

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR - FAO #91001 **

RE: ADVISORY OPINION - **

NON-LAWYER PREPARATION **
OF LIVING TRUSTS

CASE NO. 78,358

BRIEF OF FLORIDA ASSOCIATION OF LIFE UNDERWRITERS

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PRELIMINARY STATEMENT

The FLORIDA ASSOCIATION OF LIFE UNDERWRITERS ("FALU"), is a Florida corporation with offices located at **2909 Bay to Bay Blvd.**, Suite 410, Tampa, FL 33629. FALU is an organization of full-time life insurance underwriters/agents, consisting of approximately 8,000 members **who** are licensed **to** sell life insurance and related products in Florida. FALU has association counterparts in each of the **50 states** and the U.S. territories of Puerto Rico and Guam. It's national counterpart is the National Association of Life Underwriters, with offices at 1922 F Street, NW, Washington, DC 20006.

STATEMENT OF CASE AND FACTS

The nature of this **case** is the above styled Proposed Advisory Opinion by the Florida Bar. FALU has no objection to the facts in the proposed Opinion.

FALU files this Brief pursuant to Court Order dated September 3, 1991, granting its Notice of Appearance and Motion **for** Leave to File **a** Brief and Reply Brief, dated August 30, 1991. Its Initial Brief **was** ordered to be served not later than October 3, 1991.

In the context of the proposed Bar Opinion and this Brief, FALU basically views the non-lawyer as a life insurance agent.

All emphasis in this Brief is supplied.

SUMMARY OF ARGUMENT

The qualified, regulated, non-lawyer insurance agent has a business and professional role to play in the creation of a living trust; especially in steps 1 (gathering of information) and 5 (funding) set forth in the proposed Opinion. This role is defined and established by statute and prior UPL decisions by this Court. It is **also** supported by the Florida Constitution.

ARGUMENT

ISSUE PRESENTED FOR REVIEW: Whether it constitutes the unlicensed practice of law for a corporation or other nonlawyer to draft living trusts and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer and the completed documents are reviewed by a member of The Florida Bar prior to execution.

Life insurance agents are thoroughly regulated by chap. 626, Florida Statutes, 1990. Among other things, they are defined in sec. 626.051; licensed by sec. 626.112; investigated pursuant to sec. 626.201; examined pursuant to sec. 626.221 & .241; governed by the Unfair Insurance Trade Practices Act, secs. 626.951-.99, and a Code of Ethics, sec. 626.797 and chap. 4-9, Florida Administrative Code; and required by sec. 626.2815 to undergo continuing education.

But FALU does not advocate that agents perform business or professional activities for which they are unqualified or unregulated.

FALU seeks only to preserve permissible existing rights (and duties) for qualified, regulated, non-lawyer insurance agents to participate in their proper roles in the creation of a living trust; as set forth in steps 1-5 (p. 16-23) of the proposed Opinion.

Examples of those existing rights are set forth in the list of "permissible" non-lawyer activities in the In re Florida Bar and Raymond, James & Assocs., Inc., 215 So. 2d 613, 614 (Fla. 1968). While James applies to securities, life agents can and do use the lists of permissible and prohibited activities as a guide, applying common sense in their application to the facts.

Specifically, the qualified insurance agent can be a great help to the lawyer and client in:

"Step 1) the gathering of the necessary information" to create a trust. This activity is simply part of the sales and analysis process done routinely by almost any life agent, and at no charge to the "client". Agents are trained to do it; they like it; and their companies support them in it. If the agent and lawyer work together properly, everyone benefits. The life agent's role in assisting the lawyer in Step 1 should clearly be preserved,

"Step 5) the funding of the trust document". In a number of instances, life insurance is the major asset, if not the only

one, of such a living trust. The insurance proceeds provide much needed liquidity for the beneficiaries; and the trustee manages and distributes these proceeds in a structured manner. In some cases, non-liquid assets are unforeseeably "poured over" from a Will into the Trust; and predictable liquidity is important in that instance, **as** well, to **pay** taxes and avoid forced sale of non-liquid assets, for example. Customarily, neither agents nor their companies charge for designating the Trustee as a beneficiary or policy owner, nor **for** payment of proceeds to the Trust upon death of the insured.

It is fairly safe to say that enough "liquidity" in an estate is always welcome; and, in fact, is a necessary ingredient in the frequently unpredictable mix and value of estate assets. And the payment and value of the death proceeds of the policy are reassuringly predictable. The life agent has an important role to play in Step 5 which should be preserved.

FALU supports the "reasonable protection" standard for those (clients) advised. Florida Bas v. Town, 174 So. 2d 395, 396-7 (Fla. 1965) (quoting Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962)), vacated on other grounds, 373 U.S. 379 (1963).

As a policy matter in the context of seeking legal assistance, this Court has already recognized that **a** state may **not** choose the way of greater interference in a constitutionally protected activity when a lesser burden or less drastic means will do. Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1978). For example, such **a** protected activity exists in the case

at bar, Art. I, sec. 2, Fla. Const., (the inalienable right to be rewarded for industry and to acquire, possess, and protect property). It is one which applies to all parties, life agents included.

FALU suggests that this Court's policy of judicial restraint should **also** apply when several professional disciplines overlap, as recognized in Florida Bar re Advisory Opinion - Nonlawyer Preparation of Pension Plans, 571 So. 2d 430, 433 (Fla. 1990), so long as the public is reasonably protected. In the creation of living trusts, the discipline of both the lawyer and non-lawyer underwriter can sensibly overlap and mutually enhance the other--with resultant client benefit.

In its proposed Opinion, the Bar has also recognized the legitimate overlapping of lawyer and non-lawyer functions of various kinds, with attendant commercial benefits if correctly done: page 18 (discussing Step 1), pages 22-23 (discussing Step 5), and page 26.

CONCLUSION

FALU does not believe that the living trusts described in the proposed Opinion are an insurance product. And so the activity described in the Opinion does not seem to be regulated unless this Court does it.

But the qualified, regulated, non-lawyer insurance agent has a recognized role to play and is not the target of the Opinion. He/she can and does peacefully coexist with lawyers, Trustees,

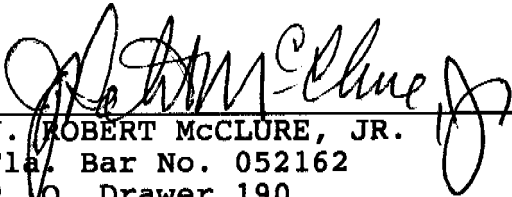
CPA's, bankers, etc.; and is entitled to be rewarded for his/her industry.

So FALU requests the Court not to impose any extraneous requirements on legitimate, non-lawyer life agent activity in order to reach and cure non-lawyer activity which should be regulated, if not prohibited. Fair, even-handed regulation is called for, with a decision which provides guidance for lawyers and non-lawyers alike, as prior decisions have done.

Respectfully submitted,

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