IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

IN RE:

FLORIDA BAR ADVISORY OPINION - UNLICENSED PRACTICE OF LAW NON-LAWYER PREPARATION OF LIVING TRUSTS

CASE No: 78,358

INITIAL BRIEF OF

FAMILY LIVING TRUSTS, INC. OF FLORIDA

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ABBREVIATIONS

The following abbreviations will be used in this Brief:

Committee - The Florida Bas Standing Committee on the Unlicensed Practice of Law

Company- The interested party herein, Family Living Trusts, inc. of Florida.

Living Trust Company - One of those entities engaged in the industry of marketing living trusts.

Living Trust - Unless otherwise indicated, the collection of documents developed to accomplish the living trust concept, including revocable intervivos trust documents as well as pour-over wills, various powers of attorney, designations of health care surrogate, declarations commonly known as a "living will" and other such documents.

Opinion - the proposed Advisory Opinion as propounded by the Committee, FAO # 91001.

UPL - The unlicensed practice of law.

STATEMENT OF THE CASE AND FACTS

The interested party herein (the Company) is a company that markets living trusts as contemplated in the Opinion. The Company does not, however, engage in acts which it believes is the unlicensed practice of law and differs in its business methods from those criticized in the. The Company, through a representative, attended the hearings of the UPL Committee, and outlined to the UPL Committee its methods of doing business and the rationales therefor. No recommended method of practice has been offered by the Committee, other than the negative implication that no such business be conducted, no industry be developed, under the threat of every action being labeled as UPL and prosecution brought.

The Company does not object to the "facts" purporting to show public harm or any other matter as identified in the but expressly notes that much of the testimony was anecdotal, speculative, and without substantial corroborating support enough to guarantee a minimum of credibility, much less clear and convincing evidence. Only further enquiry, using a methodology not available or not used by the Committee can give this Court the basis for a truly informed opinion on this matter.

The Company agrees and supports certain of the Committee's conclusions as expressed in the Opinion and objects to others. In the course of the Argument herein, allusions to permissible action will be suggested, which will be largely activities which the Company does now or would likely agree to do in the future.

QUESTION PRESENTED

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?

SUMMARY OF ARGUMENT

The UPL Committee suggests to this court in its Opinion that the entire industry as developed by living trust companies be prevented from operation by labelling all relevant activities when engaging in this business as the unlicensed practice of law. This position is factually and legally unwarranted.

The Committee has failed to make a proper study of all the entities involved inthe this industry, which is an area filled with the blending of professions. The Committee identifies a division of the business into five segments or "steps". This usage will be followed. However, only two of the five steps necessarily involve the practice of law. Three have tangential concerns for unlicensed practice of law. With the establishment of industry guidelines, perhaps at this Court's direction, widespread public harm of the kind testified to can be precluded ok abated.

There is no apparent immediate public necessity for the destruction of this industry and no justification for permitting such extreme judicial regulation without much further review of the industry. The effect of the Court's opinion and any regulations must, in any case, be applied to all entities which engage in the practices similar to five steps, and this application is overbroad without further study.

ARGUMENT

I.

THE ACTIVITIES OF THE NONLAWYER COMPANIES ENGAGED IN THE INDUSTRY OF LIVING TRUSTS DOES NOT OF NECESSITY CONSTITUTE THE PRACTICE OF LAW

A. REVIEW OF THE INDUSTRY

The industry developed by living trust companies is not unlawful, and does not, of necessity, require engaging in unlicensed practice of law.

The industry of living trust production is not as narrow as the Committee has presented. There are actually three identifiable types of entities. First are the attorneys engaged in this area as part of their professional practice. Second are the institutions engaged in this area as an adjunct to their licensed banking, investing and brokerage activities and their positions as fiduciaries. And third, there are the recently established living trust companies which engage in this area as a lawful business activity.

There is at present no inherent proscription of the activity of the living trust companies. Many industries exist wherein there is an blend of the legal, financial planning, fiduciary, and accounting professions. Examples are insurance, taxation, and investment industries. Many industries, moreover, make use of separate but coordinated marketing, production, quality control and servicing departments inside each independent entity of the industry. Many industries involving a product, such

as automobiles, yield examples of this departmental specialization. To limit the scope of the living trust industry to the one facet of "the practice of law" in this context is against the experience of current business practice.

In the case of The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1191 (Fla. 1978), the Court stated:

> "... any attempt to formulate a lasting, all encompassing definition of the practice of law is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the ever changing business and social order. '" Brumbaugh at 1191-1192 citing State Bar of Michigan v Cramer 249 N.W. 2d 1 (Mich.1976).

Furthermore, courts have heretofore recognized that there is a definite role for nonlawyers in many areas lawyers have traditionally been active in, if not exclusively, including real estate conveyance (see Preferred Title Insurance Services, Inc. v Seven Seas Resort Condominium, Inc. 458 So.2d 884 (Fla. 5DCA 1984), pension plan development (see The Florida Bar In re: advisory Opinion - Nonlawyer Preparation of Pension Plans, 571 So.2d 430 (FLa. 1990), and mechanic's liens (see The Florida Bar in Re: advisory Opinion - Nonlawyer Preparation of Notice to Owner and Notice to Contractor, 544 So.2d 1013, (Fla. 1989). In the case of In Re The Florida Bar and Raymond, James and Associates, 215 So.2d 613 (Fla. 1968), the Court set out lists delineating the appropriate role of nonlawyers in the financial planning area.

The Supreme Court of Florida has determined that a parcing of the activities involved in the industry is not of overriding

importance, holding in the Pension Plan case, Supra, at p. 433 that "In cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation.' " Ibid, citing Application of N.J. Soc'y of Certified Pub. Accountants, 102 N.J. 2331, 237, 507 A.2d 711, 714 (1986).

Therefore a mere division of the activities of an industry into "steps" in some of which lawyers may or must practice, is not conclusive of the matter. The benefit of the industry to the public and the operations of the entities engaged in it are relevant. Unless there is no other method for an entity to accomplish a step, there is no reason not to permit a blending or overlapping of professional disciplines to accomplish the goal of the activity.

However, the legal profession, apparently represented by the UPL Committee, represents but one facet of the industry, but is apparently attempting to prevent evolution of the third type of entity by asking that this Court identify all relevant activities as the unlicensed practice of law. This will have a chilling effect on the establishment of industry standards and practices so broad that the living trusts companies may well cease to exist altogether. In the process, perhaps unintendedly, the Bar attacks the future of the other non-lawyer institutions as well. If the committee can not countenance overlapping professional activities, then both the living trust companies and the heretofore unregulated institutions will be endangered.

Banks, investment and brokerage firms (collectively "institutions") actively engage in each of the "five steps". The public harms cited in the Opinion itself includes reference to banks. Banks may differ in their forms of solicitation, but are subject to every speculative and anecdotal criticism leveled at the living trust companies, and then some.

The banks use their positions and reputations of trust with depositors to induce them to place confidence in their corporation in general and therefore in the ancillary services it provides. Other investment and brokerage institutions similarly use their primary positions as fiduciaries and agents in which confidence in the institution is built by reputation to imply that their ancillary activities are of the same caliber. In this atmosphere of trust and reliance, a non-lawyer teller, officer, or institutional broker or agent may suggest the consideration or use of a living trust. While trust business development is technically outside the fiduciary roles of such institutions, a pass-through or umbrella influence on clients' activities can not be denied. a living trust company, on the other hand, has no such inherent back-log of previously developed relationships, reputation or fiduciary reliance to promote itself and its ancillary services and products. This Court should gather information on the extent of living trust services as an adjunct of such institutions and the extent of public harm caused thereby. It is speculatively asserted that the institutions are capable of many times the public harm that living trust companies

are capable of at this stage of development of the industry. Any application of unlicensed practice of law theories to living trust companies must be equally rigorously applied to these institutions or a much greater imminent public harm is being done. These institutions cannot retreat into the safe haven of their licenses as fiduciaries given the Opinion's expression of the unregulated nature of the living trust industry. It is no excuse that such institutions are not the apparent "target" of the Opinion. This argument merely reinforces the unconstitutionally **overbroad** nature of the Opinion and raises serious constitutional questions of equal application and equal protection of the law. Therefore whereas living trust companies must perforce market by different methods than the institutions, those methods, if legal, are not made reprehensible by the fact that they operate in a much more open-market atmosphere while the institutions in effect sell their ancillary services in-house in a manner reminiscent of bait-and-switch tactics. The mere fact that solicitation formats differ do not condemn or exonerate any individual activity.

The marketing activities that living trust companies engage in are themselves are well governed by advertising and soliciting laws and regulations both on the state and federal level. The Court may take judicial notice of these many regulations, or establish an ad hoc entity mandated to **gather** such information.

A bank employee typically gathers all the initial information described in step one, with the attendant criticism

of interest in future sale of services, including fiduciary services. An institution-employed lawyer typically draws up documents (with speculatively a much greater chance of self-dealing for the institution and conflicts of interest on the part of the attorney than any attorney engaged by a living trust company). The institution then often attempts to induce the client to name the institution, if not trustee, as administrator or manager (charging a fee) of a pool of liquid assets that the institution can manipulate (with the opportunity for churning) and charge commissions for handling. The institution has less concern than a living trust company that estate considerations are taken care of, even to a lack of interest in anything other than liquid assets being in the corpus of the trust at all. The overbroad effect of the Opinion on an industry heretofore apparently not the source of significant inherent public harm, and despite the existence of speculative harms, makes the Opinion inherently flawed.

II.

THE "FIVE STEPS" DO NOT PRECLUDE NON-LAWYER INVOLVEMENT IN EACH STEP

Despite the above, it is patently the business practices of the living trust companies that are the primary target of the Opinion. The Committee does describe the process of the production (as opposed to marketing) of living trusts as accomplished by every entity in the industry, and identifies five

steps in each transaction. It is the Committee's opinion apparently that each of the five steps must of necessity exclusively involve the practice of law, and that not one segment of the combination of all five steps can not be accomplished other than by the practice of law. This is not so. The steps as described by the Committee are: 1) the gathering of the necessary information; 2) the assembly of the document; 3) review with the client; 4) the document's proper execution; and 5) the funding of the trust document. This discussion will address the steps in order of attorney involvement rather than chronologically.

A) Assembly of the Document

Two steps are without doubt the exclusive province of the attorney: step 2, assembly of the documents; and step 3, review of the documents with the client. Step 2, assembly, is the practice of law because it requires skill and knowledge beyond that commonly possessed by the average citizen. This level of ability (or the ability to apply skills on behalf of others) requires a legal education and Bar passage. Nevertheless, several of the witnesses to the hearings of the Committee commented that the skill is not so esoteric as to be beyond the reasonably competent and informed attorney practicing in this area. The Committee recognizes in the Opinion that the witnesses generally asserted that many of the provisions are standard clauses having been well litigated in probate and tax courts. What is required from a practitioner's point of view, therefore, is not original language drafting skills so much as an eye for recognizing the

applicability of well recognized clauses to the individual situation confronted. However, while it is conceivably possible that this step does not require an attorney licensed in Florida, it should, for the sake of protecting against the public harm of practice by those not familiar with what the Committee describes as "the peculiarities" of Florida law as well as federal or other jurisdiction law. Furthermore, for proper professional responsibility to attach to the act, Florida licensure must be required.

B) Review with the Client

Step 3, review of the document, is the practice of law because it requires an analysis and understanding of the desires as expressed by the client and the ability to provide a concurrent "translation" of the document language to insure that ultimately if litigated the document, even if otherwise valid, accomplishes those desires. There is also the need in this step to be able to assure the client that, under a pledge of professional responsibility, that the documents will accomplish the goals set for it. This ability and responsibility is the essence of the practice of law, requiring not only skill and knowledge greater than the common citizen, but also the active practice of the profession and the submission to professional regulation thereof specifically in Florida.

Some living trust companies divide the practice-of-law steps between two attorneys in order to provide a safeguard against conflict of interest by an attorney possibly representing the

company in step 2 and the client in step 3. Any attorney representing the client must perforce be able to exercise independent judgement even to advising against proceeding with the living trust transaction. This speculative public harm has not been much addressed by the Committee in the opinion, as considering it beyond its purview, but should be addressed by the Court.

c) Gathering Information

Beyond these two areas, the line between practice of law and permissible activity by non-lawyers is much less clear. As to obtaining client information, in the both Pension Plan and Raymond, James cases, Supra, the Court recognized that non-lawyers could gather relevant information. This gathering was especially recognized in the context of overlapping and complimentary activity by nonlawyers and lawyers. those living trust companies which bifurcate the attorney's roles as described above insist that the assembly attorney also have a role in gathering information, not the least consideration of which is that the living trust is a product desired by the client with sufficient knowledge of its capabilities and limitations.

But also, the attorney needs to have the expression of the client, not the nonlawyer, as to his desires, to avoid the possibility of the overbearing of the will of the client by the non-lawyer, and to properly determine what should be included in the assembly. This "analysis" is perhaps another step that the Committee overlooks or describes as the "threshold" question of

whether the client **"needs"** the living trust. The difference between gathering and analysis was important and integral to the Pension Plan and Rawnond, James cases. For the Committee, as expressed in the Opinion, part of the analysis or threshold determination is the determination that the trust is **"needed".** Here the Committee is substituting its determination and that of all lawyers for the expressed desires of each individual client. while it is not in the ultimate commercial best interests of any entity in the industry, lawyer, institution or living trust company, it is particularly inappropriate for the lawyers to refuse to accede to clients' wishes even if there is little apparent **"need"** as determined by lawyer, for the motivation, beyond determination that it is legal, is not for the lawyer to **judge.**

This criticism, the substitution of the lawyer's will for the client's, greatly outweighs in public harm, on the anecdotal basis relied upon by the committee, the speculative harm that might occur by widespread use of the living **trust** and the living trust companies to procure it. This occurs especially if the client's mind is determined on a non-intuitive course (non-intuitive for most lawyers, that is). In other words, if a client wants something, it's not the lawyer's place to say," you can't have it because you don't need **it."** Does the Committee expect that attorneys should tell clients **(colloquially),"You** can't have a dissolution of your marriage (ie I won't represent your case) because you don't need it?" That would certainly be the

substitution of the lawyer's will for that of the client, and even impinge on the overlapping professional decision of clergy and marriage counsellors, and involve an area in which the lawyer may well not be competent to render a opinion at all. The need or desire for a trust, just as with dissolution of marriage, may not be based on purely financial considerations of taxes and estates. After all, the client may not want to gain the last iota of tax advantage; the client may want the living trust perhaps for its intervivos provisions regarding guardianship. Lawyers often, through ignorance of the living trust, or distaste for drafting as well as the professional interest in increasing probate work, advise against living trusts based on their own value systems, not the client's. It is this very point that has led to bitter criticism of the legal profession. The Committee's Opinion only reinforces this attitude, the Court's should not.

Moreover, there is much advantage to having a two step approach to step 1. Many legal professional offices utilize a preliminary information gathering procedure by a nonlawyer to aid the lawyer in the efficient analysis of the situation. There the nonlawyer is under the presumed supervision of the attorney. But in the instant case, this "efficiency" is presumably still a valid rationale in a case involving overlapping professions for each profession may involve itself to the extent of its licensure and ability, independently of the other overlapping profession. Thus, whereas it is not and should not be, a priori, the unlicensed practice of law for a nonlawyer with an insurance or

accounting or financial planning license to engage in information gathering appropriate to their profession (and even analysis and activity thereon within their proper purview); then, if and when he passes the information to an attorney for legal analysis and **"assembly",** pursuant to a request for a living trust, the information gathering can not be the unlicensed practice of law then looked at in hindsight, a posteriori.

D) Execution of the Documents

The execution of the documents, step 4, is a matter which the Committee recognizes as quite ministerial. The footnote referring to real estate closing procedures is appropriate. It is likely that in the course of the discussion of the Opinion, this point might be lightly glossed over. But it is important to note that here, while an attorney may well be an appropriate supervisor, the actual action is not done by the attorney, but by the client. Execution is not an act requiring legal skill or a license to practice, supervision is. After the step 3 review, if the legal advice is to go ahead, then step 4 is a forgone conclusion, except as to the actual act. Public harm can only occur if some duress or incapacity to execute exists. Attorneys are familiar with the evaluating circumstances surrounding signing wills and contracts and are good witnesses to the fact that the ceremony has been conducted correctly, so as to forestall any future criticism, but the attorney is not ultimately the active party. The relevance for this discussion is that here the Committee itself identifies an area really not in

the actual practice of law, but necessary to the transaction. This bolsters the legitimacy of the living trust companies claim to be allowed to exist, under the theory that if every necessary activity is not the practice of law, then a way must be found to accommodate the entire process, if legal and desired by the public, and to provide for overlapping or interlocking professional activities. The living trusts are not required to fulfill a contract, as most real property closings are, but the voluntary establishment of an entity which is still subject to revocation and alteration (unlike irrevocable trusts). The inchoate public harm of an improperly executed living trust, and especially its component parts, has existed for many other documents, and is therefore no new threat. Unless every will and deed is invalidated for not having been executed under the supervision of an attorney, this point can not be used by the Committee as an excuse to prevent the living trust companies from operating. The Committee must not merely seek to blandly hope to "avoid any problems" by outlawing the living trust companies, it must accommodate a legitimate business activity in the context of current social and business order.

E) Funding the Trust

The final necessary step, number five, is identified as funding the trust document. In fact it is the trust itself that is funded. The practice of law is not necessarily required for this step to occur. As the Opinion implies, this step is not even an absolute requirement for the trust to be in existence; it will

be in place, but empty. It is in this area that the Committee finds public harm done by an attorney who left the trust unfunded. No declaration that this step is exclusively the province of lawyers will remedy that harm. This inattention to funding is another criticism of complete attorney control of living trusts. However, Many living trusts companies consider this an integral part of their service.

Many attorneys make additional charges for funding transactions, many living trust companies do not. It is in the area of the actual transactions required for transfers into the trust that legal practice may be required. Real property, for instance, may indeed be required to be conveyed with the aid of an attorney. But what of common accounts? What of personal property? Even the Florida wills statutes provide an informal means of distributing personalty, if referred to under a will. FS 732.515. Surely brokers of accounts in financial institutions are capable of retitling the assets of their own accounts without outside interference. Furthermore, no Florida attorney is competent to convey even real property that is located in another state, even if the trust situs is Florida.

The second question, what to put in or leave out of the trust, is again a matter where the legal, financial planning, insurance, and accounting professions surely overlap. There are many tax (primarily federal) and probate questions. And here, there are some issues that have yet to be fully resolved that do call for an attorney's opinion and advice. The homestead issue

raised by the Committee is a pitfall for the unwary precisely because the legal and judicial community has not settled the matter. Living trust companies will be looking to thses professionals for guidance and education.

The clients of living trusts are ultimately responsible for the funding of their trusts. Any counselor, of whatever professional persuasion, can only advise and suggest. They may advise and suggest only in their area of expertise. But anyone, nonlawyer or lawyer, may cajole and remind the client that this step needs to be undertaken to fully accomplish the original goals.

The funding, as the Opinion implies, is an ongoing process. As new assets are created, or former assets are sold or exchanged, the trust will expand and contract and proper advice is required. The living trust companies interest in further sales, so much criticized by the Committee, is an incentive to keep them in contact with the clients for continual review of the situation. Attorneys and institutions also have exactly the same interest and incentive. As has been pointed out, attorneys often do the least in following back up even after initial funding, and institutions are often primarily interested in developing a pool of manageable accounts.

THE OPINION *AS* DEVELOPED AND PRESENTED CAN NOT PROPERLY SUPPORT A RULING OF THE SCOPE REQUESTED WITHOUT FURTHER INPUT

A. The Opinion is based on an **improper procedure and** inadequate record

The committee attempts to distinguish the Pension Plan, Supra case, on the basis that the record herein shows a greater need for public protection and that the living trust area is governed by state law.

First, the record **herein** does not show significant present public harm. There is simply too much anecdotal testimony.Of the public harm cited in the Opinion, there is a glaring example of attorney failure, not defective living trust company practice, and accusations made by institutional trust officers regarding attorneys. Surely this one accusation, and even the spector of others like it, would not justify disestablishment of the entire legal profession. However, it might justify discipline of the individual practitioner. Earlier, the Opinion cites the activity of the **"Kensington"** company, apparently approving of at least some of its methods, wherein there is described considerable attorney activity overlapping the company's activity (the Company herein operates differently, with even more regard to Florida attorney involvement), then contrasts that with an egregious example of mere form sales. There are certainly ways to accommodate properly acting living trust companies while limiting the activities of the unscrupulous. The exceptional examples only prove that the living trust industry needs guidance and

regulation, not wholesale elimination.

Second, the Opinion states that practice in this area is before the Florida courts and is governed by state law. This is patently inaccurate as much of the living trust activity is in recognition of the procedures of the Internal Revenue Service, a federal agency and the estate taxes as set out in the federal tax code (the Opinion also mentions credit shelter - a creature of the federal law). While this does not preclude the need for the attorneys involved with the area and the living trust companies to be Florida attorneys, the Opinion is nonetheless incorrect.

In the area of attorney review, the Opinion criticizes the economic practices of living trust companies that voluntarily compensate an independent attorney for his review by implying that the size of the fee determines the quality of the review. The earlier example given of attorney Dunn does not state how much he was compensated for his review. Was his successful activity uncompensated? Was it bought at an exorbitant cost? Does the Committee wish the Court to set the amount of attorney compensation? How much was the trust institution officer paid to review the trust in the case of the trust improperly handled by the attorney? These examples of public harm are contradictory and invalid to support wholesale destruction of the living trust companies ability to conduct business.

The Committee belatedly returns to the narrow issue presented by the petitioner and disapproves of the practice based upon the situation of the nonlawyer giving all the legal advice.

The issues discussed above have tried to point out where professional activities may overlap and those where attorneys must have their independence. The question of who is in the control of whom is properly addressed by a delineation of the proper spheres of activity, not the blanket elimination of the nonlawyer from the business. The current business and social order apparently demands and approves of the living trust companies and their activity. The Court must set guidelines for the activities, not substitute its judgement for that of the marketplace. The public has made its opinion regarding the practice of the legal profession of attempting to arrogate to itself exclusive ability to act in certain ares very clear and this is one area that the public demands a system at least more attune to the marketplace.

As the living trust companies continue to advertise and hold their seminars, the body of knowledge held by the general public will slowly be enhanced. Where this erodes the professional bailiwicks of the legal profession, as has occurred in the conveyancing, pension plan, and other areas, the Court must recognize the process of evolution of the business and social milieu, and intercede on behalf of the public, not the entrenched mandarins of the profession.

B. FURTHER INFORMATION GATHERING IS NECESSARY *TO* A PROPER REVIEW

The circumstances that brought the activity of this industry to the attention of the UPL Committee and thence to the Court

have some similarities to the series of decisions in the case of The Florida Bar, In Re: Advisory Opinion HRS Nonlawyer Counselor, **518 so.2d 1270** (Fla. **1988)** and **547** so.2d 909 (Fla. 1989). A the close of the earlier decision, the Court felt: "The paramount concern in defining and regulating the practice of law is the "protection of the public from incompetent, unethical, or irresponsible representation." [Citing The **Florida** Bar **v** Moses, **380 So.2d 412** (Fla. **1980)** at 417]. The Court stated:

> "While we agree with the committee that **HRS** lay counselors are engaged in the practice of law, we are not convinced that such practice is the cause of the alleged harm, or that enjoining this practice is the most effective solution to this complex problem. The parties have raised legitimate and pressing concerns which are worthy of further study. The Chief Justice shall appoint an ad hoc committee to study the problem and make recommendations to this Court. " HRS at 1272.

The instant situation clearly calls for a similar study **of the** industry and a proper analysis of all the entities, lawyers, living trust companies, and financial institutions. Proper determination of public harm must be made.

It is becoming increasingly apparent that the practice of law overlaps many other legitimate professional and commercial activities. The Court has already addressed several such areas including pension plans, financial investments, real estate transactions and mechanics lien activities. In the Pension supra, case, The Supreme Court found that pension planning is an area, **"in** which several professional disciplines overlap." In the Raymond, James, Supra, case, The Supreme Court approved of two

lists delineating allowable and not-allowable practices. In Notice, the Court discussed the customs of the industry.

The harm done to the public is not from the areas under discussion which do not constitute the practice of law. Harm, to the extent that the anecdotal references presented by various witnesses, is caused by the areas in which the practice of law is most clear - the drafting and review of the documents. Public harm is easily prevented in the execution area, by mandating supervision of such practices under the same reasoning of opinions related to real estate closing transaction practices. Public harm is easily prevented in the funding area by mandating that conveyance transactions be handled as they are traditionally handled -by individuals or their agents, where appropriate, and by attorneys in regard to real property.

It is beyond the scope of this enquiry to alleviate public harm attributable to poor solicitation practices. This area is in the purview of the legislature and various regulatory agencies which control commercial solicitation, especially home and telephone solicitations, the particular concern of many of the witnesses.

It is a well recognized trend that quasi-professional forms practice in the legal field is widespread and the subject of scrutiny by the Florida Bar. Do-it-yourself-forms providers **and** transcription-only practitioners abound. How much better to permit non-lawyer engagement in clearly non-practice areas of public information, solicitation and marketing of living trusts.

The Supreme Court has recognized and approved forms practice by non-lawyers in the Pension and Notice cases. It may decline to do so here, and still provide the latitude sought by the living trust companies.

The Committee has clearly gone beyond the scope of the question presented to present issues affecting the entire industry. Whenever such a broad condemnation is proposed, the interest of the proponents must be scrutinized. It may be an unintended result, but it is a result nevertheless, that much of the traditional practice of banking and investment companies will be drastically affected by any limitation in this field. It is no valid argument that banks were not the "target" of the committee's activity, it is incumbent upon the courts to apply the law uniformly and without favor. If it is deemed that by virtue of their licenses, regulatory requirements, and industry standards, despite that fact that these are not applied in the area under review, and not including standards applied to fiduciary activities, banks are exempt from application of the proposed UPL, then the Court must provide a means whereby any non-bank company may be so licensed and regulated. While it may be traditional activity for many banking companies, it is a traditional non-banking adjunct activity, ancillary to true banking. The same is applicable of investment houses.

Banks and investment brokerage houses have an even greater opportunity for overreaching, self-dealing and conflicts of interest than any trust preparation companies. There is criticism

of the tie-in-sales that may be a motivation of some representatives and agents for living trust companies. There is an even greater interest by institutions in the funding of such trusts with liquid assets over which the corporation is the trustee, or the portfolio manager. These entities have inherently less interest in peripheral assets such as residential real property and personal property, and allusion has been made to the funding practices of such entities that bear this out.

To date there have been many such trusts produced. Where are the complaints from the clients? Harm has been identified by those who have an interest in maintaining an eroding monopoly. Harm has been identified primarily when practitioners have reviewed other practitioner's work product. The first set of practitioners includes attorneys, bank trust officers, and lay trust production company agents. The second set of practitioners includes the same litany of attorneys, bank trust officers and lay trust production company agents. It would seem impossible for the Court to prevent or forestall public harm unless a mechanism amounting to declaratory judgement construing each trust portfolio is put in place. Clearly an impossible task. As with any poorly drawn will, contract, or other instrument, it is only when such instrument is reviewed that it can be criticized. There is just no earthly way to ensure that a trust will be better drawn by one entity than another, merely by virtue of the status of the presenter. The status of the actual drafter and the actual reviewer is another matter. It is within the scope of the control

of the practice of law that those who set word to paper be licensed as attorneys. But, counselling and education of the public is done by many professions. Legal advice is a hallmark of the attorney. Financial advice is the hallmark of the insurance, investment, banking and accounting profession. Marketing is accomplished by both highly reputable companies and by disreputable companies and individuals. The regulatory mechanisms are in place to control marketing, advertising and soliciting.

What will the Court have done with the numerous members of the public with trust portfolios in place? Is each suspect? Is the organized bar willing to review each plan? Is the Court to require recording of all such documents, including living wills and ambulatory pour-over wills?

It is well settled that each person may represent himself and even make his own will. No one must use the services of an attorney. Yet, wills are ambulatory, and are subject to court interpretation in the future. Nevertheless, wills are ultimately acceptable as valid documents and their provisions enforced with a minimum of statutory requirements. Is it the practice of law for clergy, financial planners, insurance agents and the general media culture to disseminate the requirements and the advantages of such instruments? Why is it different with living trusts? Is there to be a massive statute of frauds just for living trusts? Will this court mandate a review board or the public recordation of every living trust?

The living trust companies are engaged in a commercial

venture in which the marketing aspects of which benefit the public by putting a premium on enlightening the public as to legal realities, not do it harm. If anything, the flourishing of this industry will contribute to the legal knowledge possessed by the average citizen. The legal profession will also benefit by a more knowledgeable public that will seek its help in appropriate circumstances. The legal profession should find no interest in seeking to stifle the promulgation of knowledge. It has taken centuries of dissemination of knowledge of general common law concerning disposition of property and estates, for the "average citizen" to have as much knowledge as he does concerning wills and conveyancing. Often the vehicle has been the clergy and government agencies rather than solely the legal profession. But with modern marketing tools, advertising and soliciting formats, such knowledge is disseminated and incorporated into the body of common knowledge much faster. It is not for the legal profession to call for a retreat to a preservation of an esoteric and arcane body of knowledge available only to the initiated, and for the initiated alone to dispense.

CONCLUSION

Only After a proper investigation of the industry has been made, pursuant to standards of the Notice and HR$ cases, can a proper determination be made herein. Then it is expected that the Court will find that the living trust companies should be allowed to continue to operate, with guidelines suggested for the development of the industry and the evolution of industry standards and practices. These should be based on the guidelines of such cases as Raymond James, Supra, wherein the Court outlines permissible and not permissible activities in such language as:

> "Raymond James and Associates, Inc., its officers, agents and employees properly may, as long as it does not violate any of the foregoing provisions [related to practice of law]...(9) lecture before groups on the subject of finance, investments economics, general principles of taxation and common and usual methods of ownership of **investments."** Raymond, James at 614, 615.

It is then to be expected that the employees of the Company will be confident in their ability to conduct their activities so as to confrom with ascertainable standards in the area of their training and focus, namely estate planning rather than financial planning, and that the Company and all other living trust companies will find their proper niche in the overlapping business and social order.

As to the narrow issue originally presented, the Court should feel that the Opinion improperly expands and overreaches its authority by addressing many more issues not properly before it, and refuse to adopt the Opinion, mandating another enquiry.

Respectfully submitted,

This 25th day of October, 1991.

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CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by US Mail delivery to the following this 25th day of October, 1991.

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