

A Real Estate Agent's Guide To The Unauthorized Practice of Law Part 1, Background

As I hang out on the legal corner I frequently hear agents, usually more experienced ones, chastise their younger colleagues not to give legal advice lest they find themselves pursued by the practice of law police. And as a member of VPAR's Legal Liability Committee I too am concerned about that, but I think that warning is too often taken to the extreme with the result that agents fail to give their clients the benefit of their specialized knowledge and experience.

This is an extensive and complex topic and I cannot cover it one article, so I will divide it into three. In this Part 1 -- Background, I will provide an overview of the regulatory framework and working definitions; in Part 2 -- Real Estate Provisions I will cover in detail the provisions of Unauthorized Practice Rule 6, Real Estate Practice; and in Part 3 -- Practical Considerations, I will try to summarize the topic and deal with some real world issues.

The inherent power to regulate the practice of law begins with the Constitution of Virginia, which vests the judicial power of the Commonwealth in the Supreme Court. Thus, pursuant to the Court's inherent power the Court defines and regulates the practice of law through its rules and through its agency, the State Bar. The rules it has issued in this regard are called the Unauthorized Practice Rules and Considerations (and the General Assembly has made it a criminal act to violate them). The Court defines the practice of law as follows:

Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill. Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever —

(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

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(2) *One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.*

(3) *One undertakes, with or without compensation, to represent the interest of another before any tribunal — judicial, administrative, or executive — otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.*

(4) *One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.*

RULE 6, § 1 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, UNAUTHORIZED PRACTICE RULES AND CONSIDERATIONS.

Don't you just love lawyers? You would think we would avoid circular definitions but it strikes me that saying "whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill" or "involving the application of legal principles to facts or purposes or desires" just avoids truly defining what we mean. But it is hard to come up with a ready definition. Try it yourself.

Commonwealth v. Jones & Robins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947), was a Virginia Supreme Court case where a real estate broker was convicted of practicing law without a license for drafting deeds, notes, deeds of trust, leases, etc. for profit. Justice Holt (one of the dissenters actually) observed that under modern conditions neither professions nor business could function successfully in a straight-jacket and wrote:

The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field.

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Chief Justice Holt continued with many examples where the regions overlap, and I note one that I believe is instructive:

Hospitals are something more than boarding houses. Nurses prepare charts which tell at a glance the progress of patients up or down. Technicians tell us the color of their blood. All of this is of great value to physicians. They take their art from empiricism into the atmosphere of science, yet no court, State or Federal, with or without a statute, has ever held that these instrumentalities are practicing medicine. The educational qualifications of doctors is certainly not less exacting than those required by lawyers, while public interest touching qualifications of doctors is not less vital than that which attaches to lawyers. The object, aim and purpose of a hospital, — the reason for its establishment and operation, is to render and perform medical treatment and nursing of a skilled character. It is the facility for affording the patient a higher and greater degree of nursing and medical attention than would be ordinarily possible outside of a hospital that makes it desirable. The opportunity to render such service enables a hospital to make a higher charge than a hotel or boarding house. The desirability of securing the needed service provides inducement for the patient to enter the hospital. The patient comes to the hospital for advice, aid and treatment — not to give either.

It seems to me one could easily substitute a real estate brokerage firm for the hospital in this quote with attendant changes substituting selling real estate for agents for nurses, etc.

In conclusion, in this article I wanted you to learn who regulates and defines the practice of law, to allow you to read the black letter definition for yourself, and to see some judicial discussion of the application of that definition. In my next article I'll focus on specific regulations and statutes that apply to the unauthorized practice of law in the real estate context.

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