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## Attorney and Client—Acts of Real Estate Broker Constituting Unauthorized Practice of Law

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The principal case well recognizes that judicial review of the decisions of administrative agencies is limited, not only by the definitions contained in the act, but also by policies adopted by the courts. These limitations on review do not appear to have created significant problems incident to due process of law requirements. Other issues on judicial review of administrative action under the West Virginia Administrative Procedure Act are certain to arise,<sup>38</sup> but the court's decision in the principal case will serve well to shape the pattern of judicial review in this jurisdiction.

*Paul Robert Rice*

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**Attorney and Client—Acts of Real Estate Broker Constituting  
Unauthorized Practice of Law**

*D*, a corporate real estate brokerage firm, was filling in earnest money contract forms and securing thereto signatures of buyers and sellers of real property. The *D* was also using and preparing form deeds and other instruments necessary to clear or transfer title. The forms used had been composed by lawyers. *P*, the Chicago Bar Association, sought to enjoin the alleged unauthorized practice of law. The circuit court found the forms used in the initial contracts were a necessary incident to the real estate business, but held that the use of forms in the preparation of deeds and other subsequent instruments constituted an unauthorized practice of law. The appellate court held that neither the initial contracts nor the subsequent deeds and related instruments could be filled in by *D*. *Held*, appellate court affirmed in part and reversed in part; circuit court affirmed. A real estate broker may properly fill in the usual form of earnest money contract or offer to purchase where such involves merely supplying of factual data, but the drawing or filling in of blanks on deeds, mortgages and other legal instruments subsequently executed requires the peculiar skill of an attorney and constitutes the practice of law. *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771 (Ill. 1966).

The question of what real estate services require the skill peculiar to one trained and experienced in the law had been

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<sup>38</sup> Harrison, *supra* note 1, at 190.

answered differently in various jurisdictions.<sup>1</sup> However, nearly all decisions recognize that the exclusion of all but attorneys from the practice of law is in the public interest. The purpose of the exclusion is to guarantee that the public has the benefit of competent and unbiased legal advice.<sup>2</sup>

In holding that the real estate broker could not prepare or draft any contracts or fill in any form contracts or form deeds, the appellate court and the dissenting opinion of the supreme court in the principal case, reasoned that only an attorney possesses the necessary skill and expertise to assure the legal validity of such transactions. The appellate court stated several times in its opinion that public interest was the basis for its decision.<sup>3</sup>

In 1943 the American Bar Association and the National Association of Real Estate Boards adopted a Statement of Principles which was widely distributed throughout real estate circles. The following is an excerpt from the circular: "The Realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments . . ."<sup>4</sup> The holding in the principal case is in keeping with the spirit of the coordinated efforts of these two organizations.<sup>5</sup>

One distinct trend of cases has reasoned that, if the activity alleged to be practicing law is incident to the real estate business, public convenience demands that the activity not be considered an unauthorized practice of law.<sup>6</sup> The "incident theory" recognizes that certain areas of the commercial and legal fields overlap and can be concurrently performed by both. But, in these cases the courts are still left with the problem of deciding what activities are, in fact, incident to the real estate business. In solving this problem, the courts have held: (1) both the initial contracts and

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<sup>1</sup> Annot., 53 A.L.R.2d 788 (1957).

<sup>2</sup> *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788 (1951); *State ex rel. Wright v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936).

<sup>3</sup> *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 31 Ill. App. 2d 575, 203 N.E.2d 131 (1964).

<sup>4</sup> ABA COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW, A STUDY OF UNAUTHORIZED PRACTICE OF LAW 32 (Sept. 1951).

<sup>5</sup> It must be pointed out that the *Canons of Professional Ethics* are violated by the lawyer who drafts a form contract or form deed used by a real estate broker if the broker is practicing law in completing the forms. CANON 47, ABA, CANONS OF PROFESSIONAL ETHICS.

<sup>6</sup> *Ingham County Bar Ass'n v. Wather Neller Co.*, 342 Mich. 214, 69 N.W.2d 713 (1955); *Cowen v. Nelson*, 207 Minn. 642, 290 N.W. 795 (1940).

the subsequent deeds are incident;<sup>7</sup> (2) only the initial contracts are incident;<sup>8</sup> or (3) neither the initial contracts nor the subsequent deeds are incident.<sup>9</sup>

In considering form contracts specifically, most of the decisions have concluded that filling in of factual data in a form type contract is a simple activity requiring no more than clerical knowledge and ability, and as such, would not constitute the practice of law.<sup>10</sup> A survey of decisions made in the past decade disclosed a majority of the cases concurring with the decision in the principal case, *i.e.*, permitting real estate brokers to fill in form contracts in their initial transactions.<sup>11</sup>

No case similar to the principal case has been before the West Virginia court. However, under its inherent power, the West Virginia Supreme Court has adopted, and revised, a definition of the "practice of law." Briefly stated, the court has said that one not a lawyer is participating in the unauthorized practice of law if, with or without compensation, he (1) gives advice on legal matters, (2) prepares legal instruments for another, or (3) represents another before a judicial or administrative tribunal which will reach a legal conclusion. Such activities will be unauthorized practice of law whether or not related to another activity.<sup>12</sup> This definition appears to be the only expression of the court concerning the preparation of legal instruments. The definition appears to leave the court with a future decision as to whether or not "prepare" includes filling in blank contracts.

It may be that the definition, standing alone, may prohibit the brokers from preparing deeds, deeds of trust or release deeds. If the language in the definition be not conclusive on this point, one may reflect briefly on the purpose of the 1965 legislature in requiring the drafter of a deed to annex his name thereto.<sup>13</sup> The question which remains unanswered is whether real estate brokers

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<sup>7</sup> *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855 (1952).

<sup>8</sup> *Keys Co. v. Dade County Bar Ass'n*, 46 So.2d 605 (Fla. 1950).

<sup>9</sup> *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 31 Ill. App. 2d 575, 203 N.E.2d 131 (1964).

<sup>10</sup> *Gustafson v. V. C. Taylor & Sons, Inc.*, 138 Ohio St. 392, 35 N.E.2d 435 (1941).

<sup>11</sup> *Indiana State Bar Ass'n v. Indiana Real Estate Ass'n*, 244 Ind. 214, 191 N.E.2d 711 (1963); *State Bar of Michigan v. Kupris*, 366 Mich. 688, 116 N.W.2d 341 (1962).

<sup>12</sup> *Definition of the Practice of Law*, app. to W. VA. SUP. CT. R., in W. VA. CODE at 371-72 (Michie 1966).

<sup>13</sup> W. VA. CODE ch. 39, art. 1, § 2(a) (Michie 1966).

in West Virginia may use form contracts in their initial transactions.

By stating it is irrelevant that the instrument prepared is connected to another activity,<sup>14</sup> the West Virginia court seems to be saying that the "incident theory" will not be recognized. But the court, in discussing the completion of Workmen's Compensation forms in *West Virginia State Bar v. Earley*,<sup>15</sup> noted that "the completion of such blank forms does not require any knowledge and skill beyond that possessed by the ordinarily experienced and intelligent layman . . . ."<sup>16</sup> This reasoning is similar to that used by the Illinois court in the principal case and it could provide the basis for a holding by the West Virginia court that no unusual skill or knowledge is required in filling out forms for the initial real estate transactions. Indirectly, this would be recognizing the "incident theory."

In *Commonwealth v. Jones & Robins, Inc.*,<sup>17</sup> the Virginia court held that a real estate broker was not engaged in the practice of law when he prepared, drafted or used simple contracts of sale as an incident of the regular course of his business, but that the drafting of deeds, deeds of trust, mortgages and release deeds was not incident to his business and was in fact practicing law. The Virginia court defines the practice of law as: "with or without compensation, to prepare for another legal instrument of any character, *other than notices or contracts incident to the regular course of conducting a licensed business.*"<sup>18</sup> It is unlikely that the Virginia court would have arrived at the same decision had that tribunal been construing the corresponding part of the West Virginia definition which provides that one is practicing law when "one undertakes, with or without compensation and *whether or not in connection with another activity*, to prepare for another legal instrument of any character."<sup>19</sup> Thus, it appears that the West Virginia court, if it were to strictly apply its definition of the "practice of law," would require the initial contracts in a real estate transaction to be prepared completely by a lawyer.

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<sup>14</sup> Note 12 *supra*.

<sup>15</sup> 144 W. Va. 504, 109 S.E.2d 420 (1959).

<sup>16</sup> *Id.* at 526, 109 S.E.2d at 434.

<sup>17</sup> 186 Va. 30, 41 S.E.2d 720 (1947).

<sup>18</sup> VA. SUP. CT. R., 171 Va. XVII (1938). (Emphasis added.)

<sup>19</sup> Appendix to W. VA. SUP. CT. R. at 371. (Emphasis added.)

The principal case represents the modern tendency, to permit real estate brokers to complete form contracts in their initial transactions while restricting the preparation of deeds and other subsequent documents to lawyers. This approach attempts to balance the public interest and public convenience. However, the West Virginia court's definition of "practice of law" obviously indicates that its primary concern is the protection of the public. Whether the West Virginia court will follow the principal case appears to depend on a future determination, based on *Earley*, whether "prepares legal instruments" includes a mere filling in of factual data in form contracts and must be completed by an attorney.

*K. Paul Davis*

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#### **Conflict of Laws—Long Arm Statutes—Sufficient Minimum Contact for In Personam Jurisdiction over Foreign Corporations**

*D1*, a corporation, loaded goods on a railroad car in California destined for South Dakota. *D2*, a corporation, was in charge of transporting the goods from California to Kansas where they were placed on another carrier for transport to South Dakota. Therefore, *D2* had no contracts within South Dakota. *P* was injured in South Dakota while unloading the goods. The injury was caused by the alleged negligent loading and transporting of the goods which occurred outside the State of South Dakota. *P* brought an action against *D1* and *D2* for the injuries received in South Dakota under South Dakota's "long arm" statute. The statute provides that when a foreign corporation commits a tort "in whole or in part" in South Dakota, against a resident, such corporation will be subject to in personam jurisdiction. *D1* and *D2* moved to quash South Dakota's jurisdiction on the grounds that they could not be reached under South Dakota's "long arm" statute. *Held*, motions granted as to both *D1* and *D2* but with leave to amend in respect to *D1*. Although the injury occurred within South Dakota, the evidence failed to show that any of the events in the causal chain leading to the injury occurred within that state. Consequently, *D1* and *D2* did not have sufficient minimum contacts to satisfy the constitutional requirements of due process.