

Unauthorized Practice of Law Committee Proposes Amendments to Virginia Supreme Court Rules, Part Six, Section I, Rule 6 Governing Real Estate Transactions

The Virginia State Bar's Standing Committee on the Unauthorized Practice of Law (UPL) has proposed amendments to the UPL rules affecting real estate settlements conducted by non-lawyers. These proposed rule amendments were prompted by statutory changes in recent years permitting nonlawyer settlement agents licensed under the Consumer Real Estate Settlement Protection Act (CRESPA) to provide escrow, settlement and closing services in the Commonwealth of Virginia. The UPL Committee will submit these rule amendments to the Council of the Virginia State Bar for approval at its next meeting on February 22 and 23, 2002 at the Holiday Inn—Select Koger Center in Richmond, Virginia. If the proposed amendments are approved, the bar will petition the Virginia Supreme Court to approve the proposed amendments.

The chief purpose of the proposed rule amendments is to clarify those services that nonlawyers can perform in connection with real estate transactions, including when a nonlawyer settlement agent is acting pursuant to CRESPA.

Any individual or business which seeks to make comment in support of, or opposition to, the proposed rule amendments must submit ten (10) copies of written comments to Thomas A. Edmonds, Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219, on or before February 4, 2002.

Unauthorized Practice Rule 6. Real Estate Practice.

UPR 6-101. Giving Legal Advice.

- (A) A non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate; except that, incident to his investigation of factual matters, he may give advice to his regular employer, other than in aid of his employer's unauthorized practice of law, or to a lawyer upon request by the lawyer therefor.
- B) A non-lawyer or lay entity may not employ a lawyer, directly or indirectly, to advise a customer in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate. A non-lawyer or lay entity may, however, refer its customer to a lawyer for legal services.
- C) If a non-lawyer or lay entity refers its customer to a lawyer for legal services involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate, such a non-lawyer or lay entity shall not exercise or attempt to exercise any control over, or imply that the non-lawyer or lay entity has any right to control the actions of the lawyer in the handling of the transaction. All decisions are to be those of the lawyer acting on behalf of his client.

UPR 6-102. Holding Out With Regard to Real Estate Services.

- (A) Except as specifically provided in UPR 6-101(A), a non-lawyer shall not hold himself out as authorized to furnish to another advice or service with respect to real estate

transactions under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, to a specific set of facts for a particular person.

- (B) Notwithstanding any rule of this Court to the contrary, a settlement agent authorized by law to provide escrow, closing or settlement services for real estate transactions may hold himself out as authorized to provide such services in the purchase or financing of real estate in the Commonwealth of Virginia.
- (B)(C) A nonlawyer shall not be excused from any violation of these Rules by any disclaimer or other statement that his unauthorized advice or conduct should be reviewed by the customer's own lawyer, admonition to seek the advice of an attorney, or waiver by the customer.

UPR 6-103. Preparation of Legal Instruments.

- (A) Unless a party to the transaction, a nonlawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, except:
 - (1) A nonlawyer may prepare a deed with respect to, or deed of trust secured by, for any real estate owned by him. A nonlawyer may prepare a deed of trust or deed of trust note for any real estate owned by him or in connection with any transaction to which he is a party involving its purchase, sale, transfer or encumbrance.
 - (2) A regular employee may prepare legal instruments for use by his employer, other than in aid of his employer's unauthorized practice of law, for which no separate charge shall be made. However, such employee may not assist his employer in the unauthorized practice of law.
 - (3) A real estate agent, or his regular employee, involved in the negotiation of a transaction and incident to the regular course of conducting his licensed business, may prepare a contract of sale, exchange, option or lease with respect to such transaction, for which no separate charge shall be made.
 - (4) A lending institution may in the regular course of conducting its business prepare a deed of trust or mortgage on real estate securing the payment of its loan, for which no separate charge shall be made.
 - (5) A settlement agent authorized to provide escrow, closing or settlement services for real estate transactions under the Consumer Real Estate Settlement Protection Act (CRESPA), Va. Code §§ 6.1-2.19, et seq. or the Real Estate Settlement Agent Registration Act (RESARA), Va. Code §§ 6.1-2.30, et seq. or any other Virginia statute now existing or hereafter enacted may complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction.
- B) A nonlawyer or lay entity may not employ a lawyer, directly or indirectly, for the purpose of drafting legal instruments affecting the title to or use of real estate for a

customer of the nonlawyer or lay entity. A nonlawyer or lay entity may, however, refer its customer to a lawyer for legal services.

UPR 6-104. Real Estate Closings.

(A) In connection with a real estate closing, a nonlawyer shall not give legal advice to another, or prepare for or advise another in the preparation of legal instruments, for compensation, direct or indirect. A nonlawyer may:

- (1) ~~Make abstracts of title (i.e., copy salient portions of what the public records show as distinguished from expressing an opinion on the legal consequences of what such records show).~~
- (2) Act as a settlement agent if registered under and in compliance with CRESPA.
- (2) Provide such services of a clerical or ministerial nature as may assist the parties in the settlement of a contract, commitment or other agreement with respect to the sale or encumbrance of property including administrative and clerical services as authorized under CRESPA and RESARA.
- (3) Act as an agent or broker in connection with issuance of title insurance commitments, binders and policies.
- (3) ~~Provide such other services of a clerical nature as may assist the parties in the settlement of a contract, commitment or other agreement with respect to the sale or encumbrance of property.~~

Perform searches of public land and related records, make abstracts of title (i.e., copy salient portions of what the public records show as distinguished from expressing an opinion on the legal consequences of such records, prepare title reports and, to the extent licensed to do so, underwrite for and prepare title insurance commitments or binders and policies.

UPR 6-105. Lawyer-Client Relationship.

- (A) A real estate agent, closing agent, lender or other party interested in a real estate transaction shall not:
- (1) Disrupt the relationship of confidence and trust which must exist between a lawyer and his client.
 - (2) Prevent a lawyer from exercising independent judgment on behalf of his client by attempting to fix the lawyer's compensation, or sharing in a percentage of his compensation, or prescribing the terms of his employment, or attempting in any way to control or direct his actions.
 - (3) Place himself between the lawyer and the owner or landlord in an attempt to act as the only conduit of information between the two, since this would prevent the establishment of the fundamental relationship of trust and direct personal responsibility which ought to exist between a lawyer and his client.

UPR 6-106. Referral of Business.

- (A) A real estate agent, closing agent, lender or other party interested in a real estate transaction may refer its customer to a lawyer subject to the following:

- (1) The customer shall first have the opportunity to select a lawyer of his own choosing.
 - (2) If the customer does not so select a lawyer, the agency shall submit a list of lawyers from which the customer may make his selection and subsequently authorize the agent to refer the representation of such customer to the lawyer so selected.
 - (3) The lawyer shall be free at all times to communicate directly with such customer, now his client; and, upon receipt of the initial referral, as well as upon the receipt of any subsequent business unacceptable to the lawyer on the basis of the prior fee arrangement, the lawyer shall communicate with his client for the purpose of establishing the fee arrangement, in which arrangement the agent shall not participate.
- (B) A real estate agent, closing agent, lender or other party interested in a real estate transaction shall not exercise or attempt to exercise any control over or imply that he has any right to control the actions of the lawyer in the handling of the transaction. All decisions are to be those of the lawyer acting on behalf of his client.

Unauthorized Practice Considerations.

UPC 6-1. A nonlawyer may not express to any person, ~~whether by way of a document purporting an opinion as to summarize the validity or legal status of title to real estate or otherwise, an opinion as to the validity of any such title, or as to the legal effect of anything found in the chain of title (such as, for example, a suit, will, judgment, release deed or extension agreement, or as to the effect on title of matters not necessarily appearing of record, such as, for example, adverse possession, the statute of limitations, or the disabilities of parties, the failure to assign dower or the failure to acquire a bona fide domicile in another state).~~ A lawyer employed by a lay agency to render services for others is restricted to the doing of acts in the course of his employment that a nonlawyer can lawfully do. Nothing herein shall be construed to impair the right to practice of duly licensed house counsel, see Unauthorized Practice Rule 1, Practice Before Tribunals; or to impair rights guaranteed by the Constitution; or to impair the rights of a subscriber under a legal services plan licensed under Chapter 23 of Title 38.2 of the Code of Virginia.

UPC 6-2. A nonlawyer may not hold out to the public, directly or indirectly, his willingness to give legal advice or perform legal services, nor solicit such services and then hire a lawyer to perform them. Such practices are not ~~purged or purified~~ validated by an acknowledgment that the nonlawyer is not authorized to give legal advice, or by any disclaimer or suggestion that such advice should be reviewed by the customer's own lawyer. A settlement agent registered under and in compliance with CRESPA or RESARA, may hold himself or herself out as providing escrow, closing or settlement services in the purchase or financing of real estate in the Commonwealth of Virginia.

UPC 6-3. A nonlawyer may compile and report factual information as disclosed by the public records, sometimes referred to as making an abstract of title; but he may not express an opinion or issue a certificate as to the legal consequences of what his investigation of the public records may show. Incident to his investigation of the facts, an abstracter may give to his regular employer or, upon request, to a lawyer his opinion as to the status of legal title as disclosed by his investigation; but neither he nor his employer, unless a lawyer or registered law corporation, may give a certificate of title or opinion to a third

party, or otherwise hold themselves out as possessing legal knowledge or skill.

UPC 6-4. The drawing or preparation of deeds, deeds of trust, mortgages, deeds of release, and other instruments affecting title to real estate requires the possession and use of legal knowledge and skill. Such instruments are extraordinary contracts and muniments of title to real estate. This is nonetheless true where a form of deed or deed of trust prepared by a lawyer may be followed or filled in, and whether the instrument is deemed simple or complex. Legal knowledge and skill are required, in any event, in the selection and completion of the proper form to fit the facts of the particular case. Notwithstanding the foregoing, a settlement agent registered under and in compliance with CRESPA may complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction. However, a non-lawyer settlement agent may not draft the deed or deed of trust or select the form of the deed or deed of trust to be used for a particular transaction.

UPC 6-5. An individual, if he chooses to do so, may draw or attempt to draw legal instruments for himself or affecting his property. A corporation acting through its employees may do the same with respect to its own property.

UPC 6-6. A nonlawyer licensed real estate agent may, pursuant to Virginia Code §54.1-2101.1, prepare for another contracts incident to the regular course of conducting a licensed real estate business. Whether in a particular case the preparation of a contract by a nonlawyer is incident to the regular course of conducting such licensed business must, of necessity, be determined on the facts of that particular case. Preparation, in this context, includes not only the drafting of a form but also the filling in of a previously prepared form. In making such a determination, the following facts, not necessarily listed in the order of their importance, are among those which should be considered:

- A. Whether the preparer is a party to the contract;
- B. Whether the object to be accomplished by the contract is essential to the regular conduct of the real estate business of the preparer or merely ancillary thereto or an indirect by-product;
- C. Whether a separate charge is made for preparation of the contract;
- D. Whether the implication of legal knowledge and skill on the part of the drafter is minimal;
- E. Whether the reliance on such service as a legal service is minimal;
- F. The extent to which the licensed purpose of the business would be frustrated if preparation of the contract were not permitted;
- G. The likelihood that legal advice will in fact be given by a nonlawyer, in connection with the execution of the contract by the parties;
- H. The extent to which preparation of the contract by a non-lawyer reduces costs, saves time and avoids inconvenience to the parties; and
- I. The custom and practice in the industry.

UPC 6-7. In connection with a real estate closing, a non-lawyer settlement agent may not give legal advice to another, or prepare for or advise another in the preparation of legal instruments, for compensation, direct or indirect. A nonlawyer may, however:

- A. Order a survey, but not give an opinion as to the adequacy of such survey or with respect to matters reflected therein.
- B. Obtain copies of leases, easements, restrictions, building codes, zoning ordinances and the like, but not give an opinion as to the legal effects thereof or any party's legal obligation to comply therewith.
- C. Order termite or other inspections, but not give an opinion as to ~~whether the results thereof comply with the terms of the contract~~ a party's legal obligations with respect thereto.
- D. Ascertain the status of utility services and assist in their transfer, but not give advice as to a party's legal obligation with respect thereto.
- E. Arrange for the issuance of casualty insurance coverage, as requested by a party in interest.
- F. Provide lien payoff figures as asserted by the lienholder, but not give advice as to a party's legal obligation to pay the amount claimed.
- G. Make mathematical computations involving the proration of taxes, insurance, rents, interest and the like in accordance with the terms of the contract or local custom.
- H. Obtain lien waivers from mechanics or materialmen in form acceptable to the party in interest, ~~but not prepare such waiver or give advice as to the legal sufficiency thereof.~~
- I. Prepare settlement statements and complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction and prepare settlement statements, such as the HUD-1, and other form documents such as the Owner's /Seller's Affidavit, Notice of Availability (of Owner's Title Insurance), and tax reporting forms including FIRPTA, Form 1099, VA R-5, and VA R-5E.
- J. Receive and disburse settlement funds, and serve as escrow agent, to the extent licensed to do so.
- K. Create or prepare a title abstract or title report, and to the extent licensed to do so, underwrite for and prepare title insurance commitments or binders and policies.

The foregoing list of examples considered to be permitted activity if performed by nonlawyers, is intended for guidance only and is thus non-exclusive.

UPC 6-8. While a lay agency may recommend to its customers the employment of a ~~particular~~ lawyer, the lawyer so employed should in all matters be employed, controlled and paid by his client, the customer. The lay agency may refer its customer to a lawyer and may consult with that lawyer or any other lawyer

engaged by its customer. The lawyer, however, owes his undivided loyalty to his client, the customer, and not to the lay agency and should be especially sensitive in real estate transactions to the ethical constraints governing conflicts of interest. To the extent the lawyer considers the lay agency to be his client and, in the preparation of legal instruments for the lay agency, he knows, or should know, that the lay agency intends to use such legal instruments in the closing of a real estate transaction for another, such lawyer is aiding such lay agency in the unauthorized practice of law. A lawyer may, however, in representing his or her lay agency client, advise the lay agency as to compliance with applicable law including the legal sufficiency and accuracy of legal documents or instruments. A direct and personal lawyer-client relationship must be established and preserved at all times; otherwise, through its own lawyer, such lay agency becomes engaged in the business of providing legal services to others.

UPC 6-9. A real estate agent in the conduct of his licensed business may, either in person or through one of his regular employees, present facts to a judicial officer on behalf of his landlord/principal in support of the issuance of a distress warrant or summons for unlawful detainer.

6-9. If legal advice is requested by a party, the nonlawyer settlement agent should take care to refer the party to a lawyer. Defining what is legal advice is difficult; however, a nonlawyer acting as a settlement agent is engaged in the unauthorized practice of law if he or she:

- A. Recommends or urges a course of action to a party to the transaction under circumstances which require the exercise of legal judgment;
- B. Drafts a legal instrument for a party to the transaction, other than completing form documents selected by and in

accordance with the instructions of the parties to the transaction; or selects or assists a party in selecting a form document, if such selection or assistance requires the exercise of legal judgment;

- C. Assists a party to the transaction in the completion of a legal document, other than a form document selected by and in accordance with the instruction of the parties, if such assistance requires the exercise of legal judgment;
 - D. Advises or instructs a party to the transaction of which way to take title to the property or the legal consequences of taking title in a particular manner, except that providing a description of the various tenancies recognized under Virginia law shall be permitted;
 - E. Attempts to settle or resolve a dispute between the parties to the transaction which requires the exercise of legal judgment to a particular situation;
 - F. Explains the legal effect of an item reported as an exception in a title commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency or agent may explain an underwriting decision to an insured or prospective insured including providing the reason for such decision;
 - G. Provides a legal opinion in response to inquiries regarding rights and obligations under legal documents provided that a layman's description of the purpose or intent of a document shall not constitute a legal opinion.
- The foregoing list of examples considered to be the unauthorized practice of law, if performed by nonlawyers, is intended for guidance only and is thus non-exclusive. 