted HRS case workers exemption from the restrictions on the practice of law which are established to safeguard the public.

None of the legal or factual arguments made by HRS justify a ruling that case workers are authorized to practice law in dependency cases. Accordingly, the conclusions of the Proposed Advisory Opinion should be sustained.

ARGUMENT

The legal arguments made by HRS in its Brief were, for the most part, addressed in detail in the Proposed Advisory Opinion. (Appendix A) The UPL Committee will not repeat the legal analysis found on pages 11-21 of the Opinion, and will limit its comments in this Brief to additional material which is relevant to the legal arguments made by HRS.

I

HRS CASE WORKERS ARE PRACTICING LAW

In its brief in this Court, HRS renews the argument it made to the UPL Committee that the actions of its case workers are not the practice of law because case workers only represent

themselves in dependency cases. In the Proposed Advisory Opinion, the UPL Committee rejected the argument that HRS case workers are acting pro se, rather than in a representative capacity, when they appear in court to pursue dependency cases.

The HRS Brief exposes the contradiction in its argument. While arguing that the HRS case workers are appearing pro se, giving the impression that an HRS case worker is representing his own private interests, the HRS Brief does admit (at page 20) that "in carrying out the dependency functions, HRS counselors are acting on behalf of the State." Also, the HRS Brief states (at p. 48) that "HRS dependency counselors are engaged in an important public function...."

As the Proposed Advisory Opinion discusses, the important public policy which is carried out by HRS case workers is to represent the best interests of the child and family unit. This Court explained, in In the Interest of D.B., 385 So.2d 83, 93 (Fla. 1980), that it is the function of HRS "to safeguard the interests of the child" in dependency cases. This Court made that statement in the context of determining whether there was a constitutional requirement for the appointment of counsel as guardian ad litem for a nine month old child. This Court held that there was no such requirement "since the proceedings were instituted by HRS to protect the interests of the child, and there were no factors here which would justify the appointment of

a guardian ad litem in addition to HRS to safeguard the interests of the child." 385 So.2d at 93.^{4/}

The argument made by HRS that it is not practicing law because, in effect, it is appearing pro se is completely inconsistent with this Court's opinion in In the Interest of D.B., supra, and with the arguments made by HRS in Point II of its brief in this Court. It is apparent to the UPL Committee that HRS case workers act in a representative capacity, just as they do in delinquency cases, and as a result the actions of HRS are within the definition of the practice of law as outlined by this Court in The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1191 (Fla. 1978) and State ex rel The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963).

II
THE PRACTICE OF LAW BY HRS
CASE WORKERS IS NOT AUTHORIZED

HRS argues in its Brief that "this Court has never exercised its rule making power to abolish or alter [the] practice" of HRS case workers pursuing dependency cases in court. (HRS Brief at 7) HRS is wrong. This Court exercised that power in Rule 2.060(a), Rules of Judicial Administration, which states

^{4/} This Court also explained that "dependency proceedings exist to protect and care for the child that has been neglected, abused or abandoned." 385 So.2d at 90.

that "all persons in good standing as members of the Florida Bar shall be permitted to practice in Florida." Rule 2.010, Rules of Judicial Administration, specifically states that the Florida Rules of Judicial Administration apply "in all courts to which the rules are applicable by their terms.... These rules shall supercede all conflicting rules and statutes." There is no doubt that the Rules of Judicial Administration apply to dependency cases. See, e.g., Rule 2.085(d), Rules of Judicial Administration, which specifies time limitations in dependency cases.

This Court further exercised its rule making power regarding HRS case workers by adopting the 1984 revisions to the Rules of Juvenile Procedure. In those Rules, this Court specifically authorized agents of HRS to sign detention petitions, Rule 8.710(a)(5), and make a diligent effort to notify the parent or custodian of the child of the detention hearing. Rule 8.710(b). To this extent, this Court authorized conduct which would otherwise be in conflict with Rule 2.060, Rules of Judicial Administration. However, the Rules of Juvenile Procedure otherwise prohibit HRS case workers from practicing law in dependency cases. See Rule 8.640, which states that pleadings must be signed by attorneys other than parties appearing pro se. It is significant that under Rule 8.630(d)(6), authorized agents of HRS may serve pleadings and sign a certificate of service, while

under Rule 8.640, the pleading itself must be signed by an attorney. Rule 8.640 explains the key distinction that

"The signature of an attorney shall constitute a certificate by him that he has read the paper or pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

This Rule emphasizes the importance of lawyer supervision over and responsibility for the pleadings filed in court in dependency cases.

HRS argues that whenever the Rules of Juvenile Proceeding make reference to a "party," that reference authorizes HRS case workers to practice law in dependency cases. (HRS Brief at 24-25) This argument, however, proves too much, for throughout the Rules of Civil Procedure, Rules of Appellate Procedure, and other rules promulgated by this Court, the term "party" is often used. The courts of this state have never interpreted the term "party" to permit an entity such as HRS to appear in a representative capacity without an attorney in court proceedings. To the contrary, this Court and the district courts of appeal have consistently held that in the absence of specific authority, such as Rule 7.050(a)(2), Small Claims Rules, an entity must be represented by counsel in court. See, The Florida Bar v. Moses, 380 So.2d 412, 416 (Fla. 1980); Magnolias Nursing and Convalescent Center v. Department of Health and Rehabilitative Services, 428 So.2d 256 (Fla. 1st DCA 1982); Quinn v.

Housing Authority of the City of Orlando, 385 So.2d 1167 (Fla. 5th DCA 1980).^{5/}

HRS argues in its brief that it should be allowed to practice law because guardians ad litem are allowed to do so in dependency cases. (HRS Brief at 26-27) HRS is wrong. Guardians ad litem are specifically precluded from practicing law in dependency cases. Rule 8.590(f), Rules of Juvenile Procedure.

HRS also argues that what it does is no different than non-lawyers who draft contracts. (HRS Brief at 27) This Court has held that the preparation of legally binding agreements for another person is the unauthorized practice of law. E.g. The Florida Bar v. Columbia Title, 197 So.2d 3 (Fla. 1967).

HRS refers in its brief to the recent rule change adopted by this Court which redefined the practice of law to exclude "limited oral communications to assist individuals in completion of legal forms approved by the Supreme Court of Florida." The Florida Bar Re Amendment to Rules Regulating The Florida Bar, _____ So.2d _____, 12 F.L.W. 366 (July 9, 1987). HRS argues that

^{5/} Daniel Dawson, Chairman of the Juvenile Rule Committee, testified that the 1984 revisions to the Juvenile Rules specifically used the term "authorized agent of HRS" in those few instances where the Rules Committee wished to authorize HRS case workers to practice law in court in dependency proceedings. (Appendix D) On June 11, 1987, the Juvenile Rule Committee voted to approve the conclusions of the Proposed Advisory Opinion, and reject a rule change proposed by HRS which would have given blanket authority for HRS case workers to prepare pleadings and appear in court in dependency cases.

this rule change permits its case workers to prepare performance agreements to be signed by a parent. (HRS Brief at 26) This is incorrect. First, the recent rule change on its face does not cover legal documents such as performance agreements. Second, Florida Statute § 409.168(3) outlines the requirements of a performance agreement, indicating that it is not a routine form, but rather a complex legal document defining the rights and obligations of the parent, child, HRS, and guardian ad litem. Absent a specific rule of this Court authorizing the preparation of such a significant legal document by a non-lawyer, existing case law requires that a lawyer representing HRS be responsible for the preparation of that document.

HRS argues in this Court that Article V Section 20(b) of the Florida Constitution provides authorization for HRS case workers to practice law in dependency cases. That provision, adopted on January 1, 1973, states:

"Except to the extent inconsistent with the provisions of this article, all provisions of law and rules of court in force on the effective date of this article shall continue in effect until superseded in the manner authorized by the constitution."

HRS does not cite any cases which support its interpretation of this provision of the Florida Constitution, nor does the text of that section assist HRS. Moreover, whatever bearing this provision had on the laws and rules in effect in 1972, it has no bearing on the current dependency statutes and rules, as Chapter 39, Florida Statutes was completely re-written in 1978 and again

in 1984, and this Court issued a complete revision to the Rules of Juvenile Procedure in 1984. Furthermore, HRS' argument is inconsistent with Article V Section 2 of the Constitution, which specifies that this Court is the sole rule making body "for the practice and procedure in all courts," and nothing in the rules adopted by this Court has ever authorized HRS to practice law in dependency cases.

HRS reiterates the argument it made at the time of the hearings on the Proposed Advisory Opinion that dependency cases are "special statutory proceedings" and that, as a result, Chapter 39 Florida Statutes can and does authorize non-lawyers to practice law in dependency cases. The Proposed Advisory Opinion (Appendix A at 16-18) rejects this argument. Unlike the few recognized special statutory proceedings, dependency cases are not a creature of statute, but rather, as HRS admits, a "descendant of the courts of equity." (HRS Brief at 3) The Fifth District Court of Appeal, in In the Interest of J.S., 444 So.2d 1148 (Fla. 5th DCA 1984) explained that

"In Florida, the circuit judge acting as juvenile judge has succeeded to all of that exceptional common law jurisdiction of the courts of chancery to act on the court's own volition to protect the interests of infants." 444 So.2d at 1149-50.

Accordingly, dependency proceedings are not "special statutory proceedings."^{6/}

CONCLUSION

The record in these proceedings reflect the serious public harm which has been inflicted on children of this state as a result of HRS case workers practicing law in dependency cases. The speculation in the HRS Brief (at 38-39, 41) that lawyers will not improve the quality of practice in dependency cases is refuted by the record.

This Court has explained that

"The single most important concern in the Court's finding and regulating the practice of law is the protection of the public from incompetent, unethical or irresponsible representation." The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980).

On this record, the conclusion of the Proposed Advisory Opinion that HRS case workers are not authorized to practice law in dependency cases should be sustained by this Court.

Furthermore, on this record, there is no justification for this Court to issue a proposed rule which would authorize HRS

^{6/} As the Proposed Advisory Opinion outlines, even if dependency proceedings were a special statutory proceeding, the 1984 revisions to the Rules of Juvenile Procedure did not intend to adopt Chapter 39 as rules of this Court. Accordingly, the Rules issued by this Court, rather than any legislation, provides the sole authority for authorizing HRS case workers to practice law in dependency cases. See Proposed Advisory Opinion at 13-15.

case workers across the board to practice law in dependency cases. The Juvenile Rules Committee has specifically rejected such a proposed rule, and the record in this case strongly suggests that such a proposed rule would inflict further harm on the children of this state.

It is essential for HRS to train its case workers in the important functions those individuals serve in dependency cases. However, such training is not a substitute for the training received by law students, the rigorous bar examinations graduates of law schools must pass, the code of professional responsibility lawyers must uphold, the Continuing Legal Education requirements of this Court, and the grievance machinery which safeguards the public from unscrupulous and incompetent lawyers.

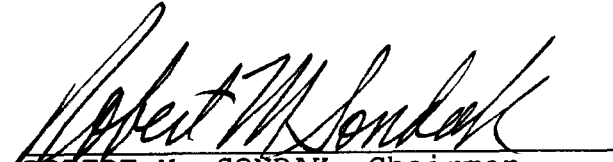
The UPL Committee agrees that HRS should be given sufficient time to implement the advisory opinion issued by this Court, and to seek appropriate funding from the legislature. The possibility that the legislature will be unresponsive to the requirements of an advisory opinion issued by this Court is not a sufficient reason to continue to inflict public harm on children of this state.

The UPL Committee respectfully requests that the Court adopt the conclusions of its Proposed Advisory Opinion.

Respectfully submitted,

THE FLORIDA BAR STANDING COMMITTEE
ON UNLICENSED PRACTICE OF LAW


By:


ROBERT M. SONDAK, Chairman
200 S.E. 1st Street
Miami, Florida 33131
(305) 358-9300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to B. Elaine New, Esq., Assistant General Counsel, Department of HRS, 1323 Winewood Blvd., Tallahassee, Florida 32377-0900; James A. Sawyer, Jr., Esq., District VII Counsel, Department of HRS, 400 W. Robinson, Suite 911, Orlando, Florida 32801; Joseph Spicola, Esq., General Counsel, Office of the Governor, The Capital, Tallahassee, Florida 32301; William D. Preston, Esq., Hopping Boyd Green & Sons, 420 First Florida Bank Bldg., Post Office Box 6526, Tallahassee, Florida 32314; Brent R. Taylor, Esq., Florida Legal Services, Inc., 226 West Pensacola Street, Tallahassee, Florida 32301, Daniel P. Dawson, Esq.,

Office of the State Attorney, 2000 East Michigan Avenue, Orlando,
Florida 32806 on this 7th day of August, 1987.


Robert M. Sondak

RMS/387-0565