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Testimony of IRELA President Ralph J. Schumann Regarding Proposals #04-18 and #04-19

My name is Ralph J. Schumann, and I have the honor of serving as the President of the Illinois Real Estate Lawyers Association (IRELA). It is a privilege to have this opportunity to speak briefly with you this morning about some concerns IRELA continues to have regarding the anticipated consequences of adoption of Proposed Rule 5.7 of the Proposed Rules of Professional Conduct as submitted to the Supreme Court by the ISBA/CBA Joint Committee on Ethics 2000. I am a solo practitioner with an office in Elk Grove Village, Illinois, and I have been practicing law in Illinois since 1983. I also serve on the ISBA Real Estate Law Section Council. IRELA was founded eleven years ago by ISBA President-Elect John G. O'Brien, and currently counts over 2,000 real estate practitioners as members.

Before I begin, allow me to just note that the IDFPR Disclosure Form that has been mentioned has been made available today to staff here.

Defining the Practice of Law

IRELA's concerns are as follows:

The practice of law is a public trust, and while the **general purpose** of the ABA Model Rules is salutary, it does not make sense to adopt without modification a Rule that introduces a mechanistic definition of the practice of law. The Illinois Supreme Court would be ill-advised to adopt an approach that would limit its ability to supervise attorneys, whether in good standing or not, with regard to actions that involve characteristics that are typically cited in support of the conclusion that an activity constitutes the practice of law. If the *In Re Howard* and *In Re Discipio* approach heretofore utilized is abandoned in areas now to be defined as "law-related services", the court potentially will be hamstrung in trying to exercise jurisdiction over activities which it has in the past found no difficulty characterizing as the practice of law. There is wisdom in viewing the practice of law as not admitting of a "mechanistic" definition and using a case-by-case approach. (See *In re Howard*, 188 Ill. 2d 423, 721 N.E.2d 1126, 242 Ill. Dec. 595

(1999).) The resulting flexibility is critical. Although the court has been able to identify and exercise jurisdiction in the past over actions which involve “giving any advice or rendering any service requiring the use of any degree of legal knowledge or skill,” *Howard*, 188 Ill. 2d 423, 721 N.E.2d 1126, 242 Ill. Dec. 595, adoption of the proposed rule likely would bring unwelcome change.

The proposed rule, in attempting to define the scope of the practice of law by identifying “**law-related services**”, misleadingly suggests that the practice of law can be facilely defined. The approach embodied in the proposed rule, to take just one example, would produce the incongruous result that a lawyer filling in the blanks of a form real estate contract such as the Multi-Board Residential Real Estate Contract 4.0 for a client, a service which current law allows a non-lawyer real estate broker to perform without being characterized as engaging in the unauthorized practice of law, would be found to be engaged in a “**law-related service**” and, by definition, **not the practice of law**. Yet, an attorney in completing the blanks of a real estate contract would, or at least should, be using a significant “degree of legal knowledge or skill” in the process. In completing the blanks dealing with real estate tax proration, in particular, an attorney draws upon developed legal knowledge regarding the idiosyncracies of the property tax system in the county in which the property is located, any recent changes in the law that may affect the type and amount of various exemptions, the timing and applicability of reassessments and exemptions, and the manner in which the tax proration number inserted in the blank may affect the overall transaction.

It is overly simplistic to arbitrarily define this process as a “law-related service” and not the practice of law simply because a non-lawyer is allowed to fill in the blanks of a form contract on behalf of a client without such action being treated as the unauthorized practice of law. Conversely, if an attorney fails to utilize the requisite degree of knowledge and skill, and fails to adequately address the likely tax burden on the purchaser in completing the tax proration blanks, should the attorney be able to avoid malpractice liability in a suit by a damaged client by claiming that the service performed was merely a “law-related service”? As was alluded to here earlier, will the attorney’s malpractice carrier deny coverage in such a situation by deeming the contract preparation by the insured attorney to be outside the practice of law because it has been transformed by a Rule of Professional Conduct into merely a “law-related service”?

The questions presented by the wholesale adoption without modification of the proposed rule, and the resulting damage to consumers, can and should be avoided. Other areas in which similar unpleasant consequences, with diminished protection afforded clients, likely would be seen include various sorts of legal services associated with real estate, such as the provision of title insurance, property and estate taxation, and mechanics liens, to name just a few areas.

The proposed revisions submitted in conjunction with the January 2, 2008 letter of William Anaya avoid the problems of the attempted mechanistic formulation of what constitutes the practice of law. In keeping with the wise approach of allowing the concept of what constitutes the practice of law to be examined on a case by case basis in light of the specific facts and circumstances, the proposed revisions remove the proposed unnecessary definition of “law-related services” in favor of the simpler, more straightforward description of “services that are not the practice of law”. Rule 1.8 is not changed, but Comment [1] is modified to address the elimination of the defined term “law-related services.” Revised Rule 5.7 is a good rule that applies the rules of professional conduct to lawyers providing any service to a client – and there is simply no reason to distinguish between legal and “law-related” services in the Rule, when such a distinction would be used to undermine the prohibition against the unauthorized practice of law, and harm consumers and practitioners alike.

Provision by Attorneys of Title Insurance in Real Estate Transactions

We are manifestly **not** trying to dictate a conclusion as to whether or not the provision of title insurance is the practice of law. Either way, the attorney still has liability. Nor, in contrast to a statement made by an earlier speaker, are we proposing a position which would have Illinois become a “minority of one”. It is not “like the sale of life insurance”.

Although at least twenty states have declined to adopt the ABA Model Rule approach in the context of the provision of **title insurance**, it would, of course, be **easier** simply to adopt the proposed rules here without analysis or modification. Some might say that there is a danger of overreaching any time an attorney provides a service to a client that can be provided by non-attorneys, and that the wholesale adoption of the proposal will not dramatically affect the practice of law by attorneys in Illinois.

Yet, the proposed cure here might well prove worse than the imagined disease. **There simply is not a demonstrated problem with the provision of title insurance by Illinois real estate practitioners.** In most cases, it is provided in connection with a pending real estate transaction to help a seller client fulfill a standard contractual obligation, or to help a buyer satisfy a requirement imposed by a mortgage lender for mortgagee coverage, rather than in some sort of “independent” business transaction. The obtaining of title insurance by consumers is simply not the sort of discretionary purchase that takes place where, for example, an attorney encourages a client to participate in some type of investment opportunity. Apart from the need for the title insurance to satisfy the standard real estate contract or lender requirements in a particular transaction, it generally does not cross the average consumer’s mind. Thus, it is not the sort of situation likely to present a risk of overreaching by the attorney. Moreover, in the unlikely event an attorney were to try to take advantage of a client by overpricing the title insurance, other existing Rules of Professional Conduct would come into play. When a lawyer does anything for a client, the lawyer must follow the Rules of Professional Conduct, and there

is no need to distinguish between law and non-legal services.

Significantly, practitioners at many large firms in Illinois have already decided that residential real estate is not a lucrative area of practice, and have switched attention in many cases to commercial real estate. Many others may well weigh the small amount of money to be made assisting consumers in residential real estate transactions against the burden of the new administrative and logistical impediments imposed by the Model Rule, and conclude that “doing real estate” is just not worth it anymore. The vast majority of IRELA members and other Illinois real estate practitioners still charge only a relatively small flat fee for handling a real estate transaction. Most real estate practitioners who also provide title insurance for their clients in connection with a transaction derive a relatively small amount of compensation from the issuance of that title insurance, and the Illinois Department of Financial and Professional Regulation (IDFPR), which oversees the issuance of title insurance, has been satisfied for the most part that the proper use of the required Controlled Business Arrangement Disclosure Statement which must be given by a producer of title insurance provides more than enough protection for consumers already. We have made copies of this disclosure form available here today for the benefit of the panel. Historically, the situation just has not been one that has presented a risk of widespread abuse.

If the proposed rule were to be adopted without modification, the typical practitioner would likely ask himself or herself “Why go through all that extra red tape to: (1) issue the disclosure, (2) provide the time-consuming explanation to even existing, repeat clients about the need to consider obtaining an independent legal opinion for something that really has never been an issue before, something many clients tend to view as an integral part of a sale of real estate, rather than as a separate “business transaction”, and then (3) obtain the written acknowledgment from the now suspicious client?” The lawyer-client relationship is one of trust and confidence, but the proposed rule would tend to undermine that very trust and confidence in circumstances where no demonstrable need for the approach exists. Many practitioners, faced with this prospect, might decide it is just easier to drop real estate and earn a living practicing in other areas.

How should attorneys handle a request by a client of a colleague to provide an “independent” legal opinion regarding allowing the title-issuing attorney to provide the title insurance? Can the required independent legal opinion be prepared after an appropriate amount of analysis and investigation and still be provided for a reasonable fee? Will it be meaningful? It may well be that the proposed requirement would simply add unnecessarily to the overall costs being paid by the consumer in connection with real estate transactions.

Over 2,000 attorneys at firms of all sizes are members of the Illinois Real Estate Lawyers Association (IRELA). The impact on IRELA members, as well as on other real estate practitioners throughout the state, of such a sea change, such a disproportionately difficult barrier

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to the provision of title insurance for their clients who are selling real estate, must be considered. Wholesale implementation of the proposed ABA Model Rule, without the minor modification that we have requested, will operate as an **extreme disservice** to the typical real estate lawyer, and likely result in large numbers of small- and medium-size firms and solo practitioners potentially abandoning residential real estate as an area of practice – ultimately harming consumers because, without a real estate attorney in their corner, they will be at the mercy of lenders, Realtors[®], and others who, shall we say, do not hold the consumer's best interests near and dear to their heart. We have already seen enough evidence of how abuses in the mortgage industry have led to economic difficulties and a pronounced downturn in the housing market.

Many practitioners are already considering the wisdom of continuing to practice in the area of real estate – we do not want to see what will happen to settlement costs, for example, if the watchdogs, the attorneys, are effectively squeezed out of the process by this sort of new disclosure requirement. Right now, because Illinois is a state in which lawyers represent buyers and sellers, consumers benefit from one of the lowest rates of settlement costs, including attorneys' fees, for residential transactions in the entire country. (48th out of 50, according to Bankrate.com.)

What will happen with mortgage loan products and mortgage terms if no attorney is looking the documents over for a consumer? Do we think the fine print suddenly will get bigger, or that the onerous “gotcha” clauses suddenly will get friendlier to the consumer? Do we really want to have a situation that is so harmful to consumers?

On behalf of the more than 2,000 members of the Illinois Real Estate Lawyers Association who are engaged in the provision of legal services to clients in real estate transactions of all kinds, we respectfully urge the Committee to revise its recommendation to the Illinois Supreme Court by substituting the previously submitted revisions to Rule 5.7 and the short modification of Comment [1] to Rule 1.8.

Respectfully submitted,

Ralph J. Schumann
President, Illinois Real Estate Lawyers Association