If the Land is Here, You May be Practicing Law Here: UPL and Ethics Issues in Multi-State Real Estate Closings

by

Norman M. Powell, Esquire*

Law firms and title companies throughout the country conduct and facilitate complex, multi-state real estate closings. They often do so from main offices, national accounts offices, or other central locations. But they may face charges of unauthorized practice of law, and their in-house counsel may be charged with violating ethics rules, if any of the real estate is located in certain jurisdictions.

Some jurisdictions regulate certain aspects of the real estate transaction as the practice of law, and prosecute non-lawyers for violations. Caselaw in Arkansas and Delaware establishes that drafting closing documents, including deeds, notes, and mortgages, constitutes the practice of law, and so must be done by attorneys. See Ark. Bar Ass'n v. Block, 323 S.W.2d 912 (Ark. 1959); In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000). Caselaw in Colorado recognizes such conduct as the practice of law, but permits non-lawyers to perform such tasks incident to transactions in which they are interested "provided no charge is made therefor." Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n, 312 P.2d 998 (Colo. 1957). Similarly, in Delaware and South Carolina, conducting a real estate settlement constitutes the practice of law. See In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000); Matter of Lester, 353 S.C. 246 (2003). A lower court decision in West Virginia reached the same conclusion, but on appeal the decision was voided for procedural reasons. McMahon v. Advanced Title Servs. of W.V., 607 S.E.2d 519 (W.V. 2003). Finally, Delaware regards the disbursing of funds from a real estate settlement as the practice of law. See In re Froelich, 838 A.2d 1117 (Del. 2003). Thus, title companies and other non-lawyers engaging in such activities in, or with respect to property located in, such jurisdictions may be at risk for unauthorized practice of law prosecution.

Some jurisdictions, including Delaware, Georgia, North Carolina, and Texas, generally require that lawyers admitted in those jurisdictions attend to those aspects of the real estate transaction regarded as the practice of law. See In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000); In re UPL Advisory Opinion 2003-2, 588 S.E.2d 741 (Ga. 2003), The North Carolina Bar, Authorized Practice Committee, Guidelines for Attorneys Licensed in Other Jurisdictions (July 2003); Texas Gov't Code § 83.001. Often, these restrictions are imposed without regard to whether performance of the task at hand occurs within the subject jurisdiction or elsewhere.

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*Mr. Powell is a partner in the Delaware law firm Young Conaway Stargatt & Taylor, LLP, where his practice includes service as Delaware counsel in real estate and asset-based financing transactions and delivery of legal opinions. He was Chairman of the Delaware State Bar Association's Real and Personal Property Section from 1996 to 1998. His e-mail address is npowell@ycst.com. This article originally appeared in the Spring 2008 edition of the American Bar Association's Section of Business Law Committee on Commercial Financial Services Commercial Law Newsletter

Rule 5.5 of the Model Rules of Professional Conduct[1] provides in relevant part that "[a] lawyer admitted in another United States jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction that . . . arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." On its face, Rule 5.5 appears to provide a safe harbor for attorneys, allowing them to perform closings involving property in another jurisdiction in which they have not been admitted without fear of prosecution. However, Alabama, Alaska, the District of Columbia, Hawaii, Illinois, Kansas, Kentucky, Maine, Michigan, Mississippi, Montana, New Mexico, New York, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming do not have such provisions in their rules of professional conduct.

Certain other jurisdictions do have such provisions in their rules of professional conduct, but require for their application that other conditions be satisfied. These include California (allowing temporary transactions if certain notice is provided on a firm's website), Connecticut (requiring that the attorney be admitted in a jurisdiction which allows Connecticut attorneys to practice temporarily in that jurisdiction), Nevada (requiring that an annual report be filed and reporting fee paid), New Jersey (requiring payment of an annual fee), and South Dakota (requiring an attorney to obtain a South Dakota sales tax license and pay the appropriate tax). And even in states where Model Rule 5.5 has been adopted verbatim, several opinions have been issued stating that an attorney licensed in such state must conduct the closing. See In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000); In re UPL Advisory Opinion 2003-2, 588 S.E.2d 741 (Ga. 2003).

In-house lawyers with title insurance companies who have certain supervisory responsibilities may be prosecuted in the subject jurisdiction for violation of its ethics rules arising from the title company's conduct in the transaction. Rule 5.3 provides in relevant part that:

> "a lawyer shall be responsible for conduct of . . . a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
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> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
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> (2) the lawyer . . . has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Rule 8.5(a) provides in its second sentence that "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." The choice of law rule set forth in Rule 8.5(b)(2) provides that "if the predominant effect of the conduct is in a different jurisdiction [than the one in which the conduct actually occurred], the rules of that jurisdiction shall be

[1] The Rules in any given jurisdiction may differ, or may be interpreted and applied differently. Unless otherwise specified, references in this article are to the Model Rules of Professional Conduct.

applied to the conduct." Thus, lawyers may find themselves subject to disciplinary action in jurisdictions where they aren't admitted, don't maintain offices, and have never visited, whether professionally or otherwise.

Finally, under Rule 8.4 it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." So, most any lawyer involved in a transaction that presents possible violations may be at risk.

So, when a transaction includes the conveyancing or granting of a mortgage or other security interest in real estate in another state, competence (Model Rule 1.1) is just one, and a far from dispositive, question to ask in deciding who should handle what aspects of the transaction. *Caveat viator*.