IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
RE: ADVISORY OPINION
NONLAWYER PREPARATION OF
NOTICE TO OWNER AND NOTICE
TO CONTRACTOR
_____/

CASE NO. 73,306

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

Joseph R. Boyd, Chairman
2441 Monticello Drive
Tallahassee, Fl. 32302
(904) 386-2171

Mary Ellen Bateman
UPL Counsel
The Florida Bar
Tallahassee, Fl. 32399-2300
(904) 222-5286

Lori S. Holcomb
Assistant UPL Counsel
The Florida Bar
Tallahassee, Fl. 32399-2300
(904) 222-5286

Counsel For The Standing
Committee On UPL

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS.....	ii
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT.....	2
I. THE COMPLETION OF THE NOTICE TO OWNER AND NOTICE TO CONTRACTOR REQUIRES THAT THE PERSON COMPLETING THE FORM POSSESS LEGAL SKILL AND A KNOWLEDGE OF THE LAW GREATER THAN THAT POSSESSED BY THE AVERAGE CITIZEN.....	2
II. IT IS THE UNLICENSED PRACTICE OF LAW FOR NONATTORNEYS TO ENGAGE IN ORAL COMMUNICATION WITH THEIR CUSTOMERS IN THE COMPLETION OF FORMS WHICH HAVE NOT BEEN APPROVED BY THE SUPREME COURT OF FLORIDA.....	4
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8

TABLE OF CITATIONS

CASES

	PAGE
The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978)	4
The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979)	4
The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), judgment vacated on other grounds, 373 U.S. 379 (1963)	2
The Florida Bar v. Town, 174 So.2d 395 (Fla. 1965)	3

STATUTES

§713.06(2)(a), Fla. Stat. (1988)	6
§713.23(1)(d), Fla. Stat. (1988)	6

SUMMARY OF THE ARGUMENT

The proposed advisory opinion found that the completion of the Notice to Owner and Notice to Contractor as required by the Mechanic's Lien statute constitutes the practice of law. As part of this finding, the Standing Committee on the Unlicensed Practice of Law found that the completion of the notices requires that the person completing the forms possess legal skill and a knowledge of the law greater than that possessed by the average citizen. The skill and knowledge required is measured by the type of activity at issue and not the person performing the activity. As such, the Standing Committee's finding is proper and the practice constitutes the practice of law. However, the practice is the authorized practice of law if the nonattorney completing the forms does not engage in oral communication with the customer or the forms are approved by this Court.

ARGUMENT

I.

THE COMPLETION OF THE NOTICE TO OWNER AND NOTICE TO CONTRACTOR REQUIRES THAT THE PERSON COMPLETING THE FORM POSSESS LEGAL SKILL AND A KNOWLEDGE OF THE LAW GREATER THAN THAT POSSESSED BY THE AVERAGE CITIZEN.

The first argument of Amicus Curiae National Association of Credit Management of Florida, Inc. (hereinafter "NACM") is that the Standing Committee on the Unlicensed Practice of Law (hereinafter the "Standing Committee") incorrectly determined that the completion of the Notice to Owner and Notice to Contractor meets the second prong of the test developed in The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), judgment vacated on other grounds, 373 U.S. 379 (1963). The second prong of the Sperry test asks whether "the reasonable protection of 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 ..." 140 So.2d at 591. The Standing Committee found that the completion of the Notice to Owner and Notice to Contractor requires this skill. Rather than refuting this finding, NACM's argument supports it.

NACM argues that the construction industry, unlike the general population of the State, is aware of the requirements of the Mechanic's Lien statute and keeps current on changes. Therefore, the construction industry does possess legal skill and a knowledge of the law greater than that possessed by the average citizen. By

stating that the construction industry possesses this skill and knowledge, NACM acknowledges that the person completing the Notice to Owner and Notice to Contractor needs to possess legal skill and a knowledge of the law greater than that possessed by the average citizen. The second prong of the Sperry test is therefore met.

Not only does NACM's argument support the finding of the Standing Committee, it erroneously construes the second prong of the Sperry test. NACM asks this Court to apply the test to a specific group of people, the construction industry. However, it is the activity and not the person performing the activity that must be viewed in light of the Sperry test. Therefore, in the Sperry case itself, this Court found that the representation of a third party in patent matters constituted the practice of law even though the respondent, a registered patent attorney, possessed legal skill and a knowledge of patent law greater than that possessed by the average citizen. As this Court held in The Florida Bar v. Town, 174 So.2d 395 (Fla. 1965) in enjoining an accountant from completing corporate documents, "[t]he reasonable protection of the rights and property of those involved requires that the person 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." 174 So.2d 397. Therefore, it is what type of knowledge is required rather than what type of knowledge the person possesses that is critical in defining whether the conduct constitutes the practice of law. Clearly, the conduct in question

meets this test, and therefore, nonlawyer completion of the Notice to Owner and Notice to Contractor constitutes the practice of law.

II.

IT IS THE UNLICENSED PRACTICE OF LAW FOR NONATTORNEYS TO ENGAGE IN ORAL COMMUNICATION WITH THEIR CUSTOMERS IN THE COMPLETION OF FORMS WHICH HAVE NOT BEEN APPROVED BY THE SUPREME COURT OF FLORIDA.

NACM's second argument is that this Court should not "expand" the rule of The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978) by preventing the Notice to Owner/Notice to Contractor companies from engaging in oral communication with clients. NACM argues that Brumbaugh limits certain types of oral communication rather than precluding oral communication as stated by the Standing Committee. NACM's interpretation, however, is too narrow and ignores the clear holding of the case. Although this Court listed examples of types of questions which the nonattorney could not answer, Brumbaugh holds that nonattorneys "must not engage in personal legal assistance in conjunction with [the nonattorney's] business activities, including the correction of errors and omissions." 355 So.2d at 1194. This personal legal assistance includes oral communication with the customer in order to complete the form. The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979). The only activity which the nonattorney may engage in is typing forms for the customer, provided that the nonattorney only copy the information given to them in writing by the customer. Therefore,

the Standing Committee's interpretation of Brumbaugh is not an expansion, but is a correct statement of the holding of the case.

Even if this Court were to look at the questions listed in Brumbaugh, the type of information which NACM seeks to relay to customers would constitute the unlicensed practice of law. NACM argues that the restricted communication is limited to inquiring or answering questions as to the particular forms which may be necessary, how best to fill out the forms, where to properly file the forms, and how to present evidence at the hearing. NACM wishes to communicate with its customers regarding the information utilized on the form (how best to fill out the forms and which particular forms may be necessary), the practical advantages of one type of service over another (where to properly file the forms), the need for serving more than one form (where to properly file the forms), and the appropriateness of serving a Notice if the time has expired (inquiring or answering questions as to the particular forms which may be necessary). Therefore, the type of information which NACM wishes to elicit from or relay to its customers is prohibited even under its narrow interpretation of Brumbaugh.

Although Brumbaugh prohibits oral communication when completing forms which have not been approved by this Court, Rule 10-1.1(b), Rules Regulation The Florida Bar, allows the nonattorney to engage in oral communications "reasonably necessary to elicit factual information to complete [Supreme Court approved] form(s) and inform the individual how to file such form(s)." Therefore, if the Notice to Owner and Notice to Contractor forms are approved by

this Court as requested by the Standing Committee, NACM would be allowed to ask its customers when they first commenced to furnish materials, labor or services; whether the customer was doing business with the contractor, subcontractor, or sub-subcontractor; why the customer was billed for serving two notices; and other spontaneous oral communication reasonably necessary to elicit factual information which NACM argues is needed to conduct its business. However, NACM would not be allowed to explain the definition of privity, interpret the intricacies of the Mechanic's Lien statute, or otherwise render legal advice. Therefore, the information which NACM wishes to elicit or impart may be communicated if the forms are approved. As to NACM's suggestion that in approving the forms this Court take into consideration potential legislative changes that may occur in the future, any necessary leeway is incorporated in the form set forth in exhibit "B" attached to the proposed advisory opinion as it sets forth the form currently existing in the statutes. §§713.06(2)(a); 713.23(1)(d), Fla. Stat. (1988). Therefore, if the statutes were to change, the approved forms would also change.

CONCLUSION

NACM and the Standing Committee agree that nonattorneys should be allowed to complete the Notice to Owner and Notice to Contractor. NACM merely misconstrues the law set forth in the proposed advisory opinion and its application to the findings of fact. Should this Court agree with NACM's interpretation of the case law, the definition of the practice of law would be greatly limited while the area of authorized activities would be greatly expanded. It is not necessary for this Court to take this drastic step in order to reach the result reached by the Standing Committee. Therefore, the Standing Committee on the Unlicensed Practice of Law respectfully requests that this Court adopt the conclusions of law as expressed in its proposed advisory opinion.

Respectfully submitted by
the Standing Committee on UPL,

Joseph R. Boyd, Chairman
2441 Monticello Drive
Tallahassee, Fl. 32302
(904) 386-2171

Mary Ellen Bateman
UPL Counsel
The Florida Bar
Tallahassee, Fl. 32399-2300
(904) 222-5286

Lori S. Holcomb
Assistant UPL Counsel
The Florida Bar
Tallahassee, Fl. 32399-2300
(904) 222-5286

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert B. Worman, 145 North Magnolia Avenue, Post Office Box 1764, Orlando, Florida 32802 and Stephen R. Moorhead, 316 Baylen Street, Suite 560, Pensacola, Florida 32501 this 28th day of December, 1988.

Lee J. Holcomb
Attorney