

# THE UNAUTHORIZED PRACTICE OF LAW: WHAT IS PROHIBITED IN REAL-ESTATE TRANSACTIONS?

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## Introduction

The past year has seen a flurry of case law regarding the issue of what constitutes the unauthorized practice of law in connection with real estate transactions. The courts (and applicable regulatory authorities and agencies) have not been uniform in their rulings and pronouncements, which can differ greatly depending on which state is involved. Some states are very jealous of guarding the legal profession -- and ostensibly, the public -- against what they perceive as the encroachment of other professions and businesses (such as brokers, realtors and banks) into the business of providing legal services and advice. Other states are willing to accept "economic reality" and permit nonlawyers to perform what they believe are routine and ministerial "quasi-legal" tasks, such as conducting residential real estate closings and completing (and in some cases, charging for) standardized form deeds, mortgages, and leases, which tasks they believe benefit consumers by reducing the cost of the transaction, increasing competition, and minimizing delays.

## Recent Decisions Finding Unauthorized Practice of Law

### A. *Toledo Bar Association v. Chelsea Title Agency of Dayton, Inc.* (Ohio)

In the most recent decision in this area, the Ohio Supreme Court, in *Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, 100 Ohio St.3d 356, 2003 Ohio 6453 (2003), held that the preparation of a deed by a title agency for its customer, where not prepared or reviewed by an attorney, constitutes the unauthorized practice of law.

Chelsea Title Agency of Dayton, Inc. ("Chelsea"), is a title agency that markets title insurance. According to the court, "[Chelsea] is not an attorney licensed to practice law in Ohio or any other jurisdiction." *Id.* at P1. Chelsea, through a nonlawyer agent, prepared a general warranty deed to convey real property by entering data into a form provided by an attorney, and then had the grantor sign the deed. According to the court, "[a]lthough the deed contained language specifying that it was prepared by an attorney, it was neither reviewed by nor prepared under the supervision of an attorney." *Id.*

The Secretary of the Unauthorized Practice of Law Committee of the Toledo Bar Association notified Chelsea that its preparation of the deed constituted the unauthorized practice of law and requested that Chelsea "cease its practice of preparing deeds for its title customers." Apparently not learning its lesson (or choosing to just ignore the admonition of the Toledo Bar Association), Chelsea subsequently prepared a quitclaim

deed for another one of its title customers to convey property in Lucas County, Ohio, which deed also was neither prepared nor reviewed by an attorney. This prompted the Toledo Bar Association to file a formal complaint against Chelsea, charging it with the unauthorized practice of law and asking it to refrain from such conduct in the future.

Based on stipulations submitted to the Board of Commissioners of the Unauthorized Practice of Law ("Board"), the parties agreed that Chelsea's actions constituted the unauthorized practice of law. The Board recommended that the Ohio Supreme Court accept Chelsea's admission that its conduct constituted the unauthorized practice of law and its consent to be enjoined from such conduct in the future. The Ohio Supreme Court adopted the Board's findings and conclusions *in toto*, stating that in Ohio, "[t]he unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice law in Ohio (citation omitted), and that, "[t]he practice of law embraces the preparation of legal documents on another's behalf, including deeds which convey real property" (citations omitted). *Id.* at P.7.

The Ohio Supreme Court went beyond the Board's recommendations, however, and also imposed a civil penalty on Chelsea. Miffed that Chelsea had deliberately ignored and violated the original notification from the Toledo Bar Association and proceeded to prepare another deed for a customer, the court elected to send Chelsea a message by tacking on a fine of \$1,000. The court reasoned that the imposition of this additional penalty furthered the stated purpose of applicable Ohio rules and regulations regarding investigations and proceedings adopted for "the protection of the public, the courts, and the legal profession." Unfortunately Chelsea learned -- the hard way -- that it doesn't pay to thumb your nose at the local Bar Association when they tell you to "cut it out." Chelsea freely admitted the error of its ways and promised to "go and sin no more." However, its penance as prescribed by the Ohio Supremes included an unexpected additional \$1000 "offering" to the Great State of Ohio.

It is interesting that the court did not mention whether Chelsea charged a fee for the deeds it prepared in violation of the Toledo Bar Association's written notice. The court does acknowledge that -- at least with respect to the general warranty deed prepared by Chelsea -- Chelsea simply added data and information in blanks on the deed, which was a form that was provided by an attorney. One wonders if it would have made any difference if the attorney who supplied the form was representing one of the parties to the transaction.

## B. South Carolina Cases

Recent state court decisions in South Carolina on the issue of what constitutes the unauthorized practice of law in South Carolina involve actions – or inaction – by title companies and agents (as did the *Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, case, *supra*). In *Ex Parte: Charles M Watson, Jr., County Atty. for Greenwood County, Petitioner; In Re: The Unauthorized Practice of Law*, 356 S.C. 432 (S. C. 2003), the South Carolina Supreme Court held, in a petition for a declaratory judgment, that when nonlawyer title abstractors examine public records in connection with a title search

and then render an opinion as to the content of those records in connection with a tax foreclosure sale, they are engaged in the unauthorized practice of law. In this case, the petitioner, the County Attorney for Greenwood County, S.C., sought a declaratory judgment on behalf of tax collectors and County Attorneys throughout the state as to "whether title abstractors, when performing their duties without an attorney's supervision, are engaged in the unauthorized practice of law." *Id.* at 760. Apparently, this had been a matter of dispute and contention among tax collectors and county attorneys.

In connection with tax foreclosure sales of real property in South Carolina, tax collectors must provide notice of the sale to the property owner and any lien holders. To determine what parties are entitled to notice, tax collectors commonly hire title abstractors to examine the public records and report the status of title. These abstractors usually are not licensed attorneys. The petitioning County Attorney asserted that a nonlawyer title abstractor who examines public records and reports the status of title, without the supervision of an attorney, is engaged in the unauthorized practice of law. The South Carolina Supreme Court, based on precedent established by other recent case law in South Carolina, agreed with the petitioner. The court cited with approval its prior holdings in *State v. Buyers Service Co.*, 292 S.C. 426, 432-33 (S.C. 1987) (preparation of title abstracts by title companies for purchasers of residential real estate without supervision of attorney constitutes unauthorized practice of law); *Doe v. McMaster*, 355 S.C. 306, 315-16 (2003) (title company's title search and preparation of title documents for lender, without supervision of attorney, is unauthorized practice of law); and *Matter of Lester*, 353 S.C. 246, 247 (2003) (disciplining attorney for buyer of land who authorized paralegal to conduct closing where attorney was not present, even though attorney had reviewed settlement statement and other closing documents and was accessible by telephone in case questions arose).

Based on these precedents, the court stated that, "we find that examining titles and preparing title abstracts constitute practicing law. Therefore, we require that licensed attorneys either conduct or supervise such activities." *Ex Parte: Charles M Watson, Jr., County Atty. for Greenwood County, Petitioner; In Re: The Unauthorized Practice of Law, supra*, 356 S.C. at 435. The court reasoned that because property owners, buyers, lien holders, and counties all depend on the tax collector to properly notify those parties statutorily entitled to notice, any errors in the title abstractor's report could result in the tax sale being invalidated and exposure of the county to due-process claims from parties who claimed they did not receive notice. The court further noted that even if the title abstractor's report was not guaranteeing title or certifying that title was marketable (the court acknowledged that "the tax title is of a quitclaim-deed nature"), it still had a "legal effect," i.e., "it signifies that title has been conveyed," and must either be prepared or approved by a licensed South Carolina attorney. *Id.* According to the court, "if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law." *Id.* at 436.

Finally, the court acknowledged that the cost of the tax-sale process to counties would increase if attorney involvement were required in the performance or oversight of title examination and abstract function, but decided that this factor was outweighed by the concern that mistakes in these functions as the result of the non-involvement of attorneys (such as failing to notify the proper parties), and reliance on potentially defective reports, would cause greater harm and prove even more costly in the long run.

In *Doe v. McMaster*, *supra*, the South Carolina Supreme Court held (in a declaratory judgment action) that a lawyer's supervisory activities in the context of refinancing a real estate mortgage involving four steps (title search, preparation of loan documents, closing, and recording title and mortgage) did not constitute the unauthorized practice of law. The lawyer had petitioned the state supreme court to "determine whether his business association with a lender bank and a title insurance company constituted the unauthorized practice of law." *Id.* at 309. The court held that the preparation of real estate instruments by laypersons constitutes the unauthorized practice of law, and that without the presence of an independent supervising attorney the lender could not prepare such instruments. The court also ruled that real estate and mortgage closings should be conducted only under the supervision of independent attorneys (who are not the employees of title companies, and who, if they represent both the lender and the buyer, must "giv[e] full disclosure of [their] role to both parties and obtain[] consent from both parties to continue"). *Id.* at 315. The court further held that the recordation of a new mortgage and related documents "occurs as part of a real estate transfer, which is an aspect of conveyancing affecting legal rights, [and] is the practice of law, "which requires attorney supervision of the process." *Id.* at 316.

Interestingly, the lawyer who filed this petition to the court asked for a declaration that the title company had a right to furnish title because "it is incidental to its business." However, the court ruled that in the prior case of *State v. Buyers Service Co., Inc.*, *supra*, 292 S.C. at 432, it had "rejected the title company's argument that it did not need attorney supervision because the title search was merely incidental to their own business." (In that case, the court divided the closing process into four steps: (1) the title search, (2) the preparation of loan documents, (3) the closing, and (4) recording documents, and concluded that each of the foregoing steps involved the "practice of law.") The court in *Doe v. McMaster* ruled that, "Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling [the petitioner] must insure the title search and preparation of the loan documents are supervised by an attorney." *Doe v. McMaster*, *supra*, 355 S.C. at 312-13. The South Carolina Supreme Court cited prior case law in the state for the proposition that the practice of law "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability (citation omitted). For this reason, this Court has consistently refrained from adopting a specific rule to define the practice of law." *Id.* at 311-12. *See also* Tara Austin, *Legal Professionalism: Doe v. McMaster and the Lawyer's Role in Real Estate Transactions*,

55 S.C. L. REV. 591 (2004) (discussing *Doe v. McMaster* decision and other South Carolina cases, which have made it clear that an attorney must supervise the several stages of a real estate closing and be present at the closing).

Other recent South Carolina cases have focused (unsurprisingly) on the lack of supervision by lawyers of other individuals involved in real estate transactions, and on the preparation of legal documents, conducting of closings, and execution of documents by non-lawyers. In *In re Baker*, 359 S.C. 550 (S.C. 2004), the South Carolina Supreme Court suspended an attorney from the practice of law for a three-month period for the following conduct, which the court found violated numerous provisions of the South Carolina Rules of Professional Conduct pertaining to attorneys: (1) permitting an unlicensed law school graduate to conduct real estate closings (approximately 60 to 80 per month), both inside and outside of the law firm offices, without the defendant attorney (or any other attorney) being present; (2) permitting this individual, with the attorney's knowledge and occasionally in her presence, to sign the attorney's name on real estate closing documents without indicating he was signing for the attorney; (3) permitting this individual, after the closings had occurred, either to sign as witness and/or notary or to have other firm employees sign as witness and/or notary on the documents related to the closings, even though neither he nor they were not present at the closings. The defendant attorney admitted that she was responsible for supervising this individual. According to the court, the defendant attorney "made no meaningful inquiry into the propriety of non-lawyers conducting real estate closings," and "did not conduct any legal research, consult with an attorney outside her firm, or seek guidance from the South Carolina Bar concerning the propriety of a non-lawyer conducting real-estate closings". *Id.* at 552. See also *In the Matter of James W. Avant*, 2004 Ga. LEXIS 797 (Sup. Ct. of Ga., Sept. 27, 2004), at \*3 (accepting attorney's petition for voluntary surrender of his license based on, among other things, his admission that on numerous occasions his office assistant prepared the closing documents for real estate transactions for which he was the closing attorney but where in fact, "he did not supervise his assistant in the preparation of the documents; . . . his assistant conducted the closings in [the attorney's] absence and with his knowledge and direction; and . . . he signed the closing documents as the settlement agent after his assistant had actually conducted the closings").

Similarly, in another recent South Carolina involving the unauthorized practice of law, *In re McMillian*, 359 S.C. 52 (S.C. 2004), *rehearing denied*, 2004 S.C. LEXIS 159 (June 9, 2004), a disbarred attorney entered into a business arrangement with a title company to close large volumes of real estate loans. Because of the large volume, the attorney could not attend all the closings. When the attorney did not attend, the title company's non-lawyer staff would conduct closings and sign the attorney's name (which practice the attorney was aware of and did not prohibit). The title company's office manager was even given signatory authority over the disbarred attorney's trust accounts. Because of the attorney's failure to manage, supervise, and reconcile the accounts there were substantial problems involving misappropriations and dishonored checks, including a lender becoming the holder of an unsecured note because of failure to record the lender's mortgage. The court ruled that the attorney assisted the title company's non-

lawyer staff in the unauthorized practice of law (thereby violating the South Carolina Rules of Professional Conduct) by allowing the title company to use his trust account in closings. The court stated that, “the South Carolina Rules for Lawyer Disciplinary Enforcement prohibit a lawyer from attempting to violate the professional rules . . . and prohibit[] a suspended lawyer from being employed by a member of the South Carolina Bar as a paralegal or in any other capacity connected with the law.” *Id.* at 62.

### C. Arkansas Cases.

On June 17, 2004, the Arkansas Supreme Court issued two cases, *Speights v. Stewart Title Guaranty Co., Inc.*, 2004 Ark. LEXIS 391 (Sup. Ct. of Ark. June 17, 2004), and *American Abstract and Title Co. v. Rice*, 2004 Ark. LEXIS 401 (Sup. Ct. of Ark. June 17, 2004), holding that in each case class action lawsuits could proceed against the title-company defendants and rejecting the arguments of the title companies that the respective trial courts lacked jurisdiction to determine if they had engaged in the unauthorized practice of law.

In the *American Abstract* case, the title company acted as a settlement and escrow agent during a real estate transaction involving the class representatives, who alleged that the title company engaged in the unauthorized practice of law and asked the trial court to certify the matter as a class action. The lower court certified as a class, “[a]ll persons who paid [the title company] a document preparation fee, a closing fee and/or had money in [the title company’s] escrow account since May 30, 1997.” *Id.* at \*32 (quoting from trial court findings of fact). The title company argued that the trial court did not have subject-matter jurisdiction to determine whether the title companies named in the lawsuit engaged in the unauthorized practice of law, because under the Arkansas Constitution only the Arkansas Supreme Court and the Supreme Court Committee on the Unauthorized Practice of Law (“CUPL”) had the power to make such a determination.

In the *Speights* case, the plaintiffs alleged (on behalf of themselves and others who, within the past five years, “have purchased, sold, or refinanced real property within the State of Arkansas . . . and who have been assessed and have paid, or had paid on their behalf, title insurance premiums or fees to the [title company] defendants or their agents, for the purpose of obtaining a title insurance policy in conjunction with the closing of such sale, purchase, or refinancing transaction”) that the title companies were wrongfully charging their customers a fee for closing services, including title searches and opinions that had previously been conducted by licensed attorneys. *Id.* at \*2. In particular, the plaintiffs asserted that because the title companies required the class members to bear costs and expenses for legal work, the title companies were issuing and charging for *de facto* legal opinions as to the marketability of title, which constituted the unauthorized practice of law. As in the *American Abstract* case, the title companies argued that the determination as to whether these actions constituted the unauthorized practice of law could only be determined by the CUPL, and that the plaintiffs had no private cause of action against the title companies.

As in its *American Abstract* decision rendered the same day, the Arkansas Supreme Court in the *Speights* case rejected these arguments, stating that, “we addressed this precise issue in the *American Abstract* case, which is also handed down this day. In that case, we hold that the CUPL does not have exclusive jurisdiction over matters such as this one.” *Id.* at \*6. The court reasoned that because the CUPL does not have the power to enforce any decision regarding the unauthorized practice of law -- any remedial action it may take is purely discretionary rather than mandatory -- “then it clearly cannot be vested with *exclusive* jurisdiction to consider allegations that a person or entity has engaged in the unauthorized practice of law. At most, the CUPL . . . merely shares this jurisdiction in these matters.” *Id.* (emphasis in original text.) In each of these cases (*American Abstract* and *Speights*) the Arkansas Supreme Court certified the lawsuits as class actions, but noted that neither it nor the respective trial courts could rule on the merits of the underlying claims. On September 30, 2004, the Arkansas Supreme Court issued a supplemental opinion in the *Speights* case, *Speights v. Stewart Title Guaranty Co., Inc.*, 2004 Ark. LEXIS 521 (Sup. Ct. of Ark. Sept. 30, 2004). The Supreme Court denied the title companies’ petition for rehearing and clarified its prior holding, stating that although “a trial court may not delve into the merits of the case” in determining whether the requirements of the Arkansas Rules of Civil Procedure have been satisfied for the certification of a class action, “motions to dismiss for failure to state a claim under [the Arkansas Rules of Civil Procedure] may be resolved by a trial court.” *Id.* at \*1-2.

D. *In re UPL Advisory Opinion 2003-2* (Georgia)

The Georgia Supreme Court recently held that preparation of a "deed of conveyance" (i.e., a grant deed or deed to secure debt -- which is the Georgia term for a deed of trust), and facilitation of the execution of a deed of conveyance (i.e., notarization) constitute the "practice of law," and performance of these functions by anyone other than a licensed Georgia attorney is the unauthorized practice of law. The case is *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472 (Ga. 2003). The court noted that it had previously “issued formal advisory opinions which confirmed that a lawyer cannot delegate responsibility for the closing of a real estate transaction to a non-lawyer and required the physical presence of an attorney for the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt).” *Id.* at 473.

The proponents of “lay conveyancing” (described by the court as “the practice by which non-lawyers close real estate transactions, provide settlement services, or select, prepare and complete certain real estate closing documents,” *Id.* at 474), or “witness only-closings” (described by the court as closings where “notaries, signing agents and other individuals who are not a party to the real estate closing preside ‘over the execution of the deeds of conveyance and other closing documents, but purport to do so merely as a witness and notary, not as someone who is practicing law,’” *Id.* at 474 n.3) had argued that requiring the services of a Georgia attorney for real estate closings and the execution

of deeds of conveyance harmed the public interest, by increasing costs and stifling competition. The court rejected this argument, stating that:

[T]he public interest is best protected when a licensed Georgia attorney, trained to recognize the rights at issue during a property conveyance, oversees the entire transaction. If the attorney fails in his or her responsibility in the closing, the attorney may be held accountable through a malpractice or bar disciplinary action. In contrast, the public has little or no recourse if a non-lawyer fails to close the transaction properly. It is thus clear that true protection of the public interest in Georgia requires that an attorney licensed in Georgia participate in the real estate transaction.

*Id.* at 474.

The court concluded that because it had exclusive authority in this area, and had consistently issued advisory opinions in the past finding that considerations of public policy dictated that only a licensed Georgia attorney could close a real estate transaction or prepare or facilitate the execution of deeds, it was “unpersuaded that the time has come to change the policy with regard to lay conveyances or witness-only closings.” *Id.*

*See also GRECCA, Inc. v. Omni Title Services, Inc.*, 277 Ga. 312, 312 (Ga. 2003) (holding that Georgia Supreme Court has sole and exclusive authority to issue rulings on the unauthorized practice of law, and upholding dismissal of action by Georgia Real Estate Closing Attorneys Association, a private bar association, which had sought standing to obtain injunctive relief against title company for alleged unauthorized practice of law); *In re UPL 2002-1*, 277 Ga. 521, 522 (Ga. 2004) (“It is well established that this Court has the inherent and exclusive authority to govern the practice of law in Georgia, including jurisdiction over the unlicensed practice of law”).

#### E. Bankruptcy Cases

In *In re Van Dyke*, 296 B.R. 591 (Bankr. D. Mass. 2003), the bankruptcy court held that although it is not always clear exactly whether conduct such as the completion of schedules and statements constitutes the practice of law in Massachusetts, “it is likely that in most cases the preparation of a Chapter 13 petition by a non-lawyer, if not under the direct supervision of an attorney, constitutes the unauthorized practice of law.” *Id.* at 595. The court recognized that “there is a split among the states as to whether just the completion of legal forms constitutes the unauthorized practice of law,” *Id.* at 594, and stated that “the majority view [is] that the preparation or filling in of blanks on preprinted forms constitutes the practice of law.” *Id.*

The bankruptcy court also found that in Massachusetts, the question of exactly what activities constitute the unauthorized practice of law has not been directly addressed. The court referred to a prior Massachusetts Superior Court case, *Mass.*

*Conveyancers Ass'n v. Colonial Title & Escrow, Inc.*, 2001 Mass. Super. LEXIS 431 (June 5, 2001), which held that conveyancing (i.e., the various functions concerning the creation, transfer and termination of an interest in real property) constitutes the practice of law. But the bankruptcy court noted that in that case, “[a]lthough . . . the court concluded that the title company engaged in the practice of law, the title company’s activities went well beyond the mere completion of a simple form.” *In re Van Dyke*, 296 B.R. at 594. (In the *Mass. Conveyancers* case the court acknowledged that what conduct constitutes the unauthorized practice of law is fact specific and a comprehensive definition would be impossible, but stated that in general such conduct consists of “[d]irecting and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured (citation omitted) . . . .” *Mass. Conveyancers Ass'n v. Colonial Title & Escrow, Inc.*, 2001 Mass. Super. LEXIS at \*14.)

In another recent Massachusetts bankruptcy case, *In re Lucas*, 2003 Bankr. LEXIS 1328 (Bankr. D. Mass., October 10, 2003), a Michigan attorney, who was not licensed to practice law in Massachusetts, was ordered to show cause why sanctions should not be imposed upon him for the unauthorized practice of law. The attorney represented Household Finance Corporation, which had a third mortgage against the individual debtor’s property. Soon after the debtor filed a pro se petition for Chapter 7 relief, he reaffirmed his obligation to Household Finance, which reaffirmation was prepared by the attorney. The attorney filed his appearance with the court as “agent” for Household Finance. But all correspondence and documents prepared and submitted by the attorney in the bankruptcy case were on the letterhead of the attorney’s law firm, and contained no reference to his alleged status as an agent of Household Finance. According to the court:

In general directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and act upon opinions as to what rights are and as to the legal methods which must be adopted to enforce them; giving and furnishing legal advise as to such rights and methods; and drafting, in the course of one's work, documents by which such rights are created, modified, surrendered or secured constitute the practice of law. *In re van Dyke*, 296 B.R. 591, 594 (Bankr. D. Mass. 2003). [The Michigan attorney] prepared a Reaffirmation Agreement in which contractual rights were modified and created. Further, he provided pro se debtors with a form of notice he believed would be of assistance to them in understanding the reaffirmation process. Therefore all of his actions, including his correspondences, involving the Reaffirmation Agreement constitute the practice of law.

*Id.* at \*4-5.

The bankruptcy court found that the use of the law firm’s letterhead could easily mislead the debtor and the court, especially where, as in this case, “an unrepresented party is exactly the kind of individual likely to believe that the Notice which this Court read as containing information contrary to the Code, was an attorney’s statement of what the Debtor’s mere signing of the reaffirmation agreement obligated him to do.” *Id.* at \*10. The court further characterized the attorney’s conduct as “misleading and irresponsible for an experienced bankruptcy attorney,” and did not buy his explanation that it was a mere “typo” that caused the use of the word “attorney” in the notice sent to the court attached to the debtor’s reaffirmation agreement. *Id.* As a remedy for the attorney’s misleading behavior, the bankruptcy court ordered that a copy of its decision be provided to the Massachusetts Board of Bar Overseers and the Michigan Attorney Discipline Board. The court also ordered the attorney to pay a fine of \$500 as a sanction for engaging in the unauthorized practice of law.

Because a limited liability company (“LLC”) is neither a partnership nor a corporation under the Bankruptcy Code – though an LLC has the characteristics of both – can a member or manager file a bankruptcy petition on behalf of the LLC without engaging in the unauthorized practice of law? This question was addressed and answered in *ICLNDS Notes Acquisition, LLC*, 259 B.R. 289 (Bankr. N.D. Ohio 2001). In this case the court held that the debtor, ICLNDS Notes Acquisition (“ICLNDS”), an Ohio LLC, was not eligible under the Code to file a *pro se* Chapter 7 bankruptcy petition, and that ICLNDS’s manager engaged in the unauthorized practice of law by filing the petition. (It is not certain from the court’s decision whether the manager was a member of the LLC, or an independent manager. Under Ohio law, an LLC may be managed by a manager who is not a member. Ohio Rev. Code Ann. § 1705.25).

ICLNDS’s voluntary bankruptcy petition (with attached schedules) was signed by David Bruno both as “Manager” of ICLNDS and as the non-attorney petition preparer under § 110 of the Code. (Section 110 regulates the activities of non-lawyers who prepare bankruptcy petitions for compensation, and permits a lay person to assist another person with ministerial acts such as typing a petition). ICLNDS did not file an application to employ an attorney in connection with the filing. The United States trustee brought an action to dismiss ICLNDS’s bankruptcy petition, arguing that an LLC could not appear in court *pro se*, and that Mr. Bruno had engaged in the unauthorized practice of law by filing the petition. ICLNDS and Mr. Bruno neither responded to the trustee’s motion nor appeared at the hearing on the motion.

The court agreed with the trustee’s arguments, and granted the trustee’s motion to dismiss the case. The court first addressed the issue of whether an LLC constituted an entity eligible to file a bankruptcy petition under the Code. The court noted that, under §§ 109(a) and 101(13) of the Code, the debtor must be a person or a municipality, and that § 101(41) of the Code defines “person” as including individuals, corporations, and partnerships. The court then stated that although there is no specific reference in the Code to LLCs, “[u]nder the rules of construction applicable to the Code . . . the use of the term ‘includes’ is not limiting (citation omitted). In other words, individuals,

corporations and partnerships are clearly eligible for relief, but other similar entities are as well”). *Id.* at 292.

The court determined that under Ohio law (as in other states), an LLC is neither a partnership nor a corporation, but a “hybrid” that has features of both a corporation and a partnership. Therefore, the court held, “[a]s corporations and partnerships are eligible to be debtors, and because an LLC draws its character from both of those forms of doing business, an LLC is similar enough to those entities that it also comes within the definition of ‘person’ and is eligible for protection under the Code”. *Id.* at 293.

The court then turned to the issue -- which appeared to the court to be one of first impression -- of whether ICLNDS could make a *pro se* appearance in court through its manager (who was not an attorney), or could only be represented by counsel. The court stated that although, under 28 U.S.C. § 1654, individuals have the right to represent themselves without a lawyer in federal proceedings, “[t]hat right does not extend to permit them to represent other people or entities because by doing so they would be engaging in the unauthorized practice of law. The general rule is that corporations, which are artificial entities, may only appear in court through an attorney.” *Id.* The court noted that the Ohio Supreme Court had adopted a similar rule. The court also noted that this same general rule, supported by the vast majority of case law, applied to partnerships as well, i.e., partnerships must be represented by counsel in legal proceedings. Accordingly, the court ruled that whether an LLC is viewed as a corporation, a partnership, or a hybrid, it could only appear in court through an attorney. The court further noted that had ICLNDS so requested, it ordinarily would have been granted an additional period of time to obtain legal counsel. However, the court granted the trustee’s motion to dismiss the case because ICLNDS, despite being on notice, did not respond to the motion to dismiss or file an application to employ counsel.

Finally the court cited, as an additional reason to dismiss the case, the fact that Mr. Bruno’s actions in preparing and filing the bankruptcy petition and schedules constituted the unauthorized practice of law. The court stated that under Ohio law, the practice of law “includes commencing an action or proceeding in which the person is not a party (citation omitted).” *Id.* at 294. Therefore, the court held, an individual who prepares and signs a bankruptcy petition (which commences the case) other than in the individual’s own name, is commencing the case for another and has engaged in the unauthorized practice of law. (The court also noted that the unauthorized practice of law would include counseling another individual or entity on financial matters in connection with bankruptcy). The court ruled that the fact that Mr. Bruno signed the petition as a non-lawyer bankruptcy petition preparer did not protect him because § 110 of the Code “does not authorize a non-lawyer to give substantive advice and counsel about the bankruptcy process or otherwise to engage in the practice of law (citations omitted).” *Id.* at 295. The court noted that while Bankruptcy Rule 9010 authorizes a debtor’s agent, attorney in fact, or proxy to appear in court and act in the debtor’s behalf, this Rule expressly states that such representative may only “perform any act not constituting the unauthorized practice of law.” *Id.* at n.2 and n.3.

The court's ruling in *ICLNDS Notes Acquisition* that an LLC can only appear in court through an attorney, and that a non-lawyer who prepares and files a bankruptcy petition on behalf of an LLC is engaged in the unauthorized practice of law (whether an LLC is regarded as a corporation, partnership, or hybrid entity), brings some much-needed guidance to what had heretofore been an unanswered question. The court's analysis of this issue is sound and well reasoned, and should encourage LLCs to retain and consult counsel before making the decision to file a bankruptcy petition. State court decisions have also held that an LLC may not file a *pro se* appearance and must be represented by counsel.

The basic jurisdictional defect in *ICLNDS Notes Acquisition* was astutely raised by the trustee and prevented ICLNDS, as an LLC, from filing a *pro se* bankruptcy petition or being represented by its non-attorney manager, thereby resulting in dismissal of the case. It is puzzling why ICLNDS did not elect to cure this defect simply by hiring counsel and re-filing the petition. It is interesting to speculate as to what the result would have been if the trustee had not asserted this defect, i.e., could (or would) the court have raised and decided this issue *sua sponte*? Could or would the issue have been raised via an appeal? What if the jurisdictional issue had not been raised during the bankruptcy court proceedings, and there was a court-approved conveyance of the real property owned by ICLNDS? Would title insurance protect the grantee if it were later determined that the bankruptcy court did not in fact have subject matter jurisdiction?

It is hard to conceive of a conveyance out of bankruptcy that would not be defensible from a title standpoint, as long as the property had been conveyed in accordance with (and by the parties authorized by) the LLC's operating agreement. The grantee should be entitled to the status of a bona fide purchaser even if the LLC's bankruptcy petition had not been properly filed (which would not involve a title defect). If the members of the LLC had not all agreed to file the petition in the manner done by ICLNDS, and the dissent had been brought to the attention of the title insurer, it would need to make an informed underwriting decision before agreeing to issue the title policy. If such dissent was unknown to and had not been disclosed to the title insurer, the newly insured purchaser (or lender) might be subject to defenses raised by the title insurer for matters "created, suffered assumed or agreed to" by the insured, or known to the insured and not disclosed to the title insurer. However, if the jurisdictional issue had not been raised by anyone before the conveyance out of bankruptcy and no specific exception had been taken by the title insurer in the title policy issued to the new purchaser or lender, then any subsequently asserted jurisdictional defects would appear to be covered under the policy's insuring provisions against loss from "any defect, lien, or encumbrance on the title" and "unmarketability." A title insurer would probably not wish to create a blanket exception for the "effect of the bankruptcy" of the LLC, because the conveyance would arise out of the bankruptcy proceeding and the coverage provided would be "illusory."

*See also Poore v. Hollow Enterprises*, C.A. No. 93A-09-005 (Del. Super. Ct. Mar. 29, 1994) (holding that, based on the contractual nature of an LLC and its limited

liability, an LLC is prohibited from representing itself in a Delaware court and must be represented by Delaware legal counsel); *Strother v. Harte*, 171 F.Supp. 2d 203, 205 (S.D.N.Y. 2001) (same); *Paton v. Old Mill Builders, LLC*, 2000 Conn. Super. LEXIS 3425 (Dec. 14, 2000) (same); *Valentine L.L.C. v. Flexible Business Solutions, L.L.C.*, 2000 Conn. Super. LEXIS 1605 (June 22, 2000) (same); *Banco Popular North American v. Austin Bagel Co., L.L.C.*, 2000 U.S. Dist. LEXIS 6979 (S.D.N.Y. May 23, 2000) (same); *International Ass'n of Sheet Metal Workers Local 16 v. A.J. Mechanical* (D.Or. June 16, 1999) (same); *Valiant Ins. Co. v. Nurse Network, LLC*, 1998 Conn. Super. LEXIS 2792 (Conn. Super. Sept 25, 1998) (same); *Orsini v. Interiors of Yesterday, LLC*, 284 B.R. 19 (Bankr. D. Conn. 2002) (rule against pro se appearances by artificial entities applies to limited liability companies); *Kraebel v. N.Y. City Dep't of Hous. Pres. & Dev.*, 002 U.S. Dist. LEXIS 71 (S.D.N.Y. Jan. 3, 2002) (ruling that where debtor had transferred property to LLC of which she was sole member, if court agreed that LLC could be added as plaintiff at any time in future debtor would have to file an appearance and submit evidence showing that she is a licensed New York attorney in good standing in order to represent it); *In re Schneider*, 271 B.R. 761, 764 (Bankr. D.Vt. 2002) (“[i]t is clear that § 110 [of the Bankruptcy Code] does not authorize a non-attorney to provide substantive legal advice to prospective debtors regarding the bankruptcy process or to otherwise engage in the practice of law” (citations omitted)); *Collier v. Cobalt*, 2002 U.S. Dist. LEXIS 7892 (E.D. La., Apr. 22, 2002), at \*3-4 (“regardless of whether the LLC may be characterized as a corporation, a partnership, or a hybrid, it may only appear in court through counsel”); *Kipp v. Royal & Sun Alliance Pers. Ins. Co.*, 209 F. Supp. 2d 962, 963 (E.D. Wis. 2002) (“[t]he appropriate response when an LLC's pleading is not signed by counsel is to: (1) order the LLC to appear by counsel ‘within a reasonable time,’ and (2) issue a warning that the failure to do so may result in entry of default and default judgment”); *In re Calhoun*, 312 B.R. 380, 383 (Bankr. N.D. Iowa 2004) (ruling that when an LLC and one of its members both seek to file a bankruptcy petition, they must do so separately); Robert Laurence, *Swimming Upstream: A Final Attempt at Persuasion on the Issue of Corporate Pro Se Representation in State Court*, 54 ARK. L. REV. 475 (2001); Elizabeth S. Miller, *The Advent of LLCs and LLPs in the Case Law: A Survey of Cases Dealing with Registered Limited Liability Partnerships and Limited Liability Companies*, Partnerships and LLCs – Important Case Law Developments 2001, American Bar Association Annual Meeting, Chicago, Illinois, August 7, 2001, p. 193 *et seq.*; Elizabeth S. Miller, *The Emerging LLC and LLP Case Law: A Survey of Cases Dealing With Registered Limited Liability Partnerships and Limited Liability Companies*, American Bar Association 2003 Annual Meeting, San Francisco, California, August 12, 2003.

### **Recent Decisions Finding No Unauthorized Practice of Law**

#### **A. *Dressel v. Ameribank* (Michigan)**

In *Dressel v. Ameribank*, 468 Mich. 557 (2003), the Michigan Supreme Court held that a mortgage lender did not violate Michigan’s statute against the unauthorized

practice of law when its employees completed standard mortgage documents, for which the lender charged a fee. The court noted that the purpose of statutes prohibiting the unauthorized practice of law is to protect the public, and stated that in Michigan, “our courts have found a violation of the unauthorized practice of law statutes when a person counseled another in matters that required the use of legal knowledge and discretion . . .” *Id.* at 566.

According to the court, "the preparation of ordinary leases, mortgages and deeds do[es] not involve the practice of law (citation omitted). They have become 'so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training' (citation omitted). To insist that only a lawyer can draft such documents would impede numerous commercial transactions without protecting the public (citation omitted), i.e., would not further the purpose of restricting the practice of law to trained and licensed attorneys (citation omitted)." *Id.*

The court considered how far such statutes could go to achieve the stated purpose. In this case, the Court was impressed by the analysis of the trial court judge, who reasoned it was “obvious” that the practice of law includes (a) preparation and handling of “actions and proceedings on behalf of clients before judges and courts,” and (b) “the giving of legal advice in any action taken for others in any matter connected with the law.” *Id.* at 565 (quoting from trial court record).

"More problematic," said the trial judge, "is the drafting of documents." In this connection, the trial judge stated (and the Michigan Supreme Court agreed) that a distinction must be made between drafting documents to address "the legal effect of special facts and conditions" [which would constitute the practice of law] and documents needed for "the ordinary run of agreements [used] in the every day activities of the commercial and industrial world (citation omitted)" [which would not constitute the practice of law]. *Id.*

Based on this analysis, the court found that the preparation of “ordinary” mortgages by the bank was done in the normal course of the bank’s business and that “[t]he bank’s employees did not draft the mortgage document. They merely completed a standard form document that the federal government compiled and that is readily available to the public.” *Id.* at 567. The court reasoned that no special legal knowledge or discretion was required in connection with the completion of the document and that the bank did not counsel the plaintiffs regarding the advisability of entering into the transaction. According to the court, “[i]n general, the completion of standard legal forms that are available to the public does not constitute the practice of law.” *Id.* at 568.

Finally, the court dismissed as "immaterial" the fact that the bank charged a fee for document preparation, stating that, "(c)harging a fee for nonlegal services does not transmogrify those services into the practice of law." *Id.* In conclusion, the Court held that "a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge." *Id.* at 569.

Judge Weaver, in her concurring opinion, made a cogent argument concerning the danger of attempting to establish an ironclad all-encompassing definition of the "practice of law." As she pointed out in a footnote, "The majority does not explain what has changed that allows it to define what it was incapable of defining in the past." *Id.* at 571 n.2. She also notes (in another footnote) that "[t]he view that the 'practice of law' does not admit of exact definition is shared by many other jurisdictions (citations omitted)." *Id.* at 570 n.1. Judge Weaver would prefer a case-by-case determination of the "practice of law," which is the rule followed by most states (and which was followed by Michigan courts prior to the *Dressel* decision). (Bringing to mind U.S. Supreme Court Justice Stewart's classic definition of obscenity -- "I know it when I see it.")

Although the court's holding clearly applies to "filling in the blanks" in standard residential closing and conveyancing documents, the *Dressel* decision may cause some discomfort among Michigan attorneys because it applies to *all* real estate transactions (including commercial). The court stated that the preparation of any standard legal document in business settings does not constitute the unauthorized practice of law unless, as noted above, it requires "the use of legal discretion or profound legal knowledge." Even commercial real estate documents that are "standard," or in common use, are only starting points (and are usually adhesion documents greatly favoring the drafter) and (unlike most residential conveyancing documents) are highly negotiated and modified to fit each individual transaction. As Judge Weaver stated in her dissenting opinion, "[w]hether certain conduct requires the use of 'legal discretion or profound legal knowledge' is as open-ended an inquiry as whether that same conduct constitutes the 'practice of law.' 'Legal discretion' and 'profound legal knowledge' are amorphous concepts that, like the 'practice of law,' do not lend themselves to a single interpretation. Thus, even with the majority's definition, a lack of consensus will persist among the courts." *Id.* at 571. Perhaps Judge Pound was correct when he said in his concurring opinion in a 1919 New York appellate court decision, *People v. Title Guaranty & Trust*, 227 N.Y. 366, 379 (1919) (when real estate closings were much less complicated), "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."

Subsequent Michigan court decisions have affirmed the Supreme Court's holding in *Dressel, supra*. See *Newton v. Bank W.*, 262 Mich. App. 434, 436 (2004) ("a bank does not engage in the unauthorized practice of law when it completes standard mortgage forms and charges a fee for the service" (citing *Dressel, supra*)); *Lewis v. First Alliance Mortg. Co.*, 2004 Mich. App. LEXIS 1623 (Mich. Ct. App. June 17, 2004), at \*3-4 ("In *Dressel*, the Court held that a bank does not engage in the unauthorized practice of law by completing mortgage documents and charging a fee (citation omitted). After the release of the opinion in *Dressel*, the unauthorized practice of law issues raised by the plaintiff and defendant on appeal were dismissed by order of this Court"); *Holman v. Rock Fin. Corp.*, 2004 Mich. App. LEXIS 2107 (Mich. Ct. App. August 10, 2004) (rejecting, based on Michigan Supreme Court's holding in *Dressel, supra*, plaintiffs' claim that mortgage lender engaged in unauthorized practice of law by preparing "final loan documents" and charging fee for preparation of legal documents); *Tingley v.*

*Waldrop*, 2004 Mich. App. LEXIS 1744 (Mich. Ct. App., June 24, 2004), at \*31-32 (holding that “clerical communications by non-lawyer did not constitute “managing litigation” on behalf of other plaintiffs to extent that it was “assisting another in matters that require the use of legal discretion and profound legal knowledge” (quoting *Dressel*, *supra*)).

B. *Countrywide Home Loans, Inc. v. Kentucky Bar Association* (Kentucky)

In *Countrywide Home Loans, Inc. v. Kentucky Bar Association*, 113 S.W. 3d 105 (Ky. 2003), the Kentucky Supreme Court vacated an Advisory Opinion, KBA U-58, adopted by Kentucky Bar Association, which declared that the performance of a real estate closing by a “lay closing agent” constituted the unauthorized practice of law.

The Kentucky Supreme Court was asked to review Advisory Opinion U-58, which was adopted by the Kentucky Bar Association (“KBA”) in 1999 and published in 2000. This Advisory Opinion concluded that the performance of a real estate closing by a layperson constituted the unauthorized practice of law. Several trade groups (representing banks, title companies, and realtors) objected to this determination, arguing that U-58 was contradictory to public policy as well as to U-31, a previous advisory opinion that allowed laypersons to conduct real estate closings so long as they avoided giving legal advice. They also urged the court to “follow the majority of other jurisdictions by clarifying that laypersons may conduct real estate closings in Kentucky without engaging in the unauthorized practice of law.” *Id.* at 112. U-31 provided that “[a] ‘real estate closing’ is at best ministerial in nature,” and that, “[t]he closing, which consists mainly of financial matters, payments, schedules of payment, and insurance, is basically a nonlegal function.” U-31 also permitted banks and other lending institutions to close real estate transactions when they provided “lender services.” U-58, on the other hand, concluded that real estate closings may not be conducted by persons who are not real parties in interest without direct supervision of a licensed attorney, and that title agencies and title insurance companies could not conduct real estate closings. U-58 stated that “[r]eal estate closings should be conducted only under the supervision of an attorney because questions of legal rights and duties are always involved, and there is no way of assuring that lay settlement agents would raise, or would not attempt to answer, the legal questions (citation omitted).” U-58 further provided that “[t]he lender’s employee may also prepare and complete necessary ‘form’ loan documents if no fee is charged, directly or indirectly, for such services, provided that the lender’s own attorney or some other licensed attorney passes judgment on and is responsible the documents as finally executed.” With respect closings by title companies, U-58 provided that, “[a] lay settlement agency may compile and report factual information from the public records, including abstracts of title, but may not render title opinions.” U-58 contained an appendix of hypothetical “horribles” that could occur at real estate closings that would result in the need for legal advice.

After reviewing the evidentiary record – including voluminous testimony and depositions of witnesses from the Unauthorized Practice Committee of the State Bar, practicing real estate attorneys, a law professor, a real estate agent and appraiser, the “attorney and manager of the American Land Title Association,” title company and title association officers and directors, and mortgage company officers – the court first determined that a “closing” is “that ‘final event’ where the parties gather around a table to complete their transactions by signing and exchanging documents and transferring funds.” *Id.* at 118. The court then found that there was almost universal agreement among the various witnesses that significant changes had occurred over the past 20 years in the way that real estate transactions were conducted – primarily due to technological advances and the emergence of the secondary mortgage market – and that the documents required at the closing are more standardized and seldom negotiated.

The court reasoned, however, that these changes have had little impact on the essential nature of real estate closings, which still involves primarily such ministerial duties as presenting the documents to the parties, instructing them where to sign, and disbursing funds. According to the court, “few, if any, significant legal questions arise at most residential closings.” *Id.* at 119. The court also noted appropriate safeguards to protect the participants exist because “in those few instances where legal questions do arise, lay closing agents are properly trained to answer only if they can do so by reading from the document itself without providing any additional explanation. If they cannot do so, they are trained to halt the closing so that the parties may seek legal counsel.” *Id.* at 119-120. The court noted further the salient effect of competition by laypersons and title companies on the rates charged by attorneys for real estate closings, stating that, “the presence of title companies encourages attorneys to work more cost-effectively.” *Id.* at 120. The court further noted that title companies require their agents to carry errors and omissions insurance, that underwriters strictly monitor the use of funds by agents and evaluate their competence, and that title insurance is available to homebuyers (in addition to lenders) to protect them from title defects and errors. The court also stated that, “lay closing agents are subject to common law negligence claims if their negligence results in damages.” *Id.* at 121.

Noting that it had been presented with an issue of first impression, i.e., whether conducting a real estate closing constituted the unauthorized practice of law, the court held that “it is not the unauthorized practice of law for a layperson to conduct a real estate closing for another party.” *Id.* The court, adopting the reasoning of U-31, therefore vacated U-58, which the court found was based on demonstrably faulty assumptions. The court found, in particular, that settlement agents (such as title agents) perform services comparable to those provided by attorneys, and that if in fact they actually engaged in the unauthorized practice of law they could be criminally prosecuted under Kentucky law. The court also noted that it while many buyers often incorrectly assume that the lender’s lawyer represents their interests, “for us to require parties to have independent counsel would substantially increase the transactional costs associated with a home purchase and thus run contrary to the public’s interest.” *Id.* at 123.

Finally, the court distinguished the present case from allegedly contrary positions taken by Virginia and New Jersey. The court noted that in Virginia, while lay closings are permitted by statute (*see* Virginia Consumer Real Estate Settlement Procedures Act, Va. Code §§ 6.1-2.19 et seq.; Virginia Real Estate Settlement Agent Registration Act, Va. Code §§ 6.1-2.30 et seq.), prior to adoption of this legislation the Virginia Supreme Court had approved a Virginia Bar Association Opinion on the Unauthorized Practice of Law, which determined that real estate closings by laypersons were the unauthorized practice of law. The Kentucky Supreme Court found that the Virginia Supreme Court concluded that, unlike the determination by the court in the present case, a “closing” involved *all* aspects of the real estate transaction from beginning to end, including contract review, loan commitment review, and survey and title review (which events the court in the instant case reasoned would normally occur prior to the actual closing). With respect to the determination of the Supreme Court of New Jersey, in *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 139 N.J. 323 (N.J. 1994), that real estate transactions involve the unauthorized practice of law but are nonetheless authorized, the court similarly noted that the New Jersey Supreme Court was concerned with the entire transaction and not just the closing (although the New Jersey Supreme Court stated that the closing, among other aspects of the transaction, “to be properly understood must be explained by an attorney,” *Id.* at 339). The court in the instant case reasoned that while it agreed with the New Jersey court that many parts of a real estate transaction involve the practice of law, “[t]he closing . . . is not one of these when it is conducted without the giving of legal advice of counsel.” *Countrywide Home Loans, Inc. v. Kentucky Bar Association*, 113 S.W. 3d at 127.

C. *King v. First Capital Financial Services Corp.* (Illinois)

In *King v. First Capital Fin. Servs. Corp.*, 343 Ill. App.3d 404 (3<sup>rd</sup> Dist. 2003), the lender commenced a foreclosure action to foreclose its mortgage on the borrower’s property. The borrower challenged the validity of the mortgage, arguing that the lender had engaged in the unauthorized practice of law by preparing the loan documents without the assistance of a lawyer and charging the borrower a fee for document preparation.

The court rejected these arguments, finding that this case was similar to a previous Illinois appellate court decision, *First Federal Savings and Loan Ass’n v. Quinlan & Tyson, Inc.*, 162 Ill. App. 3d 581 (1987), which in turn relied on an Illinois Supreme Court case, *Chicago Bar Ass’n. v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116 (1966). The court ruled that the Illinois Supreme Court had established that the rule in Illinois is that “since the defendant [lender] had prepared the documents for use in its own business, it was not engaged in the unauthorized practice of law but, rather, was acting *pro se*” (citation omitted). *King v. First Capital Fin. Servs. Corp.*, 343 Ill. App.3d at 407. According to the court, “The defendant has not held itself out to be a legal advisor and has not prevented the plaintiffs from seeking legal advice concerning the mortgage.” *Id.*

The court ruled further that whether a lender charges a fee for document preparation, as in this case, did not distinguish it from the *Quinlan & Tyson* case or constitute the unauthorized practice of law. The court noted that instead of itemizing the fee, the lender could have validly “charged the fee in a number of other ways, including merging it with other fees or charging a higher interest rate.” *Id.* at 408. Because the court ruled that the lender had not engaged in the unauthorized practice of law, it refused to address the borrower’s further argument that it was entitled to a private cause of action against the lender. Judge Lytton concurred in the court’s opinion, but believed that the charging of a fee by the lender “change[d] the nature of the transaction” because they were required either to pay the fee or not receive the mortgage.” *Id.* But he concurred with the majority’s opinion because he believed the relevant Illinois statute does not allow money damages for the unauthorized practice of law, and in this case the borrower had not demonstrated that he had suffered any monetary loss.

Because of the importance of the issues decided by the appellate court in this case, the Illinois Supreme Court accepted the borrower’s Petition for Leave to Appeal on January 28, 2004. *King v. First Capital Financial Services Corp.*, 207 Ill. 2d 605 (2004) (Decision Without Published Opinion).

### **State Statutes Regulating Real Estate Closings by Non-Lawyers**

For examples of state statutes that permit lay closings under certain circumstances, *see* Colo. Rev. Stat. § 38-35-125 (2002) (recognizing authority of non-lawyers to close real estate transactions); Minn. Stat. § 481-02 (2002) (exempting non-lawyer real estate closings from statutory definition of unauthorized practice of law); O.C. G.A. § 15-19-52 (2002) (non-lawyers in Georgia may conduct certain transactions *pro se*, to which they are a party).

In other states, court rules and ethics opinions permit nonlawyer involvement in real estate closings under certain circumstances. The North Carolina State Bar Association adopted a Formal Ethics Opinion, FEO 9, and Advisory Opinion 2002-1, regarding the unauthorized practice of law, which permits a nonlawyer to conduct a real estate closing and disburse funds so long as the nonlawyer does not give legal advice, advocate for any party, or draft legal documents. A North Carolina statute, N.C. Gen. Stat. § 84-2.1 (2004), defines the term “practice law,” as follows:

The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon

titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition. The phrase "practice law" does not encompass the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S. 7A-38.5.

In Indiana, the Unauthorized Practice of Law Committee of the Indiana State Bar Association, a private trade association of attorneys, has drafted a proposed amendment ("Amendment") to Indiana Admissions and Disciplinary Rule 24 entitled "Rules Governing the Unauthorized Practice of Law" (which rule currently sets forth the procedure for bringing actions to restrain or enjoin the unauthorized practice of law). Section 2(a) of the Amendment would define the practice of law (the definition of which has been declined numerous times by the Indiana Supreme Court) as "ministering to the legal needs of another person for consideration, either directly or indirectly." This definition includes providing to another person, either "directly or indirectly:" . . . (4) Selection, preparation, or completion of a legal document." Section 2(b) of the Amendment lists certain activities that nonlawyers would be able to perform, even if they constituted the practice of law. These activities include selling legal document forms previously approved by lawyers, and selecting and completing legal documents that a lawyer had previously approved "by filling in the blanks where that activity requires only common knowledge regarding the required information and general knowledge of the legal consequences." The Amendment would also permit nonlawyers to engage in activity that the Indiana Supreme Court determines is permissible.

In the State of Washington, Washington Admission to Practice Rule 12, "Limited Practice Rule For Closing Officers," permits a state-licensed nonlawyer to "select, prepare, and complete the appropriate legal documents incident to the closing of real estate and personal property transactions." The position of "LPO" was created in 1983 in response to a Washington Supreme Court decision holding that laypersons performing those tasks were engaged in the unauthorized practice of law. *See Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 447 (Wash. 1981). To become certified to engage in this limited practice of law, such laypersons must first pass an examination, and thereafter must complete minimum continuing legal education requirements. *See* APR 12(b)(2)(ii).n.9 and APR 12(f). APR 12(d) governs the scope of practice for nonlawyers authorized to provide limited legal services in closing real estate transactions. Under ATP 12(b)(2)(vii), an LPO may "select, prepare and complete documents in a form previously approved by the [Limited Practices] Board." APR 12(e) prescribes the conditions and limitations under which LPOs may prepare and complete

such documents, including disclosure “to the parties of the limitations of the services provided pursuant to this rule.” If an LPO exceeds the authorized scope of the limited practice -- including the use of unauthorized forms -- the LPO is required to meet the same standard of care as a licensed attorney. *See Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 845-46 (2001), where the court held that the LPO’s use of unapproved documents constituted the unauthorized practice of law and made out a prima facie case of malpractice.

In Illinois, S.B. 2136, the “Legal Document Preparer Act,” was introduced in the Illinois legislature in January 2004. The proposed Act states that no person shall engage in the preparation of legal documents unless the person is certified, and provides for the certification of a “legal document preparer,” defined as “an individual who is certified pursuant to this Act to prepare or provide legal documents, without the supervision of an attorney.” The requirements for certification of an individual would include the following: (1) citizen or legal resident of the United States; (2) at least 18 years of age; (3) good moral character; (4) compliance with all applicable laws, court rules and orders adopted by the Illinois Supreme Court; and (5) a certificate of completion from a paralegal assistant program or a degree from a law school accredited by the American Bar Association; a high school diploma or a general equivalent or a four-year bachelor of arts degree in combination with law-related experience. The proposed Act further provides guidelines for the application process and the renewal of certification, and establishes the Board of Legal Document Preparers and outlines its duties and powers. As of the date of this article, the ultimate fate of this legislation is uncertain.

### **The ABA’s Position on the Unauthorized Practice of Law**

A special American Bar Association “Task Force on the Model Definition of the Practice of Law” reviewed the practice of law in the various states and issued a report and recommendations, dated June 11, 2003 (available at [http://www.abanet.org/cpr/model-def/taskforce\\_rpt\\_429.pdf](http://www.abanet.org/cpr/model-def/taskforce_rpt_429.pdf)), for presentation to the ABA House of Delegates. Among the recommendations is “that every jurisdiction adopt a definition of the practice of law.” The ABA Task Force, in connection with its report and recommendations, prepared a proposed definition of the “Practice of Law” (“Model Definition”), which reads as follows:

Task Force on the Model Definition of the Practice of Law

Draft (9/18/02)

#### **DEFINITION OF THE PRACTICE OF LAW**

(a) The practice of law shall be performed only by those authorized by the highest court of this jurisdiction.

(b) Definitions:

(1) The "practice of law" is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.

(2) "Person" includes the plural as well as the singular and denotes an individual or any legal or commercial entity.

(3) "Adjudicative body" includes a court, a mediator, an arbitrator or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;

(2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;

(3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or

(4) Negotiating legal rights or responsibilities on behalf of a person.

(d) Exceptions and exclusions: Whether or not they constitute the practice of law, the following are permitted :

(1) Practicing law authorized by a limited license to practice;

(2) Pro se representation;

(3) Serving as a mediator, arbitrator, conciliator or facilitator; and

(4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.

(e) Any person engaged in the practice of law shall be held to the same standard of care and duty of loyalty to the client independent of whether the person is authorized to practice law in this jurisdiction. With regard to the exceptions and exclusions listed in paragraph (d), if the person providing the services is a nonlawyer, the person shall disclose that fact in writing. In the case of an entity engaged in the practice of law, the liability of the entity is unlimited and the liability of its constituent members is limited to those persons participating in such conduct and those persons who had knowledge of the conduct and failed to take remedial action immediately upon discovery of same.

(f) If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

Comment

[1] The primary consideration in defining the practice of law is the protection of the public. Thus, for a person’s conduct to be considered the practice of law, there must be another person toward whom the benefit of that conduct is directed. That explains the exception for pro se representation. The conduct also must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law.

[2] The exception for pro se representation in paragraph (d)(2) contemplates not only self-representation by an individual but also representation of an entity by an authorized nonlawyer agent of the entity in those jurisdictions that permit such representation.

.....

On December 20, 2002, the US Department of Justice and the Federal Trade Commission issued a joint letter (“Joint Letter”) to the American Bar Association warning it not to promulgate model rules that would restrict non-lawyers from preparing common documents used in residential real estate transactions. The Joint Letter states, in relevant part, that:

Together, the DOJ and the FTC have become increasingly concerned about efforts to prevent nonlawyers from competing with attorneys in the provision of certain services through the adoption of Unauthorized Practice of Law opinions and laws by state bar agencies, courts, and legislatures. . . . The proposed Model Definition is overly broad because it would prohibit nonlawyers from offering a number of services that they currently provide in competition with lawyers to the benefit of consumers.

.. the DOJ and the FTC are unconvinced that the adoption of such a broad definition of the practice of law would serve the public interest.

.....

Similarly, real estate agents routinely fill out and explain purchase and sale agreements, the basic agreements into which buyers enter as the first steps toward buying a home. They may explain to consumers the ramifications of failing to have the home inspection done on time, the meaning of the mortgage contingency clause, and other portions of the agreement. They may also negotiate these clauses during the purchase process. Realtors often explain what is required by state law to obtain a smoke detector certificate, a termite certificate, and other certificates required by law for the purchase and sale of a home. Under Section (c) of the proposed Model Definition, all of these activities could be considered giving people advice about their legal rights and responsibilities (Section (c)(1)), negotiating legal rights on behalf of people (Section (c)(4)), or selecting, drafting or completing legal documents or agreements affecting people's rights (Section (c)(2)).

.....

When nonlawyers compete with lawyers to provide services that do not require formal legal training, consumers may consider all relevant factors in selecting a service provider, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. The use of lay services also can reduce costs to consumers. Evidence suggests that the use of lay real estate closers provides a lower cost alternative for consumers. Additionally, although accountants and tax preparers do not typically itemize the legal-related services included in their services, it is probable that the cost of retaining an attorney for those same services would often be higher. Advice and information about the laws from tenants associations and other advocacy organizations is often free. Will writing and other legal form fill software packages can be significantly less expensive than hiring an attorney to draft the will or other legal document. These services plainly benefit consumers.

The FTC cited several specific reasons in the letter why it believes the rules proposed by the ABA in the Model Definition are designed to stifle competition and will increase consumer costs. The Joint Letter also claims that the rules are a potential threat to e-commerce. The Joint Letter concludes that there is no evidence that the anticipated increase in consumer costs it foresees will create a concurrent benefit for consumers. The Joint Letter states, in this regard, that:

Costs that the proposed Model Definition likely would impose on consumers should not be imposed without a convincing showing that lay

services have not only injured consumers, but also that less drastic measures cannot remedy the perceived problem. . . . until demonstrated otherwise, accountants, bankers, real estate brokers and others skilled in business should remain able to provide advice and legal information related to their particular practices without harming the public. This already occurs every day in multiple jurisdictions with little or no evidence that consumers would benefit by the same advice instead being provided by an attorney.

The Department of Justice often intercedes in matters involving the determination of whether certain acts constitute the unauthorized practice of law, by filing *amicus curiae* briefs when it believes that state bar associations have attempted to unduly restrict non-lawyers from competing with attorneys in connection with residential real estate transactions.

The Real Property, Probate and Trust Law Section of the ABA states that its position is that it “is not advocating any particular position in this matter but will advise our members of any new developments.” American Bar Association, Section of Real Property, Probate and Trust Law, *Unauthorized Practice of Law*, Section Info, [http://www.abanet.org/rppt/section\\_info/upl/home.html](http://www.abanet.org/rppt/section_info/upl/home.html) (visited October 4, 2004).

### **Legal Document Preparation Services (“Do it Yourself”)**

A recent development has been the significant growth of “do-it-yourself” legal-document-preparation companies, in particular “We the People.” This company is a California-based national franchiser of paralegal offices, and provides forms for divorce, bankruptcy, tax preparation, real estate, and other legal services at rates significantly below those charged by licensed attorneys. The company has opened several Chicago-area offices, prompting the introduction of legislation, supported by the Illinois Bar Association, which would enable bar associations in Illinois to bring lawsuits against such organizations for the unauthorized practice of law. To counter this effort, We the People has caused the introduction of “The Legal Document Preparer Act” in the Illinois Senate (see the discussion of this proposed legislation earlier in this paper), which would authorize and license paralegals to prepare and provide certain legal documents.

Organizations such as We the People (which has even garnered the support of Rudolph Giuliani in New York) argue they are not competing directly with attorneys and are serving a market that does not have access to or cannot afford to retain attorneys. They claim that they are merely “document experts” who do not provide legal advice to their *pro se* customers and only assist them in completing “fill-in-the-blanks” standard legal forms – at greatly reduced prices that are as low as ten percent of what an attorney would charge. Many of these organizations operate out of no-frills storefront offices, and some even conduct all of their business on the Internet. They rely on high volume to maintain their low prices.

Bar associations and others in the legal community counter that these companies do not confine their services to simply filling out legal forms, and in fact regularly “step over the line” by providing legal advice. They claim that consumers are misled by individuals untrained in the law and that every legal document, no matter how “simple,” can have major legal consequences depending on the individual’s situation and the facts of the matter. Attorney organizations have filed unauthorized-practice-of-law suits against We the People in Nebraska, North Carolina, Florida, Illinois and Texas. At least one judge in Illinois has refused to accept divorce papers prepared by We the People, on the basis that the documents were void because they were prepared by a non-lawyer.

Although We the People has been the defendant in 29 lawsuits alleging it is engaging in the unauthorized practice of law, 26 of the suits have been either won by the company or else dismissed (there are still suits pending in North Carolina, Illinois and Tennessee). There may even be a grudging acceptance of these types of organizations by some bar groups.

### **Conclusion**

As evidenced by the above discussion and case summaries, the determination of what actions constitute the unauthorized practice of law in real estate transactions is not settled or consistent. But the “battle lines” are clearly drawn. On the one hand, the organized real estate bar in many states argues forcefully that: licensed attorneys are an indispensable part of any real estate transaction (including the closing); there is in reality no such thing as a simple “point and sign” closing; “one size fits all” standard conveyancing documents do no such thing and require the use of legal discretion and knowledge; public policy requires that only licensed attorneys prepare legally binding documents and pass judgment on their suitability and enforceability; and attorneys are more accountable to consumers than nonlawyers because they are subject to professional disciplinary actions and malpractice claims. On the other hand, nonlawyer groups typically involved in real estate transactions (such as banks, title companies and agents, realtors, and governmental agencies) argue just as forcefully that: lay closing persons are competent to perform residential closings; the vast majority of closings involve only ministerial or administrative duties and functions and virtually all legal issues have been resolved before the closing; lay persons conducting closings are trained not to answer legal questions and to halt the closing when such questions arise and advise the parties to seek legal advice; closing documents are standardized and seldom if ever negotiated or modified; title insurers and agencies carry errors and omissions policies, are monitored and regulated, and are subject to penalties (both civil and criminal) for any misdeeds, negligence, or wrongdoing; owner’s title insurance is available and offered to residential buyers; and public policy is promoted and consumers benefited because closing services performed by laypersons provide needed competition and greatly reduce legal and other costs of the transaction. It is unlikely that this philosophical (and practical) debate will subside in the foreseeable future, and the issue will continue to be dealt with by individual states, whether by means of applicable case law, statute, or regulatory or administrative rulings. For additional commentary in this area, *see* Michael C. Ksiazek,

*Note: The Model Rules of Professional Conduct and the Unauthorized Practice of Law: Justification for Restricting Conveyancing to Attorneys*, 37 SUFFOLK U. L. REV. 169 (2004); Marjorie A. Shields, *Unauthorized Practice of Law -- Real Estate Closings*, 119 A.L.R. 5<sup>TH</sup> 191, sec. 5.