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Unauthorized Practice of Law by Realtors and Title Insurance Companies

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Notes

UNAUTHORIZED PRACTICE OF LAW BY REALTORS AND TITLE INSURANCE COMPANIES

Historically, the exchange of real property has been considered a proper subject for the practice of law. The early deeds and other documents related to such transactions were of such a nature that only the lawyer could prepare them and the general public looked to the legal profession for these services. In recent years, however, certain aspects of land transactions, although legal in nature, have slipped from the lawyer's domain. Real estate companies and title insurance companies have taken over many of the lawyer's functions and quite naturally, the question of unauthorized practice of law has arisen.

The purpose of this note is to bring to the public's attention the activities in which real estate and title insurance companies are participating and to discover the premise on which the contention that their activities constitute the unauthorized practice of law is based.

In order to become acquainted with the activities in question, one might review the recent case of *Beach Abstract & Guaranty Co. v. Bar Ass'n of Arkansas*¹ for a partial list. There, the appellants were authorized to operate and maintain abstract-of-title plants and to engage in the preparation of abstracts of title, to act as general agent of title insurance companies in the solicitation of business and the issuance of title insurance policies, and to act as escrow agent in connection with insuring titles and in closing real estate sales. A declaratory judgment held that the following activities constituted the unauthorized practice of law:

Drafting and preparation of warranty deeds, disclaimer deeds, and quitclaim deeds; promissory notes, real estate mortgages, real estate purchase contracts and related instruments; forms of agreement for the sale of real estate, chattels, and choses in action; mortgages and pledges of personal property; forms of conveyances naming husband and wife as grantees; bills of assurance, dedication instruments, and tract and subdivision restrictions; escrow instructions, set-

¹ 326 S.W. 2d 900 (Ark. 1959).

ting forth agreements between buyers and sellers; affidavits of marital status and heirship, and various additional forms of affidavits and other instruments to remove clouds and perfect titles.²

Such activities as these listed would clearly seem to be within the concept of the practice of law, and one might very well wonder why any court would grant realtors and title insurance companies the privilege to engage in them. The fact that courts do authorize non-lawyers to engage in these activities nevertheless exists. In the case of *Bar Ass'n of Tennessee v. Union Planters Title Guaranty Co.*,³ the legal profession suffered a serious blow. There, the Tennessee Court of Appeals literally threw open the doors to the invasion of the practice of law by laymen, holding that "the right of real estate brokers to draw documents appertaining to the business of real estate brokers is expressly preserved by statute, which, to some extent, in our opinion, indicates what the public policy of Tennessee should be in the instant case."⁴ The court then extended the privilege given to real estate brokers by stating:

[T]itle insurance companies should not, by narrow or strained construction, be prohibited by court decisions from drafting legal documents which are intimately connected with the business for which they are chartered. The public policy of this State, established by court decisions, should be kept in harmony with public policy established by statute.⁵

With this recent decision in mind, it is worthwhile to investigate the arguments which have been brought up in defense of acts which should constitute the unauthorized practice of law.

One of the most forceful arguments is that the widespread availability of reliable printed forms makes the intervention of a lawyer unnecessary. In modern times, laymen have made extensive use of standard forms which have been carefully prepared by competent attorneys and which can be easily purchased at printing concerns for a nominal sum. And in addition to this efficient material, form books prepared by careful lawyers are also readily available.

² *Id.* at 901. This list is merely a summation of the activities involved in the case.

³ 326 S.W. 2d 767 (Tenn. 1959).

⁴ *Id.* at 779. The Tennessee statute referred to is Tenn. Code Ann. §62-1325 (1951):

Any person licensed hereunder that engages in drawing any legal document other than contracts to option, buy, sell, or lease, real property, may have his or her license revoked or suspended as provided in this chapter.

⁵ *Bar Ass'n of Tennessee v. Union Planters Title Guaranty Co.*, 326 S.W. 2d 767, 779 (Tenn. 1959).

An excellent example of the impact of such printed materials on a court can be seen in *Hulse v. Criger*,⁶ a case involving the sale of real estate, where the court made this broad statement:

Likewise, general warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training. They are in fact less complicated than contracts for sale of real estate. We know that these forms are furnished to the public at the office of the Recorder of Deeds through the state. We think the preparation of these instruments in closing transactions in which a real estate broker is acting as broker is so closely related to the transaction and the business of the broker as to be practically a part of it and that he is not engaging in unlawful practice of law to prepare them under such circumstances. The same thing is true of ordinary short term leases, notes, chattel mortgages and trust deeds in transactions which the broker procures.⁷

A similar holding can be found in the case of *Ingham County Bar Ass'n v. Walter Neller Co.*⁸ where a real estate concern was allowed to fill in standard printed forms for property transactions on the grounds that no exceptional legal training was necessary to prepare the forms and because the general public required the convenience. This argument offered in support of the majority opinion was refuted by a vigorous dissent which stated in part:

In my opinion the preparation of deeds, mortgages and contracts in real estate transactions are not routine, requiring no legal skill. Such acts often involve a correct description of the property, the assumption of a mortgage, the nature of the title to be conveyed, whether joint owners or title by the entirety, and whether there may be lien on the property for unpaid taxes or other reasons. The selection of the proper form or blank for the real estate transaction for others or the filling out of such blanks constitutes the practice of law and can only be rendered by those entitled to practice law.⁹

The view expressed in this dissent has ample support.¹⁰ The court in *Keys Co. v. Dade County Bar Ass'n*,¹¹ for example, frowned upon the use of printed materials by a real estate company with this pointed statement:

An instrument entirely adequate in one instance may be totally inadequate in another, and even if a particular form may be common to many transactions, it may not serve to effectuate the transfer if

⁶ 263 Mo. 26, 247 S.W. 2d 855 (1952).

⁷ *Id.* at —, 247 S.W. 2d at 861.

⁸ 342 Mich. 214, 69 N.W. 2d 713 (1955).

⁹ *Id.* at —, 69 N.W. 2d at 722.

¹⁰ A similar statement is found in *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, 41 Wash. 2d 697, 251 P. 2d 619, 621 (1952): "The probability of injurious consequences from the acts of the unskilled, is shown by the constant stream of litigation arising from this source."

¹¹ 46 So. 2d 605 (Fla. 1950).

there are errors in the parties, the description, the signatures, or the acknowledgement.¹²

A final illustration of the disdain which many judges have for the widespread use of form material is a concise statement by Judge Pound:

I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced.¹³

Thus, it can be seen that courts are not in harmony in regard to the use of form materials. It would seem, however, that the view taken by Judge Pound is the most reasonable statement found on the subject. Not allowing the complexity of the common law instruments to appear in modern documents has not removed the complexity of the law behind every word of such instruments. Laymen find it difficult to understand this fact in their search for convenience and economy, but until they do, the danger of misusing a simple instrument will continue to exist.

Another argument used by real estate and title insurance companies in defense of their activities is that legal services rendered are purely incidental to their main functions and that, therefore, the main function should determine whether the activity is the practice of law.¹⁴ This argument has been refuted on many occasions, however, and on close examination of the cases which have been involved with the problem, it appears that the sound doctrine is to deny this contention any merit. The court in *Title Guaranty Co. v. Denver Bar Ass'n*,¹⁵ in refusing to recognize the "incidental" theory, held that "preparation of these documents is not necessary to defendants' abstract or title insurance business, [sic] it is a separate, distinct and other business, much of which constitutes practice of law."¹⁶ This point is again made in *Pioneer Title Insurance & Trust Co. v. State Bar of Nevada*¹⁷ where the court declared that "the question should be whether the incidental legal services are *necessary* to the providing of what is essentially lay counselling. It should not be enough that certain legal services can be said to be incidental or reasonably connected."¹⁸

From these vivid comments, one can readily see that courts are not overly impressed with the "incidental" theory. The distinctions be-

¹² *Id.* at 607.

¹³ *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 125 N.E. 666, 670 (1919).

¹⁴ *La Brum v. Commonwealth Title Co.*, 368 Pa. 239, 56 A. 2d 246, 247 (1948).

¹⁵ 135 Colo. 423, 312 P. 2d 1011 (1957).

¹⁶ *Id.* at —, 312 P. 2d at 1015.

¹⁷ 74 Nev. 186, 326 P. 2d 408 (1958).

¹⁸ *Id.* at —, 326 P. 2d at 412.

tween the practice of law and the business of selling real estate and providing title insurance are all too obvious for courts to make needless concessions to laymen.

There are at least three closely related reasons worth mentioning why real estate and title insurance companies should not be allowed to engage in activities which constitute the practice of law. The first, and most important reason, is a recognition of the fact that prohibiting the unauthorized practice of law is for the benefit of the general public. This fundamental principle is pointed out in *Bennie v. Triangle Ranch Co.*:¹⁹

A wise public policy has uniformly maintained . . . [that] provisions regulating the practice of law [are] for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other. . . .²⁰

The general public can rely on the competence of the legal profession with the added assurance that lawyers are subject to court supervision, in addition to being legally responsible for the accurateness of their services. This statement cannot be made on behalf of laymen, for even though they may be competent, the general public is nevertheless in danger as to any mistakes which may occur. As pointed out in *Gardner v. Conway*, "Protection of the public is set at naught if laymen who are not subject to court supervision are permitted to practice law."²¹

The second reason for prohibiting the unauthorized practice of law is that the activities of laymen have created costly litigation. Such litigation is not unusual where matters demanding the technical skill of an attorney have been entrusted to one who is untrained. A statement by the court in *Commonwealth v. Jones & Robins, Inc.*²² exemplifies this fact:

Titles to real property at times have been upset and in some cases the owner either lost his property or was compelled to fight a costly lawsuit all because of a defective deed prepared by an untrained layman.²³

A similar statement is found in a vigorous dissent in *Ingham County Bar Ass'n v. Walter Neller Co.*:²⁴

It is also a well-known fact that a substantial number of cases have been and are in the courts of our State where the principal cause of

¹⁹ 73 Colo. 586, 216 Pac. 718 (1923).

²⁰ *Id.* at —, 216 Pac. at 719.

²¹ 234 Minn. 468, 48 N.W. 2d 788, 795 (1951).

²² 186 Va. 30, 41 S.E. 2d 720 (1947).

²³ *Id.* at —, 41 S.E. 2d at 724.

²⁴ 342 Mich. 214, 69 N.W. 2d 713 (1955).

the litigation was the incompetent preparation of a legal instrument by a layman on behalf of another layman.²⁵

The third reason for limiting the activities of laymen is the fact that only licensed and qualified attorneys have the broad and inclusive training sufficient to cope with all of the legal implications of any transaction. A layman's knowing "a lot of law about a particular subject"²⁶ falls far short of this high standard. One of the best statements concerning the test of the required qualifications was adopted in *Union City & Obion County Bar Ass'n v. Waddell*:²⁷

"The practice of law is . . . limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose."²⁸

And in addition to possessing the required legal training, it is the attorney alone who is under an oath making him an officer of the court and subject to its discipline so that his privilege of practicing law can be revoked whenever his "misconduct makes him unfit to exercise the duties of his office."²⁹

Realizing that attorneys are under such close scrutiny, it is reassuring to know that the judicial system is also fully equipped to cope with the unauthorized practice of law. In addition to statutory power, it is universally recognized that courts have *inherent* power to make such rules and regulations as are necessary to govern the practice of law.³⁰ In Kentucky, the court has held that "the making of rules of practice in courts, as well as out of courts, in matters pertaining to the rights of individuals under the law, is inherently possessed by courts and judges. . . ."³¹ And to refute any arguments to the contrary, the court has specifically held that attorneys *do not* hold their positions as part of the governmental machine by any inherent right.³²

²⁵ *Id.* at —, 69 N.W. 2d at 722.

²⁶ *In re Bercu*, 273 App. Div. 524, 78 N.Y.S. 2d 209, 218 (1948).

²⁷ 30 Tenn. App. 263, 205 S.W. 2d 573 (1947), citing *In re Co-operative Law Co.*, 198 N.Y. 479, 92 N.E. 15, 16 (1910).

²⁸ *Id.* at —, 205 S.W. 2d 579.

²⁹ *Commonwealth ex rel. Ward v. Harrington*, 266 Ky. 41, 48, 98 S.W. 2d 53, 57 (1936).

³⁰ *State Bar Ass'n of Connecticut v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A. 2d 863, 868 (1958); *Conway-Bogue Realty Investment Co., v. Denver Barr Ass'n*, 135 Colo. 398, 312 P. 2d 998, 1002 (1957); *Gardner v. Conway*, 234 Minn. 468, 48 N.W. 2d (1951). *In re Baker*, 8 N.J. 321, 85 A. 2d 505, 512 (1951).

³¹ *Hobson v. Kentucky Trust Co. of Louisville*, 303 Ky. 493, 497, 197 S.W. 2d 454, 457 (1946).

³² *Commonwealth ex rel. Ward v. Harrington*, 266 Ky. 41, 48, 98 S.W. 2d 53, 56 (1936); and see *Commonwealth v. Richie*, 114 Ky. 366, 70 S.W. 1054 (1902).

The privilege of practicing law has been referred to as a "franchise from the state conferred only for merit."³³ In view of this principle, one can readily understand why a court not only has authority to protect the high standards set for the bar, but in fact has a duty to purge the bar of all violators.³⁴ Since courts have the power to both admit and disbar attorneys, it would be anomalous if they did not have a similar power to prevent the illegal practice of law by laymen.³⁵ Such practice has been held to constitute contempt of court on many occasions.³⁶

From the foregoing discussion of the unauthorized practice of law, one should be able to detect the obvious need for a proper definition of the practice of law as it relates to realtors and title insurers and for a practical interpretation of any definition decided upon. Defining the practice of law is an extremely difficult task and for this reason it is understandable why many laymen honestly believe that their activities are not included in those limited to the legal profession. Furthermore, it is not difficult to understand why some courts condone the activities of laymen when more than one interpretation can easily be given to an ambiguous definition. For this reason, it is worthwhile to examine closely the definitions approved in several jurisdictions in an effort to determine the limitations of the term "practice of law."

In Kentucky, the Court of Appeals has defined the practice of law as being "any service rendered involving legal knowledge or legal advice, whether of representations, counsel, advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities or business relations of one requiring the services."³⁷ This definition is somewhat similar to one approved of in an Illinois³⁸ decision:

[It] is the giving of advice or rendition of any sort of service by any person, firm or corporation where the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.³⁸

An Idaho case adds to these general words that the practice of law in a larger sense includes "the preparation of instruments and contracts by which legal rights are secured. . . ."⁴⁰

³³ *In re Co-operative Law Co.*, 198 N.Y. 479, 92 N.E. 15, 16 (1910).

³⁴ *In re Taylor*, 309 Ky. 388, 217 S.W. 2d 954 (1949).

³⁵ *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934).

³⁶ For an extensive accumulation of cases see Annot's, 36 A.L.R. 533 (1925) and 100 A.L.R. 236 (1936).

³⁷ Ky. Ct. App. R. 3.020.

³⁸ *People v. Peoples Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931).

³⁹ *Id.* at —, 176 N.E. at 907.

⁴⁰ *Idaho State Bar v. Meservy*, 335 P. 2d 62, 64 (Idaho 1959), citing *In re Matthews*, 57 Idaho 75, 62 P. 2d 578, 581 (1936).

The Kentucky court has declared one of the basic principles which laymen have tried to deny: "Practicing law is not confined to performing services in actions or proceedings in courts of justice . . ." ⁴¹ and arguments to the contrary are not well founded. As pointed out in a recent New Jersey case, "In determining what is the practice of law it is well settled that it is the character of the acts performed and not the place where they are done that is decisive." ⁴²

From the definitions and interpretations thus far discussed, one may wish to agree with the Arkansas court which concluded that "it is not possible to give a definition of what constitutes practicing law that is satisfactory and all inclusive. . . ." ⁴³ The Arkansas court went on to rule on a particular question of unauthorized practice, however, and arrived at the conclusion that "anyone who assumes the role of assisting the court in its process or invokes the use of its mechanism is considered to be engaged in the practice of law." ⁴⁴

An interesting statement indicating that definitions throughout the country are not consistent or clear-cut is found in a Virginia ⁴⁵ decision which held it was of "no moment" that the legislature had failed to define the practice of law. The Virginia court approved an earlier Colorado opinion that "the phrase 'practicing law' . . . has long had a sufficiently definite meaning throughout this country to be given a place in both constitutional and statutory law without further definition." ⁴⁶ Perhaps this is an over-simplification of the problem. Taken together, however, these cases indicate the difficulty in arriving at a suitable definition.

It is doubtful whether it would be of great value to propose a definition at this time, but it would seem that several observations can be made which directly affect the scope of any definition. One such observation is that certain acts should come within the practice of law. There should be no doubt that the preparation of such instruments as deeds and mortgages should be done only by an attorney, yet, realtors and title insurers openly oppose this proposition. A second observation is that there is an obvious problem of determining whether efficiency should be sacrificed in a given case in the interest of sound administration of the various activities which should con-

⁴¹ *Howton v. Morrow*, 269 Ky. 1, 4, 106 S.W. 2d 81, 82 (1937).

⁴² *Stack v. P. G. Garage, Inc.*, 7 N.J. 118, 80 A. 2d 545, 546 (1951).

⁴³ *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W. 2d 408, 411 (1954).

⁴⁴ *Id.* at —, 273 S.W. 2d at 411.

⁴⁵ *Richmond Ass'n of Credit Men v. Bar Ass'n*, 167 Va. 327, 189 S.E. 153 (1937).

⁴⁶ *Id.* at —, 189 S.E. at 158, citing *People v. Merchants' Protective Corp.*, 189 Colo. 531, 209 Pac. 363, 365 (1922).

stitute the practice of law. The general public demands streamlined, efficient service from laymen who are willing to engage in activities which lawyers insist are the practice of law. The courts must face this demand and determine its legitimacy in order to render a proper decision.

It would seem that in Kentucky the court has a workable test available for determining whether the unauthorized practice of law exists in any particular instance. Ky. Rev. Stat. §30.170 (3) provides that:

No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from drawing any instrument to which he is a party.

This statute has been interpreted by the court in *Carter v. Trevathan*⁴⁷ where it is stated that:

[O]ne, who is not a lawyer, must not only act without consideration for his services in drawing the paper but he must be a party to, or his name must appear in, the instrument as one to be benefited thereby. Merely having a pecuniary interest, direct or indirect, in the transaction covered by the instrument he draws will not suffice.
 . . .⁴⁸

On the basis of these two authorities, it would seem that real estate and title insurance companies must establish either that the questioned activities are not legal in nature or else that they are parties with more than pecuniary interests. In fact, it could be argued that such laymen would need to establish that they are parties with beneficial interests. This proposition is supported by the *Hobson* case where the term "party" is defined as "one who has a beneficial interest in the corpus of the estate being administered by the fiduciary, and does not apply to a fiduciary whose duties are purely ministerial."⁴⁹ So far as the definition of "party" is concerned, there surely is no distinction between a person acting as a fiduciary and one engaged in the real estate or title insurance business. In the ordinary case, realtors and title insurance companies would find it exceedingly difficult to establish that that portion of their activities which are of the nature commonly performed by lawyers in their professional capacity, are not legal in nature or that their services spring from something more than pecuniary interests.

In conclusion, it is suggested that decisions such as *Bar Ass'n of Tennessee v. Union Planters Title Guaranty Co.*,⁵⁰ which hold that

⁴⁷ 309 S.W. 2d 746 (Ky. 1958).

⁴⁸ *Id.* at 748.

⁴⁹ *Hobson v. Kentucky Trust Co.*, 303 Ky. 493, 501, 197 S.W. 2d 454, 459 (1946).

⁵⁰ 326 S.W. 2d 767 (Tenn. 1959).

activities commonly carried on by attorneys are not the practice of law and therefore cannot be enjoined when engaged in by real estate and title insurance companies, are detrimental to the general public. The possibility of mistakes creating costly litigation is all too obvious. No definition of the practice of law should be laid down that would allow laymen to prepare vital instruments such as deeds and mortgages. Any definition susceptible of such loose interpretation should certainly be reevaluated. Only then will the general public be properly protected and the bench and bar be performing their historic duty of rendering such protection.

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