



ILLINOIS STATE  
BAR ASSOCIATION

# REAL PROPERTY

The newsletter of the ISBA's Real Estate Law Section

## Editor's note and comments

By Gary R. Gehlbach\*

With the frenetic pace of most of our lives, roughly balancing families, friends, civic and other commitments with law practices that seem to become more "virtual" every day, the notion of professionalism is often a distant concept. This issue attempts to jolt us out of our robotic paces and contemplate for a few pages the role of real estate practitioners. Bill Anaya's "Call to Arms" is more a "call to task," and his trenchant essay probably hits home at least a little for all of us. What are our responsibilities as transactional attorneys? With the plethora of service providers that are willing to fulfill our roles and supplant us in residential closings, are we capable of and willing to provide the legal services that only a professionally trained and licensed attorney can provide?

"Call to Arms" invites a response. Read Bill's article critically and ask yourself how you fare with respect to the standard he articulates. Is his a realistic view of the practice of real estate law in 2004? Send me your responses, preferably via e-mail. (However, call first with your e-mail address. To manage the onslaught of unwanted e-mails, my system relegates to "junk" any mail from a sender whose e-mail address is not in one of my address books).

Following the theme of professionalism and providing meaningful legal representation to our real estate clients, Joe

Fortunato reports on the status of a proposed HUD rule that, if implemented, could have a significant impact on our practices. Joe, as well as Bill Anaya and other members of the ISBA Real Estate Law Section Council, worked hard to convince HUD to reconsider its proposal.

**Liability unabated.** As medical malpractice attorneys worry about whether their doctors will operate on them or their family members in non-emergency situations, and as the Illinois General Assembly apparently fails to address medical malpractice in this state, the Illinois Supreme Court declines to apply the Recreational Use of Land and Water Areas Act (745 ILCS Act 65) to situations in which the landowner exercises any discretion in deciding who may use the landowner's property. Tort liability is alive and well.

Most of us would probably be reluctant to jump on a sled and shoot through a homemade luge course on our neighbor's property, and I still remember something about assumption of risk from Professor Conviser. Moreover, this Act, which took effect in 1965, generally applies when "an owner of land ... either directly or indirectly invites or permits without charge any person to use [the owner's land] for recreational or conservation purposes." 745 ILCS 65/4. The landowner "owes no duty of care to keep the premises safe ... or to give any warning of a ... dangerous condition ... to persons entering" on the land for recreational or conservation purposes. 745 ILCS 65/3. As reported in the April 2004 issue of the ISBA *Agricultural Law* newsletter and in the June 2004 issue of the *Illinois Bar Journal*, the Illinois Supreme Court in *Hall v. Henn*, 208 Ill 2d 325, has ruled that this law only applies to owners who open their property to the general public, apparently without discretion.

**Special use procedure the practice of law (but prospectively only).** As Jack Tibbetts reported in this publication last August (Vol. 49, No.1), the Illinois Supreme Court, by overturning decades

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of precedence, found that an application for special use was an administrative rather than a legislative matter, subject to administrative review. *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164. Thus, *de novo* review no longer applies and the record must be made before the zoning board with all of the attendant due process concerns. A recent decision by the Second District Appellate Court, *Oak Grove Jubilee Center, Inc. v. The City of Genoa*, 283 Ill.Dec. 610, states a corollary to this principle. First finding that *Klaeren* should only be applied prospectively, the court examines the ability of a non-attorney agent to represent an entity (in this case, a religious association) in a special use proceeding before the municipal zoning board. Finding "that any legal document filed by a nonlawyer on behalf of another in a judicial or administrative proceeding is void *ab initio* (283 Ill.Dec. at 622; citations omitted), the court found that when the minister for the plaintiff represented the church before the local zoning board, *Klaeren* had not yet been decided. Therefore, the proceedings before the village board were legislative in nature and not the practice of law. Since *Klaeren*, however, the same proceedings are now administrative and comprise the practice of law. Query whether our local state's attorneys and municipal counsel will be advising the local zoning authorities to reject any filings or presentations on behalf of entities by non-attorneys.

**The broader reach of the Illinois transfer tax.** Effective June 1, 2004, P.A. 93-657 amended the Illinois Real Estate Transfer Tax Law. This tax now applies to ground leases of 30 years or more and to transfers of an interest in a "real estate entity." The definition of a real estate entity might surprise you. Without regard to mortgages or other liens or encum-

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branches, this means any entity that owns, directly or indirectly, real property the value of which is greater than 75 percent of the total fair market value of all of the entity's assets. The Illinois Department of Revenue has already published a form,

**PTAX-203-B, Illinois Real Estate Transfer Declaration Supplemental Form B**, to comply with this new revenue enhancing law. The next issue of this publication will include an article describing this change in more detail.

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# Call to arms: A 21st century call to professionalism for real estate lawyers

By William J. Anaya<sup>1</sup>

Many of our younger colleagues consider me a dinosaur or an anachronism—a lawyer from a different age who actually ordered and reviewed abstracts of title and prepared scores of title opinion letters in the practice of law, and not as an academic exercise in some ancient social ritual at the Smithsonian. To our younger colleagues and to many of our contemporaries, preparing title opinion letters as an attorney's legal opinion of sellers' evidence of marketable title is a petrified concept similar to Jurassic amber carrying the ancient DNA code of long extinct reptiles.

Fortunately, I am not yet extinct and I intend to offer some insight to those who are currently reflecting on the nature and scope of the practice of law in this state and elsewhere. I recognize that some of those currently examining and testing the limits of the practice of law are in it for their own gain. They are not lawyers, but entrepreneurs looking to open new markets. Others, as lawyers, judges and policymakers, are properly reflecting on and seriously examining the nature and scope of our learned profession and the franchise we operate in the public trust.

Indeed, this constant dynamic of self-examination, criticism and correction is the responsibility of every member of a learned profession. It is that dynamic that separates professionals from those who merely quantify risk associated with providing a service and then charge a price designed to cover the foreseeable losses in providing that service so that there will be enough money left over to turn a profit. The nature and scope of a profession are wholly unconcerned with entrepreneurial analysis but rather are focused on the delivery of a necessary professional service. Therefore, in determining the nature and scope of the professional practice of real estate law, the question is: Is the service under review a necessary professional service or ancillary to the practice of law? If the service

requires legal skill and training, then only a licensed lawyer is allowed to perform that service. Otherwise, the entrepreneurs are properly free to apply their calculus and enter the market at their risk. In the case of ancillary title services, the answer is available in the analysis of the ancient, albeit petrified, amber.

For example, both historically and currently, sellers of Illinois real property are, by custom, practice and common contract, legally obligated to provide the buyer with *evidence of marketable title* to the sellers' property. Every word in that contractual obligation has legal significance. The *evidence* is legally sufficient *evidence* which is admissible in court. *Marketable title* is a legal concept that involves, among other things, title free and clear of third-party claims and liens, lawful access and, uniquely to each individual transaction, subject only to the contractually provided and permitted exceptions. There is a common misconception that there is some common and universal *marketable title* that can be applied to every individual transaction. To the contrary, marketable title is negotiated individually in each transaction, and the contract terms, riders and attorney approval provisions define what the parties have determined is marketable in that specific transaction.

Note, for example, that contracts in the Chicago area mandate surveys and an endorsement provided by the title insurer for "extended coverage" (*i.e.*, a negotiated title insurance endorsement wherein the title insurance carrier specifically waives the five preprinted "Standard Exceptions" found at Schedule B of each and every title insurance policy insuring the owner's interest in the real property). According to the contract terms customarily in use in the Chicago area, the evidence of marketable title would not be sufficient unless extended coverage is included. In the same state, however, we can close a similar transaction downstate,

and the customary contract terms generally do not include survey exceptions and a requirement for extended coverage. In both cases, title may be marketable and the evidence of title may be legally sufficient, but the contract terms and the terms and forms of taking title and evidence of title are remarkably different.

Who is qualified to interpret and make a recommendation on the *evidence of marketable title*? Moreover, who is qualified to interpret and make a recommendation to sellers on the myriad *choices* of forms of evidence of marketable title to use (*e.g.*, in this state, an abstract of title or the *choice* of one of the several forms of American Land Title Association title insurance and endorsements) and the choice of one of the several title insurers and title agencies available to provide the evidence of marketable title and related closing services? In the final analysis, each of these recommendations involves legal consequences. What *evidence* is proper, acceptable and legally sufficient *evidence of marketable title* and which ancillary service provider should provide the evidence and the closing services are all ultimately legal questions that can only be the subject of a recommendation by a licensed Illinois lawyer.

While an individual seller may make his or her own choices, a non-lawyer cannot make a recommendation concerning the nature, scope, type, form or forms, or provider of evidence of marketable title to a third party because the recommendations on each of these matters necessarily involves the practice of law.

The proof is in the amber.

For years we asked non-lawyers to abstract selected public records. Indeed, the abstractor reviewed a larger suite of records than do the current title insurance companies. Probate and chancery records were abstracted from the official county records kept pursuant to the recording statute. Those abstracted records were

assembled into a document aptly identified as an "Abstract of Title" by the abstract company. The abstract company carried errors and omissions insurance for mistakes made in the process.

The initial entry in the Abstract was the Patent issued by the President of the United States through one of the Land Offices located within the state. Abstracts were extended after each transaction in anticipation of the seller selling all or part of the seller's property.

Sometimes Abstracts came in the form of "Stub Abstracts" when another abstract company was chosen to prepare subsequent evidence of title for a later transaction. In those instances, the seller's lawyer tendered the original Abstract (certified by the first abstractor from the Patent through a final entry at a specific date and time) and the "Stub Abstract" was certified as beginning at or before the final entry in the first abstract through the last entry in the official records on a certain date. The certified abstracts were tendered by the seller's lawyer to the buyer's lawyer, who examined the entries and ultimately determined if the seller had provided evidence of marketable title to the buyer as provided in the contract. To assist Examination were developed and used locally, as well as state and region-wide.

Inevitably, sellers' lawyers and buyers' lawyers would discover "clouds" on title as disclosed in the tendered evidence. Sometimes those clouds could be resolved with reference to convention, or by affidavit, or perhaps by quitclaim deed. Sometimes quiet title suits were necessary to resolve issues. Occasionally, even the evidence of marketable title in the form of the Abstract was rejected by one of the lawyers because the abstractor had failed to meet the appropriate standard of care. This procedure was the rule in the early 1980s in downstate Illinois and is still in use in various states—for example, Iowa. For various historical and practical reasons, the Chicago Metropolitan area modified this procedure to accommodate the practical problems associated with a major metropolitan population, high population density, and the effects of records lost in the Chicago Fire of 1879. Nonetheless, even in Chicago lawyers continued to represent the parties in real estate transactions, and continued to provide the exact same services in the exact same role. Sellers' lawyers counseled sellers in the negotiations with the contract and made recommendations to the sellers on the proper and legally sufficient evidence of marketable title to use so that the seller could discharge the sellers' contrac-

tual obligations to the buyers. That recommendation could be in the form of Torrens certificate or the choice of a title insurer, and, most assuredly, the choice of the title agency—neither the insurance carrier nor the agency was (or is) fungible, and the lawyers' choices depended on the individual lawyer's education, skill, training, and, of course, experience. We still make our recommendations to clients for consultants, experts, contractors, lenders, and title insurers based on the same criteria. With whom do we have experience, and who do we know personally or by reputation? Who can perform the tasks the way our education, skill and training dictate? Ultimately, we recommend the agency, the agent, the service, and the product with which and with whom we have developed a relationship based on our experience, education, and training, and with whom we have had success for and on behalf of our clients. Applying such criteria is the practice of our profession.

More importantly, the recommendation, if not the actual choice, of the agent and agency to prepare the legally sufficient and contractually mandated evidence of marketable title is vested in the seller's lawyer. No one else but a licensed lawyer is qualified to analyze the array of legal issues and services that are associated with the seller's legal needs.

It goes without saying that some title companies, lenders and brokers have a vested interest in minimizing the role of the real estate lawyer. Recognize why. The popular suspicion is that without lawyers, the unscrupulous entrepreneur will freely victimize the populace. Certainly licensed lawyers have a role as the proverbial guardians of the henhouse, but the entrepreneurial motivation is less evil and more insidious. In my experience, most of the entrepreneurs who intend to substitute their services for those of the lawyers are genuinely well-intentioned and honest business people who, in their business model, provide for the quantifiable contingency that their customers will experience losses due to the errors and omissions of the business operator. The business operator covers the risk with third-party insurance or other risk-pooling techniques, thereby increasing the costs of any particular transaction.

Lawyers too make mistakes, but those mistakes do not add to the costs of individual transactions. Rather, the practice of the profession involves anticipating and curing our clients' legal issues, thus reducing the costs of individual real estate transactions. No part of a legal fee is charged to provide

a fund to pay anticipated and expected claims. Professional services reduce risks, transaction costs and the costs associated with risk.

This limited role of the lawyer as the guardian of the hen house also wrongly implies that the only time society should be concerned is when a citizen is injured by the errors or omissions of the non-lawyer practicing law. No one would seriously suggest that non-licensed individual may practice medicine on the poor and "underserved" in a community, and that the only time a non-licensed individual should be enjoined from performing routine surgeries (e.g., cataracts or appendectomies) is after a patient is injured.

Yet the so-called national document preparation services posture in their public advertisements and in public debates that individuals are free (a constitutional right!) to represent themselves *pro se* while using the entrepreneurs' forms and accepting the product generated by their procedures. Worse, these nefarious entrepreneurs chide the profession by arguing that their services provide access to the legal system for those so-called "underserved" members of the community.

Aside from the absurdity of accepting this proposition (that licensed lawyers get the people with money, and those without sufficient means get the non-professional, uneducated and inexperienced document preparation services which accept neither responsibility nor liability for their acts or omissions), the sinister effect would be that the practice of law would intentionally ignore those individuals who have limited means to access the legal system, leaving those individuals of limited means to the mercy of the untrained, uneducated, inexperienced and, by their specific contractual limitations, irresponsible purveyors of legal document services. Because the practice of law is a learned and honorable profession, the practices employed by these untrained entrepreneurs must be aggressively and permanently enjoined. If the so-called "underserved" are being denied access to legal services because of their limited means, then the profession is ethically bound to provide those services and that access, and to aggressively resist the efforts of the misguided entrepreneurs who refer only to market analyses, demographics, risk-pooling and profits, and not the best interests of the client.

Practicing law without a license, like practicing medicine without a license, must be aggressively enjoined in every case. Let's recognize the non-professional, unregulated entrepreneurs' motives

for what they are: new markets, new turf for them to conquer. And let's be clear: It is not a market or turf issue for lawyers. Rather, it is merely protecting un-represented individuals from profiteers who do not have the skill, education, training, experience, or proper motivation to provide any, even modest, legal services, even to those of the most limited means. Each state has laws prohibiting the unauthorized practice of law, and each state must decide the scope of the practice of law within that state. The various states' supreme courts will analyze the custom and practice in each state to determine the scope of the practice of law.

For example, lawyers in California and Arizona have reportedly abandoned the closing table, paving the way for para-professionals and corporate escrowees to provide limited legal and *more costly ancillary services* in residential real estate transactions. The scope of the practice of law in those states is significantly different than that in Illinois, where lawyers still actively provide legal services for clients.

I suspect that in California, like here, some members of the traditional real estate bar considered the services performed at, and in preparation for, the closing table to be less important than the services that trial and corporate lawyers perform in the courtrooms and in the boardrooms of corporate America. It could not be clearer that traditional real estate lawyers are a bargain, and while they work hard to protect their clients, they are paid less, much less (compared to attorneys practicing in other areas of the law) than the value of the service they provide for the benefit of their clients.

I also recognize that real estate transactions have become more and more complicated, and that legal fees are constantly under attack from within the profession and by those who perceive our services as unnecessary or duplicative. Even the current Bush administration has discounted the role of the real estate lawyer by proposing ill-advised regulations that would have suspended historic RESPA prohibitions and allow the bundling of ancillary services (mistakenly including some legal services within the "bundle") and calling that progress in the name of efficiency.<sup>2</sup>

Unfortunately, efficiency gained by ignoring or removing the only advocate for the parties involved in the sale or purchase of their home is no bargain. Fortunately, the proposed HUD regulations have been withdrawn after several industry leaders objected loudly—not the least of which was the organized bar in the state of Illinois through official

comments provided by the Illinois State Bar Association and the Illinois Real Estate Lawyers Association. In proposing the misguided rule, HUD arrogantly demonstrated that it simply misunderstood the role of the real estate lawyer in those states, like Illinois, where the practice of law still includes pre-closing contract negotiations, analysis, preparation and acceptance of the evidence of marketable title, the legal review and analysis of survey and title issues—from offer and acceptance through closing and post-closing.

HUD apparently does not recognize a real estate lawyer in the sense defined by the Illinois Supreme Court. Rather, the misinformed only recognize a real estate lawyer as a litigation lawyer who concentrates his or her practice in real estate litigation, which is often made necessary just because no real estate lawyer was actively involved in the transaction process.

Ignorance is largely forgivable, however, but not in those instances in which the misinformed or ignorant intentionally foist their unfounded and arrogant interpretation of the practice of law on the unsuspecting public while pursuing only their self-interests, all the while simultaneously protesting the criticism of their efforts and activities by disingenuously invoking the constitutional rights and privileges of the soon-to-be-bilked citizenry. Such actions are not ignorant, but arrogant and must be enjoined.

It is time for a reality check: The practice of law is not a generic or fungible commodity to be quantified and provided as a function of cost or economic efficiency. No one, except for a licensed lawyer, may practice law. It should be readily apparent that a non-lawyer may be able to provide a 'knock-off legal service' at a lower price than the actual legal service provided by a licensed lawyer. But the proposition itself suggests the obvious and proper analysis: It is not the cost but the service that is the relevant consideration. Indeed, the cost for the "knock-off" service is, more likely than not, excessive in relation to the value of the actual, substitute legal service provided by an individual or entity who provides the substitute service without any professional skill, training, education, or experience in the law. Excessive fees paid to non-professionals should be disgorged. Lawyers are only entitled to reasonable fees, and "knock-off" and substitute service providers should be required to return excessive fees.

Where are the self-appointed champions of an individual's right to represent himself or herself *pro se*, when it

comes to excessive fees paid for alleged "document preparations services" who charge much higher fees than other legitimate document preparation and typing services? The substitute and "knock off" service providers advertise their activities as cost-effective, proper and lawful, but upon closer analysis, each representation proves false.

If value for cost is the issue, then substitute legal services are always more expensive, less effective, often meaningless, errant, ill-advised, unnecessary, and of less value than legal services analyzed and provided by a licensed lawyer, who not only has the skill, education, training and experience in the law, but is also guided by professional ethics, supreme court rules, and who carries professional liability exposure in tort. Not one of the commercial "knock off" or substitute legal services can offer as much for so little cost.

Even the United States Department of Justice (DOJ) has improperly concluded—using some mystical macro-economic analysis—that the issues are costs and efficiency, and not the adequate performance of proper legal services by a licensed professional. DOJ, so full of hubris, has entered the debate on behalf of commercial entities—disrespectfully chiding the American Bar Association for its model definition of the practice of law as too broad. DOJ would opt for a definition that would exclude so-called ancillary services in transactions so that non-lawyers could perform some of those so-called ancillary services, which some states consider the practice of law based on the custom and practice in those states. In its pedantic zeal, DOJ chooses to ignore federalism in favor of its largely ignorant misunderstanding of the practice of law in the several states outside of the Beltway.

The ABA's proposed definition of the practice of law may be subject to individual criticism just because the practice of law is different in each state, making any "one-size-fits-all" definition somewhat mechanical and unwieldy. The ABA's attempt to reach some consensus on the scope of the practice of law is, however, not subject to any reasonable criticism for the same reason cited by Plato<sup>3</sup> in defense of philosophy: Just as "the unexamined life is not worth living," the practice of law is a dynamic and those who participate in the practice of law are duty bound to define the scope of the practice of law periodically so that the practice remains vital. The ABA, the state bar associations, even DOJ and the rest of us in the hinterland can and should repeatedly examine what we do

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and why.

The ABA's proposed definition is laudable just because of the debate that produced it, and the debate it created. The public debate should sharpen the legal debate, which will ultimately be decided by each individual state's supreme court.

What is a lawyer to do, besides reporting the unauthorized practice of law and supporting those bar leaders willing to stake their reputations and finances on the battle to maintain the franchise we keep in the public trust? In short, maintain high standards, pursue the best interests of our clients, zealously and ethically represent our clients, jealously guard the private franchise we have in the public trust, and maintain the custom and practice that ultimately defines the scope of the practice of law in each state.

I am older now—in my fifth decade and well into my second decade in the practice. As such, I am compelled to perform a little mentoring to those younger lawyers who are willing to listen, and for those seasoned veterans who care to indulge me. I assure you, this is not hubris. I want to share with you what I believe is the proper role of a real estate lawyer:

1. First of all, you are the only person who really represents your client. Your client will get a lot of advice (some of it legal) from lenders, brokers, insurance agents, title companies, inspectors, and their Uncle Fred. Most of the advice and counsel they receive from ancillary service providers is skewed to the best interest of that ancillary service provider. It is critically important that you work up a real estate file like you would any other file that was going to trial. Any good trial lawyer will tell you that his or her success depends on the fact that he or she knows the facts and the law better than his or her opponent. Brilliance and style are marginal qualities in litigation. How well was the file analyzed and how prepared was the lawyer are the critical elements of successful litigation. Good trial lawyers will tell you they knew their opponent's case better than the opponent knew their own and could have tried a better case on behalf of their opponent. In other words, good lawyering in the courtroom, boardroom, and at the closing table requires preparation. Merely showing up at closing, collecting a fee, simply reviewing documents, and taking the word of ancil-

lary service providers and opposing counsel—with little or no earlier investigation or preparation—is unacceptable, no matter that the modest fee charged is commensurate with the modest services performed. Why mimic the substitute and "knock-off" service providers and then complain later that they took the lawyer's place at the closing table. Indeed, real estate lawyers do not "perform closings" as if the activities performed by a real estate lawyer in preparation of a closing were a magic show, or worse, a mere ministerial act. Rather, real estate lawyers represent clients in the complete transaction in all of its facets and with all of its permutations.

2. Always remember that each and every piece of paper that is prepared as part of a real estate transaction has a direct, specific and identifiable link to litigation. Accuracy, specificity, and, above all, precision are the marks of a professional preparing these documents. There simply is no excuse for any professional taking the position that a mere scrivener could prepare the closing documents and that errors can be corrected as "scrivener's errors."

For example, the grantor clause in a deed requires analysis of the correct parties' names, any changes in those names, their marital status or state of incorporation, with a view toward completing an accurate and identifiable change of title. If Mary Kay Smith is your seller, and she took title as Mary Kay Jones, identify that fact appropriately (f/k/a or nee).

Every time we ignore precision and accuracy, we lend credence to those commercial entities that deprecate the activities we perform, and we jeopardize the custom and practice involved in determining the practice of law. That is, if we are repeatedly as careless as the title companies, what value do we add?

Similarly, the grantee designation should not be an afterthought. Your client came to you so that you would analyze how your client should take title. Which estate is better? How does ownership affect our client's other interests? This is not just a question of marketing or estate planning, although the practice of law rarely stops with any one activity and should lead to a full and complete analysis of the client's legal needs and wishes (business, estate and tax planning). Every time one of us fails to recognize that we are full-time

- professionals, the “knock off” and substitute service providers fill the void we leave. Count on it every time.
3. The legal description is by its very name something that is within our most critical review. Does it precisely follow the survey and the title commitment? If not, why not? Imprecision provides another opportunity for the commercial entities to provide examples of risk pool analysis as an alternative to what we know to be simply shoddy legal services.
  4. The Subject To clause is not boilerplate. Our clients signed the contract and the terms of that contract control. What did the parties agree to convey and take title subject to? There is no standard or form “subject to” language preprinted on a deed form because every transaction is unique. As part of our preparation, we must know the contract, and we must recognize which covenants, conditions and restrictions have been agreed to. Every time one of us fails to prepare a deed in strict conformance with the terms described in the contract, the substitute providers become more emboldened.
  5. The jurat and notary seal do not appear simply as decoration or as some nostalgic reference to historical enfeoffment. To the contrary, the jurat and notary provide the litigator with the means to gain admissible evidence corroborating that the grantor intended to convey the property according to the terms described in the deed. In the absence of testimony from the grantor, the jurat and notary, in proper form, provide the litigator with authenticated evidence to prove the matter asserted. Precision mandates that the grantor’s name in the notary clause should be identical to the description you drafted in the grantor clause—without one wit of change in capitalization or punctuation, and without leaving out one piece of information described in the grantor clause. Precision within the form is how we distinguish ourselves from those who are ignorant of the significance of the details.
  6. Every document that is presented at closing, by the other party or within the closing package, has a direct connection to litigation. Deprecating humor about the volume of documents, or minimizing the significance of any one of those documents at the closing table, minimizes our role at the closing table, and shows a disrespectful indifference to or ignorance of the

purpose of the closing and the purposes for the documents. For example, the promissory note and the mortgage are easy to identify as documents prepared in anticipation of litigation. They form the basis of the obligor’s promises and the obligee’s rights. Each clause has a purpose. Lenders have prepared the documents in order to allocate those rights, duties and obligations and to properly secure those rights, duties and obligations to or for the benefit of the lender or its assignee—ultimately so that those rights, duties and obligations will be enforceable in litigation. Every time one of us fails to acknowledge and appreciate the significance of the documents at a closing table, we concede ground to those commercial entities who use our own analysis and deprecating humor as support for their contention that the activities we perform need not be performed by a licensed professional lawyer.

7. The closing is not the beginning of the process: It is the culmination of a lot of hard work, accuracy and precision on behalf of the professional preparing for and attending the closing. Documents should have been reviewed and transmitted to opposing counsel well in advance of the closing. If you really want closings to proceed more efficiently and quickly, make sure the other side has had adequate time to review the documents prior to closing. The documents should be signed and approved in anticipation of closing. For the entire world to see, the closing should appear *pro forma*. There is simply no excuse for a professional drafting or making significant revisions to closing documents at closing—outside of those that are necessarily prepared and delivered by the lender at the closing. Residential closings should take no more than one hour. Each time a closing is extended because of the failure of the lawyer to adequately anticipate and prepare for a closing, the substitute providers get another opportunity to perform additional services that had been within the practice of law. What is worse? They take the higher ground left vacant by the unprepared lawyer.

Documenting a real estate transaction is an art. It is not *pro forma* and we should not allow it to be performed by substitute service providers under any circumstances.

I am reluctant to criticize young real estate lawyers for failing to maintain the custom and practice of the professional

real estate lawyer as I was trained. Rather, I level my criticism at our more experienced colleagues who should know better, and at the law schools and at the bar associations for failing to mandate transactional courses in the law school curriculum and in CLE. Any accredited law school should have, as part of its mandatory curriculum, a course on documenting real estate transactions for residential and commercial real estate transactions. I recognize that the large law firms have long since abandoned the residential real estate practice, not because that practice area is less professional, but because it is less profitable largely due to many of the reasons described above.

Indeed, new lawyers embarking on careers after law school generally receive minimal practical training in documenting residential or commercial real estate transactions—and what training is available most commonly comes in the form of one-day seminars presented by the title companies, whose real interest is attracting new business through free seminars, and to leave the attendees with the inescapable conclusion that the only way to get through a closing is to work with that title company. No lawyer should consider himself or herself qualified to practice real estate law after attending only a one-day seminar presented by a title company hawking its services, forms and practices.

The solution to the problem lies not in criticizing current practitioners but in candidly noting the neglect of the law schools to adequately prepare new professionals appropriately. Our bar associations should become more actively involved in law school curriculum development and CLE training, and our law schools should be more concerned about the orderly transfer of property as necessary to an orderly society. Our governmental agencies should keep clear of promoting commercial activities under the guise of efficiency and controlling costs.

Finally, as I prepare to crawl back into my cave, I want to say again that the practice of law is a learned and honorable profession and a franchise that we hold in the public trust. It is our responsibility to maintain that franchise for the benefit of the public, not our own. We must continue to seek out those unlicensed individuals and entities that participate in the unauthorized practice of law, and aggressively move to enjoin those individuals and entities whose activities are within the dynamic scope of the practice of law in our state. Most importantly, each individual lawyer must maintain the highest ethical and professional standards involving precision and accuracy, so that the

custom and practice is never attainable by non-lawyers. Unless we continue to distinguish our profession and ourselves, we run the risk that our profession will be indistinguishable from the substitute legal service providers.

1. Mr. Anaya is an attorney with Arnstein & Lehr LLP in Chicago, a member of the ISBA Real Estate Law Section Council, and counsel to the ISBA in significant matters versus non-lawyers allegedly involved in the

practice of law.

2. HUD's proposed rule has been withdrawn, in significant part due to concerted opposition from, *inter alia*, the organized bar. See Joe Fortunato's article in this issue.

3. Plato, *Apology of Socrates* 38a.

# HUD'S "Final Rule" on its proposal to amend RESPA

By Joseph R. Fortunato, Jr.\*

In the summer of 2002, the U.S. Department of Housing and Urban Development (HUD) issued a proposed rule that would have revamped the Real Estate Settlement Procedures Act of 1974 (RESPA). The avowed purpose of HUD Secretary Mel Martinez was to simplify the mortgage process in residential transactions and to bring a level of certainty to consumers regarding the cost of credit. The rule would have provided two significant new methods of disclosure of loan costs:

1. **The Enhanced Good Faith Estimate (GFE)**—The format for the GFE would have changed to require certain price quotes for lender fees to be non-modifiable, but it would also have allowed the lender to charge up to 10 percent over the cost of third-party services.
2. **The Guaranteed Mortgage Package (GMP)**—The lender would have been required to quote an interest rate and a set guaranteed price for all other required services without any itemization. Under this proposal, lenders would have been exempt from the Section 8 prohibition against kickbacks, thus allowing lenders to make a profit on third-party settlement services.

During the public comment period in the fall of 2002, HUD and Congress received more than 45,000 comments from affected parties in the industry. Most were from those who would have been adversely affected by the implementation of the rule, such as smaller lending institutions, smaller title companies, many third-party service providers, real estate professionals, and real estate transactional attorneys.

The consensus among the "smaller players" in the industry was that the larger lending institutions would utilize the GMP by obtaining third-party services through captive providers, thereby allowing them to aggressively increase market share to the detriment of those lenders without the means to own and control such service providers. Many affected service providers, such as real estate attor-

neys, expressed concern about the likelihood that less competition for the larger lenders, diminished levels of service by overburdened third-party providers, and the absence of borrower preference would cause increased costs to consumers as well as a failure to meet necessary time deadlines. The resultant general dissatisfaction with the process would have been detrimental to the public. The impact on smaller service providers would have been devastating as well.

Notwithstanding significant comment from the industry and criticism of the proposed rule by Congress, HUD revised the rule but did not make the content of the revision public. Rather than seeking more comment, HUD submitted the rule to the Office of Management and Budget in December 2003 for final approval.

HUD Secretary Martinez recently announced his resignation as HUD Secretary to plan a campaign for the U.S. Senate from the state of Florida. The department's Acting Secretary and Bush Administration nominee, Alphonso Jackson, was faced with the prospect of the refusal on the part of Congress to approve his appointment if the rule was implemented. Apparently, the ardor for the adoption of the rule on the part of the Bush Administration cooled somewhat as the 2004 election campaign heated up. Without significant support from the Administration, Mr. Jackson apparently knew that his appointment required the withdrawal of the proposed rule. HUD announced the withdrawal of the rule, stating that its revised plan would be available at a later unspecified date.

While Mr. Jackson stated that the delay in his appointment was unrelated to the withdrawal of the rule and that he was committed to the concept of simplifying the mortgage process, many consumer advocates believe that the rule is not likely to reappear. The extraordinary response from the mortgage industry (generally opposed to the rule) apparently overwhelmed HUD and was not ignored by Congress. Others were pleased by the

withdrawal of the rule due to concern about the possible facilitation of predatory lending in which a lender can obscure the financial terms of a loan.

Many mortgage brokers and mortgage bankers favored the withdrawal of the rule yet supported attempts to improve and simplify the mortgage loan process. Most believe that the mortgage loan regulatory process ought not foster the elimination of competition in the industry or provide for the possibility of increases in the costs to consumers due to lax regulation and oversight of the activities of the larger lending institutions.

Others in the industry expect the rule to reappear in some form after the 2004 presidential elections. Title companies and attorneys in particular have voiced concern that there simply is too great an incentive on the part of the larger lenders to avail themselves of the potential benefits to them under the rule as initially proposed. These third-party providers had hoped for an exemption from the rule for the costs of their services, while still allowing for the creation of a "Guaranteed Title Insurance and Closing Costs Package." If the 2004 elections do not result in a new administration, it is likely that those potentially adversely affected by the proposed rule will again mobilize opposition to the rule in Congress and/or attempt to carve out desired exceptions under the rule.

Any rule that concentrates market structure should be cautiously reviewed. The consolidation of power in the hands of a small group of large lenders and service providers could lead to higher, rather than lower, costs for consumers. This result would be directly contrary to HUD's stated objective of reforming the mortgage process for the benefit of consumers.

\*©Joseph R. Fortunato, Jr. Mr. Fortunato, a partner with Fortunato, Farrell, Davenport & Arnold in Westmont, IL, is President of the Illinois Real Estate Lawyers Association and Vice-Chair of the ISBA Real Estate Law Section Council.



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