

UNAUTHORIZED PRACTICE OF LAW OPINION 197

NONLAWYER REPRESENTATION OF PARTY TO A REAL ESTATE TRANSACTION

You have presented a hypothetical situation in which Attorney has received a contract concerning a real estate transaction showing that Attorney will be the settlement agent. The contract has an addendum which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the seller's documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that Attorney's settlement statement should show no charges to the seller from Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

The Committee considered your inquiry at its June 8, 2000 meeting and has directed me to transmit its conclusions to you.

Under the facts you have presented, you have asked the committee to opine on the following questions:

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?
 - a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?
 - b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorney's name?

ANSWER: The title company cannot lawfully represent the seller in a legal capacity in the real estate transaction. If the "representation" involves either the giving of legal advice or preparation of legal instruments, the title company is engaging in the unauthorized practice of law. Only an attorney licensed to practice law in the Commonwealth of Virginia can undertake a legal representation of a party to a real estate transaction. In the context of a real estate transaction, a non-lawyer may not give legal advice. Va. S. Ct. R., pt. 6, §I, UPR 6-101; UPL Op. #183. While authorized to provide escrow, settlement and closing services as a licensed settlement agent under the Consumer Real Estate Settlement Protection Act (CRESPA), a title company may not furnish legal advice or prepare legal instruments. See, e.g., Va. Code §6.1-2.22 (No settlement agent can provide

legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party; Va. S. Ct. R., pt. 6, §I, UPR 6-103 (A) (a non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate). It is the unauthorized practice of law for a title company or real estate settlement service to prepare deeds, deeds of trust and notes on behalf of a real estate seller or purchaser. UPL Ops. 141, 91, 86, 80, and 76.

In summary, a title or settlement services company cannot hold itself out as authorized to undertake a legal representation of a person nor provide legal advice or prepare legal documents in connection with a real estate closing. UPRs 6-101, 6-102 and 6-103.

- a. It is the opinion of the committee, under the circumstances you present, that the named settlement agent is placed in the position of dealing with sellers who are not represented by counsel, because the title company is not authorized by law to act as an attorney for sellers.
 - b. Since the title company cannot lawfully prepare the deed on behalf of the sellers, the fee charged by the title company on the settlement statement cannot include a fee for the preparation of the deed. A non-lawyer is not entitled to collect a fee for providing legal services which they are not authorized to perform. Va. S. Ct. R., pt. 6, §I (Introduction) ("Any fees charged by a person engaged in the unauthorized practice of law are not collectible in court."); UPL Op. #112 (1990) (It is the unauthorized practice of law for a mortgage company to make a separate charge for the preparation of legal instruments affecting title to real estate in connection with a real estate closing.) If an attorney not directly employed by the title company prepared the deed, the fee charged for deed preparation should be itemized separately with the preparing attorney's name.
2. If Attorney complies with the instructions of the title company, is Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

ANSWER: This is an ethics question, not an unauthorized practice matter, and is beyond the purview of this committee. This issue has been referred to the Standing Committee on Legal Ethics.

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?

ANSWER: No. Your inquiry presents two scenarios, one in which a Virginia licensed attorney in private practice owns the title company and another in which the attorney is an employee of the title company. In both situations, it would appear that the attorney is representing the *title company*

MEDIA CONTACT: James M. McCauley, Ethics Counsel
 RELEASE DATE: August 25, 2000

**VIRGINIA STATE BAR COUNCIL TO REVIEW
 UNAUTHORIZED PRACTICE OF LAW OPINION
 CONCERNING NONLAWYER REPRESENTATION OF A
 PARTY IN A REAL ESTATE TRANSACTION**

RICHMOND—Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on October 26–27, 2000, in Williamsburg, Virginia, is expected to consider for approval, disapproval, or modification, a proposed unauthorized practice of law opinion issued by the Standing Committee on the Unauthorized Practice of Law.

UNAUTHORIZED PRACTICE OF LAW OPINION 197

Opinion 197 was issued by the Standing Committee on the Unauthorized Practice of Law on June 26, 2000. This opinion generally addresses: 1) whether a title company can be retained to serve as a legal representative of the seller in a real estate transaction when that title company is not the settlement agent in the transaction; 2) whether the title company can represent the seller if the person employed by the title company is an attorney in private practice who owns the title company; and 3) whether the attorney in the capacity as owner/employee of the title company could perform legal services for clients of the title company.

In this opinion, the Committee concluded that the title company, a lay entity, cannot lawfully represent the seller in a legal capacity in the real estate transaction. If the “representation” involves either the giving of legal advice or preparation of legal instruments, the title company is engaging in the unauthorized practice of law. Only an attorney engaged in private practice and licensed to practice law in the Commonwealth of Virginia can undertake a legal representation of a party to a real estate transaction. In the context of a real estate transaction, a nonlawyer may not give legal advice to a party nor prepare legal instruments to which he or she is not a party. If the seller needs or desires legal representation, the seller cannot be represented by the attorney employed by the title company. The title company is a lay entity which is not authorized to practice law, and cannot employ its attorney to provide legal services to its customers.

Inspection and Comment

The proposed unauthorized practice of law advisory opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than September 25, 2000.

and not the seller. If the seller needs or desires legal representation, the seller cannot be represented by the attorney employed by the title company. The title company is a lay entity which is not authorized to practice law, and cannot employ its attorney to provide legal services to its customers. *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 167 Va. 327, 189 S.E. 153 (1937); UPL Op. #60 (1985). Only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller. The title company or agency may refer the seller to a lawyer, pursuant to the requirements of UPR 6-106 (A) which provides:

- (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.
4. Can an attorney acting in his capacity as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a non-attorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

ANSWER: Generally it is the unauthorized practice of law for a lawyer employed by a lay corporation to provide legal services to its customers. *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond, supra*. Therefore, the committee would regard such an attorney as a non-lawyer in the circumstances you present. The committee opines that only a Virginia licensed attorney engaged in the private practice of law may undertake a legal representation of a party to a real estate closing. Thus, in the facts you present, the attorney employed by the title company is to be treated as a non-attorney for purposes of your inquiry and the seller is not to be considered as represented by their own attorney in this situation.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting, after the requisite period for public comment, in accordance with Part Six: Section IV: ¶10(c)(iv) of the Rules of the Virginia Supreme Court. Should Council approve the Opinion, it will then be reviewed by the Supreme Court pursuant to Part Six: Section I: ¶10(f)(iii).

Committee Opinion
 June 26, 2000