

KENTUCKY BAR ASSOCIATION
Unauthorized Practice of Law Opinion KBA U-31
Issued: March 1981

Question: Does a real estate mortgage lender, or a title insurance company on behalf of a real estate mortgage lender, commit the unauthorized practice of law by performing the ministerial acts necessary in the closing of a real estate loan?

Answer: Qualified no.

References: SCR 3.020; Kentucky Bar Assn v. First Federal Savings & Loan Assn, 342 S.W.2d 397 (Ky. 1961); Frazer v. Citizens Fidelity Bank & Trust Co. 393 S.W.2d 778 (Ky. 1965); Kentucky Bar Assn v. Tussey, 476 S.W.2d 177 (Ky. 1972); Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Assn. 540 S.W.2d 14 (Ky. 1977)

OPINION

This Committee, as well as the highest court of this Commonwealth, has from time to time issued many opinions concerning real estate mortgage lenders and title insurance companies, involving preparation of legal instruments.

The practice of the closing of real estate loans throughout the Commonwealth involves both “insider” attorneys, (where there is a lawyer employee of the corporation) as well as “outsider” attorneys (where there is a lawyer who is involved in an attorney/client relationship and who is not an employee of the corporation).

SCR 3.020 provides in part:

The practice of law is any service rendered involving legal knowledge or legal advice, whether representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liability, or business relations of one requiring the services.

In Kentucky Bar Assn v. First Federal Savings & Loan Assn. 342 S.W.2d 397 (Ky. 1961), the court held that an in-house attorney cannot give a title opinion since that would constitute the practice of law and the giving of legal advice. In Frazer v. Citizens Fidelity Bank & Trust Co. 393 S.W.2d 778 (Ky. 1965), the court held that a bank or trust company cannot through either in-house lawyers or lay employees prepare deeds or mortgages for other persons. Kentucky Bar Assn v. Tussey, 476 S.W.2d 177 (Ky. 1972), implied that an in-house attorney could draft a legal instrument so long as no fee or compensation for such was charged. Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Assn. 540 S.W.2d 14 (Ky. 1977) held that a lay employee of a lending institution can complete forms only if there is no charge to borrowers and a licensed attorney (either in-house or outside) either prepared or reviewed and approved the instruments involved. (Emphasis added)

This Committee in KBA U-21 issued an opinion as to the bounds of proper activities of lay employees of title insurance companies. Implicit within this opinion is the assumption that a supervising attorney, either an in-house or outside attorney, had reviewed all documents and approved them prior to the closing.

A "real estate closing" is at best ministerial in nature. Some lawyers will allow secretaries and paralegals to participate in closings. The closing, which consists mainly of financial matters, payments, schedules of payment, and insurance, is basically a nonlegal function. So long as the lay person avoids the giving of legal advice, there is no problem with a lay employee closing a real estate transaction.

The rub which frequently arises in a real estate closing situation is that often questions of a legal nature are posed to the layman who is closing the transaction. Any response would constitute legal advice and would be the unauthorized practice of law by the person answering the questions. In such an instance, the lay person should discontinue the closing and seek proper legal advice. It should be observed that many Federal loans involve significant knowledge of the law, and questions as to what is meant in the documents would certainly involve the unauthorized practice of law.

Note to Reader

This unauthorized practice opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides in part: "Both informal and formal opinions shall be advisory only."