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Unauthorized Practice of Law--Mortgage Company's Charging for Attorney's Title Examination

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UNAUTHORIZED PRACTICE OF LAW—MORTGAGE COMPANY'S CHARGING FOR ATTORNEY'S TITLE EXAMINATION—Respondent corporation was engaged in making loans secured by mortgages on real estate. Before any loan was made, an attorney's examination of the title to the property was required. Respondent engaged its own lawyer at a fixed salary to perform various legal services consisting principally of examining and passing judgment on the titles to all properties which would be mortgaged to it.[1] The attorney did not receive a legal fee for each examination, and the statement of service charges made by the respondent to the borrower at the time of the closing contained an item "exam. of title," for which no specific charge was made.[2] Normally, separate charges were not listed but rather a total amount was entered according to a graduated scale based on the amount of each loan. An original contempt proceeding was brought by the petitioner charging respondent with engaging in the unauthorized practice of law by (1) rendering title examination service for a borrower, and (2) charging the borrower a fee. *Held:* Respondent was in contempt of the Court of Appeals, and was ordered to cease and desist from rendering title examination service and charging a fee therefor, one judge dissenting without opinion. Title examination is a service which can be performed for others only by an attorney and is unauthorized practice of law if performed by a mortagee's salaried attorney, who does not receive the examination fee which is charged to the mortgagor. The court found that since all other items within the service charge list remained relatively constant, the only variable that could account for the graduated scale was an attorney's fee for the title examination. The amount of the remuneration received here gave rise to an inference that the compensation was actually for legal services rendered.[3] *Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n,* 342 S.W.2d 397 (Ky. 1961).

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[1] The court stated that there are two customary methods in which title opinions may be legally rendered in this type of business: (1) by a lawyer representing the borrower; and (2) by a lawyer of the lender's selection who is paid an attorney's fee for each service rendered. Here the respondent followed neither method.

Irrespective of whether the attorney receives a salary, is paid a percentage, or is paid for each separate item of work, the result would seem to be the same so long as the lay agency pays a lawyer one amount for his services and for those services charges a different amount to the borrower.

[2] One of the association's officers admitted that part of the loan expense included in the service charge was allocable to the title examination. Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W. 2d 397, 399 (Ky. 1961).

[3] See People v. Sipper, 61 Cal.App. 844, 142 P.2d 960 (1943); State *ex rel.* Fatzer v. Schmitt, 174 Kan. 581, 258 P.2d 228 (1953); Hughes v. Fort Worth Nat'l Bank, 164 S.W.2d 231 (Tex. Civ. App. 1942).

Prohibition of the unauthorized practice of law is to protect the public[4] from substandard legal service[5] and to prevent conflicts of interest.[6]

Rule 3.020 of the Rules of the Court of Appeals[7] defines the practice of law as follows:

> 'The practice of law' is any service rendered involving legal knowledge or legal advice, whether of representation, counsel, advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor.

In 1901 the Court of Appeals had apparently restricted the meaning of "the practice of law" to litigation in the courts.[8] This definition persisted until 1937 when the practice of law was held not to be

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[4] See Beach Abstract & Guar. Co. v. Bar Ass'n, 326 S.W.2d 900 (Ark. 1959); Commonwealth *ex rel.* Ward v. Harrington, 266 Ky. 41, 98 S.W.2d 53 (1936); Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951); Niklaus v. Abel Constr. Co., 164 Neb. 842, 83 N.W.2d 904 (1957).

[5] Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958); Commonwealth v. Jones & Robbins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947). For an example of damages resulting from incompetent legal practice by a layman see Mickel v. Murphy, 147 Cal.App.2d 718, 305 P.2d 993 (1957).

[6] The relation of attorney and client cannot exist between a corporation's customer and the attorney who is an employee of the corporation, for the reason that in such a case the attorney is subject to the direction of the corporation and not the directions of the client. Also his loyalties are engaged by the corporation, not by the client. Unger v. Landlord's Management Corp., 114 N.J.Eq. 68, ——, 168 Atl. 229, 231 (1933) citing with approval *In re* Co-Operative Law Co., 198 N.Y. 478, ——, 92 N.E. 15, 16 (1910); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934). The relationship between the attorney-employee and the corporation is that of master-servant. The corporation stands between its customer and its attorney-employee. New Jersey State Bar Ass'n v. Northern N.J. Mtg. Ass'n, 22 N.J. 184, ——, 123 A.2d 498, 505 (1956).

[7] Hereinafter cited as RCA. RCA 3.020 was adopted pursuant to Ky. Rev. Stat. § 30.170 [hereinafter cited as KRS] which provides that the court shall adopt and promulgate rules defining the practice of law and prescribe a code of professional conduct of attorneys and the practice of law and prohibits the adoption of a rule which prevents a person not holding himself out as an attorney from writing a deed, mortgage or will or prevents a person from drawing any instrument to which he is a party.

[8] Dunlap v. Lebus, 112 Ky. 237, 65 S.W. 441 (1901). The *Dunlap* case involved the interpretation of Ky. Stat. § 100 [hereinafter cited as KS] which provided: "No person shall practice law as an attorney at law in any court until he has obtained a license so to do." KS 100 was § 3 of the Act of Oct. 10, 1892, ch. 100, p. 258 and was impliedly repealed by an Act of March 17, 1902, ch. 17, p. 45, then compiled as KS 98-1. See *In re* Creste, 30 Ky. L. Rep. 249, 98 S.W. 282 (1906). KS 98-1 was impliedly repealed by KS 98a-1 in 1918, ch. 131, p. 559, § 1. KS 98a-1 provided: "No person shall hereafter be licensed as an attorney or counselor at law in this state except as herein provided for." KS 98a-1 is presently designated as KRS 30.010 which provides:

> [N]o person shall practice law in this state without being licensed and sworn, and no person shall be licensed as an attorney except as provided in this chapter.

confined to performing services in judicial actions or proceedings, but also to include giving advice and preparing instruments of a legal nature.[9] In two later decisions[10] the court in accordance with the majority view[11] stated that a corporation could not be licensed to practice law. However, banks and trust companies engaged regularly for compensation in such acts as preparing legal instruments and documents, giving advice to customers, and conducting necessary litigation through salaried attorneys under the assumption that such conduct was authorized by Ky. Rev. Stat. 30.170,[12] until the decision in *Hobson v. Kentucky Trust Co.*[13] In this case the court held that a trust company, as a part of its services as a fiduciary, could not perform legal services on the advice of a licensed attorney in its employ without being engaged in the unauthorized practice of law. The court did not base the decision primarily upon the fact that a corporation may not be licensed to practice law, but upon the commission of specific acts by the corporation which constituted the unauthorized practice of law.[14]

The court stated that the principal case fell within the same category of services which were condemned in the *Hobson* case, and since the title examination was primarily for the benefit of the borrower and clear title was a condition precedent to the granting of the loan, a legal service was being performed for the borrower rather than by lender's attorney for the lender. The "primary benefit" test, as employed by the court here, is a reverse application of the principle underlying a number of cases in which the performance of certain legal services, which would otherwise constitute the practice of law, was permitted by lay persons who had a "substantial interest" in the subject matter of the transaction and could therefore be considered

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[9] Howton v. Morrow, 269 Ky. 1, 106 S.W.2d 81 (1937).

[10] Kendal v. Beiling, 295 Ky. 782, 175 S.W.2d 489 (1943); Mutual Bankers Corp. v. Covington Bros. & Co., 277 Ky. 33, 125 S.W.2d 202 (1938).

[11] *E.g.*, Arkansas Bar Ass'n v. Union Nat'l Bank, 244 Ark. 48, 273 S.W.2d 408 (1954); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937).

[12] See note 7 *supra.*

[13] 303 Ky. 493, 197 S.W.2d 454 (1946).

[14] The court in defining these specific acts stated that it was:

> [P]ermanently enjoining the defendants from engaging in, or performing regularly and as a business or advertising or soliciting and holding itself out to the public as qualified to so act (with or without compensation, directly or indirectly), any of the following acts in the circumstances indicated, to wit: writing deeds, wills, conveyances and other legal documents requiring expert knowledge and equipment in their phraseology so as to comport with the law relating to such matters; or engaging in preparing any instrument wherein it is designated as a fiduciary to enforce and administer the provisions in same, or to hold itself out as possessing the requisite knowledge so to do. *Id.* at 505, 197 S.W.2d at 461.

parties acting primarily for their own benefit.[15] It is now a moot question whether the respondent was merely determining the risk of loss through possible failure of the borrower's title it would take if the loan were made, or whether it was determining the marketability of the title for the borrower's benefit.[16] The court summarily placed the service within the latter classification, thus leaving a vaguely defined test with no explanation other than that the title examination constituted a condition precedent to the granting of the loan.

An examination of the record in the principal case reveals no instance in which the attorney's opinion of a title was disclosed to a borrower, nor that the attorney was present at any closing. Apparently the Bar Association was complaining of the corporation's charging its customers for title examination performed by its salaried attorney.[17]

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[15] *E.g.*, State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958). There are several theories used by the different courts in determining what constitutes the unauthorized practice of law by laymen or lay agencies. They are as follows: (1) The customary function of an attorney as discussed in Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); (2) The "substantial interest" theory as discussed in *Connecticut Bank & Trust Co., supra;* (3) The "incidental" theory as discussed in Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957)(Giving legal advice, preparing legal instruments and rendering other services usually performed by an attorney is not unauthorized practice if it is done incidental to a regular business or profession.); (4) The "consideration" or "compensation" theory as discussed in 60 A.B.A. Rep. 521, 532 (1935)(Certain legal services or counselling may be performed as an incident to a business regularly carried on; the party is practicing law if he receives consideration for such services.); (5) The "complexity" theory as discussed in Gardner v. Conway, 234 Mnin. 468, 48 N.W.2d 788 (1951)(Certain legal services or counselling has been allowed lay persons as incidental to their business, but such is not allowed if it involves the resolution of difficult or complex questions of law.); (6) The "knowledge" theory as discussed in People *ex rel.* Illinois State Bar Ass'n v. Peoples Stock Yark State Bank, 344 Ill. 462, 176 N.E. 901 (1931) (When the giving of advice or rendering services requires any degree of legal knowledge or skill, it is the practice of law.); (7) The "public service" theory as discussed in Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, *supra,* (Where acts are recognized as the practice of law, but are permitted because they are a necessity or convenience for the public.).

See also Carter v. Trevathan, 309 S.W.2d 746 (Ky. 1958); Carter v. Brien, 309 S.W.2d 748 (Ky. 1956); Hobson v. Kentucky Trust Co., 303 Ky. 493, 197 S.W.2d 454 (1946). In these Kentucky cases it is stated that it is not the practice of law for a lay person to draw an instrument to which he is a party beneficially interested in the subject matter.

[16] Under such an approach, where it is encumbent upon a grantor to tender a deed to the land with clear and marketable title, could the grantee search the title and draw up the instrument without engaging in the unauthorized practice of law? If it is a condition precedent that the grantor have a marketable title, would not the grantee in examining the title be performing a legal service primarily for the benefit of the grantor? Does the loan company undertake primarily to pass upon the marketability or validity of the title, or does it determine the risk that will be taken if the loan is made? Would it make a difference if the borrower were using the loan for the purchase of the land or whether he already owned it?

[17] The original complaint, filed Oct. 20, 1955 in the Kenton Circuit Court, stated this as one of its allegations. On April 12, 1958 the complaint was amended to include the years 1955, 1956, 1957, and the preceding portion of 1958.

(Footnote continued on next page)

By combining legal charges with commercial services, the respondent was requiring each borrower to pay a lawyer's fee for title examination. The examination fees thus paid by the borrowers were being appropriated to the respondent's own use. Notwithstanding a corporation's disability to practice law,[18] the respondent's "package deal"[19] combined; all the services come under one charge. See note 20 *infra.* placed the practice of law in a commercial surrounding which is foreign to the proper practice of law and has been soundly condemned.

In *In re L.R.*,[20] the New Jersey court suspended an attorney for engaging in such a practice; it would be an anomaly if the courts did not restrain a layman or corporation from the same practice.[21] While a corporation may hire an attorney at a fixed salary to represent it in legal matters, it may not sell these legal services to another, nor appropriate the receipts to its own use.[22] Where a layman or

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(Footnote continued from preceding page)

In its supplementary brief, filed May 12, 1969, the petitioner states at page 11 as follows:

> We contend that respondent by following the practice hereinbefore set out has and is (1) engaged in the unauthorized practice of law by retaining these substantial sums charged for title examination fee. . . .

[18] Cases cited in note 11 *supra.*

[19] The package deal is a system whereby commercial and legal services are

[20] 7 N.J. 390, 81 A.2d 725 (1951). The defendant, an attorney, was found guilty of violating American Bar Association Canons 27 (solicitation), 35 (intermediaries), and 47 (aiding in the unauthorized practice of law). He had formed a real estate corporation advertising a one-package system which included servicing a transaction from its inception to its closing. The corporation had its own legal department (defendant) which expedited and processed every mortgage. The New Jersey court stated that:

> The practice which has been referred to as 'a one-package system' is a system whereby commercial services, including a lawyer's fee, are rendered to a person for a single charge. This throws the practice of law into a commercial atmosphere which is wholly foreign to the concept of a correct practice and which has been soundly condemned.

Id. at ——, 81 A.2d at 726. See also *In re* Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 186, 326 P.2d 408 (1958); *In re* Rothman, 12 N.J. 528, 97 A.2d 621 (1953).

[21] Bump v. District Court, 232 Iowa 623, ——, 5 N.W.2d 914, 921 (1942). The court stated that:

> An attorney is subject to the discipline of the court for irregular practice while the layman who engages in similar actions can be reached only by the more difficult processes of injunction or contempt. It would be strange to permit to a layman what is condemned and forbidden to an attorney.

[22] *In re* Otterness, 181 Minn. 254, ——, 232 N.W. 318 (1930). Syllabus by the court:

> A corporation cannot itself practice law, nor can it lawfully do so by hiring an attorney to conduct a general law practice for others for pay, where the fees earned are to be and are received as income and profit by the corporation.

See *In re* Luster, 12 Ill.2d 25, 145 N.E.2d 75 (1957)(disciplinary proceeding against an attorney); Steer v. Land Title Guarantee & Trust Co., 113 N.E.2d 763 (Ohio C. P. 1953); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944); Stewart Abstract Co. v. Judicial Comm'n, 131 S.W.2d 686 (Tex. Civ. App. 1939). *But see,* Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954).

corporation does collect and appropriate attorney's fees, the party making such payment should be permitted to recover the amount so paid.[23] The Ohio Court of Common Pleas in *Steer v. Land Title Guarantee & Trust Co.*[24] held that:

> [A] salaried lawyer for a title company may render an opinion to his own corporate principal without being guilty of unauthorized practice of law, but when the corporate principal 'sells' that opinion, legal in nature, to an outsider, that corporate principal is guilty of illegally practicing law. . . . [T]he corporate principal is . . . guilty of unauthorized practice of law by making such a 'sale' of a legal opinion to a third party even though that legal opinion was prepared for it by its salaried lawyer, directly in the course of the corporate principal's business activities.[25]

If, in the principal case, the respondent's subterfuge had been allowed, the result would be to permit a corporation to engage in the business of handling legal matters for others, to destroy the confidential relationship an attorney bears to his client[26] and to lessen the usefulness of the profession to the public. For the respondent's attorney to aid it in the practice of law or to participate in or to sanction such a practice was improper.[27] The privilege conferred on the lawyer is individual and subject to withdrawal if he fails to maintain proper professional and moral standards of conduct. The responsibilities and duties connected with this privilege cannot be delegated to nor shared with a corporate employer. Just as a lawyer may not share his professional responsibility with a corporation, neither may he share his professional emoluments with it.[28]

The appropriation of the legal fees for title examination, notwithstanding the "primary benefit" test, placed the respondent in the position of practicing law and he was therefore held to be in contempt of court. To laymen a bank with its salaried attorney may seem infallible, but the bank, the attorney, and the public must be reminded of a basic principle—a corporation simply cannot practice law. Every time a layman or lay agency performs a legal service for another,

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[23] Lowe v. Presley, 86 Ga.App. 328, 71 S.E.2d 730 (1952). *Cf.*, Vogel v. Lotz, 26 N.J.Misc. 281, 60 A.2d 815 (1948).

[24] 113 N.E.2d 763 (Ohio C. P. 1953).

[25] *Id.* at 766-67.

[26] See generally note 6 *supra.*

[27] Canon 47 (RCA 3.540) provides:

> No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

The Canons of Ethics of the American Bar Association is recognized as a sound statement of the standard of professional conduct and as persuasive authority by the Kentucky court. RCA 3.170; *In re* Kenkel, 279 S.W.2d 770 (Ky. 1955).

[28] A.B.A., Opinions of the Committee of Professional Ethics and Grievances of the American Bar Association, Opinion 8, at 71 (1957 ed.).

directly or indirectly, the control of the judicial system is weakened, and the public is subjected to the dangers of unauthorized practice. These laymen and lay agencies are exploiting the legal profession, and in many cases no protest is being made by the bar; to the contrary, some members of the bar are aiding corporations in unauthorized practice. Lawyers owe it to the profession and to the public to bring these matters to the knowledge of the court.

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