

## **RISK & TEMPTATION: THE UNAUTHORIZED PRACTICE OF LAW BY DIRECTORS**

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The unauthorized practice of law (hereinafter referred to as “UPL”) continues to be a hot topic largely due to the recognized risk generated from and created by a violation. The UPL by any member of the board of directors creates a potential risk to all community associations (both condominium and homeowners) which the association and the board should strive to avoid. The temptation for a director to engage in UPL is always present. Quite often, UPL occurs in community associations that are self-managed, who have directors who ostensibly have a certain amount of knowledge or experience in community associations, or who may desire to economize by foregoing legal advice. These factors, and undoubtedly there are others, should be “red flags” to Associations and the Board of Directors that UPL is, or may be, about to occur.

The consequences of UPL can be very serious. A director who commits UPL may subject the community association to substantial liability. Furthermore, the perpetrator of UPL could personally be at risk. Engaging in UPL is a criminal offense in the State of Florida. In fact, it is a misdemeanor of the first degree, punishable by up to one year in jail and a fine of up to one thousand dollars for each violation. Keep in mind that directors and officers’ insurance and the indemnification provisions in the community association’s governing documents may not protect directors from their own criminal activity. In summary, a director who engages in UPL may be guilty of a crime and may also have violated his or her fiduciary duty to the association. As such, a director who commits UPL may be financially liable to the association for any damages suffered by the association.

The Florida Supreme Court has addressed UPL in the context of community association law. In 1996, the Florida Supreme Court issued its Advisory Opinion in The Florida Bar Re: Advisory Opinion--Activities of Community Association Managers, 681 So. 2d 1119 (Fla. 1996). This Advisory Opinion delineates tasks and actions which definitely constitute UPL, which may constitute UPL, or which may fall into a gray area wherein the surrounding factual circumstances determine whether or not the task or activity is UPL. The Advisory Opinion is ostensibly limited to the activities of a Community Association Manager (hereinafter referred to as “CAM”). Under Florida Law, a CAM must be licensed by the state and must annually earn a specified number of continuing education credits. It is logical to extend the Florida Supreme Court guidelines to directors, who are not required to be licensed nor required to annually earn continuing education credits.

Based on the Florida Supreme Court Advisory Opinion, certain actions appear to be UPL and therefore may present a significant risk to directors. For instance, a particular danger that directors should carefully avoid is giving advice to the community association that in reality involves the legal consequences of taking a certain course of action. Another pitfall is drafting claims of lien or satisfactions of lien. Although claims of lien and satisfaction of lien appear deceptively simple and are among the most common documents drafted for the community association, claims of lien and satisfactions of lien actually require legal analysis of the community association’s legal rights arising out of the governing documents and the Florida Statutes, as well as a determination of the correct legal description and an analysis of record title ownership of the property in question. An improper or unlawful claim of lien or satisfaction of lien may subject the association to a lawsuit for among other possible causes of action, slander of title. In addition to UPL, a director who drafts an improper or unlawful claim of lien or satisfaction of lien may have breached his or her fiduciary duty to the association.

Based upon the Florida Supreme Court Advisory Opinion, directors should also refrain from:

1. Preparing amendments to the Declaration, Articles of Incorporation, or Bylaws;
2. Drafting the Frequently Asked Questions and Answers Sheet (Department of Business and Professional Regulation Form BPR 33-032);
3. Drafting a Notice of Commencement Form (when constructing improvements on community association property);
4. Determining the timing, method, and form of giving notices of meeting; and/or
5. Determining the votes necessary for the community association to take certain actions.

All of these actions would appear to be UPL pursuant to the Advisory Opinion.

Lastly, pursuant to the Advisory Opinion, drafting a limited proxy form or drafting the documents required to exercise a community association's right of approval or first refusal to a sale or lease may constitute UPL if it involves any legal analysis or interpretation.

Although the Florida Supreme Court's ruling on UPL may seem to inconvenience the community association, these rules ostensibly were, at least, designed to protect community associations and their directors from making decisions or drafting documents that could expose the association and its directors to significant financial, legal, and potentially even personal liability. While we may not agree with each item that has been classified as UPL, we cannot ignore or recommend associations ignore the risk and potential liability. Therefore, Clayton & McCulloh strongly recommends that directors consult a licensed Florida attorney who specializes in community association law when the directors have any doubt as to whether a particular action may be UPL. The risks created by UPL, both to the community association and to the individual directors, are too great to ignore. Consider the age-old adage: an ounce of prevention is worth a pound of cure. Consult with your qualified legal counsel before UPL potentially creates any risk or liability to your community association or any personal liability to you as a director. Don't succumb to the alluring risk and temptation of the unauthorized practice of law. ☞