

WEST VIRGINIA STATE BAR**Committee on Unauthorized Practice of Law
Opinion No. 2003-01****1. Is the Preparation of a Written or Oral Report on Property the Practice of Law?**

Previously in Advisory Opinion 93-003, the Committee made clear that a title search is the practice of law and that a lay person may not conduct such a search for another unless under the direct control and supervision of an attorney. The Committee now further finds that it is the unlawful practice of law for a lay person to prepare any documents or make an oral report that explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effects of other matters found of record that could effect the marketability of title, unless under the direct control and supervision of an attorney.

The Committee is of the opinion that the gathering of factual information that appears in the public record such as the names of the grantors or grantees, date of the instrument, recording date, or parties to judgement liens, trust deeds or other instruments of record is not the practice of law, unless, the gathering of said information is used for the purposes of determining the quality or validity of title of the present owners of the real estate or used to assure the quality or validity of title to a second party for purposes of purchasing said real estate or use of said real estate as collateral for a secured transaction.

2. Is the Provision of a Title Search, Exam or Opinion by a "Title Company" the Unauthorized Practice of Law?

The Committee is of the opinion that the rendering of an opinion to another of the legal significance of the presence or absence of matters of record and/or the condition of the title or the giving of any other advice concerning the application of legal principles is the practice of law. As such, only licensed attorneys may perform this service for others.

The Committee is aware of certain business organization, whether incorporated or not, that hold themselves out as "title companies", and sell or provide title examinations, title searches, property reports or otherwise certify the quality or validity of title or render legal advice. When these business organizations provide a report that certifies the quality or validity of title or otherwise provide legal advice, this activity is the practice of law and may only be rendered by a licensed attorney.

Moreover, W. Va. Code 30-2-5 prohibits corporations or voluntary associations from practicing law. Accordingly, a "title company" may not employ staff attorneys to provide this service to others as this would constitute the unauthorized practice by a corporation or association. Further "[t]he fact that any such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law shall not be held to permit or allow any such corporation or voluntary association [to engage in the practice of law]." Id.

3. What is the Direct Supervision and Control of a Lay Person in Conducting a Title Examination?

The committee has found that a lay person may not conduct a title examination unless this examination is "under the direct supervision and control of an attorney". For purposes of this opinion a "title examination" is the process of evaluating at county courthouses recorded legal instruments such as Deeds and Wills, to establish a history of ownership (chain of title); reviewing other legal instruments such as rights of way, leases, deeds of trust, and other liens; making a determination of the attachment of these liens and encumbrances to the subject real estate; reviewing tax records to determine proper assessment; and reporting the results of that examination, by various means, to another.

It is clear that a licensed attorney at law must be included in the title examination/ certification process. An attorney who a) conducts his/her own examination and reports his/her findings or b) issues, as a title insurance agent a title policy based on those findings, is operating within the bounds of the law. However, when a lay entity is involved in the process, the committee feels further guidance is necessary. What is meant by the phrase "under the direct supervision and control of a licensed West Virginia Attorney"?

The Committee finds as follows:

I. Non-lawyer searchers may not offer any service which constitute the practice of law to the general consumer public.

II. A lawyer may employ a non-lawyer assistant in the representation of the attorney's client; so long as:

- a. The attorney retains a direct relationship with the client.
- b. The client understands that a non-lawyer will be conducting the title examination.
- c. The lawyer, based on the certification, education, training, experience of the searcher, reasonably supervises the searcher throughout;
- d. The lawyer remains solely responsible for the work-product, including all actions taken or not taken by the searcher to the same extent as if such search had been furnished entirely by the lawyer.

III. Subject to the provisions of Section II, above, lay title agents must use the services of a licensed West Virginia attorney to conduct a reasonable examination of title prior to the issuance of title insurance policies, but they are prohibited from sharing fees with that lawyer for title

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examinations.

4. **Is a Title Search, Exam, or Opinion Prepared by a Non-Lawyer and Provided to and/or by a Lender in Satisfaction of a Borrower's Condition for a Loan the Unauthorized Practice of Law?**

As a condition of the loan, the lender generally requires the borrower to provide a title search, exam or opinion certifying, proving or indicating the validity or quality of title of the real estate. The lender also often requires the borrower to purchase title insurance to protect the lender's lien or encumbrance. It is the lender that selects and/or contracts with the insurance agent or company and places the request for the insurance. The title insurance company then obtains a "preliminary report on title" from its employees or contractors. Licensed attorneys do not perform these "preliminary reports on title". These non-lawyer "preliminary reports on title" are relied upon by the title insurance company for purposes of

determining exceptions to and requirements of issuing title insurance. The borrower pays for the lender's title insurance and also pays for the non-lawyer's "preliminary reports on title." The circumstances imply the borrower/purchaser is paying for a title search or other certification of the quality or validity of title to the real estate that is being purchased. The HUD settlement statement prepared for closing reflects that, not only does the borrower/purchaser pay for the title insurance to protect lender, but also pays for an "abstract", "title examination" or "title search." There is no other search preformed.

The borrower/purchaser may not be informed that the "abstract", "title examination" or "title search" that they pay for is not prepared by a lawyer. The "preliminary report on title" is prepared for the sole purpose of insuring the lender's interests and satisfactory to the insurance company for the risks it is assuming for the premium paid. Indeed, borrowers/purchasers are sometimes offered owner's title insurance for an additional premium but they most often decline based upon the assumption that they have received assurances of the quality or validity of title that they have acquired. Moreover, lenders are accepting this non-lawyer "preliminary report on title" on behalf of the borrower as satisfaction of the loan condition that borrower provide certification of the quality or validity of title. The borrower/purchaser also relies upon this non-lawyer "preliminary report on title" as being the required certification of title. Thus, in practice, the lender is accepting a non-lawyer "preliminary report on title" and, in turn, providing this said report from the title insurance company to satisfy borrower's condition of certifying the quality or validity of title. The lender, therefore, is providing a legal service in the form of a title exam or an opinion of the condition of the borrower's title. The lender is not an attorney. This is the unauthorized practice of law by the lender in West Virginia.

The committee further understands that lenders also directly purchase non-lawyer "abstract" or other non-lawyer certifications of title from title companies or others and that they are "providing" those to the borrower as certification of title in the same manner as preliminary reports of title for lender's title insurance are provided. This, too, is the unlawful practice of law by the lender in West Virginia.

The Committee further notes the W. Va. 33-11A-11[c] provide that when insurance is required as a condition of obtaining a loan, "[n]o title insurance shall be issued until the title insurance company has obtained a title opinion of an attorney licensed to practice law in West Virginia, which is not an employee, agent, or owner of the insured bank or its affiliates..."

5. Does a Lay Person Who Conducts a Real Estate Closing Engage in the Unlawful Practice of Law?

The issue before this Committee is whether real estate closings conducted by lay persons constitute the unauthorized practice of law

From documents submitted to the Committee various activities can occur at real estate closings in connection with the purchase and financing of the purchase of residential real estate or the refinancing of prior existing secured loans. These activities include, but are not limited to, the following:

1. Reviewing the final terms of the transaction in connection with the sales contract;
2. Completing legal documents, including deeds of trust or other security instruments, notes, riders, and rights of rescission;
3. Making certain that lenders will have valid first liens upon property conveyed as

security;

4. Reviewing title insurance binders or opinions to determine what is included or excluded and that title policy requirements can be met;
5. Determining that the legal description of the land conforms with a survey;
6. Determining that easements and/or other restrictions have been identified and have not been violated or encroached upon;
7. Determining if there is sufficient evidence of hazard insurance;
8. Determining the amount of taxes owed and providing for payment of taxes at closing;
9. Preparing HUD form 1, settlement statement;
10. Addressing contingencies specific to the transaction;
11. Attending the closing and obtaining appropriate signatures on documents;
12. Attending the closing and answering buyer and/or seller questions about documents and/or the transaction;
13. Recording documents and seeing that releases for payoffs are recorded and security instruments constitute valid liens; and
14. Escrowing and disbursing proceeds.

The practice of law, as described by the West Virginia Supreme Court by Rule on March 28, 1947 and amended July 1, 1961 states in relevant part:

In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge or skill.

More specifically, but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures. Nothing in this paragraph shall be deemed to prohibit a lay person from appearing as agent before a justice of the peace or to prohibit a bona fide full-time lay employee from performing legal services for his regular employer (other than in connection with representation of his employer before any judicial, executive or administrative tribunal agency or officer) in matters relating solely to the internal affairs of such employer, as distinguished from such services rendered to or for others.

While some ministerial and clerical functions occur as part of a real estate closing, *i. e.*, preparation of the HUD settlement statements, simple execution of documents, and disbursement of proceeds,² in general, legal principles are applied to the factual situation to determine if and how the transaction should be concluded. For example, there is a determination that the lender can obtain a valid first lien; that the legal description of the land conforms to the survey; that the title insurance requirements have been met; that evidence of hazard insurance is sufficient; that easements and other restrictions have been noted and have not been violated or encroached upon; and that legal instruments have been properly signed to constitute binding documents to achieve their legal purposes. Most

importantly, however, it is inherent at the closing itself that buyers and sellers will have questions about the transaction and the documents, which answers necessarily go to their respective legal rights and obligations. Such answers are advising on legal matters. Thus, in West Virginia, generally, real estate closings constitute the practice of law.

In conclusion, it is clear that as a whole, real estate closings are the practice of law. The Committee presumes that significant harm to the public occurs just by the practice of law by lay persons and holds such practice to be the unauthorized practice of law.^[2]

The reference to lay persons in this section does not apply to a non-lawyer assistant employed, retained by or associated with a lawyer in accordance with Rule 5.3 of the Rules of Professional Conduct and consistent with all other Rules of Professional Conduct.

[1] For additional analysis of the issues discussed in Section 3, please see Appendix A.

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