

KENTUCKY BAR ASSOCIATION
Unauthorized Practice of Law Opinion U-58
Issued: September 1999

NOTICE:

This opinion was vacated by the Kentucky Supreme Court on August 21, 2003. See Countrywide Home Loans, Inc., et al v. Kentucky Bar Association, 113 S.W.3d 105 (Ky. 2003).

Question: May real estate closings be conducted by persons who are not real parties in interest without direct supervision of a licensed attorney?

Answer: No.

Question: May title agencies or title insurance companies conduct real estate closings?

Answer: No.

OPINION

Only licensed attorneys may practice law in Kentucky. The practice is regulated exclusively by the Kentucky Supreme Court. The compelling reason for such regulation is to protect the public against rendition of legal services by unqualified persons. Kentucky Rule of Professional Conduct (RPC) 5.5. The practice of law is defined by SCR 3.020 as any service:

"involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services."

The "unauthorized" practice of law is the performance of those services contained in the definition by "non-lawyers" for "others".

It is not the unauthorized practice of law for a party to a real estate transaction to represent himself or to prepare closing documents to which he is a real party in interest, provided that no fee is charged to any other party. SCR 3.020. Otherwise only a licensed attorney may represent a closing party, prepare conveyancing or mortgage instruments, or charge a fee for legal services related to a real estate transaction. Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965); Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Association, 540 S.W.2d 14 (Ky. S.Ct. 1976).

Real Estate Closings

Real estate closings typically have either two or three real parties in interest: seller and buyer, borrower and lender, or seller, buyer-borrower, and lender. Of these three, the least complex are the two-party closings of single sale or loan transactions involving the transfer of an interest in real estate, by deed or mortgage, for purchase money or loan proceeds. The sale of real estate

financed by a third-party lender is the more complex because it involves separate sale and secured loan transactions in a simultaneous closing.

The "conduct" of a closing is the culmination of such transactions. Notwithstanding the standardization of real estate closing documentation, it is unrealistic and naive to assume that, in all instances, the settlement agent can present important legal documents to the seller, buyer, borrower, and/or lender at a closing without legal questions being asked and without giving legal advice. The preparation and presentation of closing documents is an implied representation that the documents fulfill the requirements of the parties' contractual commitments and the law, and that the documents have been reviewed and found to be legally sufficient. Real 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. State v. Buyer's Service Co., 357 S.E.2d 15 (S.C. 1987). Whether stated or not, the person conducting the closing vouches for the legal sufficiency of the documents, whether complex, simple, or pre-printed. It does not matter whether the instruments are deemed simple or complex. As Judge Pound said when closing transactions were much less complicated than today, "The most complex are simple to the skilled, and the simplest often trouble the inexperienced." People v. Title Guaranty and Trust, 125 N.E. 666 (N.Y. 1919).

The legal questions present at a closing, whether asked or should be asked, are endless, as demonstrated by the attached appendix of issues affecting the quality of title and enforceability of documents. In summary, the contract of sale or the loan commitment must be reviewed and interpreted for contract compliance and remedies. Sufficiency of the legal description or survey plat and access to public ways and utilities must be determined. The title opinion or title insurance commitment must be reviewed and interpreted to inform the purchaser of its meaning and potential risks, and the effect of restrictions, encumbrances, and other title exceptions. The closing documents must be explained.

By its very nature a real estate closing involves substantial rights and liabilities. The parties approach the closing having made commitments with other parties and invested time and money in anticipation of a mutual understanding of their contractual obligations and trusting that all legal issues have been properly addressed. If a problem arises during closing and there is no attorney-client relationship, the parties are without the benefit of independent counsel and may lack the leverage or will to halt a transaction that is not in their best interests.

Closing Supervision by Attorney

An attorney need not be physically present at the closing, so long as it is in fact conducted under his supervision and control, but the responsible attorney must be familiar with the documentation and be available at the time of closing for consultation. He bears ultimate responsibility for the closing and is subject to disciplinary action for any act or omission which otherwise would be misconduct by him or his closing employees, as well as being legally accountable under the duty imposed by Seigle v. Jasper, 867 S.W.2d 476 (Ky. App. 1993). By failing to attend or supervise a closing, the attorney who is responsible for the documentation or who has examined and opined on the quality of title may be guilty of aiding or assisting lay settlement agents in the unauthorized practice of law contrary to SCR 3.470.

Closing by Institutional Lender

When an institutional lender is a real party in interest to a real estate transaction as mortgagee, its lay employee or in-house attorney may preside over the mortgage closing with a customer not represented by an attorney. Though institutional lenders, namely banks, savings and loans, and Farm Credit Services are not subject to the same disciplinary action as attorneys, the public is protected to some degree by state and federal requirements for licensure, capitalization, oaths of directors and officers, insured deposits, and other regulations. The lender's employee may attend to the ministerial issues of financial matters, payments, and insurance related to the loan, as these are commonly non-legal functions. KBA U-31.

The lender's employee may also prepare or select 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 for the documents as finally executed. Federal Intermediate Credit Bank of Louisville, *supra*.

However, institutional lenders may not by their employees or salaried attorneys provide title opinions to their borrowers because the "analysis of recorded interests in land coupled with an opinion as to its legal status" is a service lawfully performed for others only by a licensed attorney. Kentucky State Bar Association v. First Federal Savings & Loan Association of Covington, 342 S.W.2d 397 (Ky. 1961). Moreover, no lender's lay employee may undertake to give legal advice to or answer any questions posed by the borrower or any other transaction party involving interpretation of legal provisions of closing documents or other matters requiring legal knowledge or skill. When a legal question is asked or becomes apparent, the institutional lender employee should suspend the closing to consult legal counsel in order to avoid the unauthorized practice of law. (See KBA U 31.) Such employee may not conduct any part of a real estate closing other than the mortgage loan.

Closing by Title Companies

A distinction must be made as to lay settlement agencies such as title companies and title insurance companies which are not real parties in interest to the real estate or loan transactions. Their only interest is the payment of settlement fees. They act only as a conduit to exchange funds and documents. A lay settlement agency may compile and report factual information from the public records, including abstracts of title, but may not render title opinions. They may act as an agent or broker in connection with the issuance of title insurance commitments and policies, and may provide clerical services for a closing. KBA U-21; U-31. They do not conduct a closing or examine the required documents with an eye for protecting the independent legal rights of the seller, buyer, or lender. Such agencies are not regulated and owe no legal duties to the parties other than those imposed by agency or tort law. Their employees have no mandated educational prerequisites for real estate transactions or disciplinary oversight. A title agency may not conduct real estate closings or mask legal fees for closing services under the guise of a "settlement fee" or other charge. Their conduct of a closing absent independent legal counsel constitutes the unauthorized practice of law. Virginia UPL Opinion #183 (1996); Annotation, 85 A.L.R. 2d 184.

APPENDIX

Typical Questions at Real Estate Closings That May Involve Legal Advice

- the legal name, existence, and authority of an entity-grantor;
 - the nature of the estate and quality of title conveyed;
 - the effect of survivorship title on estate plans;
 - the difference between special and general warranties, or no warranty at all, and the purchaser's remedies for title defects;
 - generic deed exceptions for easements and other encumbrances of record;
 - closure of a metes and bounds description or other description deficiencies;
 - rights of access to public ways and utilities;
 - interpretation and impact of zoning and other land use regulations;
 - completion of promised improvements by the seller or subdivider;
 - air and mineral rights;
 - significance of deed covenants, conditions, and restrictions;
 - upstream and downstream surface drainage;
 - the presence of unacceptable dominant easements, or the lack of necessary servient easements appurtenant;
 - the effect of adverse possession, prescriptive use, and the champerty statute;
 - eviction of tenants and trespassers;
 - release of statutory liens for labor and materials furnished, unemployment contributions and federal and Kentucky death taxes;
 - survey and other exceptions in the preliminary title opinion or title commitment;
 - what title policies cover and what they exclude;
 - the duties and liability of title attorneys, real estate agents, and lenders;
 - the rights to and limitations of future advances under open-end loans;
 - remedies against defaulting parties;
 - interpretation of environmental site assessments and remediation of contamination;
 - survival of warranties, representations, and covenants, and indemnification;
 - claims for latent defects in buildings;
 - disclaimers in homeowner's warranties and termite inspection reports;
 - disclosures of condition of property improvements, or of the agency and loyalty of a broker;
 - the tax consequences of various matters in the closing;
 - the effect of marital dissolution upon loan obligations; or
 - the fine print of the so-called federal closing documents.
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