

**COMMITTEE ON UNLAWFUL PRACTICE OF LAW
ADVISORY OPINION 2002-01**

INTRODUCTION

The Committee on the Unlawful Practice of Law has received several inquiries and complaints regarding various real estate practices. In addition, the Committee held a public hearing on June 3, 2002 relating to the practices of title companies. The Committee now addresses those concerns as it understands the issues. Throughout all of the following discussion, the Committee is guided by the definition of the practice of law promulgated by the West Virginia Supreme Court by Rule on March 28, 1947 and amended July 1, 1961. This Rule states in relevant part:

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

More specifically but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures.

1. Whether the preparation of a property report is the practice of law.

Previously in Advisory Opinion 93-003, the Committee made clear that a title search is the practice of law and that a lay person may not conduct such a search for another unless under the direct control and supervision of an attorney. The Committee now is compelled to distinguish the reporting of factual matters of record (herein termed "property report") from the report of legal effect or significance of matters that may affect title to real estate (herein termed "title exam" "title search," or "title opinion"). The Committee is of the opinion that gathering factual information that appears in the public records, such as the names of grantors and grantees, dates, prior instruments, or the purport or substance of instruments, is not the practice of law. This is because this activity does not involve the application of legal principles to facts, purposes or desires. It is the mechanical process of recording information. For example, credit agencies may review public records to determine the existence of liens.

2. Whether the provision of a title search, exam, or opinion by a title company is the unauthorized practice of law.

In contrast to mere record reporting, the Committee is of the opinion that when an individual purports to render an opinion to another of the legal significance of the presence or absence of matters of record and/or the condition of the title or give any other advice concerning the application of legal principles, this is the practice of law. As such, only licensed attorneys may perform this service for others. As the Committee understands, there are business organizations, whether incorporated or not, calling themselves "title companies" and selling to others information the Committee terms property reports. However, these property reports are sold or provided by the title companies to others as title exams, title searches, or otherwise purporting to certify the validity of title or render legal advice. When property reports purport to certify title or otherwise provide legal advice, this activity is the practice of law and may only be rendered by a licensed attorney. Moreover, W.Va. Code § 30-2-5 prohibits corporations or voluntary associations from practicing law. Accordingly, a title company may not employ attorneys to provide this service to others as this would constitute the unauthorized practice of law by a corporation

or association. Further, “[t]he fact that any such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law shall not be held to permit or allow any such corporation or voluntary association [to engage in the practice of law].” Id.

The Committee further notes the legislature has excepted from the prohibition against corporations or voluntary associations practicing law “a corporation or voluntary association lawfully engaged in examining and insuring the titles to real property....” W. Va. Code § 30-2-5 (emphasis added). Thus, the Committee distinguishes between corporations or voluntary associations providing legal services, such as title searches, exams or opinions (which are prohibited), and title insurance companies which are engaged in examining and insuring titles to real property. Title insurance companies are informing themselves about the risks they chose to assume or decline in the business of providing title insurance. As such, these corporations or voluntary associations may employ attorneys to examine and insure titles to real property.

3. What degree of control must an attorney exercise over lay persons performing title searches on the attorney’s behalf.

While an attorney may employ lay persons to assist in the provision of legal services, the lay person must be under the control and supervision of the attorney. Thus, as set forth in Advisory Opinion 93-003, lay persons may conduct title searches for prospective clients under the direct supervision and control of an attorney.

The Committee, however, declines to comment on the degree of control necessary or to define the legal relationship that must exist between the attorney and the assistant. That is, the Committee renders no comment on whether the assistant must be an employee of the attorney, an independent contractor, or whether any other legal relationship is necessary. Rather, the Committee views the attorney as ultimately responsible for the legal services provided. How the attorney exercises that responsibility is not a question of whether the activity is or is not the practice of law. Instead, it is a question of the quality of the attorney’s practice of law, which is not within the jurisdiction of this Committee.

4. Whether a title exam prepared by a non-lawyer and provided by a lender in satisfaction of a borrower’s condition for a loan is the unauthorized practice of law.

The Committee understands the following practice occurs in connection with obtaining financing for the purchase of real estate, or obtaining refinancing of loans secured by real estate in West Virginia. As a condition of the loan, the lender requires the borrower to provide a title exam or search certifying, proving, or indicating the validity of title of the real estate to the borrower. The lender also often requires the borrower to purchase title insurance to protect the lender’s lien or encumbrance. It is the lender that selects and/or contracts with the insurance agent or company and places the request for the insurance. The title insurance company then obtains an “abstract” or property report from its employees or contractors. These are not title exams or searches by licensed attorneys. These non-lawyer abstracts or property reports are relied upon by the title insurance company for purposes of issuing the title insurance. The borrower pays for the lender’s title insurance and also pays for the non-lawyer “abstract” or property report. However, the circumstances imply the borrower is paying for a “title exam” and the HUD settlement statement prepared for closing reflects that not only does borrower pay for the title insurance to protect the lender, but borrower pays for a “title exam.” There is no other title search performed.

Apparently, the borrower is not informed that the title exam he or she pays for is not prepared by a lawyer, but only an abstract or report for purposes of insuring lender’s interests and satisfactory to the insurance company for the risks it is assuming for the premium paid. Indeed, borrowers are sometimes offered owner’s title insurance but they most often decline, reasoning they have already paid for the same thing. Moreover, lenders are accepting this non-lawyer “abstract” or property report on behalf of the borrower as satisfaction of the loan condition that borrower provide certification of the validity of title. The borrower also relies on this “title exam” as being the required certification of title.

Thus, in practice, the lender is accepting a non-lawyer “abstract” or property report and, in turn, providing this non-lawyer “abstract” or property report from the title insurance company to satisfy borrower’s condition of certifying the validity of title. The lender, therefore, is providing a legal service

in the form of a title exam, or an opinion on the condition of the borrower's title. The lender is not an attorney. This is the unauthorized practice of law by the lender in West Virginia.

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

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

5. Whether real estate closings by agents of title companies or title insurance companies are the unauthorized practice of law.

In Advisory Opinion 93-003, this Committee stated that the conducting of real estate closings is the practice of law. Consequently, they must be conducted by attorneys. Since corporations and voluntary associations cannot practice law, W.Va. Code § 30-2-5, then title companies may not employ attorneys to provide this legal service, nor may its lay employees or agents provide this service to others. Further, since the conduct of a closing is not part of the insuring and examining of titles to real property, title insurance companies may not employ attorneys to provide this service.