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Cover Your Grass: Ethical Considerations in Land-Use Transactions

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COVER YOUR GRASS: ETHICAL CONSIDERATIONS IN LAND-USE TRANSACTIONS

Acknowledgement

This paper explores the contours and boundaries of the transactional lawyer's ethical duties. In researching this topic, we discovered several excellent papers others had written on the subject. Rather than reinvent the wheel, we updated and added to four existing papers along with some additional research to create this paper. We would like to thank the authors of the four existing papers for generously allowing us to utilize their works. They include:

- *Conflicts of Interest: Entity Creation and Other Sticky Situations*
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I. Defining the Practice of Law¹

A. Texas

We start by considering what constitutes the practice of law. The practice of law in Texas is defined by statutes and the case law. Section 81.101 of the Texas Government Code states:

- (a) In this chapter the “practice of law” means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.
- (b) *The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.*
- (c) In this chapter, the “practice of law” does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.

(emphasis added).

However, with regard to real estate transactions, Section 83.001 of the Texas Government Code reads as follows:

- (a) A person, other than a person described in Subsection (b), may not charge or receive, either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien.
- (b) This section does not apply to:
 - (1) an attorney licensed in this state;

¹ This section was largely borrowed from *Attorneys in the Hot Seat: Problems and Solutions*.

- (2) a licensed real estate broker or salesperson performing the acts of a real estate broker pursuant to Chapter 1101, Occupations Code; or
 - (3) a person performing acts relating to a transaction for the lease, sale, or transfer of any mineral or mining interest in real property.
- (c) This section does not prevent a person from seeking reimbursement for costs incurred by the person to retain a licensed attorney to prepare an instrument.

Section 83.001 appears to allow non-attorneys to draft legal documents in the context of a real estate transaction, as long as they are not collecting a fee for their efforts.

The interplay of Sections 81.101 and 83.001 understandably creates confusion. While, on the one hand, the legislature has chosen to promote the role of non-attorneys in real estate transactions, non-attorneys are not exactly given carte blanche. Matters involving the rendering of legal advice and the formation of legal opinions are still reserved to attorneys alone. Whether an activity involves the rendering of legal advice or the formation of legal opinions must be closely examined.

B. Other Jurisdictions

Texas is not alone in struggling to balance the need for consumers to have access to affordable closings with the need for consumers to be protected from the unauthorized practice of law. In 2002, as the North Carolina State Bar Council was considering whether to allow attorneys to delegate real estate closing tasks to employees working under their supervision, a Special Committee on Real Estate Closings of the North Carolina Bar was formed, and even the Justice Department's Antitrust Division and the Federal Trade Commission officially weighed in, requesting that the rule change be permitted, and supervised non-attorneys be allowed to perform certain tasks in the conduct of a real estate transaction.

Pennsylvania's Unauthorized Practice of Law Committee has expressly prohibited attendance at real estate settlements by paralegals, legal secretaries and other laypersons, in place of designated legal counsel, and prohibited representation of property owners in real estate tax assessment appeals by anyone other than a licensed attorney. *See* Pennsylvania Unauthorized Practice of Law Committee Formal Opinions 96-102 and 98-101.

In 2011, Massachusetts' highest state court, the Massachusetts Supreme Judicial Court, issued an opinion addressing what aspects of a real estate closing must be performed by licensed attorneys only, and what tasks may be performed by non-attorneys. *Real Estate Bar Ass'n for Mass. v. Nat'l Real Estate Info. Servs.*, 459 Mass 512, 946 N.E.2d 665 (Mass. 2011). In that case, case, the plaintiff bar association maintained that the issuance of title insurance policies constitutes the unauthorized practice of law, because it requires some examination of the legal title to a property. The Massachusetts Supreme Judicial Court held that certifying good, clear and marketable title is a role reserved for attorneys, but the "issuance of title insurance policies" is a permissible role for non-attorneys, although the court specifically noted that nothing in the

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