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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE: ADVISORY OPINION
NONLAWYER PREPARATION OF LIVING TRUSTS

INITIAL BRIEF OF

Mid-America Living Trust Associates, Inc.
National Family Trusts, and
Living Trusts America

IN OPPOSITION TO THE PROPOSED ADVISORY OPINION

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ABBREVIATIONS

The following abbreviations will be used in this Brief:

Committee	–	The Florida Bar standing Committee on the Unlicensed Practice of Law.
Living Trust Companies	=	Interested Parties Mid-America Living Trust Associates, Inc., National Family Trusts and Living Trusts America
Opinion	–	Proposed Advisory Opinion **FAO #91001.**
UPL	–	Unlicensed practice of law.
Woodruff	=	Alan P. Woodruff's letter to Lori Holcomb dated January 2, 1990.

RECORD CITES

The following record cites will be used:

"Prop. Op. at ___"	–	Citation to the Proposed Advisory Opinion.
"Record Jan. 25, 1991 at ___"	=	The transcript of the January 25, **1991,** public hearing.
"Record April 26, 1991 at ___"	–	The transcript of the April 26, **1991,** public hearing.
"Record, Tabs ___"	=	Refers to the separately tabbed categories on file with this Court

STATEMENT OF THE CASE

Petitioner, IRA C. HATCH, on behalf of American Family Living Trust (a now defunct living trust marketing company) requested a formal Advisory Opinion as to:

> "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."

The Standing Committee on the Unlicensed Practice of Law (hereinafter "Committee") received similar requests from others and hearings were conducted on January 25, 1991, and April 26, 1991.

Oral and/or written testimony was submitted by twenty-eight attorneys; three customers; two trust companies; two insurance men; one paralegal; and one consumer advocate. Although billed as "public hearings," there was no indication that anyone from the public actually attended. Record, Tabs 1-10.

According to the Committee, at the hearings attorneys related numerous instances of harm which it used to justify its finding of "public harm." However, the Record shows that these alleged instances of harm numbered but three, and in no case was damage proved. This scant record of vague allegations of harm was, nevertheless, used to sustain the Committee's "finding" of public harm.

On August 1, 1991, the Committee issued proposed Advisory Opinion FAO number 91001 (hereinafter "Opinion") and invited

participation by other interested parties pursuant to Rule 10-7.1(g)(2).

The Opinion reached far beyond the scope of the question presented by requesting that the Florida Supreme Court ban all nonlawyers and nonlawyer companies from selling living trusts in Florida. Prop. Op. at 7.

Because the original question under consideration by the Committee was fairly narrow in scope, i.e., it addressed only "nonlawyers or nonlawyer corporations who drafted living trusts," numerous living trust companies who use lawyers to draft and review living trusts, neither filed objections nor participated at the hearings.

However, now that the scope of the Opinion encompasses all living trust companies, irrespective of the efficacy of their marketing programs, grave concern for the devastating effect the Opinion will have on commerce has resulted. Companies which either were not interested, or only mildly interested in the outcome due to the limited scope of the question presented to the Committee, have recently filed objections as a result of the Committee's broad advisory opinion.

Interested parties Mid-America Living Trust Associates, Inc., National Family Trusts, and Living Trusts America (hereinafter "Living Trust Companies") are three companies which market living trust estate plans using conservative marketing schemes. Their living trust plans are all drafted and reviewed by licensed attorneys, or under the direct supervision of a licensed attorney.

Adoption of the Committee's Opinion would prevent these conservative companies from selling living trusts in Florida.

The Committee's broad-brush treatment of nonlawyer involvement with living trusts has smeared a number of reputable companies with unwanted and unwarranted paint.

Although drawing the borders of the unlicensed practice of law is within the ambit of this Court (Rule 10-7.1(g)(3)), if the Court adopts the Opinion as written, the resulting image will improperly include excellent nonlawyers and nonlawyer companies who are providing needed estate planning services in accordance with their constitutionally guaranteed freedoms.

QUESTION PRESENTED

Does the marketing of living trusts by all nonlawyer companies, irrespective of how they may use attorneys in their marketing programs, constitute the unlicensed practice of law?

SUMMARY OF ARGUMENT

The Opinion seeks to ban the sale of living trusts by all nonlawyers and nonlawyer companies. The Opinion is constitutionally flawed for a number of good reasons.

First, many living trust companies do not engage in practices which constitute the practice of law. There are five steps in the creation of a living trust: 1) the gathering of the necessary information; 2) the assembly of the document; 3) review with the client; 4) execution of the document; and 5) the funding of the

trust document. The Committee's Opinion holds that all of these steps constitute the practice of law and must be performed by an attorney.

Of the above listed steps, however, only assembly and review of the trust documents requires skill beyond that possessed by the average citizen. The gathering of information, execution and funding steps can be successfully performed by trained nonlawyer living trust representatives. Those steps therefore do not constitute the practice of law and nonlawyers must not be prohibited from performing such services.

Second, the Opinion is not supported by the facts. There has been no adequate showing of specific public harm nor is there any evidence that nonlawyer activities in the living trust field have caused harm to the public. Nor has the Committee shown that an injunction on nonlawyer living trust companies is the most effective solution to protect the public from improper nonlawyer practices. In fact, a number of more effective and less restrictive alternatives are available.

A ban on the nonlawyer sale of living trusts is not in the public interest in light of the harm the public will suffer if such nonlawyer services are prohibited. If the Committee's Opinion is adopted, a large sector of the public will be denied access to a convenient and affordable method of estate planning.

Third, the Committee's Opinion is based on hearings and its resultant record which are constitutionally inadequate in violation of the Living Trust Companies' procedural due process rights.

Although the question presented to the Committee was limited to the issue of nonlawyer drafted living trusts, the Opinion goes far beyond that issue and would have this Court ban the sale of living trusts by all nonlawyers. The public notice was defective because it failed to apprise those who market attorney drafted trusts of the true nature and extent of the issues to be considered by the Committee.

In addition, the Record lacks sufficient evidence of public harm, plus there is no evidence that the committee investigated the issue by communicating with any of the relevant industries involved, e.g. insurance, accountants, banks or trust companies.

Fourth, the Opinion is fatally flawed because it is the product of a Committee wherein the vast majority of the voting power is held by attorneys who have a pecuniary interest in the outcome of its decisions. The ratio of voting attorney to non-attorney members in this case was 11 **to 1**. Statute requires five non-attorneys on a committee of at least fifteen attorneys. Integration Rule, Art. XVI, section 10-1.1(d).

Fifth, the Opinion unconstitutionally deprives Living Trust Companies of their constitutionally guaranteed right of liberty and property without due process of law. The Opinion restricts Living Trust Companies' freedom to contract and right to pursue a lawful occupation.

Sixth, the Opinion is void for vagueness because it fails to adequately define what constitutes the **"sale"** of living trusts and what activities nonlawyer living trust companies may and may not

engage in. The Opinion is void for overbreadth because it would ban the sale of living trusts by all nonlawyer companies including those companies with very conservative programs which are not involved with the unlicensed practice of law. The Opinion broadly stifles fundamental liberties of speech and association where less restrictive alternatives to promote the State's interest in protecting the public are available.

Seventh, to deny **all** nonlawyers and nonlawyer companies the right to do business in Florida violates the guarantees of the First Amendment protections of Freedom of Speech and Association.

Finally, the Committee's Opinion violates the Commerce Clause because it prohibits living trust companies from providing estate planning services in Florida. Given the existence of other methods of public protection, the ban unnecessarily and unreasonably impairs interstate commerce in violation of the Commerce Clause.

ARGUMENT

I.

NONLAWYER SALE OF LIVING TRUSTS DOES NOT CONSTITUTE THE UNLICENSED PRACTICE OF LAW.

A. FLORIDA'S DEFINITION OF UNLICENSED PRACTICE OF LAW AND UNDERLYING POLICIES

The unlicensed practice of law is defined by the Florida Integration Rule as:

> "The UPL, as prohibited by statute, court rule and case law of the State of Florida." Integration Rule Art XVI section 10-1.1 (b).

Although the **years** have produced broad tests and fact specific

case law to date, the term "unlicensed practice of law" remains undefined. In State v. Sperry 140 So.2d 587 (Fla. 1962), vacated on other grounds 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428, this Court delineated the following test:

> "If the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the 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, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law." Ibid. at 591.

Recognizing that the Sperry definition may not be suitable for all instances of nonlawyer conduct, this Court later clarified that the "...definition is **broad** and is given content...only as it applies to specific circumstances of **each** case." The Florida Bar v. Brumbaush 355 So.2d 1186, 1191 (Fla. 1978).

> "We agree that any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of juris prudence such practice must necessarily change with the ever changing business and social order.'" Brumbaush at 1191-1192 citing State Bar of Michigan v. Cramer 249 N.W.2d 1 (Mich. 1976); See also The Florida Bar In re: Advisory Opinion-Nonlawyer Preparation of Notice to Owner and Notice to Contractor 544 So.2d 1013, 1016 (Fla. 1989)

The purpose in regulating the practice of law is the protection of the public from the harm arising out of incompetent, unethical and irresponsible representation. The Florida Bar v. Moses 380 So.2d 412, 417 (Fla. 1980).

Where a case involves an overlap of professional disciplines, the court must focus on the public's realistic need for protection. The Florida Bar In re: Advisory Opinion-Nonlawyer Preparation of

Pension Plans 571 So.2d 430 (Fla. 1990). In the Pension Plan case, the Florida Bar asked this Court to find that nonlawyer involvement in designing and preparing pension plans and advising clients constituted the UPL. This Court refused to do so, and instead stated:

> "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.

Living Trust estate planning is quite similar to pension planning because it is also a highly specialized area in which several professional disciplines overlap. It is therefore necessary "to avoid arbitrary classifications and focus on the public's realistic need for protection and regulation" in this area.

B. SPECIFIC BPPLICATION TO THE FIVE STEPS IN THE CREATION OF A LIVING TRUST

In its Opinion, the Committee described five steps in the creation of a living trust: (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. Prop. Op. at 16.

The Committee asserts that each of the above five steps constitutes the practice of law.[1] This Court's prior holdings in

[1] Most importantly, in the Committee's advisory opinion in the Pension Plan case, supra, the Committee stated the following activities did not constitute the UPL: 1) promoting, marketing and selling pension plans; 2) explaining alternatives generally available to the public, such as discussing options; and 3) gathering client information including financial resources, objectives, costs, liabilities, and preparation and filing of

UPL cases, however, do not support the Committee's opinion as to all five steps.

(1) Gathering the Information

The mere gathering of the information necessary to create a living trust does not constitute the UPL. When dealing with reputable living trust companies, potential customers first meet with a trained nonlawyer living trust representative who explains various methods of probate and guardianship avoidance and then gathers general information from the customer. This information includes basic information regarding the customer's assets, marital status, children, previous marriages, and estate planning objectives.

After gathering the information, the representative forwards the information to a local attorney who contacts the client to verify the data and to determine the customer's needs, the type of trust best suited thereto, and what other planning documents may be required to meet the client's goals.

The actual gathering of the information does not require any more skill or knowledge than that possessed by the average person.

(2) Assembly of the Document

Well run, conservative living trust companies agree that the drafting and assembly of trust documents requires skill and knowledge of the law greater than that usually possessed by the average citizen and should therefore, be performed by attorneys.

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annual returns. The Committee's opinion prohibited the nonlawyer only from engaging in analysis, drafting and termination of the pension plan. Pension Plan, supra, appendix.

Accordingly, living trusts marketed and sold by many living trust companies are all drafted and reviewed by attorneys or at least, by persons working under the direct supervision of an attorney.

(3) Review with the Client

Living Trust Companies agree that an attorney, or one under an attorney's direct supervision, should review the collected information and trust documents for the client prior to execution of the trust. Reputable living trust companies make this their regular practice.

(4) Execution of the Trust Documents

Unlike drafting and review of the trust, execution of the trust document does not require skill beyond that possessed by the average person. Execution of a living trust and will involves signatures, dating, and some notarization and witnessing. The execution is very similar to the formalities required at a close of escrow which is routinely handled by nonlawyers.

(5) Funding of the Trust Document

Funding of the trust requires that the trustor's personal and real property be transferred into the trust. Typically, this simply involves a visit to each of the trustor's banks and other financial institutions whereat the trustor will change the account signature cards to reflect the account ownership by the trust. With regard to real property, new deeds must be drawn in accordance

with the trust and recorded at the County where the land is located.[2]

In Advisory Opinion 89-5 the Committee held that a law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if certain conditions are met. Citing Cooserman v. West Coast Title Co. 75 So.2d 818 (Fla. 1954), the Committee noted that real estate transactions "are usually nonadversarial" and allowing nonlawyers to participate "will reduce the cost to clients." The key is delegation by, but responsibility of, the attorney.

The Committee imposed the following conditions on nonlawyer real estate closings: 1) the attorney must supervise the work up to closing; 2) the attorney must determine that the client understands what is happening; 3) clients must consent in writing; 4) the supervising attorney must be available either in person or by telephone; and 5) the nonlawyer must not make impromptu decisions or give legal advice.

Based on Cooperman, susra, where an attorney drafts the trust documents and reviews them with the client, a trained nonlawyer trust representative should be permitted to assist the customer in executing and funding the trust. As in the case of real estate closings, the executing and funding of a trust is nonadversarial in

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[2] Much of the evidence submitted to the Committee centered on the "Homestead Property" issue. It is apparently unclear as to whether homestead property should or should not, be held in a living trust. A clever trust writer, such as a Living Trust Company attorney, can easily craft trust language that would ultimately be construed by the Court in favor of the trustor's intent. "Me thinks the lady doth protest too much." Shakespeare.

nature and allowing nonlawyers to assist in the funding will reduce the cost to clients. In addition, funding of the trust does not require legal skill or knowledge beyond that of an average person.

C. THE FACTS DO NOT SUPPORT THE COMMITTEE'S OPINION

Central to the Court's inquiry in UPL cases is whether a specific public harm results from the specific non-lawyer activities at issue. HRS Nonlawver Counselor, supra, Nonlawver Preparation of Notice to Owner and Notice to Contractor, supra, Nonlawver Preparation of Pension Plans, supra.

The Court should also be convinced that a) the non-lawyer's practice of law is the cause of the alleged harm and b) that enjoining the practice is the most effective solution. HRS Nonlawver Counselor, supra.

Finally, in determining whether a regulation is in the public interest, the Court should balance the alleged public harm which exists in the absence of regulation against the harm the public suffers if regulation is implemented. Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n. **312 P.2d 998,1007 (Colo. 1957).**

In light of the foregoing, questions regarding the unlicensed practice of law must be determined according to the particular facts of each case, and considering (1) the alleged public harm, (2) whether the nonlawyer's practice is the cause of the alleged harm, (3) whether enjoining the practice is the most effective solution, and (4) whether or not regulation is in the public interest, taking into account the "ever changing business and social order."

Barlow F. Christensen discussed the threat of injury from unlicensed practitioners in his article The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - or Even Good Sense? 1980 Am.B. Found. Research J. 159 (1980). Christensen states:

> "At the outset, it may be revealing to note that there is comparatively little in the history of unauthorized practice, either in the literature or in the cases, by way of hard evidence of substantial actual injury to the public through the activities of unauthorized practitioners. There is much talk about the danger of such injury. But with only occasional exceptions, the court cases do not involve injury to individuals. The vast majority of them have been brought by The Bar and have been instigated not as a result of injury to individuals but as a consequence of investigations by bar committees. As a result, the cases and other materials do not afford clear proof of public injury." Ibid. at 203

Substantial evidence of public harm is absent in many UPL cases. A nationwide survey of bar committees which handled matters related to nonlawyer lay divorces and real estate services revealed that "only two percent of some 1188 matters handled by bar committees in 1979 stemmed from complaints from disgruntled customers and fewer still involved claims of incompetence." Deborah L. Rhode, Policing the Professional Monopoly: a Constitutional and Empirical Analysis of Unauthorized Practice Prohibition 34 Stan.L.Rev. 1 (1981) (hereinafter "Rhode").

In the case at bar, the Committee's Opinion cites but three examples of public harm, which it alleges occurred as a result of

the nonlawyer sale of living trusts.[3] In none of those examples, however, did the trust customer suffer damage. In each instance, the client either asked for and received a refund of his money or the error was discovered and corrected.

Even though the cited activities may have involved improper practices, those few examples do not warrant a ban on all sales of living trusts by nonlawyer companies. Errors are committed daily by lawyers and nonlawyers alike. Such scant evidence pales in comparison to the thousands of satisfied living trust customers who have benefitted fromthe valuable services provided by living trust companies.

(2) THE NONLAWYER DID NOT CAUSE THE HARM

In one specific example cited in the Committee's Opinion, the trust customers did not suffer harm as the result of nonlawyer practices but rather as a result of an omission on their attorney's part. Prop. Op. at 10. In that instance, a financial planner referred his customers to an attorney because their joint living trust did not provide them a credit shelter from estate taxation. The attorney made the necessary changes and, without executing the documents, sent them back to the financial planner. When a bank trust officer asked to see a copy of the trust over a year and a half later, he noticed that the trust had never been signed. Prop. Op. 11; Record April 29, 1991 at 56. Clearly any resulting harm the couple suffered was due to their attorney's error, not that of

[3] The Opinion actually cites four examples, but one involved a member of the Florida Bar who met with clients and drafted the documents but failed to see that the trust was signed.

the nonlawyer who merely referred his customers to the attorney.

By contrast, some living trust companies not only make certain that the documents are signed but also do all of the funding of the trust at no cost to the customer.

(3) INJUNCTION IS NOT THE MOST EFFECTIVE SOLUTION

Enjoining the sale of living trusts by all living trust companies is not the most effective nor the most desirable solution to protect the public from nonlawyer practices. Other effective less restrictive solutions include holding the trust companies to the same standards of competence and ethical conduct as attorneys, registration, certification, and licensing requirements. Rhode at 94-96. Victims of improper practices have all tort and contract remedies at law available to them and they can turn to the courts for redress. In addition, consumer protection agencies and statutes provide additional avenues for recovery.

Even if the Court finds that the Committee has raised legitimate objections, this Court should decline to enjoin the practice in question and, at a minimum, order that an ad hoc committee be appointed to investigate the nonlawyer practices and make recommendations to the court as it did in HRS Nonlawyer Counselor, supra.

(4) ADDITIONAL REGULATION IS NOT IN THE PUBLIC INTEREST.

The Court must determine whether the regulation is in the public interest by balancing existing public harm against the harm the public suffers if additional regulation is implemented. Conway-Bogue, supra, at 1007.

In Conway-Bogue, supra, the Bar Association brought an action to enjoin realty brokers from preparing certain legal documents and giving advice as to the legal effect thereof. The court held that the advantages to be derived from the regulation were outweighed by the convenience the public enjoyed in choosing with whom they would do business.

> "We feel that to grant the injunctive relief requested, thereby denying to the public the right to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest; that the advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their broker or their lawyer shall do the acts or render the service which plaintiff seeks to enjoin." Ibid. at 1007.

In discussing the possibility of public harm in the absence of regulation, the court further stated:

> "We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments." Ibid. at 1008.

In Dale A. Whitman's article Home Transfer Costs: An Economic and Legal Analysis 62 Geo.L.J. 1311, Whitman discusses economics and the involvement of attorneys in realty title transfers.

> "A major factor in the inefficiency of present real estate transfers is the concept that attorneys should search titles and conduct closings. The use of legally trained professionals to perform these routine tasks constitutes an enormous waste of skill and causes increased overall costs to parties." Ibid. at 1334.

Studies indicate that the majority of the public's legal needs are not met by Florida attorneys. A recent report by the Florida

Bar revealed that only 20% of the legal needs of indigent Floridians are being met by services provided by attorneys and legal aid programs. The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent in Florida, Opening the Doors to Justice - The Quest To Provide Access For the Poor In Florida, at *28* (Feb. 1991).

Reform legislation was recently introduced in California in relation to the provision of legal services by nonlawyer legal technicians. (A copy of the legislation is provided in the Appendix). Such legislation was introduced following a finding that roughly 80% of the legal needs of low income Americans, are unmet, and 130 million middle-income Americans, are unable to get help with civil legal problems when they need it because they cannot afford it. The result is a two-tiered system where only the very rich can afford legal services and the vast majority are shut out from legal services all together. AB 168 ch 4.5, art. 1, section 6250(a).

The proposed legislation further states, "the factors chiefly to blame for the high cost of legal services are the high costs involved in becoming a lawyer and the profession's monopoly over delivery of service." AB 168 ch. 4.5, art. 1, section 6250(b).

In response to the public's need, the bill provides for licensing requirements for legal technicians whereby they can give legal assistance or advice to another for compensation. Regarding the public interest the bill states,

> If a regulatory scheme is to serve the public interest, it must adequately balance the public's need for protection from incompetence and fraud with the public's need for affordable access. The current licensing scheme applicable to lawyers focuses only on the former and virtually ignores the latter. No regulatory scheme, no matter how extensive, can immunize the public from harm. Instead, the providers of legal services should be free to provide the widest possible range of services, with the least burdensome and least costly regulatory scheme available, consistent with effective and meaningful public protection. BY balancins the public's needs, the Legislature concludes that the benefit of delivering low-cost lesal services to a majority of the population justifies some risk of harm. (Emphasis added). AB 168 ch. 4.5, art. 1, section 6250(d).

In the case of living trusts, the greater public harm results if living trust companies are prohibited from marketing living trust estate plans. A ban on such activities will deny a large sector of the public access to a convenient and affordable method of estate planning. Generally, living trust representatives schedule appointments and make presentations to give general information about living trusts at no cost to the customer, even if no contract results. Such a practice makes living trusts affordable for the rich and poor alike. Without the availability of services, the public would be forced to consult an attorney who would charge an hourly fee for the same services. As a result, those with limited funds and resources, a large portion of the public, would find it impossible to reap the advantages a living trust offers.[4]

Living Trust Companies offer living trusts drafted and reviewed by attorneys at competitive prices. In addition, sales

[4] One nonlawyer company even offers to do a living trust estate plan free for anyone who purchases an annuity.

representatives are on the whole better trained in the area of living trusts than most lawyers. In fact, most attorneys who practice in this field of law have learned most of what they know by reading books such as How to Avoid Probate and The Living Trust, nonlawyer written best sellers, and by attending seminars that are often presented by nonlawyer insurance and financial investment companies.

Living Trust Companies also offer other services which the majority of attorneys do not. Many living trust representatives make house calls and actually go to the financial institutions to assist in the transfer of the customer's funds and assets into the trust. Furthermore, Living Trust Companies usually include the following attorney drafted documents at no extra cost: (1) durable powers of attorney for financial management; (2) durable powers of attorney for health care and/or living wills; (3) transfer deeds on real property; (4) asset schedules; and, (5) letters of transfer on personal property assets.

The Opinion prohibits customers from choosing with whom to associate for the purpose of doing business. If the Committee's Opinion is adopted, customers will be forced to deal directly with attorneys if they wish to form a living trust even if they prefer not to do so.

The public harm in the absence of the regulation is de minimis in comparison to the greater public harm that will result if the Opinion is adopted. The Committee presented only three examples of public harm which it attributes to the nonlawyer sale of living

trusts. These examples do not justify banning all sales of living trusts by all companies. Many companies, including Living Trust Companies, have very conservative marketing programs and only sell trusts drafted and reviewed by attorneys or those under the direct supervision of an attorney. The Committee's proposed ban on all sales of living trusts simply goes too far.

Other less restrictive solutions will adequately protect the public. Trust companies may be held to the same standards of competence and ethical conduct as attorneys. Registration, certification or licensing requirements may also be imposed to protect the public from incompetent nonlawyers. Rhode at 94-96.

Each of the cases cited in the Opinion involves the giving of legal advice and the drafting of legal instruments and documents by nonlawyers. As previously stated, many nonlawyers and nonlawyer companies only market living trusts which have been drafted and reviewed by attorneys or, at the very least, under the direct supervision of an attorney. The cited cases are therefore easily distinguishable from the case at bar and do not support the Committee's broad sweeping ban of the nonlawyer marketing of living trusts.

In light of the broad definition of "UPL" and the foregoing case law and law review articles, the nonlawyer sale of living trusts by reputable living trust companies does not constitute UPL.

II.

THE PROCEDURES FOLLOWED BELOW AND THE RESULTANT RECORD ARE CONSTITUTIONALLY INADEQUATE

Should this Court reject the arguments set forth above, this Court, nevertheless, should not affect the substantial rights at issue based on the scant Record below. The Record of the hearings below are wholly inadequate to make a determination that nonlawyer living trust companies improperly practice law when they engage in the marketing and sale of living trusts. The nonadversarial nature of the proceedings below, lack of proper notice, lack of investigation, and the minimal evidence presented prevent this matter from being ripe for adjudication. As a result of the foregoing, the Committee's Opinion is violative of Living Trust Companies' procedural due process rights. U.S. Const. amend XIV; art. I, section 9, Fla. Const. At a minimum, this Court should appoint an ad hoc committee and remand for further investigation, hearings, and findings. HRS Nonlawyer Counselor, supra.

A. THE INADEOUATE RECORD BELOW

Integration Rule Article XVI section 10-7.1(b) requires that a request for an advisory opinion detail all operative facts upon which the request for opinion is based. The request for advisory opinion as framed by Petitioner Ira C. Hatch presented the following issue: whether it constituted the UPL for a corporation or other nonlawyer to draft living trusts and related documents where the nonlawyer gathers the information and the documents are reviewed by a Florida attorney.

The question presented to the Committee was very limited in scope and afforded notice that the Committee would be issuing an opinion concerning only the drafting of living trusts by nonlawyers. As a result, Living Trust Companies did not attend the hearings because their programs market only attornev drafted and reviewed trust documents.

The Committee's Opinion, however, goes far beyondthe question presented by preventing the nonlawyer marketing and sale of living trusts. Thus, the public notice was ineffective as it failed to apprise those who market and sell living trusts of the extent of the issues which would be considered, denying them an opportunity to present contrary viewpoints.

At the Standing Committee level, only two hearings were held during which limited oral and written testimony was received. There is no evidence, however, that the Committee communicated directly with or entered into any investigation or active dialogue with any of the relevant industries involved such as the living trust companies, or the life insurance, banking, or accounting industries. As a result, those practicing in the field were denied their right to influence decisions that will affect their livelihood.

As to living trust sales representatives, there was no evidence in the Record below regarding their unique background in estate planning or education or supervisory requirements.

Moreover, in its Opinion, the Committee made a specific finding of public harm even though there is very little "evidence"

in the Record of any actual public harm as a result of nonlawyer activity in the living trust field.

Public harm, or the likelihood of such, is a prerequisite to this Court adopting the Committee's opinion. Moses, supra. The Opinion indicates that attorneys related instances of harm, but, also reveals that the instances were not numerous and were generally nonspecific in nature. Typically, only brief, vague "facts" were given and the offending party was not named nor was the offender given an opportunity to respond. Most of the testimony came from lawyers practicing extensively in the area who have a vested interest in seeing that nonlawyers not be allowed to compete. There was never any discussion as to whether as much, or even more, harm is caused by lawyers.

Based on this inadequate record, it was entirely improper for the Committee to make a finding of public harm and then use that as a basis for issuing its Opinion. Before broadly prohibiting the sale of living trusts by nonlawyers, this court should, at a minimum, insist that an adequate record be developed on the various issues, including public harm, if such exists.[5]

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[5] The only empirical study of which Living Trust Companies is aware shows no indication of wide-spread public injury attributable to nonlawyer practice in various areas of law. Rhode at 33-35, 85-86. Instead, some courts have noted the absence of empirical support for allegations of nonlawyer incompetence. For instance, in Colorado, where realtors had given real estate advice in most real estate transactions over a 50 year period, the record in a bar-initiated unlicensed practice suit revealed no "instance in which the public had suffered injury." Id. at 86. Similar findings were made by the New Mexico Supreme Court. Id.

In HRS Nonlawyer Counselor, supra., this Court was faced with complex issues involving UPL questions relating to nonlawyer court representation in uncontested dependency hearings. Based on the record presented, this Court declined to decide the case and decided further study was needed. This Court then ordered that an ad hoc committee be appointed to study the problem and make recommendations to the Court. The counselors were permitted to continue their activities in the interim. Id. at 1272.

This case is similar in that the Record neither contains evidence of public harm nor proof that enjoining nonlawyers from certain activities is an effective solution. The matters at issue are of great public importance and involve thousands of nonlawyers as well as broad public interest. A decision restricting nonlawyer practice in the living trust field should be made only after an adequate record is developed with fuller opportunity for investigation and testimony. If this Court is persuaded that the Committee has raised legitimate issues, it should appoint an ad hoc committee composed of members from various industries to study the problem and make recommendations.

B. THE RECORD WAS BASED ON INACCURATE INFORMATION

In deciding the issue presented, the Committee considered a letter and outline prepared by a Florida attorney who specializes in estate and tax planning. Woodruff. Said letter was "intended to provide Committee members who are not primarily estate planners with some insight into the legal issues associated with...the

estate planning process." Woodruff. Woodruff's letter was intended to influence the Committee's decision; the problem is that it contains a number of incorrect statements and misleading information.

In his letter, Woodruff states that "a living trust requires the services of an attorney twice, once to transfer property into the trust and once to transfer it out; whereas a will may only require one transfer of property." Woodruff at 3. This statement is absolutely **false.** The successor trustee has easy access to the trust property and can distribute it without an attorney. Woodruff also incorrectly states that living trusts require a separate trust tax return. Id. So long as the trustors are alive, no tax return is required for the trust.

Woodruff also **states** that living trusts are not appropriate when substantially all of the grantor's property is held in joint tenancy since upon the grantor's death the property passes to the co-owner by law and does not become part of the probate estate. Id. Although this is technically true, it is extremely misleading. Living trusts are much more advantageous than joint tenancy because of the possibility that the joint tenants may die at the same time. Without a living trust, such joint tenancy property would become part of the probate estate. Furthermore, when a joint tenant dies, only his one half interest is stepped-up in value. Hence when the survivor sells the property, capital gains tax is owing on one half. By contrast, if community property is held in a living

trust, both halves are stepped-up in value at the first death and zero capital gains taxes are owing on sale by the survivors.

Woodruff also contends that nonlawyers should not perform estate planning services because they are not aware of the tax consequences of transferring property into the living trust. Id. at 6. Albeit true, in some circumstances, an IRA or retirement plan should not be retitled into a trust, however, this is not a problem of such magnitude so as to undermine the efficacy of a living trust. Well trained marketing representatives advise their customers to contact the IRA or pension plan manager before making a decision whether to move the property into the trust. In addition, it is worth noting that IRAs, KEOGHs and other qualified plans are not subject to probate so their transfer into the trust usually does not serve any purpose.

Marketing representatives advise clients with large estates to see an estate planning attorney for advice regarding irrevocable insurance trusts, charitable remainder trusts and gifting programs. Many living trust companies have policies limiting their estate planning to the living trust and associated documents, i.e. pour over will, durable powers of attorney, living will, and designation of guardian and health care surrogate.

Woodruff argues that nonlawyers should not be permitted to execute trust documents. Woodruff at 8-9. Executing wills and trusts, however, is very similar to the procedures involved in executing a close of escrow which the Florida Bar already allows; see argument supra.

Based on the above, it is clear that the Committee's Opinion is based upon inaccurate and misleading information supplied by an estate planning attorney for the purpose of influencing the Committee members. The Opinion must not be adopted because of the corrupt data upon which it is based.

C. COMMITTEE CONFLICT OF INTEREST.

The Opinion fails to comport with the rule of this Court regarding the improper participation by certain members of the Standing Committee. Rule 10-7.1(b) addresses conflicts of interest with respect to members of the Committee and states:

> Committee members shall not participate in any matter in which they have either a material pecuniary interest that would be affected by a proposed advisory opinion or committee recommendation or any other conflict of interest that should prevent them from participating. However, no action of the committee will be invalid where full disclosure has been made and the committee has not decided that the member's participation was improper.

(Emphasis **added.**)

In this case, two attorney members of the Committee declined to vote because of conflicts relating to their legal practice in the estate planning field. Nevertheless, the Record indicates that both Participated and one member aggressively participated in the hearings. Record, Jan. 25. **1991** at **24-25, 40-43,** 58, 60-62.[6]

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[6] Gregory G. Keane, a member of the Committee and attorney who specializes in estate planning, declined to vote based on a conflict of interest. The Record reflects, however, that he repeatedly engaged in the discussions for the purposes of influencing the other Committee members and affecting the Committee's decision.

In addition, due process concerns arise where those who construe and enforce restraints on activities of occupational groups have a financial stake in their application. Rhode at 6.

In Gibson v. Berryhill 411 U.S. **564, 93 S.Ct. 1689, 36** L.Ed.2d. **488 (1973)** the United States Supreme Court held that those with substantial pecuniary interests in legal proceedings should not adjudicate those disputes. Ibid. at **1698**; See also Tumev v. Ohio 273 U.S. **510, 47** S.Ct. **437,** 71 **L.Ed. 749 (1927).**

In his hornbook, Modern Legal Ethics, Charles W. Wolfram stated: **"The** dangers inherent in any regulatory system relying on informal dispositions are compounded when the enforcing authorities have an economic stake in the outcome. The very concept of due process presupposes a dispassionate decisionmaker free from both the fact and appearance of self **interest."** Ibid. at **51.** Before considering the due process issues which spring from the Committee's Opinion, it is necessary to understand the historical development of UPL.

Sensitivity to **UPL** originally sprang from the legal profession's desire to quash lay competition for law business. James W. Hurst, The Growth of American Law, **319 (1950).** In **1914** the New York County Lawyers' Association appointed the first standing committee on unlawful practice. Ibid. 323. There was little interest in the matter, however, until the Great Depression in **1929.** Ibid.

In **1930** the American Bar Association appointed a committee on the subject. **"In 1933** the Association made the topic an item of

it's 'National Bar Program' which it had designed to draw to a focus the interests of all bar organizations in the country. By 1940 over 400 bar association committees had been appointed to consider the unauthorized practice of law." Ibid.

> "The depression of the 1930's stimulated the first really widespread and organized concern of the bar with it's lay competition. This coincidence of events ill fitted claims that this activity was moved simply by regard for protecting the public against the incompetent or unscrupulous. The speedy development of the drive against "unauthorized practice," set against the circumstances of the time, suggested that the movement was born more or an emotional desire to do something in the face of social catastrophe, than out of a deeply reasoned analysis. Evidence of this was to be found in the almost complete lack of any scientific fact gathering out of all the sudden bustling of committees and associations." Ibid.

The Florida Supreme Court considered the due process issues which arise out of unlicensed practice regulations in The Florida Bar v. Brumbaush, supra. The court stated: "Because of the natural tendency of all professions to act in their own self interest,...the Court must closely scrutinize all regulations tending to limit competition in the delivery of legal services to the public and determine whether or not such regulations are truly in the public interest." Ibid at 1198.

By state rule, the Florida Bar Standing Committee must consist of at least fifteen members, not less than five of whom must be nonlawyers. Integration Rule, Art. XVI, section 10-1.1(d). The remaining members are attorneys who have a direct pecuniary interest in the advisory opinion which the Committee renders.

The Committee at the time of voting on the matter at issue, had 35 members, five of whom were non-lawyers. Only three of the five non-lawyers were present and voted on the issue. Clearly the lay members of the Committee had little influence on the Committee's decision in this case where they were outnumbered by a ratio of 11 to 1.

Each advisory opinion which limits or bans nonlawyers from engaging in activities which may also be performed by an attorney, inevitably has a direct or indirect financial effect on the members of the Committee.

In addition to the above, it cannot be denied that the legal profession continues to feel economic pressures. As the 1930 depression lead to the Bar's widespread and organized concern with lay competition, the legal profession today is clearly experiencing the financial effects of the current recession. To ignore such economic pressures is to deny reality.

Given the above facts, close scrutiny of the Committee's broad and sweeping Opinion to ban the sale of living trusts by all nonlawyer companies, as opposed to banning only improper practices, reveals that the Opinion was rendered based on corrupt information by a biased group with a financial stake in the outcome. The Opinion proposed by the Committee clearly violates due process in violation of the Fifth and Fourteenth Amendments.

III.

THE OPINION UNCONSTITUTIONALLY DEPRIVES LIVING TRUST COMPANIES OF FUNDAMENTAL FREEDOMS GUARANTEED BY THE CONSTITUTION.

A. CONSTITUTIONAL SAFEGUARDS

The Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived of life, liberty or property without due process of law. U.S. Const. amend. V and XIV.

> "Any restriction of constitutional rights must be narrowly drawn to express only the legitimate interests at stake." Roe v. Wade 410 U.S. 113, 115, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), NAACP v. Button 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

A regulation which restricts constitutionally protected activity is unconstitutional if there are other reasonable ways to achieve the same basic purpose through less drastic means. Shelton v. Tucker 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); The Florida Bar v. Brumbaush, supra.

B. THE OPINION VIOLATES LIBERTY AND PROPERTY RIGHTS.

The right of personal property and the right to private property guaranteed by the Fifth and Fourteenth Amendments include the right to make contracts for the acquisition of property. Coppage v. Kansas 236 U.S. 1, 14, 35 S.Ct. 240, 59 L.Ed. 441 (1914).

The States may not restrict the freedom of contract without due process of law. State v. Ives 167 So. 394, 123 Fla. 401 (Fla. 1936). Included in the constitutionally guaranteed freedom of contract is the citizen's property right to pursue any lawful

business. State v. Rose 122 So. 225, 228, 97 Fla. 710 (Fla. 1929).

Chief among the contracts which are constitutionally protected "...is that of personal employment by which labor and other services are exchanged for money and other forms of property." Coppage v. Kansas, supra at 14.

> "Freedom of contract is the general rule; restraint is the exception, and when it is exercised to place limitations upon the right to contract, the power, when exercised, must not be arbitrary or unreasonable, and can be justified only by exceptional circumstances." States v. Ives, supra, at 399.

In Florida Bar v. Brumbaugh, supra, this Court held that the court must consider the effect any limitations on the practice of law will have on important constitutional rights which are necessarily affected thereby. Ibid. at 1192. The Brumbaugh Court acknowledged that their decision would definitely affect the petitioner's constitutional right to pursue a lawful occupation. Ibid.

The Committee's Opinion proposes a complete and total ban on the marketing of living trust estate plans by all nonlawyer companies irrespective of the methodology and soundness of their marketing programs. Adoption of this Opinion would prevent even legitimate law abiding trust companies from engaging in a lawful business in the State of Florida. Adoption of the Opinion will therefore deprive Living Trust Companies of their constitutionally guaranteed right of personal liberty and the right to private property without due process of law.

C. **THE OPINION IS ID FOR VAGUENESS.**

Due Process requires that laws which prohibit conduct be sufficiently explicit to inform those who are subject to the law what conduct on their part will render them liable to its penalties. Connally v. General Construction Company 269 U.S. 385, **391, 46 S.Ct. 126,** 70 L.Ed. **322 (1926).**

The "common intelligence standard'' is used in determining whether a statute is void for vagueness. Ibid. **"A** statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Ibid.

The Committee's Opinion proposes an injunction on the sale of living trusts by all nonlawyers and nonlawyer companies. The Committee fails, however, to adequately define "sale" such that nonlawyers must speculate as to which activities they may engage in without subjecting themselves to penalty. It is unclear whether the Committee's Opinion prohibits only the nonlawyer's receipt of money for living trust estate planning services. The Opinion **does** not specify which activities constitute activities pursuant to **a** "sale." May nonlawyers continue to gather information for attorneys who will prepare the trust? May nonlawyers assist living trust customers in funding the trust? May nonlawyers continue to provide living trusts provided they do not receive compensation therefor? The various interpretations of the Committee's opinion are endless.

Based on the above, a person of "common intelligence" must necessarily guess at the meaning of the Committee's opinion in an attempt to fashion his conduct accordingly. The Opinion is therefore void for vagueness and violates due process.

D. THE OPINION IS OVERBROAD.

Although a State may seek to pursue a legitimate governmental purpose, it may not do so by means that broadly stifle the exercise of fundamental personal liberties when a less restrictive way of satisfying that interest exists. Shelton v. Tucker, susra at 488.

In the case at bar, the Committee seeks to ban the sale of living trusts by all nonlawyers. This ban is unconstitutionally overbroad in that it includes those companies, such as Living Trust Companies, with marketing programs that use licensed attorneys and which do not involve the UPL.

A number of nonlawyers and nonlawyer companies properly employ corporate counsel to both draft and review living trust estate plans. Some companies also arrange for licensed Florida attorneys to review the documents prior to delivery to the customer. Some companies insist that the clients must immediately and independently hire a local attorney to represent their interests. This creates a true attorney-client relationship at the time of contracting. Some companies require that the fee charged and received by the local attorney be paid directly by the client to the attorney with no company interest whatsoever.

The corporate counsel will then draft the documents according to the local attorney's specifications. The local attorney is

clearly responsible for overseeing and evaluating the work to make certain that the document meets the client's needs and that the documents comply with Florida law.

To ban the sale of living trusts by companies which sell attorney drafted living trusts unnecessarily stifles their exercise of the constitutional freedoms of speech and association, as well as their constitutionally guaranteed liberty and property rights to engage in a lawful occupation.

The State's interest in protecting the public from incompetent and irresponsible representation may be achieved by means much less restrictive than a total ban on nonlawyer sales of living trusts. Such less restrictive means include holding trust companies to the same ethical standards as attorneys, and/or imposing registration, certification or licensing requirements. Rhode at 94-96.

IV.

THE OPINION VIOLATES FIRST AMENDMENT FREEDOM OF SPEECH RIGHTS.

A. THE OPINION RESTRAINS FREEDOM OF SPEECH

The First Amendment to the United States Constitution made applicable to the States through the Fourteenth Amendment prohibits a State from making laws which restrain or abridge the freedom of speech. U.S. Const. amend. I; Art. 1, section 4, Fla. Const. (1968).

"Only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can

justify limiting First Amendment freedoms." NAACP v. Button 371 U.S. 435, **438, 83** S.Ct. 328, 9 L.Ed.2d **405 (1963).**

A regulation which limits a First Amendment freedom either on its face or in application is unconstitutional if the same basic purpose can be achieved through less drastic means. Shelton v. Tucker, supra, at **488.**

The regulation of the practice of law and a ban on nonlawyer activities has a clear impact on First Amendment freedoms. "In a culture where law plays so dominant a role in dispute resolution, **broad** constraints on the ability of laymen to give and receive legal assistance raise substantial First Amendment concerns.'' Rhode, supra, at p. 6.

In the United States Supreme Court case of United Mine Workers of America, District 12 v. Illinois State Bar Association **389** U.S. 217, **88** S.Ct. **353,** 19 **L.Ed.2d** 426 (1967), the Miner's union hired a licensed attorney to represent union members in workers' compensation claims. The State Bar Association complained that these practices constituted the UPL.

The Court held that the freedoms of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gave the union the right to hire attorneys to assist members in the assertion of their legal rights. Ibid. at 221-222.

The Supreme Court stated:

> "The First Amendment would, however, be a hallow promise if it left government free to destroy or erode its guarantees by interactive restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such, We have therefore

> repeatedly held that laws which actually effect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even **because** the laws do in fact provide a helpful means of dealing with such an evil." Ibid. at 222.

In the case at bar, adoption of the Committee's Opinion would directly effect the First Amendment freedom of speech rights of Living Trust Companies and their customers in giving and receiving estate planning services.

Applying the case law to the issue at bar, the State must demonstrate both a compelling State interest and that there are no less restrictive means of protecting the public than banning lay practice.

The purpose behind Florida's regulation of the practice of law is the protection of the public from incompetent, unethical and irresponsible representation. Moses, supra at 417. The protection of the public from incompetent and unethical representation, whether it be rendered by a licensed attorney or nonlawyer, is certainly an important State interest.

Based on only a few cited examples of improper nanlawyer practices, however, the Committee proposes to ban the sale of living trusts by all living trust companies, including those which do not engage in the UPL because their trust plans are both drafted and reviewed by licensed attorneys or someone under the direct supervision of an attorney. Such a restriction unreasonably impinges on Living Trust Companies' First Amendment freedom of speech and fails to meet the "less restrictive means" standard.

B. LESS RESTRICTIVE ALTERNATIVES EXIST

There are a number of viable alternatives which impinge less on First Amendment rights while at the same time protect the public from unethical living trust companies. Professor Rhode discussed the following alternatives in her article Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibition, supra.

> "First, laymen providing legal assistance could be held to the same standards of competence and ethical conduct as attorneys for purposes of civil liability. Some occupational groups, including bankers, brokers, realtors, and accountants, are **already** subject to regulations that **could** or does incorporate competence and fiduciary standards comparable to those in the ABA's Code of Professional Responsibility.
>
> A second possibility would be to require that lay practitioners **obtain informed** consent before providing services to any potential client.
>
> Finally, where there is a demonstrable need for State supervision, some combination of prosecutorial oversight, registration, certification, and licensing requirements may prove adequate **...** consumer protection agencies could investigate individual cases and monitor areas of practice involving a high incidence of fraud, misrepresentation, or incompetence." Ibid. 94-96.

Yet another avenue is available to this Court to achieve its purpose through means which are less restrictive of First Amendment freedoms. This Court can, as it has done many times in the **past,** delineate exactly which nonlawyer activities constitute the UPL and which do not. This Court may also specify those steps in the living trust estate plan which must be carried out or supervised by a licensed attorney and which activities may be performed by living

trust company agents. In re The Florida Bar and Raymond. James and Associates 215 So.2d 613 (Fla. 1968); Brumbaugh, supra; HRS Nonlawyer Counselor, supra; Nonlawyer Preparation of Notice to Owner and Notice to Contractor, supra.

In sum, adoption of the proposed ban on the nonlawyer sale of living trusts would violate Living Trust Companies' First Amendment right to freedom of speech since there are less restrictive alternatives which will adequately serve the State's interest.

V.

THE OPINION VIOLATES FIRST AMENDMENT FREEDOM OF ASSOCIATION RIGHTS.

The freedom of association is included in the bundle of First Amendment rights guaranteed to the states through the Fourteenth Amendment. Louisiana v. NAACP 366 U.S. 293, 296 81 S.Ct. 1333, 6 L.Ed.2d 301 (1961).

As with the First Amendment freedom of speech, the State must demonstrate a compelling state interest and use the least drastic means which effectively achieve that interest. Shelton v. Tucker, supra at 488.

In United Mine Workers of America, District 12 v. Illinois State Bar Association, supra, the United States Supreme Court acknowledged the state's broad power to regulate the practice of law, however, it also warned that resulting regulations may violate one's right of association.

> "...It is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation

significantly impair the value of associational freedoms." Ibid. at 222.

In NAACP v. Button, susra, the NAACP brought suit against the Attorney General for a declaration that a statute banning solicitation of legal business by a "runner" was unconstitutional.[7] Ibid. at 423

NAACP activities included an extensive program of assisting and financing litigation aimed at ending racial segregation in the public schools. Typically a member of the NAACP legal staff appeared at a meeting of parents and children to explain the legal steps necessary to achieve desegregation. The staff member then passed out forms authorizing him or other NAACP attorneys of his designation to represent the signors in legal proceedings. Ibid. at 421.

The NAACP argued that the challenged statute infringed the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutional rights. Ibid. at 428

The Supreme Court held that the NAACP's activities were "modes of expression and association by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business," violative of the canons of professional ethics. Ibid. at 428-429

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[7] A runner is an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. NAACP v. Button, supra at 423.

The court further stated:

> "The decisions of this court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say... that the purpose of these regulations was merely to ensure high professional standards and not to curtail free expression. For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." Ibid. at 438-439.

As previously discussed, the state can accomplish its interest in protecting the public through the use of alternatives which are less restrictive of First Amendment freedoms. If the Committee's Opinion is adopted and nonlawyer companies are prohibited from marketing living trust plans, like the NAACP and its customers, Living Trust Companies and their customers will be denied their right to associate for the purpose of assisting persons who seek estate planning services. As such, the Opinion deprives Living Trust Companies and their customers of their First Amendment freedom of association.

VI.

THE OPINION VIOLATES THE COMMERCE CLAUSE

The United States Constitution provides that: "Congress shall have power...to regulate commerce with foreign nations, and among the several states." U.S. Const. Art. 1 section 8.

That legal services are the subject of interstate commerce, was made clear in Goldfarb v. Virginia State Bar 421 U.S. 657, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). In Goldfarb, the court held

that the state bar's minimum fee schedule constituted a restraint on legal services and therefore had a negative effect on interstate commerce. Ibid. at 2011

In the case at bar, the Committee's Opinion violates the Commerce Clause in that it prohibits living trust companies from providing estate planning services in Florida. Such a ban would not only impair interstate commerce, but it is an unreasonable solution given the existence of other alternative methods of public protection which have no adverse affect on interstate commerce.

CONCLUSION

For all of the reasons stated herein, Living Trust Companies pray that the Court decline to **adopt** the Committee's advisory opinion.

Should the Court elect not to do so, however, Living Trust Companies pray that the Court modify the Committee's Opinion in such a way as to allow well run reputable living trust companies which employ Florida attorneys to draft the trust documents, to continue marketing living trust estate plans in the State of Florida.

In the alternative, Living Trust Companies request that the Court adopt standards similar to those delineated by this Court in Cooperman v West Coast Title Co., **supra**. Such standards would provide living trust companies with guidelines and enable them to design and operate marketing programs which satisfy the laws of Florida without denying the public a valuable service.

If this Court elects not to do any of the foregoing, at the very least, this Court should order that an ad hoc committee be appointed to study the problem and make recommendations. Said committee should be composed of members ***of*** the public and representatives from various relevant industries.

DATED: 11 Oct 91

Respectfully submitted,

WILL H. HALKER, JR.
Attorney for Mid-America Living Trust Associates, Inc.
National Family Trusts
Living Trusts America

APPENDIX

DEFINITION OF LIVING TRUSTS

A living trust is usually a revocable contract, wherein the owner of the estate property designates himself/herself: settlor, trustee, and beneficiary. Said contract is an estate planning device which allows the owner to transfer property into the trust prior to his/her death.

LIVING TRUSTS VS. WILLS: THE ADVANTAGES OF A LIVING TRUST

Property held in a living trust avoids probate.

Probate costs money, (attorneys charge "reasonable" fees; source: Probate Examiner, Tallahassee, Florida)

Probate invites public scrutiny whereas living trusts are private.

Probate delays distribution to loved ones. (1 - 1 1/2 years in Florida; source: Probate Examiner, Tallahassee, Florida)

Probate causes psychological trauma. (Decedent's loved ones must go to court to prove death, etc.)

Probate may require multiple attorneys. (Real property is subject to probate in the situs state.)

Living trust estate plans offered by living trust comsanies vary in price and are extremely competitive.

Living trust comsanies provide a complete estate plan including:

- Living trust plan (A-B for married people)
- Durable powers of attorney for financial management
- Durable powers of attorney for health care/living will (aka right to die with dignity)
- Deeds of transfer for real property
- Letters of transfer for personal property
- Property schedule forms

Living trusts can easily be modified or revoked to meet changes in family structures.

LITTLE KNOWN FACTS ABOUT LIVING TRUSTS

A-B living trusts can avoid up to $235,000 in federal estate taxes in a married couple's estate.

Many persons who purchase living trust estate plans from specialty living trust companies do so for convenience (house calls are made by marketing representatives) and because they do not like attorneys.

Many persons have been told by their attorney that they "do not need a living trust because their estate is less than $600,000." (This bad advice is probably malpractice per *se.)*

A living trust may be designed so as to satisfy the MEDICAID resource and income qualification standards which, if satisfied, will pay for the long-term nursing care of the incapacitated person. The living trust companies are taking the lead in this area by employing "elder law" attorney specialists.

Living trust details are not taught in law schools.

ASSEMBLY BILL No. 168

Introduced by Assembly Member Eastin

December 20, 1990

An act to add Section 6127.1 *to,* to add Chapter 4.5 (commencing with Section 6250) to Division 3 of, and to repeal and add Sections 6125,6126, and 6127 of, the Business and Professions Code, relating *to* legal services, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 168, as introduced, Eastin. Legal services: legal technicians.

Under existing law, no person may practice law unless an active member of the State Bar.

This bill would instead provide that no person may advertise or otherwise hold himself or herself out to be an attorney, or use a title that in any way implies that he or she is an active member of the State Bar, and that no person may appear, or advertise or hold himself or herself out as entitled to appear, on behalf of another, before any court or tribunal of this state unless that person is authorized to so appear pursuant to a rule adopted by the court or tribunal *or* pursuant to law. This bill would provide for new civil penalties for violations, and would make related changes.

This bill would also establish the Board of Legal Technicians in the Department of Consumer Affairs. The bill would require every person who practices as a legal technician to be licensed or registered by the board. The board would determine which areas require licensure arid which require registration.

The bill would require various, disclosures by legal technicans. The bill would provide for conciliation and

arbitration of customer complaints. The bill would impose various fees for registration and licensure, which would be deposited into a continuously appropriated Board of Legal Technicians Fund, and would establish **a** continuously appropriated Customer Compensation Fund.

A violation of various provisions of the bill would be a misdemeanor, thereby imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The bill would appropriate *$150,000* from the General Fund to the Board of Legal Technicians Fund, and would require repayment of that amount before January 1, 1995.

The provisions that require licensure or registration and that impose duties on legal technicians would become operative one year after the bill's effective date.

Vote: ⅔. Appropriation: yes. Fiscal committee: *yes.* State-mandated local program: yes.

The people of the State ***of*** *California do enact* ***as*** *follows:*

.SECTION **1.** Section 6125 of the Business and Professions Code is repealed.

~~6125. No person shall practice law in California the person is an active member of the State Bar.~~

SEC. 2. Section 6125 is added ***to*** the Business and Professions Code, to read:

6125. No person who ***is*** not an active member of the State Bar shall do any of the following:

(a) Advertise or otherwise hold himself or herself out to be an attorney, or use a title that in any way implies that he or she is an active member of the State Bar.

(b) Appear, or advertise or hold himself or herself **out** as entitled *to* appear, on behalf of another, before any court or tribunal of this state unless **that** person is authorized to so appear pursuant to a rule adopted by the court or tribunal or pursuant to law.

SEC. **3.** Section 6126 of the Business and Professions Code is repealed.

~~6126. (a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar. is guilty of a misdemeanor.~~

~~(b) Any person who has been involuntarily enrolled as an inactive member of the State Bar, or has been from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending, and thereafter advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail. However, any person who has been involuntarily enrolled as an inactive member of the State Bar pursuant to paragraph (1) of subdivision (c) of Section 6007 and who knowingly thereafter advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail.~~

~~(c) The willful failure of a member of the State Bar, or one who has resigned or been disbarred, an order of the Supreme Court to comply with Rule 955, constitutes a crime punishable by imprisonment in the state prison or county jail.~~

SEC. **4.** Section 6126 is added *to* the Business and Professions Code, to read:

6126. (a) **Any** person who violates Section 6125 is guilty of a misdemeanor.

(b) Any person who has been involuntarily enrolled as an inactive member of the State Bar, or has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending, and thereafter advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail. However, any person who has been involuntarily enrolled as an

inactive member of the State Bar pursuant to paragraph (1) of subdivision (e) of Section 6007 and who knowingly thereafter advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable **by** imprisonment in the state prison or county jail.

(c) The willful failure of a member of the State Bar, or one who has resigned or been disbarred, to comply with an order of the Supreme Court to comply with Rule 955, constitutes a crime punishable by imprisonment in the state prison or county jail.

SEC. 5. Section 6127 of the Business and Professions Code is repealed.

~~6127. The following acts or omissions in respect to the practice of law are contempts of the authority of the courts:~~

~~(a) Assuming to be an officer or attorney of a court and acting as such, without authority.~~

~~(b) Advertising or holding oneself out as practicing or as entitled to practice law or otherwise practicing law in any court, without being an active member of the State Bar.~~

~~Proceedings to adjudge a person in contempt of court under this section are to be taken in accordance with the provisions of Title V of Part III of the Code of Civil Procedure.~~

SEC. 6. Section 6127 is added *to* the Business and Professions Code, to read:

6127. **(a) Any** person who violates subdivision (b) of Section 6125 is in contempt of the authority of the court.

(b) Proceedings to adjudge a person in contempt are to be taken in accordance with the provisions of Title **5** (commencing with Section 1209) of Part **3** of the Code of Civil Procedure.

SEC. 7. Section 6127.1 is added to the Business and Professions Code, to read:

6127.1. (a) Any person who believes that a person is violating or threatens to violate Section 6125 may bring a civil action to enjoin that violation on behalf of the general public and, upon prevailing, shall recover

reasonable attorneys' fees and costs. Any person found to have violated Section 6125 shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, provided that payment of restitution to a customer injured by the violation shall take precedence over payment of a fine.

(b) **Any** person who violates any injunction issued pursuant to this section shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where conduct constituting a violation is of a continuing nature, each day' the conduct continues constitutes a separate and distinct violation.

(c) The civil penalties prescribed by this section shall be assessed and collected in a civil action brought in the name of the people of the State of California by the Attorney General, a district attorney, or by a city attorney who **is** a public prosecutor.

SEC. 8. Chapter **4.5** (commencing with Section 6250) is added to Division **3** of the Business and Professions Code, to read:

CHAPTER 4.5. LEGAL TECHNICIANS

Article 1. General Provisions

6250. The Legislature finds that:

(a) Indigent persons and **persons** of moderate income are generally unable to afford to hire lawyers to provide needed legal assistance. Studies have shown that roughly 80 percent of the legal needs of low-income Americans go unmet, and 130 million middle-income Americans, are unable to get help with civil legal probiems when they need it because they cannot afford it. This has resulted in a two-tiered system of justice, with only the very rich able to afford legal services **and** the vast majority being shut out of the legal system.

(b) The factors chiefly to blame for the high cost of legal services are the high costs involved in becoming a lawyer and the profession's monopoly over delivery of service. The time and money necessary to enter the field

(college, law school, bar exam passage) involve high costs which, unless mitigated by a presence of competition, are inevitably passed on to the consumer.

(c) New and innovative approaches to meet this overwhelming need are required because traditional solutions, such as government-funded legal aid and voluntary efforts by the bar to provide free legal services, even when operating optimally, can accommodate only a very small fraction of that need. Permitting nonlawyer "legal technicians" to provide services directly to the public for out-of-court legal matters is just such an approach, and its advocates include consumer representatives, bar groups, and legal scholars.

(d) If **a** regulatory scheme is to serve the public interest, it must adequately balance the public's need for protection from incompetence and fraud with the public's need for affordable access. The current licensing scheme applicable to lawyers focuses only on the former and virtually ignores the latter. No regulatory scheme, no matter how extensive, can immunize the public from harm. Instead, the providers of legal services should be freed to provide the widest possible range of services, with the least burdensome **and** least costly regulatory scheme available, consistent with effective and meaningful public protection. **By** balancing the public's needs, the Legislature concludes that the benefit of delivering low-cost legal services to **a** majority of the population justifies some risk of harm.

(e) Just as with the regulation of other businesses and occupations, legal consumers have a strong interest in access to consumer protection and redress mechanisms that are publicly controlled and publicly accountable, such as those available from the Department of Consumer Affairs.

6251. **As** used in this chapter:

(a) (1) "Legal technician" means any person who is not an active member of the State Bar and who gives legal assistance or advice to another for compensation, or who holds himself or herself out as offering those services.

(2) Notwithstanding **paragraph** (1), "legal technician" does not include any person who only does one or more of the following:

(A) Provide legal assistance or advice to, or is supervised by, an active member of the State Bar. As used in this subparagraph, "supervised" means that the legal assistance or advice is provided directly to, or expressly on behalf of, an active member of the State Bar.

(B) Acts as a neutral party in the provision of conciliation, mediation, or arbitration services.

(C) Distributes written or computerized legal information or forms to be used or completed by the customer without the assistance of the distributor.

(D) Is authorized by state or federal law to give legal assistance or advice for compensation.

(E) Appears as counsel pro hac vice pursuant to Rule 983 of the California Rules of Court.

(F) Provides services as **a** Registered Foreign Legal Consultant pursuant to Rule 988 of the California Rules of Court.

(G) Provides services as a certified law student pursuant to the Rules Governing the Practical Training of Law Students.

(H) Provides legal advice and assistance as an incidental part of other nonlegal services and is certified by the Department of Consumer Affairs, pursuant to regulations adopted by it, as adequately regulated under state or federal law.

(b) (1) "Legal assistance and advice" means any of the following:

(A) Giving individualized advice pertaining to legal procedures, rights, or obligations.

(3) Selecting, completing, preparing, or submitting a legal form, pleading, or other legal document.

(C) Appearing before any federal, state, or local tribunal or court.

(2) The following do not constitute "legal assistance or advice" under this chapter:

(A) Typing, delivery, or translation of a legal form or legal document.

(B) Making available to a customer a legal-advice

manual or forms, or both and filling out, filing, or serving the forms selected by a customer at a customer's direction.

(C) Providing generic factual information pertaining to legal procedures, rights, or obligations.

(c) "Applicant" means any person who applies to the board for registration or licensure, or its renewal, pursuant to this chapter.

(d) "Board" means the Board of Legal Technicians in the Department of Consumer Affairs.

(e) "Compensation" means any money or valuable consideration paid or promised to be paid by a customer for services rendered or promised to be rendered.

(f) "Complaint" means any written or oral statement made by a customer to the Board of Legal Technicians reporting any dissatisfaction with the performance of a legal technician.

(g) "Customer" means any person who purchases, contracts for, receives, or is the third-party beneficiary of, legal assistance or advice.

(h) "Director" means the Director of the Department of Consumer Affairs.

(i) "Days" means calendar days.

(j) "Licensee" means any person licensed as a legal technician pursuant to this chapter.

(k) "Person" means an individual, irrespective of affiliation with or employment by another or a partnership, association, joint venture, or corporation.

(l) "Registrant" means any person registered pursuant to this chapter.

Article 2. Registration and Licensure Procedures

6260. (a) Unless authorized by another person or federal law to give legal assistance *or* advice for Compensation, every person who practices as a legal technician shall be required to Be either registered with or licensed by the board. Any person who is less than 18 years of age, or who has been disbarred by or has resigned with charges pending from any state bar, or who has been

enjoined from practicing as a legal technician, shall be ineligible for registration or licensure as a legal technician.

(b) The board shall permit licensure and registration by subject matter. No person shall practice as a legal technician in any substantive area unless duly registered or licensed, whichever is applicable, in that area according to rules of the board. **A** legal. technician may obtain licensure in or register for more than one area of specialty.

(c) The board shall adopt rules identifying the scope of practice of each specialty, and delineating which substantive areas or **tasks** within substantive areas shall require licensure and which shall require registration. In making this delineation, the board shall balance consumers' interest in affordable costs with consumers' interest in receiving competent services.

(1) The board shall require licensure only for those substantive areas or **tasks** in which it finds there is a substantial likelihood of irreparable harm to consumers, the ability of consumers to evaluate *the* quality of legal technicians' **work** is low, and mistakes cannot be easily corrected or remedied.

(2) Specialty areas to be delineated by the board shall include, but are not limited to, the following:

(A) Immigration and naturalization law.

(B) Family law.

(C) Housing law.

(D) Public benefits law.

(E) Litigation **support** law.

(F) Conservatorship and guardianship law.

(G) **Real** estate law.

(H) Liability law.

(I) Estate administration law.

(J) Consumer law.

(K) Corporate/business law.

(L) Intellectual property law.

(M) Estate planning law.

(N) Bankruptcy law.

(O) Employment law.

(P) Education law.

(3) On its own initiative or upon receipt of a petition for rulemaking, the board by rulemaking may specify additional registration or licensing specialties and their scope of practice. The board may also upgrade or downgrade its delineations to licensing or registration respectively, based on consumer experience.

(d) Any legal technician who practices in an area of **law** for which registration is required shall register with the board and pay an annual registration fee. Registration shall be valid for one year from the effective date thereof, and shall be annually renewed as long as the registrant continues such activity.

(e) Specialty licenses shall be granted only upon successful completion of a practice-oriented examination on the law and procedures of the relevant specialty area. The examination shall take no more than four hours to complete, and its contents shall be determined by regulation of the board in consultation with practice-oriented testing specialists. The board may require periodic practice-related reexamination as a condition of maintaining a specialty license, but the interval between initial examination and reexamination shall be no shorter than five years.

(f) (1) **Any** legal technician who practices in an area of law for which she or he is licensed may note this fact in public representations, promotional materials, and advertisements. The fact that a legal technician is registered, however, may not be so noted or promoted.

(2) In the event that a legal technician practices both in areas subject to registration **and** areas subject to licensure, the legal technician shall differentiate between them in all public representations, promotional materials, advertisements, and customer contracts with a disclosure and in the manner prescribed **by** the board.

(g) Any person who violates this section is guilty of a misdemeanor.

6261. (a) The board shall prescribe the information and forms to be submitted **by all** applicants. **All** information submitted shall be verified **by** a declaration

signed by the applicant under penalty of perjury.

(b) In addition to any other information, the board shall require all applicants to submit all of the following:

(1) **A** description of the applicant's education, training, and experience, if any.

(2) **A** description of all civil lawsuits in which the applicant settled or was found liable, but only if the lawsuit was substantially related to the applicant's qualifications, functions, or duties as a legal technician.

(3) A description of all criminal proceedings in which the legal technician was convicted, but only if the conviction was substantially related to the applicant's qualifications, functions, or duties as a legal technician.

(4) Whether the applicant is bonded, and has purchased malpractice liability insurance.

(c) The board shall maintain a record of the names and business addresses of all legal technicians. This list information about complaints, and the information required by this section shall be maintained in a format to detect patterns of behavior which may cumulatively constitute probable cause of violations of this chapter. The board shall create **a** consumer outreach program, which shall include **a** statewide 800 toll-free telephone number for customer complaints about legal technicians. The board shall make the information required by this section and information concerning the existence, nature, status, and disposition of all customer complaints filed with the board, regardless of their status or disposition, available to the public through that 800 number. All such records and information are public records for purposes of Section **6252** of the Government Code and shall be open to public inspection at reasonable times.

. 6262. Upon satisfaction that an applicant has met all applicable requirements, the board shall issue a certificate of registration or specialty license, whichever is applicable, which the registrant or licensee shall post in each place of business such that it can be easily read by customers.

6263. **(a)** Willful misrepresentation of any material

fact in an appiication for registration or licensure, or violation of any provision of this article is a misdemeanor.

(h) No legal technician may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which registration or licensure is required without alleging and proving that, at all times relevant to the performance, he *or* she was duly registered or licensed, whichever is applicable.

Article 3. Affirmative Duties and Unlawful Acts

6270. (a) In addition to any other disclosures determined by the board to be necessary to protect the public, every legal technician shall disclose all of the following, prior to rendering any services to a prospective customer:

(1) That he or she is not an attorney.

(2) The specific services to be performed.

(3) How fees and other costs are calculated and an estimate of the fees and other costs to be charged.

(b) Prior to rendering any services to a prospective customer, every legal technician shall provide the customer with a written contract, the contents of which shall include the information specified by subdivision **(a).** The disclosure that the legal technician is not **an** attorney shall be in boldface 12-point type or larger on the face of the contract. By its terms, the contract shall also include a provision allowing the customer to rescind the contract for any reason at any time, and that in the event of that rescission, the legal technician shall only charge for work already performed on a prorated basis and refund the balance of any excess paid **by** the customer. If the customer cannot read *or* cannot adequately understand English, the contract shall also be signed **by a** reader or translator of the customer's choice.

(c) (1) In the absence of a written contract in compliance with this section and signed by the customer to whom services are to be provided, it shall be conclusively presumed that a representation was made

that the legal technician is an attorney or active member of the State Bar.

(2) **Any** person who violates this section shall be subject to a fine of not more than one thousand dollars ($1,000) for each violation.

(3) No legal technician who violates this section may bring or maintain any action in any court for the collection of compensation for the performance of any act for which a written contract was required.

(d) Upon **a** customer's request, a legal technician shall also disclose **a** summary of his or her qualifications, including education, training, and experience, and whether he or **she** is bonded or carries malpractice liability insurance.

(e) Every legal technician shall post a sign in each place of business and in a place that it can be easily read notifying customers of their right and the phone number to call the Department of Consumer Affairs to find out about **a** legal technician's qualifications and to file a complaint. The board shall design **and** make the signs available to legal technicians.

(f) (1) All communications **by** a customer to a legal technician, **and** the legal technician's work product, shall be privileged from disclosure unless the privilege' is expressly waived **by** the customer. No legal technician may assert either of these privileges against the customer's wishes.

(2) **Any** person who violates this subdivision is subject to a fine of not more than five thousand dollars ($5,000) for each violation.

6271. (a) The diversion, withholding, misappropriation, or willful failure to apply any funds received from or on behalf of a customer, or the acceptance **of a** fee with no intent to perform the services agreed to, **by a** legal technician, is a public offense.

(b) Any person who violates this **section** is guilt); of a misdemeanor. If the amount of funds involved **is** less than one thousand dollars ($1,000), the violation shall be punishable **by a** fine not to exceed five thousand dollars ($5,000) as to each customer with respect *to* whom a

violation has occurred, or by imprisonment in the county jail for a term not exceeding **six** months, or both. If the amount involved is one thousand dollars ($1,000) or more, the violation shall be punishable by a fine not to exceed ten thousand dollars ($10,000) as to each customer with respect to whom a violation has occurred, or by imprisonment for a term not exceeding one year in the county jail, or both. In sentencing violators, payment of restitution to the customer shall take precedence over payment of a fine.

6272. (a) It shall be an unlawful act for a legal technician to do any of the following:

(1) Misrepresent his or her qualifications to a customer.

(2) Invade a customer's privacy by revealing customer confidences or releasing customer records to any person other than the customer without the customer's written authorization.

(3) Withhold original documents belonging to the customer, or to fail to surrender those documents upon demand, whether or not money is owed to the legal technician.

(4) Disregard a customer's specific instructions, or take significant actions on behalf of a customer without authorization.

(5) Engage in any advertising practices that are fraudulent, untrue, or misleading, including advertising or referring to registration in any way that implies licensure *or* endorsement by the State of California.

(6) Engage in any fraudulent conduct.

(7) Charge a fee in excess of the legal technician's own estimate unless authorized by the customer, or charge for work that is not necessary or not performed.

(8) Use information received from a customer to the disadvantage of that customer or another customer, or profit in any manner, other than by receiving fair payment for services, from accepting a customer's legal matter.

(9) Pay, *or* receive payment from, another legal services provider for a mere referral of employment unless the referral is through a bona fide referral service.

(10) Fail to keep the customer reasonably informed about the progress of the customer's matter or fail to respond to the customer's reasonable requests for information in a timely manner.

(11) Fail to perform in a timely manner.

(12) Engage in simple or gross negligence, as defined by the board from the perspective of a reasonable consumer.

(b) Violation of paragraphs (1) to (9), inclusive, of subdivision (a) is a misdemeanor.

6273. *(a)* Except as provided in subdivision (d) of Section 6292, a customer injured by the unlawful act of a legal technician shall retain all rights and remedies cognizable under law, and nothing in this chapter shall be construed to limit an injured customer's right to bring a civil action for damages and any other relief as may be appropriate in a small claims court or a court of general jurisdiction.

(b) Any customer claiming to have been injured by the unlawful act of a legal technician may file a complaint and seek redress through the board.

Article 4. Board of Legal Technicians

6280. (a) There is created within the Department of Consumer Affairs a Board of Legal Technicians. For the handling of complaints, the board shall create an Office of Investigation and Conciliation and an Office of Arbitration. The Office of Arbitration shall be separate and distinct from the Office of Investigation and Conciliation.

(b) The board shall consist of five members. Four members shall be public members who are not legal technicians or active members of the State Bar or who otherwise directly profit from the provision of legal services. All of the public members shall have demonstrated experience working on behalf of consumers of legal services or consumers in general, *or* demonstrated experience advocating the public interest

in the field of consumer protection or occupational regulation. Three of these four public members shall be appointed for an initial term of two years, and subsequent: terms shall be for four years. One of the two public members shall be appointed by the Speaker of the Assembly, and one public member shall be appointed by the Majority Leader of the Senate. The third public member shall be appointed by the Governor and the fourth public member shall be appointed by the Attorney General. The Director of the Department for Consumer Affairs shall appoint one legal technician to the board for an initial term of two years. After the expiration of that two-year term, the director shall fill that seat thereafter with a currently registered or licensed legal technician, and subsequent terms shall be for four years.

(c) It is the intent of the Legislature that the board shall be composed of members who are representative of the diverse ethnic population of the state and the board provide for balanced representation of both men and women.

(d) Members of the board shall serve without compensation, but shall be reimbursed for per diem and travel expenses while engaged in official duties.

6281. (a) The board shall employ:

(1) An executive director, who shall serve at its pleasure, and a staff to investigate, conciliate, and arbitrate complaints.

(2) A legal practice expert, who shall be familiar with the laws and rules regulating the provision of legal assistance or advice in the state, to advise staff on matters of legal practice and services and to serve as an expert in arbitration proceedings.

(3) Other professional, technical, and clerical personnel, on a full- or part-time basis, necessary for the proper performance of its duties.

(b) In the absence of an affirmative showing of bad faith, all employees of the board shall be immune from liability for any act or decision made during their tenure and within the designated scope of their authority.

6282. The board shall:

(a) Adopt rules and regulations required for the administration of this chapter, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) Act on all complaints that allege a violation of this chapter. That action shall include attempts at conciliation and, in appropriate cases, arbitration. When the board has reasonable cause to believe that a legal technician has engaged in a pattern of methods, acts or practices in violation of this chapter, or has made an award from the Customer Compensation Fund, it may bring a civil action seeking damages, injunctive relief, or both.

(c) Educate the public about legal technicians and consumers' rights in dealing with them, and advertise the existence and availability of the board and its services.

(d) Issue an annual written report, available to the public, and transmitted to the Governor, the Attorney General, the Legislature, the Supreme Court, the director, and the State Bar, on the board's operations and activities, and a statistical breakdown of its caseload, including:

(1) The number, general nature, status, and disposition of customer requests for information and customer complaints.

(2) The average time required to resolve and/or arbitrate complaints.

(3) The awards made by arbitrators and the Customer Compensation Fund.

(4) The level of customer satisfaction with the processing and disposition of their Complaints.

(e) Punish violations of this chapter by imposing fines, or pursuant to Section 6294 by restricting, suspending, or revoking a legal technician's registration or license.

(f) Report to the appropriate authorities any complaint that alleges a violation of a criminal statute.

(g) Issue subpoenas necessary to accomplish the objectives of this article.

6283. (a) All meetings and records kept by the board and all arbitration proceedings of the board shall be open to the public, except as provided in this section.

(b) The customer may request that identifying information or portions of records be deleted, or that arbitration proceedings be closed, to protect the customer privacy.

(c) The customer and the legal technician may agree, as part of a settlement agreement, to close all records of the complaint except for all of the following:

(1) The identity of the legal technician named in the complaint.

(2) The general nature of the complaint.

(3) The fact that the complaint was resolved to the customer's satisfaction.

Article **5.** Customer Complaints

6290. (a) All complaints under this chapter, whether received from the public or initiated by the board, shall be investigated and referred to the Office of Investigation and Conciliation by Department of Consumer Affairs investigators. In addition, any complaint which also appears to violate the standards adopted pursuant to subdivision **(b)** of Section 6294 shall also be promptly referred to a specially assigned deputy attorney general, as provided in Section **6294.**

(b) Investigations and enforcement **by** the board may include sending investigators posing **as** customers to visit and inspect the subject's performance.

6291. **(a)** The Office of Investigation and Conciliation shall investigate **all** complaints received and may attempt to conciliate them by informal means with all interested parties-

(b) The terms of any conciliation agreement reached by the parties may be put in writing. If a written agreement is desired, it shall be for conciliation purposes only and does not constitute an admission by any party that any rule of law has been violated. **A** written conciliation agreement shall be enforceable by a court of law.

(c) **A** conciliation agreement, whether verbal or written, may include any provisions agreed to be the parties, including an agreement by the customer to waive his or her right to any further relief based on the same cornplaint, except for action to enforce the conciliation agreement. However, no conciliation agreement may be construed to limit or in any way affect independent proceedings under Section 6294.

(d) (1) Conciliation shall be deemed to have failed if no settlement has been reached within 30 days of the filing of the complaint, unless both parties agree to an extension of time.

(2) In the event that conciliation fails, the office shall inform the customer about the arbitration process and preparing the complaint for arbitration. The office shall make available to both parties plain-language informational materials that address arbitration rules and procedures, a checklist of the deadlines for taking actions: suggestions for how to prepare for the hearing, the standards for deciding disputes, and appeal rights and procedures.

6292. **(a)** If conciliation fails and the complaint is based on allegations which, if true, would constitute a violation of this chapter, the customer may request that the complaint be arbitrated by the Office of Arbitration

(b) If the customer elects to submit the complaint to arbitration, the legal technician is required to participate, and may raise cross-claims which shall be decided in conjunction with arbitration of the customer's complaint. Within **14** days of the customer's election, the office shall notify the legal technician of that electidn and their rights, and shall warn that, should **the** legal technician fail to participate in the process, the cornplaint will be decided despite that lack of participation.

(c) Customers electing arbitration shall pay a filing fee based on the amount of the claim, as specified by the board. This feemay be waived **if** the customer is indigent.

(d) By electing arbitration, the customer waives the right to bring a civil action against the legal technician based on the same facts or circumstances leading to the complaint, and waives the right to collect any noneconomic damages. **An** arbitrator map, however,

impose civil penalties as part of the award. Before a customer elects to submit a complaint to arbitration, he or she shall be informed of these limitations.

(e) (1) The board shall prescribe rules for selecting arbitrators, conducting the arbitration hearing, and making awards.

(2) These regulations shall aim to make the arbitration process **quick,** inexpensive, impartial, simple, fair, efficient, effective, and final, and shall include the following provisions:

(A) All cornplaints shall be decided by a single lay arbitrator or a panel, *the* majority of whom shall *be* neither attorneys, legal technicians, nor both.

(B) No arbitrator selected may have a personal or economic relationship with any of the parties or their representatives, or any other conflict of interest.

(C) Every effort shall be made to schedule hearings at a time and location convenient to the parties, which may include evening or weekend hours.

(D) The parties may elect to represent themselves or be represented by another person.

(E) Arbitrators shall not use or impose formal rules of evidence or procedure to exclude any evidence, except for irrelevant or unduly repetitious evidence, but may be guided by such formal rules in weighing the evidence.

(F) Hearings shall be audiotaped and the tape recording shall be available to the parties at cost.

(G) In deciding disputes, arbitrators shall be guided by the substantive law of the *state.*

(H) All arbitration hearings shall be concluded by no later than 60 days after the customer elected arbitration, and awards shall be made by no later that 14 days after the conclusion of the hearing.

(f) The arbitrators' award shall be final and binding on the parties, and shall not be subject to appeal, unless it was procured by corruption, fraud, or other undue means, there was evident partiality or misconduct by an arbitrator prejudicing the rights of any party, or the arbitrators abused or exceeded their powers.

(g) Upon confirmation with the appropriate court, the award shall constitute an enforceable judgment. The board shall make plain language written information concerning the legal options and procedures for collection of judgments available to the parties.

6293. There shall be established a Customer Compensation Fund which, notwithstanding Section 13340 of the Government Code, is continuously appropriated and shall be administered by the board. This fund shall compensate consumers for acts of theft, as defined by Section 6271, if direct compensation from the offending legal technician is, as a practical matter, unavailable. Every legal technician shall pay an annual fee of no more than fifty dollars ($50) into the fund, which shall be kept in **a** separate account, be maintained in **a** sound actuarial manner, and accrue interest payable only to the fund. The board shall waive contributions to this fund for **any** legal technician who meets bonding or liability insurance standards determined by the board *to* protect consumers from loss for theft.

6294. (a) The Department of Consumer Affairs investigators and any other persons designated by the board to receive customer complaints about legal technicians shall be supervised **by an** assigned deputy attorney general, who shall also supervise a separately identified unit of prosecutors within the office of the Attorney General to conduct prosecutions under this section, and to prosecute any criminal offenses enumerated in this chapter.

(b) (1) The board shall, adopt by rulemaking, standards, the violation of which shall be cause to suspend, restrict, or permanently revoke a legal technician's registration or license, whichever is applicable.

(2) The standards prescribed **by** the board shall be consistent with the standards prescribed ***by*** statute and common law applicable to the grant of unfair business practice injunctions.

(c) When the supervising deputy attorney general determines that formal charges are appropriate, he or she shall file a formal accusation pursuant to the

Administrative Procedure Act. These procedures shall apply to all proceedings to suspend, restrict, or permanently revoke a legal technician's registration or license, except:

(1) All proceedings arising under this section shall be heard by an assigned administrative law judge or by an assigned administrative law judge from a designated panel of such judges, within the Office of Administrative Hearings, whose judgment shall be final Tor purposes of judicial review and there shall be no appeal to the board.

(2) The assigned administrative law judge may, where good cause is shown, issue interim orders prior to final adjudication to protect the public. Interim orders may include practice restrictions or, where the administrative law judge finds that disciplinary action in the underlying case is likely and the balance of hardships favors it, suspension, as appropriate. Where the interim order is entered after submission of evidence by the deputy attorney general without a hearing, there shall be a hearing on the order within two weeks of entry, unless time is waived by the respondent.

(3) Judicial review of all orders of the administrative law judge shall be by writ of administrative mandate pursuant to Section 1094.5of the Code of Civil Procedure, except all such cases shall be heard directly and exclusively by a court of appeal panel so designated by the Judicial Council. However, the State 3ar Court and its review department may not be designated. The decision of the administrative **law** judge shall be upheld where supported by substantial evidence. The decision of the designated court of appeal panel shall be final, and there shall be no further appeal.

(d) Final orders of an administrative law judge may include provisions necessary to protect the public from dishonest or incompetent legal technicians such as practice restrictions, retesting, suspension, or permanent revocation.

(e) For purposes of this section, all investigations shall be completed within four months, **and** all adjudications by administrative **law** judges shall be completed within 10 months, of receipt of the complaint by the investigators, except for good cause shown.

(f) The board shall enter and enforce all final orders issued under this section.

Article *6.* Revenue

6295. There shall be established a Board of Legal Technicians Fund for the regulation of legal technicians. The board shall assess a license application fee of no more that fifty dollars ($50) including any examination fee. The board shall also assess an annual fee of no more than one hundred dollars ($100) for each registrant or licensee, regardless of the number of specialties practiced. All fines and civil penalties imposed on any legal technician in any proceeding, and all punitive damages awarded to any party pursuant to this chapter shall be paid into the State Treasury to the credit of this fund. Money in the State Treasury and credited to the board shall be continuously appropriated for those purposes, notwithstanding Section **13340** of the Government Code.

6296. This chapter shall become operative on its effective date, except that requirements of licensure and registration and duties imposed on legal technicians, shall become operative one year thereafter.

SEC. 9. No reimbursement is required by this act pursuant to Section **6** of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates **a** new crime or infraction, changes the definition of a crime or infraction, changes the penalty fur a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.'

SEC. **10.** The sum of seven hundred fifty thousand dollars ($750,000) is appropriated from the General **Fund** to the Board of Legal Technicians Fund. That money

shall be repaid to the General Fund from the Board of Legal Technicians Fund no later than January 1, 1995.

SEC. 11. If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without *the* invalid provision or application, and to this end the provisions of this act are severable.

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States of America, and a resident of the County of Sacramento. I am over eighteen years of age and not a party to the within action. My business address is 8925 Folsom Boulevard, Suite M, Sacramento, California.

On October 11, 1991, I served the within INITIAL BRIEF IN OPPOSITION TO THE PROPOSED ADVISORY OPINION and REQUEST FOR ORAL ARGUMENT, by placing a true and correct copy thereof in an envelope, with postage thereon fully prepaid, and placing same for pick-up in the United States Mail, at Sacramento, California, addressed as follows:

THE SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE FL 32399-1925

YR. J. ROBERT MCCLURE, JR.
POST OFFICE DRAWER 190
TALLAHASSEE FL 32302

YR. KENNETH R. HART/
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WESLEY CHAPEL FL 33543

MR .JAMES C. KONARSKE
P O BOX 1166
ZEPHYHILLS FL 33539

I declare under penalty of perjury under the laws of the tate of California, that the foregoing is true and correct.

Executed on October 11, 1991, at Sacramento, California.

PAULA D. SCOTTEN