SUPREME COURT OF FLORIDA

CASE NO. 73,306

THE FLORIDA BAR RE: ADVISORY OPINION - NONLAWYER PREPARATION OF NOTICE TO OWNER AND NOTICE TO CONTRACTOR.

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AMICUS CURIE BRIEF OF NATIONAL ASSOCIATION OF CREDIT MANAGEMENT OF FLORIDA, INC.

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ISSUE PRESENTED

IT SHOULD NOT BE CONSTRUED TO BE THE UNLICENSED PRACTICE OF LAW FOR NONLAWYERS TO ENGAGE IN COMMUNICATIONS WITH THEIR CUSTOMERS FOR THE PURPOSES OF COMPLETING NOTICE TO OWNER FORMS AND NOTICE TO CONTRACTOR FORMS.

PRELIMINARY STATEMENT

National Association of Credit Management of Florida, Inc., (NACM), files its Amicus Curie Brief in this matter based upon its concern over the matters be considered by this Court substantially impacting a significant portion of the business presently conducted by NACM, which includes the gathering of information and preparing of Notices to Owner and Notices to Contractor by nonlawyers on behalf of its customers. At the hearing held by the Standing Committee on the Unlicensed Practice of Law on June 16, 1988, NACM'S representative, Dick Clark, as Director of Notice to Owner operations, and its general counsel, Robert B. Worman, testified in support of its position that the conducting of these activities did not constitute the unlicensed practice of law by a nonlawyer.

NACM has reviewed the Proposed Advisory Opinion submitted by The Florida Bar in this matter, and while it has no objection to those matters set forth in the Introduction, General Discussions of Mechanics' Lien Statute and Findings of Fact, does disagree with The Florida Bar with respect to portions of its Conclusions of Law and General Conclusion and consequently requests this Court to consider NACM'S position in these matters as set forth hereinafter.

ARGUMENT

NACM objects to The Florida Bar's analysis of the second prong of the Sperry test, wherein it determined that persons providing these notice type services possess legal skill and knowledge greater than that possessed by average citizens. While admittedly this may be true and an accurate finding as it applies to the population of this State in general, this statement is contradictory to statements contained in the Proposed Advisory Opinion Findings of Fact under the category of Current Practice, wherein The Florida Bar found:

> "Generally, the construction industry is aware of the requirements of the mechanics' lien statute as it is tested on the contractor's licensing examination. (See also National Gypsum Co. v. Travelers Indemnity Co., 417 So 2d 254 (Fla. 1982) wherein the Court found that the construction industry is aware of the requirement to give timely notice.) Any changes in the law can be relayed to the industry through the seminars." Page 10.

Thus, while admittedly the general population is not aware of Florida's Mechanics' Lien Law, it is apparent, as found by The Florida Bar and as specifically noted by the Supreme Court in National Gypsum the construction industry, as a special segment of the population is well aware of and keeps current on legal requirements pertaining to the perfection of mechanics' lien rights. That being the case, NACM would suggest that the second prong of the Sperry test has not been met, if this Court is willing to consider that population of the general public who has a need to know, or an interest in the mechanics' lien law, does possess the skill and knowledge of its application equivalent to that of those employees

of the industry who provide these Notices to Owner and Notices to Contractor.

The question then might be asked, If that is the case, why is there a need for the utilization of Notice to Owner/Notice to Contractor service companies? While this question was asked of the witnesses during the hearing, The Florida Bar's Advisory Opinion makes no reference or finding of fact on this issue. Notwithstanding this fact, the undersigned, who did testify with regard to this matter, explained to the members of the Committee that it was economically unrealistic for attorneys to devote the necessary time to do this work and charge a fee commensurate with that charged by the Notice industry, and at the same time, individual customers of the Notice industry neither have sufficient requirement in terms of the number of notices they send out each week to justify an employee doing them, nor the manpower available to devote to researching the public records and obtaining the information necessary to serve their own Notice to Owner/Notice to Contractor. As a consequence, Notice to Owner type companies can utilize economies of scale to provide this service on an economically realistic basis to its customers at a time when lawyers cannot and will not do so, and the customers cannot afford to maintain employees devoted to that task.

Of grave concern to the undersigned, both as an attorney representing lienors and bond claimants, and as attorney for NACM, is the possibility of Notice to Owner/Notice to Contractor companies being hamstrung in their ability to render an otherwise valuable service to individuals and businesses in the construction industry

which tremendously impacts their ability to recover monies otherwise due to them but unobtainable under normal collection-type lawsuits.

NACM is likewise concerned over The Florida Bar's analysis of the situation and determination that the preparing and serving of these Notices to Owner/Notices to Contractor meets the Sperry test of being the unauthorized practice of law, while at the same time acknowledging that this Court has previously ruled in The Florida Bar v. Brumbaugh, 355 So 2d 1186 (Fla. 1978), that it is not the unlicensed practice of law where a nonlawyer assists an individual with limited oral communications to complete forms and inform the individual on the filing of such forms. While The Florida Bar, in its Advisory Opinion interpreting this Court's ruling in Brumbaugh, states that nonlawyers could not orally communicate with customers, including correcting errors and omissions, NACM is concerned that should this Court expand upon or adopt in this instance a similar rule of non-communication between the Notice to Owner/Notice to Contractor companies and their customers, the ability to properly research the public records and fill out the blank notice forms could lead to errors and problems causing defective notices which previously has not existed. The comparison to title insurance searches and real estate contracts being prepared by nonlawyers is appropriate.

In Brumbaugh, this Court restricted communication against nonlawyers inquiring or answering questions as to the particular forms which may be necessary, how best the forms would be filled out, where the forms were to be properly filed, and how evidence could be presented at a Court hearing pursuant to the forms. Id. at

Page 1194. NACM is concerned that should the Court, pursuant to The Florida Bar's advisory opinion, limit its ability to communicate and converse with its customers, such as seeking information as to when the customer first commenced to furnish materials, labor or services to the jobsite, or whether the customer was doing business with the contractor, subcontractor or sub-subcontractor, it cannot determine whether or not sufficient time exists for service by United States mail, certified return receipt requested, or hand delivery, since each method is authorized by Statute. Florida Statutes Section 713.18. In addition, as required by Florida Statutes Section 713.06, where the lienor attempting to give notice is not in privity with the contractor, it must "serve" a copy of the Notice to Owner on the contractor in order to perfect its lien rights. To obtain this information may require the spontaneity of oral communication between the Notice to Owner company and its customer. Just as importantly, if a customer calls, (as has been the case in the past with NACM), inquiring as to why it was charged an extra few dollars for serving one Notice to Owner as opposed to another, the notice company needs to be able to have the opportunity to explain to the customer the additional charges were incurred due to the fact that an additional copy of the Notice to Owner had to be served upon the contractor with whom the lienor was not in privity. If the Notice to Owner/Notice to Contractor company does not have the capability of conducting these type of spontaneous communication, it would make it difficult, if not impossible, for the company to conduct its business from a practical standpoint. The consequence of this Court's ruling on this issue will have a major impact on the ability

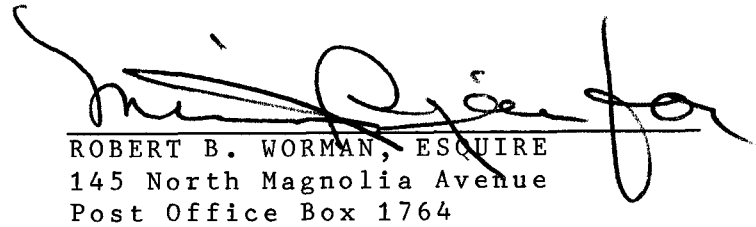
of lienors to commence the perfection of their lien rights since it is the position of NACM that it is economically unrealistic and impractical for the vast majority of lienors to attempt to perform, in-house, the serving of notices.

CONCLUSION

NACM does not believe that the nonlawyer preparation and completion of Notices to Owner and Notices to Contractor, including communicating with lienors regarding information necessary to fill in blank forms for these notices, constitutes the unlicensed practice of law. To the extent that the Standing Committee on the Unlicensed Practice of Law and The Florida Bar have suggested that the Supreme Court approve the forms proposed, NACM concurs provided that some leeway is authorized for the taking into consideration of potential legislative changes which may occur in the future with respect to the information on the Notice to Owner/Notice to Contractor form proposed. However, NACM disagrees and respectfully urges this Court not to accept and adopt the Conclusion of the Standing Committee on the Unlicensed Practice of Law and The Florida Bar that it not be allowed to communicate with its customers regarding the information utilized on the form, the practical advantages of attempting serve by certified mail, return receipt requested, as opposed to hand delivery or posting on the jobsite due to time constraints, the needs for serving more than just an original Notice to Owner on the Owner, and the appropriateness or lack thereof of serving a Notice where the time period within which to serve same may have already expired, based upon a mathematical

computation of the 45 day time limit from the furnishing of the first materials, labor or services to the jobsite.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to JOSEPH R. BOYD, CHAIRMAN, 2441 Monticello Drive, Tallahassee, Florida 32303; LORI S. HOLCOMB, ESQUIRE, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and STEPHEN R. MOORHEAD, Petitioner, 316 Baylen Street, Suite 560, Pensacola, Florida 32501; this 9th day of December, 1988.

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